

3. THE LEGAL AND POLICY FRAMEWORK RELATED TO EQUALITY

This part of the report describes and analyses the legal and policy framework related to equality in Ukraine in order to assess its adequacy to address the patterns of inequality and discrimination highlighted in the preceding part. It examines both Ukraine's international legal obligations and the domestic legal and policy framework which protects the rights to equality and non-discrimination. In respect of domestic law, it examines the Constitution, specific anti-discrimination laws, and non-discrimination provisions in other areas of law. It also examines government policies which have an impact on inequality, before turning to an assessment of the enforcement and implementation of existing laws and policies aimed at ensuring equality, including an examination of the most significant specialised body whose functions are related to equality, the Ukrainian Parliament Commissioner for Human Rights. Finally, this part reviews existing judicial practice related to discrimination.

Throughout this part, Ukraine's legal and policy framework is analysed in relation to the extent to which it complies with Ukraine's international human rights obligations and international best practice on equality. In order to assess the full picture of the Ukrainian legal and policy framework as it relates to equality, this part should be read together with, and in the context of, the previous part, which contains an appraisal of laws that discriminate overtly or are subject to discriminatory application.

3.1 International and Regional Law

Ukraine has signed and ratified (or acceded to) a number of international treaties since its independence in 1991. In addition, the Ukrainian Soviet Socialist Republic (Ukrainian SSR), one of the Soviet republics of the Union of Soviet Socialist Republics (USSR), signed and ratified a number of international treaties prior to the USSR's dissolution in 1991 which continue to apply in Ukraine as the successor state to the Ukrainian SSR. Through these ratifications, Ukraine has committed to respect, protect and fulfil the rights contained in these instruments, and to be bound by the legal obligations contained therein.

3.1.1 Major United Nations Treaties Related to Equality

Ukraine has a good record of participation in the major UN human rights treaties. It has ratified seven of the nine core UN human rights treaties: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

Ukraine also has a good record of allowing for individual complaints to be made to the relevant Treaty Bodies, having ratified the first Optional Protocol to the ICCPR, made a declaration under Article 14 of the ICERD, ratified the Optional Protocol to the CEDAW, ratified the Optional Protocol to the CAT (CAT-OP) and ratified the Optional Protocol to the CRPD.

Instrument	Signed	Ratified / Acceded
International Covenant on Civil and Political Rights (1966)	20 March 1968	12 November 1973 (Ratified)
Optional Protocol to the International Covenant on Civil and Political Rights (1976)	n/a	25 July 1991 (Acceded)
International Covenant on Economic, Social and Cultural Rights (1966)	20 March 1968	12 November 1973 (Ratified)
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008)	24 September 2009	No
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	7 March 1966	7 March 1969 (Ratified)
Declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (allowing individual complaints)	n/a	28 July 1992

Instrument	Signed	Ratified / Acceded
Convention on the Elimination of All Forms of Discrimination against Women (1979)	17 July 1980	12 March 1981 (Ratified)
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)	7 September 2000	26 September 2003 (Ratified)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	27 February 1986	24 February 1987 (Ratified)
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)	23 September 2005	19 September 2006 (Ratified)
Convention on the Rights of the Child (1989)	21 February 1990	28 August 1991 (Ratified)
Optional Protocol I to the Convention on the Rights of the Child (2000) (involvement of children in armed conflict)	7 September 2000	11 July 2005 (Ratified)
Optional Protocol II to the Convention on the Rights of the Child (2000) (sale of children, child prostitution and child pornography)	7 September 2000	3 July 2003 (Ratified)
Optional Protocol III to the Convention on the Rights of the Child (2011) (communicative procedure)	20 November 2014	No
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	No	No
Convention on the Rights of Persons with Disabilities (2006)	24 September 2008	4 February 2010 (Ratified)
Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)	24 September 2008	4 February 2010 (Ratified)
International Convention for the Protection of All Persons from Enforced Disappearances (2006)	20 December 2006	6 July 2015 (Ratified)

The failure to sign or ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICM-

RW) represents arguably the most notable gap in Ukraine's international legal obligations related to equality. At the second Universal Periodic Review (UPR) of Ukraine at the UN Human Rights Council in 2012, three states made recommendations to Ukraine that it ratify the ICMRW.⁷⁰⁶ The government of Ukraine rejected these recommendations, while stating that it "still remains fully committed to the protection of rights of vulnerable groups, including migrants".⁷⁰⁷

