



GENDER-BASED INTERSECTIONAL PERSPECTIVE IN LABOUR LAW

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Introductory remarks



Work performed by employees is dependent and subordinated, which, in turn, results in the limitation of the subject matter of the labour law to the work performed under (managerial, normative and disciplinary) prerogatives of an employer, for which employees receive compensation which is the exclusive or predominant source of livelihood for most workers.

This further means that parties to employment relationship are not equal. Namely, in addition to the *de facto* authority (expressed through economic dominance), employer has the **legal authority to manage the work of employees, regulate rights, obligations and responsibilities** stemming from employment relationship, and **punish employees for disciplinary offences**.

In addition to **providing means of subsistence**, work also gives us the opportunity to **develop our personality by working for the employer**. This is a **prerequisite for effective exercise of all other human rights** and for the **full participation** of the individual in the (social, economic and political) life of the community.

Hence, **labour law emerged from the need to regulate and limit the prerogatives of employer**, in order to **mitigate the negative consequences of inequality** between workers and employers, thus enabling the gradual "humanization" of the employment relationship.

By protecting workers, labour law norms contribute to the establishment and preservation of social peace and approaching the ideal of social justice and social cohesion, while minimal harmonization of the working conditions lead to the **harmonization of labour costs**, as an important instrument for **preventing unfair competition among employers**.

Principles of non-discrimination and equality

- Principle of non-discrimination and the principle of equality are acknowledged as fundamental principles of contemporary law: “All human beings are born free and equal in dignity and rights” (Universal Declaration of Human Rights, Art. 1).
- This includes equal right of all human beings to the enjoyment of all labour rights (the right to work, the right to just and favourable conditions of work, trade union freedoms, etc).
- Discrimination constitutes any differential treatment (distinction, exclusion, restriction, preference, etc) that is directly or indirectly based on the personal characteristic, and for which there is no objective and reasonable justification.
- Not every difference in treatment would amount to discrimination. Only differential treatment based on a personal characteristic is capable of amounting to discrimination, and only if differential treatment has the intention or effect of nullifying/impairing the recognition, enjoyment or exercise, on an equal footing, of labour rights.

Forms of workplace discrimination

- **Direct discrimination** occurs when an individual is treated less favorably than another person in a similar situation for a reason related to a prohibited ground, e.g. decision of the editorial staff of an all-male fishing magazine not to hire a competent woman for the position of a journalist, due to the belief that she would be uncomfortable and unhappy to work in an all-male work environment.
- **Indirect discrimination** refers to laws, policies or practices which appear neutral, but have a disproportionate impact on the exercise of labour rights, e.g. prescribing certain physical characteristics as occupational requirements although they are not necessary for successful performance of duties (height, strength, and other conditions that are impossible or much harder for women, minors, persons with disabilities, older people to meet); or putting a driver's license as an occupational requirement for a job where it is not necessary for successful performance of duties (discrimination of persons with disabilities, minors, older persons, persons with modest property status).
- **Harassment** is unwanted behaviour that has the purpose or effect of violating dignity of a worker, or creating a degrading, humiliating, hostile, intimidating or offensive environment for him/her, e.g. racist jokes, unwelcome comments about employee's religious garments, transferring a worker to an office without natural lightening, ventilation and tools necessary for performance of working tasks, not giving any working task to a worker or giving him/her task from which quantity and complexity is obvious that it cannot be fulfilled in due time.

Intersectional discrimination

- There are persons who are put in a disadvantageous position due to the simultaneous action of two or more grounds of discrimination, and the focus on only one ground of discrimination can render them **legally invisible**.
- In contemporary law, **protection against workplace discrimination requires identification of one ground for unequal treatment** of job candidates or employees.
- At the end of the 1980s, *intersectional approach* was designed, which allows us to see the interaction of different personal characteristics, as a basis for (systematic) discrimination of job candidates and employees.
- The intersectional approach rests on the assumption that the consequences of discrimination based on two or more personal characteristics cannot be fully understood if considered in isolation, or if simply added together.
- Intersectional discrimination can be defined as a **type of multiple discrimination, emerging from different directions, as a worker simultaneously faces discrimination based on several personal characteristics that form his/her identity, without the possibility of mathematically precise demarcation.**
- The concept of intersectional discrimination strengthens the capacity of labour law to respond appropriately to social reality.

- In disputes for protection against discrimination, it is necessary to find a *comparator*, i.e. a worker, who is in the same or a similar situation, and does not have a personal characteristic that is the ground of discrimination.
- Victims of intersectional discrimination cannot be compared to the situation of people that have only one protected characteristic.
- In this context, if a **female worker with a disability** believes that she is a victim of intersectional discrimination, it would be necessary to compare her situation with the situation of a male worker without disability. However, this way it isn't possible to see all aspects of unfavourable treatment of a female worker with disabilities, because it can be motivated not only by her sex or her disability, but also by the interaction of the two characteristics. And that is what makes her position unique, not only in relation to workers without disabilities, but also in relation to female workers without disabilities.
- Certain authors proposed **abandoning the rule on establishing the comparator**, in order to overcome the problem of proving intersectional discrimination. **Instead, the use of a contextual approach is promoted**, according to which the judge should contextualize each individual case and explain the disadvantageous position of worker who belong to multiple marginalized groups, without having to find a comparator. More precisely, this would mean the introduction of the rule, which has been affirmed in certain case law (e.g. the French Court of Cassation), that *the impossibility to compare the situation of a person who feels has been discriminated against and the situations of other people, does not eliminate discrimination, nor does discrimination cease to exist because of it).*

- The ECtHR examined the case concerning an employee (tax clerk) with an amputated leg, who required his employer to adapt the men's toilet to his needs; the employer proposed him to use the women's toilet, which already met the accessibility requirement.
- The Court found a direct connection between the adaptation, requested by the employee, and his private life (violation of Art. 8 of ECHR). This is because not having a suitable toilet in the workplace can have serious consequences for the daily life of the employee, such as feelings of humiliation and anxiety, which certainly affect the quality of private life.

HISTORY OF LABOUR LAW FROM GENDER PERSPECTIVE



Labour law in a second half of 19th and first decades of 20th century

- **Unequal treatment of men and women in the world of work was based on gender division of labour and hierarchy** that existed between men and women in the family and the society. That resulted in **failure to provide sufficient consideration of the specific needs that women have as participants in the labour market.**
- On the other hand, **some of protective measures eventually blocked women's opportunities to work under the same conditions as men.**
- Labour legislation was, at first, aimed at **protecting the most vulnerable categories of workers - women and children.** They had to join the workforce because **wages of adult male workers were so low that they were unable to provide for all family members.**
- **Special protection of children** included protectionist measures (improvement of working conditions) as well as abolitionist measures (exclusion of persons younger than certain age from the labour market).
- **Women** were the second category of workers targeted by state intervention, as industrialization enabled them to work outside the family. The original labour legislation sought to **protect the role of women in society** with its norms, primarily by:
 - limiting their working hours and night work,
 - protecting maternity,
 - in some countries by allowing longer lunch breaks for women with family duties.

- In the first couple of decades of the labour law, this protection was not afforded to all workers, but only to young women, e.g. to girls under the age of 21 in France and Luxembourg.
- **General protection of women workers** was not introduced in Europe until the last decade of the XIX century. It was based on *biological and social* reasons, which is why legislators were not asked to treat men and women equally.
- Equality between men and women was perceived as "denying women authenticity" and an obstacle to their liberation, because working for an employer would double their workload (professional activity and household work).
- **Legislators did not favour the separation of women from household work**, and, in the name of defending the family, proclaimed that child care and housework were more important for women's personal development than factory work. All the more so as the role of a mother in raising a child was considered irreplaceable, while the establishment of childcare facilities was considered to be an unreasonably high expenditure for the state.
- In certain legal systems, legal reasons for the restrictive policy for employment of women was a **ban on employment of married women**.
- In that context, labour law is traditionally conceived according to the *model of male worker employed on the basis of open-ended full time employment contract*, while social security law is built on the *male breadwinner model*, where the female takes care of children and other family members dependent on other people's care and help (female /unpaid/ caregiver), so that **marriage and motherhood emerge as an alternative to the paid work for an employer**.
- This approach survived even after the lifting of the ban on employment of married women, contributing to the legal invisibility of women, as well as to the legitimization of the patriarchal concept of work and workers.

Period following the end of World War II

- **Intensive inclusion of women in the labour market** in Europe and North America.
- This has been **influenced by post-war welfare reforms** that led to improving women's status in society, their access to education, the development of public services, etc.
- **Economic independence ensured via paid work has been seen by many as one of main prerequisites of freedom of women.**
- However, **labour legislation continued to regulate only a few marginalized "women's" labour law issues, primarily maternity protection and special protection of women due to their weak constitution** (ban on performing physically demanding jobs, such as jobs performed underground, underwater or in construction).
- Although this legislative intervention was an improvement (in comparison to labour exploitation that preceded the adoption of protective labour legislation), **some of these solutions eventually led to a "legal blockade" of women's opportunities to work and earn under the same conditions as men (*benign discrimination*)**.

Ban on night work of women in industry

Ban on night work of women in industry was motivated by:

- **biological differences** between men and women (need to protect reproductive health and to prevent anemia, tuberculosis),
- **functional differences** between men and women, since women almost exclusively did housework, which is why the ban on night work allowed them to rest longer during the night (because they couldn't rest during the day due to child care and other household work) and devote themselves more to household chores,
- **moral reasons**, due to the belief that such work is immoral for women, and that the ban protects them from the risk of being attacked or harassed when going to work or returning from work,
- **economic reasons**, because immense increase in night work could result in hyper production which consequently increases unemployment.

Ban on women's night work in industry was also confirmed by **ILO Conventions Nos. 4, 41 and 89**.

In 1970s that was called into question, as the results of **scientific research confirmed that night work has an equally detrimental effect on men's and women's health**.

- **ILO Administrative Council abrogated Conventions Nos. 4 and 41**, while Convention No. 89 is still in force, with the **1990 Protocol establishing a broader list of exceptions** to the ban on night work for women.
- This was influenced by case law of the European Court of Justice, which confirmed that the general ban on night work of women that existed in the European Community Member States, in accordance with their obligations undertaken by ratification of the ILO Convention No. 89, is not justified, because the dangers connected with the night work in no way depends on the sex of employees.
- Many countries have therefore cancelled the ratification of ILO Convention No. 89.
- Therefore, night work can be performed by both men and women, assuming measures are taken to protect their health and safety (pre-employment and periodic medical examinations, right to be transferred to day work if justified by health reasons), as well as their family duties.
- The same is true for **easing the ban on women working in physically demanding jobs**, although several European countries (Azerbaijan, Cyprus, Moldova, Slovenia, Turkey) maintained those bans in the second decade of this millennium, which the European Committee of Social Rights qualified as a violation of Article 20 of the Revised European Social Charter (the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex).