A further weakness is Ukraine's failure to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR-OP), despite having signed it in 2009. Also at the UPR of Ukraine in 2012, one state made a recommendation to Ukraine that it ratify the ICESCR-OP.⁷⁰⁸ This recommendation, too, was rejected by the government, which stated that:

*Ukraine considers that an analysis of the legal framework in the respective fields, as well as assessment of financial, economic and socio-political consequences of the implementation of a document should precede the recommendations implementation relating any international document ratification. According to this Ukraine at the moment cannot make a definitive statement on the recommendation regarding Optional Protocol to the ICESCR, however possible ratification of the abovementioned Protocol will be examined in due course.*⁷⁰⁹

706 United Nations Human Rights Council, Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review: Ukraine*, UN Doc. A/HRC/22/7, 20 December 2012, Paras 97.2 (Argentina), 97.3 (Indonesia) and 97.4 (Philippines).

707 United Nations Human Rights Council, Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review: Ukraine: Addendum*, UN Doc. A/HRC/22/7/Add.1, 21 February 2013, p. 2.

708 See above, note 706, Para 97.1 (Spain).

709 See above, note 707.

In relation to the treaties that it has ratified, Ukraine has largely done so without declaration or reservation. The Ukrainian SSR signed the ICCPR and ICESCR in March 1968 and ratified them in November 1973. At the time of its signature of each treaty, it made declarations (which it confirmed upon ratification) that it considered Article 48(1) of the ICCPR and Article 26(1) of the ICESCR, both of which declare which states are eligible to sign the Covenant, to be of a discriminatory nature. In doing so, it declared that each Covenant “in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation.” It had made a similar declaration in relation to Article 17(1) of ICERD on signing the Convention in 1966, which it then confirmed upon ratification.

A number of positive declarations have been made by Ukraine in addition to that identified in the table above. In July 1992, Ukraine made a declaration under Article 41 of the ICCPR recognising the competence of the Human Rights Committee (HRC) to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under the Covenant. On ratifying Optional Protocol I to the CRC which relates to the involvement of children in armed conflict, Ukraine made a declaration that the minimum age for voluntarily joining into its national armed forces was 19 years, a year older than the minimum age stipulated by Article 1 of the Optional Protocol. It ratified Optional Protocol II to the CRC in September 2000 and ratified it in July 2003.

Ukraine has a good record of compliance with its reporting obligations under the treaties it has ratified. While some reports have been submitted late, many have been on time or early and, at the time of publication, only one report remains outstanding.⁷¹⁰

3.1.2 Other Treaties Related to Equality

Ukraine has a very good record in relation to other international treaties which have a bearing on the rights to equality and non-discrimination. Ukraine ratifi-

⁷¹⁰ The combined twenty-second and twenty-third periodic report under ICERD which was due to be received by the Committee on the Elimination of Racial Discrimination in April 2014 had not, as of May 2015, been submitted.

ed the 1951 Convention Relating to the Status of Refugees in 2002, of particular importance given that there are an estimated 3,100 refugees and 5,700 asylum seekers in the country.⁷¹¹ Ukraine has also ratified the key Conventions relating to statelessness: the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

In the field of labour standards, Ukraine has also ratified all eight of the fundamental International Labour Organization (ILO) Conventions including the Equal Remuneration Convention and the Discrimination (Employment and Occupation) Convention. In the field of education, Ukraine has ratified the 1960 UNESCO Convention against Discrimination in Education.

Instrument	Signed	Ratified/ Acceded
Convention Relating to the Status of Refugees (1951)	n/a	10 June 2002 (Acceded)
Convention Relating to the Status of Stateless Persons (1954)	n/a	25 March 2013 (Acceded)
Convention on the Reduction of Statelessness (1961)	n/a	25 March 2013 (Acceded)
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)	7 September 1956	3 December 1958 (Ratified)
UN Convention against Transnational Organized Crime (2000)	12 December 2000	21 May 2004 (Ratified)
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)	15 November 2001	21 May 2004
Rome Statute on the International Criminal Court (2002)	20 January 2000	No
UNESCO Convention Against Discrimination in Education (1960)	n/a	19 December 1962

711 UNHCR, 2015 UNHRC regional operations profile – Eastern Europe: Overview (as of July 2014), available at: <http://www.unhcr.org/pages/49e48d4d6.html>.