- Next stages in development of labour law were characterized by gradual reorientation of labour legislation from the paternalistic attitude towards women – towards the concept based on the right to fair working conditions for all workers.
- However, labour legislation, as a rule, did not take into account experiences typical of female workers, nor did it identify the specific consequences that the seemingly neutral labour law rules have on women.
- In the 1980s, social sciences started applying the *feminist method*, which opened up a new set of labour law issues.
- The last four decades have been marked by a significant increase in the number of working married women and working mothers.
- Double working engagement of women represents a great challenge for labour law. Especially because the culture of capitalism underestimates the economic value of raising children and caring for dependent family members and often overestimates the benefits of women's participation in the labour market.

- Across the EU, in 2016, the employment rate for women aged 20-64 was 65.3% compared to 76.8% for men of same age. In 2021, employment rates among women remain 11.7% lower.
- In the same year, women represented 3/4 of workers who perform paid work on a part-time basis (22% of those women worked less than 20 hours a week).
- Women tend to work in lower-paying sectors and at more junior level jobs than men, despite more women than men obtaining a university degree.

ACCESS TO EMPLOYMENT AND GENDER-BASED DISCRIMINATION



Hiring process and discrimination risk

- In the world of work, freedom is primarily manifested as the **freedom of workers to perform professional activity of their choice**, i.e. to seek employment suited to their abilities, professional aspirations, as well as life and work experience.

The hiring process means the following steps have to be taken:

- establishing occupational requirements;
- announcing job vacancies;
- submitting job applications;
- testing applicants' abilities;
- deciding in the jobs applications;
- entering into an employment contract.

The hiring procedure must be based on the **principle of relevance**, i.e. it must be directed only towards assessing the professional abilities of job candidates.

Establishing occupational requirements

- **Occupational requirements must be *directly related to a specific job*, e.g. we can qualify as indirect discrimination establishing special occupational requirements that are not necessary for successful performance in a job, but are difficult or impossible for persons with certain personal characteristics to fulfil.**
- The general prohibition of establishing personal characteristics as special requirements for employment is not to be confused with the **permissible differentiation between jobseekers by personal characteristic**. In these situations, **for the jobs in question, personal characteristic is a *genuine and determining occupational requirement*.**
- These exceptions need to be interpreted strictly, subject to proportionality test, with elements of appropriateness and necessity.
- Genuine and determining occupational requirements must be *directly related to a specific job*, i.e. to the nature of an activity or to the context in which it is carried out. In that sense, **business necessity reasons (e.g. authenticity, decency, nature of the institution in which the work is to be performed)** can exceptionally justify prescribing personal characteristics as occupation requirements.

Exceptions to the ban on differential treatment based on the prohibited grounds

- ***Authenticity*** allows an employer to hire only persons of a specific sex due to their physical appearance (models hired to present a collection of men's or women's clothing, theatre artists, ballet dancers or opera singers; nevertheless, artistic freedom enables employer to entrust certain female acting, opera or ballet roles to men, if the director of the play decides to abandon the conventional approach.
- We also shouldn't forget the reversal of gender roles on stage in the past, most famously in the Elizabethan era all theatrical roles were played by men, because women weren't allowed to act on stage.
- The history of opera is full of examples in which both male and female opera singers played the roles of the opposite sex. This is particularly true of opera in the early Romantic period in which certain male opera characters are sung by mezzo-sopranos, such as the operas of Gioacchino Rossini, where male characters were played by women, e.g. in the operas "Tancredi", "Semiramide" and "Lady of the Lake", in which the male roles are mezzo-sopranos. The same goes for "Capuleti and Montecchi", in which Vincenzo Bellini envisioned female roles for both lead characters of the love duet.

- ***Decency***, in jobs that involve physical contact of an employee with employer's clients or where clients do not wear clothes in front of an employee (with the risk that gender prejudices and stereotypes related to certain professions can be hidden behind reasons of decency).
- In the early 1980s, the ECJ confirmed that exclusive training and hiring of women for ***midwifery*** can be justified by expectations regarding decency and privacy (and the specific quality of the relationship established between a patient and a midwife, i.e. the sensitivity of a patient who had just given birth. In the following decades, access to this profession was provided to men both in the UK, as the country against which the aforementioned proceeding was initiated, and in all other EU Member States, which underlined the obligation to periodically review the legitimacy of excluding persons of a certain sex from certain professions.

Nature of the institution in which the work is to be performed, such as:

- penitentiaries for men or women;
- if the worker is expected to work or live in the household of the employer, which includes intensive contact with certain persons and access to intimate details of their lives;
- if, due to the location of the institution where the worker works, it is not practical for the employee to live outside the employer's premises, and it is not reasonable to expect the employer to provide separate dormitories and sanitary facilities for men and women (e.g. lighthouse keepers, workers on an oil platform in the middle of the sea, etc.);
- if certain working tasks are performed in a country where, due to specific national legal and/or cultural circumstances, women wouldn't be able to perform them successfully.

- It is necessary to **assess in each case whether a job requires an employee of a certain sex, so that the permitted exception wouldn't lead to the widespread exclusion of women from certain professional fields.**

Case law of the ECJ:

- Exclusion of women from all military tasks involving the use of weapons is unlawful since it resulted in women only being hired for military health service jobs and military orchestras.
- Prescribing the male sex as a special requirement for employment in a small elite troop due to the principle of interoperability, according to which every marine, regardless of specialization, must be able to fight in a commando unit. The Court decided that there is a permissible exception to the ban on sex-based discrimination, due to the inability of women to fight "on an equal footing" with their male colleagues.
- However Court failed to address gender stereotypes expressed by the military representatives (women are not meant to fight, their presence would undermine the unit's operational cohesion, as marines would be preoccupied with a "chivalrous" need to protect their female colleagues, while the need to protect male colleagues is perceived as a heroic act, etc.).

Could the male sex be a genuine professional qualification for the job of a salesman in a men's clothing store?

An employee in this job is not necessarily required to come into physical contact with the customers when taking the measures for clothing repairs. This is primarily because the store also employs male sellers who can perform those tasks, so both men and women can be hired for the job in question.

Job advertisements and job applications

- Restriction of employers' prerogatives in the field of employment also includes a **ban on publishing discriminatory advertisements for job vacancies**.
- Public employment services are obliged to prevent the publishing of advertisements with occupational requirements related to personal characteristics, as well as gender wording of job titles (stewardess, fireman, etc.), because they indicate an employer's intention to discriminate against workers.
- **Anonymous (depersonalised) job applications** or "blind hiring" can contribute to preventing the collection of data on personal characteristics of candidates: candidates submit applications that do not contain their name and maiden name, personal information that can (in)directly indicate their sex (e.g. information on military service or career breaks due to maternity leave), information on age/year of birth and year of enrolment in college/year of graduation, in order to minimize the risk of denying employment to women of childbearing age and older workers – this information is available to the hiring committee only after the so-called short-listing.
- There is no mandatory anonymous application in any country, but ministries in several European countries have experimented with anonymous applications with some large employers.

Pre-employment ability tests

- Tests which are not relevant for evaluation of the candidate's professional abilities for work, e.g. intelligence tests and psychological tests may lead to discrimination and discourage persons with disabilities from submitting applications or from informing employers of their disability (and consequently to the absence of adaptation of working conditions to the needs of such workers).
- Pre-employment physical ability tests are mostly designed with male worker (& dominant ethnicity) in mind, as a kind of a "universal worker", against whom the abilities of all workers are evaluated.
- Namely, they are **often designed to give preference to male and younger workers** (scores of women, older persons, persons with disabilities are substantially worse in these tests). This is especially true for tests of muscle strength.
- **Statistical stereotypes** (stereotypes which reflect statistical data on workers with disabilities, as a whole, but do not necessarily reflect the situation of specific worker) **used as a starting point for physical ability tests**, despite the fact that differently designed tests could also provide a reliable assessment of the candidates' ability, as well as eliminate or mitigate the negative consequences the tests have on workers with disabilities.
- Employers are restricted from using physical ability tests unless they are necessary for a complete and proper assessment of workers' abilities and can be used only if they are valid, reliable and useful.
- This includes the requirement that the tests be designed so that the adverse effects of their implementation on certain categories of workers are kept to a minimum.

Interviews with job candidates

- In practice, **women are often asked about family planning**, which is difficult to prove in the anti-discrimination proceedings.
- **Oversight of the recruiting process** is, therefore, very important, especially via the participation of the labour inspectors, while some countries try to prevent the use of the off-limits questions in interviews by having the trade union or work councils representatives present.
- In some legal systems, **candidate has the right not to answer the employer's off-limits questions and his/her actions will not be considered illegal**. Moreover, in some legal systems, **candidates have the right to provide false answers to the employer's off-limits questions, which cannot be considered a violation of the principle of good faith**. This principle requires the participants in the hiring process to inform each other only of the facts of decisive importance for entering into a contract, and this is certainly not the case with private life information not directly related to the performance of duties. **The employer cannot claim mistake of fact regarding essential characteristics of the contracting party, and, accordingly cannot seek the annulment of the employment contract**.
- It is important for the members of the **hiring committee to be familiar with the anti-discrimination legal framework** and, whenever possible, ensure that the committee consists of members of different sex, different age and different ethnic structures.

Decision on job candidates

- One of the basic duties of an employer in the hiring process is to **respect the dignity of job candidates and treat them in accordance with their skills and abilities that are crucial for performance of working tasks, and not based on prejudices and stereotypes related to their personal characteristics.** An employer is, therefore, obliged to **select candidates for the job in good faith.**
- Namely, **discrimination may be based on stereotypical assumptions,** such as:
 - **stereotypes related to work of persons with disabilities,** e.g. that they are less productive and less flexible, use (extended) sick leave entitlement more often, their hiring is expensive due to the need to adapt the working conditions to their needs, persons with serious mental disorders regularly cause conflicts in the workplace, etc.
 - **stereotypes related to female workers and their commitment to family duties** (e.g. that it is more expensive to hire a woman than to hire a man due to special health and safety protection at work related to risks that endanger the reproductive function of female workers, as well as the fact that women are not available for work during maternity leave, and there is no guarantee that they will return to work after the birth of a child; the stereotype that the mother of a small child will be late for work more often if she works in the first shift; the stereotype that female workers are more often absent from work due to family duties, etc.
 - **tracking women into low-level jobs on the assumption that they are unwilling to commit as much time to their work as men ...**