Instrument	Signed	Ratified/ Acceded
Forced Labour Convention (1930) (ILO Convention No. 29)	n/a	10 August 1956
Equal Remuneration Convention (1951) (ILO Convention No. 100)	n/a	10 August 1956
Discrimination (Employment and Occupation) Convention (1958) (ILO Convention No. 111)	n/a	4 August 1961
Worst Forms of Child Labour Convention (1999) (ILO Convention No. 182)	n/a	14 December 2000

It is noteworthy that Ukraine is, however, one of a very small number of countries in Europe (although not worldwide) that has not ratified the Rome Statute. As such, save for the period covered by the declaration described below, Ukraine does not recognise the jurisdiction of the International Criminal Court and so the international crimes which fall within the Court's jurisdiction – genocide, crimes against humanity and war crimes – cannot be prosecuted if they have taken place within the territory of Ukraine.

Only in Europe Andorra, Belarus and Russia have similarly failed to ratify the Rome Statute. Although Ukraine signed the Rome Statute in 2000, the Constitutional Court of Ukraine ruled in 2001 that the Rome Statute was inconsistent with the Constitution of Ukraine.⁷¹² In 2006, the Chargé d'Affaires of Ukraine to the United Nations announced that the government would nonetheless submit a draft law to the Verkhovna Rada, ratifying the Statute, taking into account the decision of the Constitutional Court. In 2012, the Minister for Foreign Affairs told the President of the International Criminal Court that Ukraine intended to join the Rome Statute “once the necessary legal preconditions have been created in the context of the upcoming review of the country's constitution.”⁷¹³

712 Висновок Конституційного Суду України № 3-в/2001 у справі за конституційним поданням Президента України про надання висновку щодо відповідності Конституції України Римського Статуту Міжнародного кримінального суду (справа про Римський Статут), Справа № 1-35/2001, 11 July 2001.

713 International Criminal Court, “ICC President meets Minister for Foreign Affairs of Ukraine”, 4 April 2012.

While such legislation is still forthcoming, on 17 April 2014, the government of Ukraine lodged a declaration under Article 12(3) of the Rome Statute accepting the jurisdiction of the International Criminal Court over alleged crimes committed on its territory during the period of 21 November 2013 to 22 February 2014.⁷¹⁴

3.1.3 Regional Human Rights Treaties (Council of Europe)

Ukraine also has a very good record in relation to European treaties which have a bearing on the rights to equality and non-discrimination. In particular, Ukraine ratified the European Convention on Human Rights (ECHR) in 1997 and Protocol No. 12 to the ECHR, which provides a freestanding right to non-discrimination, in 2006.

Instrument	Signed	Ratified/ Acceded
European Convention on Human Rights (1950)	9 November 1995	11 September 1997
Protocol No. 12 to the European Convention on Human Rights (2000)	4 November 2000	27 March 2006
European Social Charter (revised) (1996)	7 May 1999	21 December 2006
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)	2 May 1996	5 May 1997
European Charter for Regional or Minority Languages (1992)	2 May 1996	19 September 2005
Framework Convention for the Protection of National Minorities (1995)	15 September 1995	26 January 1998
European Convention on Nationality (1997)	1 July 2003	21 December 2006
Convention on Preventing and Combating Violence against Women and Domestic Violence (2011)	7 November 2011	No

⁷¹⁴ Embassy of Ukraine, No. 61219/35-673-384, available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/declarationRecognitionJurisdiction09-04-2014.pdf.

3.1.4 Treaties not Ratified by Ukraine

While the few treaties which have not been ratified by Ukraine do not bind the state they, together with comments of their respective treaty bodies, do have an important interpretative function when determining the obligations of Ukraine. They should be used to elucidate: (i) Ukraine's obligations under the treaties to which it is a party, to the extent that the treaties to which it is not a party can explain concepts which are also found in those treaties to which it is a party; (ii) the content of the right to equality and non-discrimination for persons covered by the ICESCR, the ICERD, the CEDAW and the CRC who are vulnerable to multiple discrimination on grounds which include those protected by other treaties; and (iii) Ukraine's obligations under customary international law.