- Also, we must not lose sight of the so-called statistical stereotypes that have influenced determining (male) sex as a special requirement for certain jobs only because the physical capabilities of an average woman are less than the physical capabilities of an average man.
- Due to statistical stereotypes, employers often make unfavourable decisions regarding workers of a certain sex, believing they have the characteristics typical of a certain sex, such as the stereotype that, in certain jobs, workers of one sex are less productive than the workers of the opposite sex, which regularly leads to occupational segregation.
- Women are more likely than men to get a job in lower-paying sectors, while also making up a smaller portion of the total number of employees in the more promising sectors, such as the information and communication technologies, science, engineering and mathematics. On the other hand, men are underrepresented in the areas of education (with the exception of higher education), health care and social protection.
- Work in female dominated fields is often paid less than work in male dominated fields, regardless of the level of education and experience of workers. In addition to the stereotypes regarding lower productivity of women, there are other contributing factors, such as the secrecy of salaries, the fact that most job candidates, especially women, are uncomfortable with the idea of negotiating wages when entering into an employment relationship, or the inadequate evaluation of skills, commitment and responsibility of female workers (certain **job requirements in jobs which women are predominantly employed are often not evaluated** /e.g. due to the belief that women have "innate" abilities to care for others/, **while other requirements are insufficiently evaluated** /e.g. lifting and carrying adults in social care sector, as opposed to lifting loads on typically male jobs/).

Other exceptions to the ban on differential treatment

- We can mention as exception to the ban on differential treatment based on the prohibited grounds different **protective measures**, e.g. measures for protecting women in the event of pregnancy and maternity, special protection of workers representatives in the event of dismissal, special labour law protection of young persons and workers with family responsibilities.
- Finally, we can qualify as exception **positive action measures**, since confirmation of the principle of equality is not sufficient to eliminate all cases of discrimination in the field of employment. **The State must intervene in order to establish the *de facto* equality of workers.**
- Its intervention in particular involves taking measures, which **facilitate employment or otherwise favours groups of workers who have traditionally faced unfavourable treatment in the labour market.**
- Such measures are temporary, i.e. they are discontinued when substantive equality has been sustainably achieved.
- The content of these measures can **cover assistance and encouraging as many members of these groups to apply for jobs and gain skills that will allow them to apply for jobs.** Also, positive action measures can consist of **employment quotas**, e.g. 30% quota for female cadets in military and police academies, or for training women for police and military jobs, which is reflected in the employment of women in the security sector. These measures can also be introduced in favour of men, as is the case for kindergarten jobs in the Nordic countries, where many more women are employed, due to the traditional understanding of child care as a woman's job.

Quotas for employment of women

- **European countries share a negative experience with the implementation of quotas for employment of women.**
- ECJ judgment in the *Kalanke* case: the measure that allows, in case of lower representation of women in work environments, automatic and unconditional advantage in employment to women compared to men with the same abilities, is illegal.
- *Badeck* judgment: quotas can be applied under two conditions:
 - a) that women are not automatically and unconditionally given preference when female and male job candidates have the same qualifications;
 - b) that the employer makes an objective assessment of the candidates' abilities, with the possibility of taking into account the specific personal circumstances of each candidate - saving (hardship) clause allows, in the process of selection, deviation from preferential treatment of women, if there are reasons of greater "legal weight" on the side of the male candidate, e.g. if he is a war veteran.
- The further development of jurisprudence has confirmed the position that these measures can be applied only if, during the consideration of the submitted applications and verification of the abilities of the candidates, two or more candidates with the best qualifications have been selected. If their (best) qualifications are equal, the female candidate should be given preference over the male candidate. Conversely, if the male candidate has better qualifications, the female candidate cannot be given preference over the male candidate (judgements in *Marschall* and *Abrahamsson* cases).

Collective labour law

- As **the role of laws, as instruments for achieving social change** and especially change concerning consistent implementation of the principle of gender equality, **is rather limited, efforts have been made to use different instruments, including collective agreements** and other sources of autonomous law.
- Although greater prospects for promoting gender equality through *social dialogue* exist in countries with a solid legal framework for combating gender-based discrimination, **gender issues are rarely regulated by collective agreements.**
- This can be explained, among much else, by **modest number of women that are trade union members, or members of trade union committees that participate in collective bargaining, or members of trade union governing bodies that make important decisions.**
- In EU Member States, **women make up about 40% of members, but occupy on average only 5-20% of seats in union bodies,** with a particularly modest number in higher status bodies, as opposed to **working groups whose members are appointed on the basis of expertise,** in which the representation of women is somewhat higher.
- There can be **many reasons for this, from the burden of family duties, professional segregation to gender stereotypes** and the fact that trade unions are insufficiently sensitive to the needs of their female members, due to **male dominance in membership and leadership.**
- All the more so because **women are underrepresented in governing bodies of employers' associations and in tripartite bodies.**

Although it cannot be reliably claimed that greater representation of women at these levels necessarily contributes to better representation of their interests in the social dialogue. But even with that reservation, there is a need for collective labour law to become gender sensitive.

In your view, which mechanisms may foster gender diversity in trade unions, tripartite governing bodies and governing bodies of employers' associations?

CHALLENGES AND CRISIS IN THE CONTEMPORARY WORLD OF WORK – GENDER PERSPECTIVE



Economic and Political Turn Towards Neoliberalism

- Neoliberalism assumes **greater flexibility in the labour market** and the **lowering of state costs for protection against social risks**. It is believed that labour legislation, due to the obligations and (direct and indirect) costs that it creates for employers, adversely affects employers' competitiveness, which further stimulates them to resort to flexible forms of employment as well as bogus self-employment and undeclared work.
- In such environments, **there are pressures to reduce labour costs** as much as possible, and to **improve the ability of workers to adapt to the jobs available on the market**. This refers to the **concept of employability**, which is viewed as a synonym for work flexibility, but also as a substitute for job security.
- However, a **flexible labour market almost exclusively benefits the employers**.
- Neoliberalism influenced the creation of a number of **non-standard employment contracts and new forms of work, many of which are extremely precarious, and in which women are disproportionately more represented** than men.
- **The decrease in labour law protection**, in most countries, instead of the expected increase in employment, **led to the marginalization and poverty of certain categories of workers, especially women**.
- Position of women is additionally worsened by neoliberal cuts in the welfare state making women responsible for more caring. This could be very demanding if we have in mind that worsening of working conditions has led to **working very long hours or having two or more jobs**.

Demographic Change

- The world of work is affected by demographic change, especially the **tendencies of population aging and increased life expectancy**, which **emphasize the need for rising institutional support as well as engagement of both men and women in the informal care for elderly**.
- Also, there is a **need for maintaining the working ability (and motivation) of older workers**, as well as **the need to enable young workers to gain work experience and advance in their careers**.
- However, **many older women care for family members (grandchildren, parents)**. **Their unpaid work helps younger workers to better reconcile family and professional responsibilities**, but it is **also an obstacle to the integration of older female workers into the labour market** and is the cause of their lower wages (due to part-time work).
- On the other hand, **young women are at higher risk of unemployment than young men**, partly because in **some cultures they are encouraged to marry early and become mothers**. In addition, young women are often **steered**, in line with occupational segregation, **towards low paying occupations and jobs with modest chances of advancement**.



Intensive international migration

- International migrations can have a positive impact on the world of work, especially in countries with low birth rates.
- **Migration can also deepen the economic problems in the host country, especially if there is a high unemployment rate of domestic citizens, which can lead to the establishment of various statuses for migrant workers. Some of them are very precarious, which may also prove to be especially unfavourable for women.**
- **Stereotypes and intersectional discrimination lead to greater gender differences, and the so-called "3D" (i.e. dirty, dangerous and demeaning) jobs, frequently without an employment contract. This is mostly true for migrant female workers who were born outside of the host country (so-called first generation of migrant women), while the second and next generations of migrant women have a better chance of finding and maintaining employment, primarily because they were educated in the host country.**
- Finally, there are many problems with which **women who come to a foreign country for family reunification** are facing, as until recently, many countries were **denying them access to the labour market during the first couple of years of their stay.**

Economic and Financial Crisis

- The consequences of both the crisis from 2008 and the crisis caused by the COVID-19 pandemic have hit women particularly hard, deepening the existing gender inequalities.
- However, economic and financial crisis initially have more negative effects in male-dominated sectors, while in further phases women are particularly affected by crisis.
- For example, the 2008 crises and austerity gave rise to the unwanted part-time work and other forms of precarization of work, which affect mostly women, with widening the pay gap and inequality in distribution of care.
- On the other hand, negative health consequences of the pandemic (for "front line" female workers) and its negative economic consequences have hit the service sector, which mostly employs women, since many jobs have been reduced due to households expenditure reductions and welfare services cuts.
- Also, pandemic has resulted in an even more difficult balancing of family and professional duties primarily due to more intense telework, suspension of kindergartens and schools, and restrictions on the movement of the elderly due to lockdown.

- Furthermore, **crisis-induced unemployment is an important factor in the degradation of working conditions**, as high unemployment allows employers to have a much greater impact on hiring and working conditions than what is provided by law, especially as a "reserve army" of workers is available on the market and willing to work even under indecent working conditions.
- This means that in contemporary times, all workers face risks, while recent changes in the world of work can be summed up as ***jobs quality erosion***.
- **The further the labour law deviates from the standard employment relationships and moves to the field of precarious and unregulated work, the greater the chances for the emergence of forms of work in which gender appears as a significant factor** (e.g. work in an employer's household, outsourcing, human trafficking for the purpose of labour exploitation).

Technological development

- Consequences of technological development are manifested in different ways, starting with **short-term disruptions, creation of new jobs and improvements in working conditions**, in terms of abandoning many physically demanding and routine jobs.
- However, **broad work automation has decreased the need for many jobs, primarily jobs from the bottom of the hierarchy that are often performed by women.**
- Unfortunately, **the "new knowledge elite" sector cannot accommodate the majority of laid-off female workers, and their transition to the service sector is often hampered by the requirement to possess particular skills, which many of them do not have, primarily due to unequal access to training and career breaks for family duties.**

Climate change

- Climate change is having **harmful effects on businesses, although they can create opportunities for new jobs.**
- **The negative effects of climate change are harder on women, because, due to poverty, they oftentimes depend more on the natural resources than men, and because they make up the majority of employees in the field of food production.**
- Also in many societies, **due to social and cultural norms, women have less geographical mobility in the event of natural disasters, and, consequently, less of a chance at finding a new job.**

LABOUR LAW AND INTERSECTIONAL DISCRIMINATION OF WOMEN WITH DISABILITIES



Disability-based discrimination against job candidates and employees

- People with disabilities make up **about 15 percent of the world's population**. They encounter significant **obstacles in enjoying their right to work**, because of:
 1. **negative stereotypes related to their employment** (persons with disabilities are less productive and less flexible; persons with disabilities use /extended/ sick leave entitlement more often; hiring persons with disabilities is expensive due to the need to adapt the working conditions to their needs; persons with serious mental disorders regularly cause conflicts in the workplace, etc),
 2. the **lack of appropriate transportation** to work and back,
 3. the **inadequacy of the workplace, work process, equipment and working conditions for the needs of these workers**,
 4. **establishing special occupational requirements that are not necessary for successful performance in a job**, but are difficult or impossible for persons with disabilities to fulfil (e.g. putting a driver's license or special physical ability as an occupational requirement for a job where they are not necessary for successful performance of duties),
 5. **tests which are not relevant** for evaluation of the candidate's professional abilities for work, e.g. **intelligence tests and psychological tests** may lead to discrimination and discourage persons with disabilities from submitting applications or from informing employers of their disability (and consequently to the absence of adaptation of working conditions to the needs of such workers),
 6. **statistical stereotypes** (stereotypes which reflect statistical data on workers with disabilities, as a whole, but do not necessarily reflect the situation of specific worker) **used as a starting point for physical ability tests**, despite the fact differently designed tests could also provide a reliable assessment of the candidates' ability, as well as eliminate or mitigate the negative consequences the tests have on workers with disabilities.

- The emergence of obstacles for effective exercise of the right to work will largely depend on the **type of disability of a particular worker**.
- Persons with disabilities are **not a uniform group**, and some of them are workers whose employment rate, as a rule, is similar to the average employment rate on the labour market (e.g. workers with skin damage). Conversely, employment opportunities for workers with other types of disabilities are far more modest, e.g. the risk of workers with severe mental disorders being unemployed is 6-7 times higher than for workers without these disorders.
- Despite these differences, workers with disabilities, regardless of the type of each disability, often face the risks of discrimination, exclusion and marginalization.

Forms of employment of persons with disabilities

- **Sheltered employment** - a form of employment for persons with disabilities, which was widely used in the past because it reflected the dominant **medical model of disability** (primarily focused on medical treatment, rehabilitation and social protection of persons with disabilities).
- The implementation of the medical model of disability meant, above all else, **exercising the right to social security, as a substitute for income or as a supplement to income, and getting employment in protective workshops, in companies for the professional rehabilitation of persons with disabilities and in social enterprises.**
- In practice, it is often accompanied by **indecent working conditions**, especially in relation to low pay and ghettoization of workers.
- Today, it seems **acceptable primarily for employment of persons with the most severe forms of disability, but even then only as preparation and transition point towards employment on the open market.**

Employment on the open market, with reasonable accommodation

- The new tendencies reflect the ideas of the **social model of disability**, in which disability is viewed as a **socially created disadvantage and marginalization experienced by a person who has, or is considered to have, certain impairments.** Over the last few years, the **human rights model of disability** is being developed against this background.
- In the spirit of new models, **contemporary labour law encourages employment of persons with disabilities in the open market.**
- This includes cases in which it is necessary to make **acomodations regarding the job description, workflow, schedule and organization of working hours, workplace, machines and other tools to the capabilities and needs of people with disabilities** (e.g. assigning assistants, reducing working hours, modifying tasks and training, or providing a quiet workplace for an employee with mental disabilities).
- The enjoyment of labour rights is not possible if the workplace is not accessible. **Accessibility** means the **physical accessibility** of the workplace, the availability of **suitable transportation** from home to work and back, but also includes the requirements to **enable workplace communication, advertise vacancies and the candidate selection process in sign language, Braille and accessible electronic formats and forms of communication.**
- In the Convention on the Rights of Persons with Disabilities, **failure of the employer to make reasonable accommodation is expressly qualified as a form of discrimination.**
- **Accommodation requests cannot be unlimited:** prevailing view is that **the burden shall not be disproportionate when it is sufficiently remedied by state subsidies or other measures that lower the costs of adjustment or help the employer in executing it.**
- **Can we qualify as reasonable the accommodation of the workplace to the needs of a colour-blind seafarer would include the employer having to hire another seafarer, who would spend two weeks per month at sea, together with the dismissed worker?**

Such an accommodation would represent undue burden for a small maritime company with a total of five employees.

Quotas for employment of persons with disabilities

- Employment quotas, as a rule, include an **obligation or a recommendation for medium and large employers to employ a certain percentage of persons with disabilities as a minimum** (typically 2-7% of the total number of their employees).
- The main **advantage** of quotas is reflected not only in **establishing an employment relationship with the persons with disabilities**, but also in **raising awareness** (of employers, employees and the general public) of the problems they face when looking for and maintaining employment.
- **Opponents** of the quota system warn that mandatory quotas do not facilitate integration of persons with disabilities into the world of work; on the contrary, **they favour the entrenchment of stereotypes** that these workers are less productive and that, apparently, they can only be employed if that's the employers' obligation.
- Then, there is the dilemma of the real impact of quotas, since **an alternative to the employment obligation is usually provided in the form of payment of a fine, which is then used to further support employment of persons with disabilities** (through funds managed by public authorities, and less often by the social partners).
- In addition, **employers try to avoid hiring persons with disabilities** and look to fulfil alternative obligation instead, or to pay the fines. Certain employers will **put pressure on their employees to register as persons with disabilities**, especially older workers.

- The prevailing trend in contemporary legal systems is to harden the sanctions for non-fulfilment of the employment quotas, and to include a number of **alternative obligations for employers**, since the employment obligation does not have to be fulfilled by direct employment of persons with disabilities. This is especially true for getting traineeships, employing interns with disabilities or adapting the working conditions and the workplace to their needs.
- **The effectiveness of employment quotas depends on the circle of employers, as well as on the circle of persons to whom they apply.**
- When it comes to employers, the rule that the quotas apply only to medium and large employers can significantly reduce their impact on increasing the employment of people with disabilities, especially in countries dominated by small employers.
- When it comes to the circle of protected persons, some legal systems reserve this measure only for people with severe disabilities or only for people with mental health problems.
- Constitutional Court of Italy: the quotas are not aimed at providing charity, but rather at the real employment agreements, especially because their application does not affect the economic organization of the company, and because they are quite low, compared to the total number of employees in a company.

COMBINATION OF NEGATIVE STEREOTYPES RELATED TO SEX AND DISABILITY OF WOMEN WITH DISABILITIES

- It is often assumed that all persons with disabilities have the same experiences, views and priorities in relation to employment, regardless of their sex, age, economic position, and other categories to which they belong.
- **Giving "priority" to disability in relation to other personal characteristics**, when regulating the prevention and protection against discrimination of persons with disabilities, **has the effect of ignoring other factors, which can affect the position of job candidates and employees with disabilities.**
- This is especially true for the sex/gender of workers with disabilities, since **the law often does not recognize the need overcome the challenges faced by women with disabilities in the labour market.**
- Namely, people with disabilities of both sexes encounter many common problems when trying to find and keep employment and to advance in their professional careers, but **female workers with disabilities face both negative disability-related and gender-related stereotypes.**
- We should bear in mind that **women make up the majority of persons with disabilities (54%)**. This trend is likely to continue, especially given the aging of the population and the increase in life expectancy, and the fact that women, on average, live longer than men and that older people are more prone to disability than younger people.

- **Men with disabilities are encouraged to find employment more often than women with disabilities.** This is because women with disabilities are often thought of as having a passive role in society, i.e. through a **stereotype that work allows them to "somehow fill their time" rather than ensure their economic security and autonomy.**
- **In professional rehabilitation programs for persons with disabilities, more attention is often paid to men** than to women with disabilities, in terms of encouraging men to look for work, to attend retraining and additional education, while **women are directed more towards social benefits.**
- In addition, the gender stereotypes that accompany female workers with disabilities are, as in the case of women in general, linked to the **difficulties of balancing professional and family duties.** This is particularly serious if we take into account the difficult access to **services related to the care of children.** Those services are often expensive and even when they exist, they don't facilitate the integration of women with disabilities into the labour market. Mothers with disabilities often face the **prejudice that they are not capable of being good parents**, which can deter them from using support services, due to the fear that their child might be taken from them as a result.
- These and other negative stereotypes have resulted in the fact that the vast majority of modern countries are facing the **problem of unemployment among women with disabilities**, with the extent of this problem varying from one country to another (**employment rates from 16% in Bulgaria to 75% in Sweden**); women with disabilities are more likely to be unemployed than women without disabilities.
- Unemployment of women with disabilities can also be explained by their **insufficient education**, due to discrimination of persons with disabilities in the field of education, as well as the mismatch of the education system with the demands of the labour market: girls with disabilities drop out of high school more often, and are less likely to graduate from college than men with disabilities.

Challenges of implementing the intersectional approach in labour law

- **The intersectional approach strengthens the capacity of labour law to respond appropriately to social reality.**
- Although the advantages of the intersectional approach are indisputable, we must not lose sight of the **warnings that insisting on this approach leads to the so-called *degenderization of labour law*.** It is believed that **the implementation of an intersectional approach unjustifiably narrows the attention that public policy makers and legislators pay to sex/gender as the basis of discrimination.**
- There are, however, **opposing opinions, according to which the concept of intersectional discrimination strengthens gender equality, because women are most often the victims of intersectional discrimination.** However, even the latter point of view is not without critics, especially among activists who represent interests of other vulnerable groups.
- **The concept of intersectionality is compatible with the social model of disability,** since it does not reduce disability to impairments.
- When it comes to quotas for employment of persons with disabilities, it is important to note that ***no legal system has quotas for employment of women with disabilities.*** This may result in women with disabilities not having the opportunity to exercise their right to work either based on quotas for employment of women or based on quotas for employment of persons with disabilities. This is because a system with separate quotas, as a rule, favours employment of men with disabilities and women without disabilities, since a considerable number of employers, when fulfilling their obligation to employ women, give priority to women without disability. On the other hand, in case of quotas for employment of persons with disabilities, most employers fulfil the obligation of employment - by employing men with disabilities, precisely because of the stereotypes associated with the work of women with disabilities.