3.1.5 Customary International Law

Under international law, binding legal obligations on states derive from customary international law as well as from treaty law. Customary international law is deduced over time from the practice and behaviour of states.⁷¹⁵ Customary international laws are particularly significant when they reach a level at which certain norms known as peremptory norms are binding on all states and from which there can be no derogations.⁷¹⁶ It is largely accepted that the prohibition of racial discrimination is a peremptory norm of international customary law.⁷¹⁷ In addition, it can be said that the prohibition of discrimination on other grounds, such as gender and religion, may now be part of customary international law, although not

715 Shaw, M., *International Law*, Fifth edition, Cambridge University Press, 2003, p. 69.

716 *Prosecutor v Anto Furundzija*, ICTY-IT-95-17/1-T (10 December 1998), Para 153; Parker, K. and Neylon, L. B., "Jus Cogens: Compelling the Law of Human Rights", *Hastings International and Comparative Law Review*, Vol. 12, 1988–1989, p. 417. See also Vienna Convention on the Law of Treaties, Article 53.

717 De Schutter, O., *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press, 2010, pp. 64-68 and the materials referred to therein; Pellett, A., "Comments in Response to Christine Chinkin and in Defense of *Jus Cogens* as the Best Bastion against the Excesses of Fragmentation", *Finnish Yearbook of International Law*, Vol. 17, 2006, p. 85; cf Shaw, M., *International Law*, Sixth edition, Cambridge University Press, 2008, p. 287, who refers to it as part of customary international law, with no reference to it being a peremptory norm.

yet reaching the status of a peremptory norm.⁷¹⁸ Some argue, and it has been stated by the Inter-American Court of Human Rights, that the broader principle of non-discrimination is a peremptory norm of customary international law⁷¹⁹ but this is subject to debate.⁷²⁰ Accordingly, it is clear that, as a matter of customary international law, Ukraine cannot derogate from the obligation to protect, respect and fulfil the right to be free from racial discrimination; it is obliged to protect, respect and fulfil the right to be free from gender and religious discrimination; and it is arguably obliged to protect, respect and fulfil the right to be free from discrimination on other grounds.

3.1.6 Status of International Obligations in National Law

Ukraine is a monist state with Article 9 of the Constitution providing that: “[i]nternational treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.” The question then becomes how the ratified treaties fit within the hierarchy of the Constitutional legal order and which laws take precedence in a case of inconsistency.

Article 9 of the Constitution makes clear that treaties which are inconsistent with the Constitution cannot be ratified until and unless the Constitution is amended accordingly. Article 151 provides that the Constitutional Court of Ukraine may, on an appeal from the President or the Cabinet of Ministers, provide an opinion on the conformity of international treaties which are in force or which have been submitted to the Verkhovna Rada with the Constitution. In theory, no international treaty which is inconsistent with the Constitution can be ratified, thus rendering the question of

718 *Ibid.*, Shaw, p. 287; *Ibid.*, Pellett, p. 85; and Cassel, D., “Equal Labor Rights for Undocumented Migrant Workers”, in Bayefsky, A. (ed.), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton*, Martius Nijhoff Publishers, 2006, pp. 511–512.

719 Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 – Juridical Condition and Rights of Undocumented Migrants*, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), 17 September 2003, p. 23. See also, by way of example, Martin, F.F. et al., *International Human Rights and Humanitarian Law: Cases, Treaties and Analysis*, Cambridge University Press, 2006, pp. 34–35.

720 See Bianchi, A., “Human Rights and the Magic of *Jus Cogens*”, *The European Journal of International Law*, Vol. 19, 2008, p. 506; see Cassel, above, note 718, pp. 511–512; see Pellett, above, note 717, p. 85.

which would take priority moot. However, the Constitutional Court only reviews treaties when they are submitted to it by either the President or the Cabinet of Ministers, thus leaving open the possibility of a treaty being ratified which is inconsistent with the Constitution, it not having been submitted beforehand to the Constitutional Court for review. Thus, in practice, ensuring consistency between the Constitution and international treaties relies on the goodwill of the President and the Cabinet of Ministers submitting potentially inconsistent treaties to the Constitutional Court before their ratification.

The Constitution is silent on the relationship between ratified international treaties and other pieces of legislation. Article 19, paragraph 2 of the Law of Ukraine “On International Agreements of Ukraine” fills this gap clearly, providing that where there is an inconsistency between national legislation and the provisions of an international treaty which has been ratified, the provisions of the treaty take precedence.⁷²¹

There is one exception to these general rules. The ECHR has a special status within the Ukrainian legal system which makes its treatment by the courts distinct from other treaties. Article 17 of the Law of Ukraine “On Execution of Decisions and Application of European Court of Human Rights” requires courts to apply the ECHR and the European Court of Human Rights’ case-law when considering cases.⁷²² The Constitutional Court has, since its establishment, made reference to the ECHR and the case-law of the European Court of Human Rights over 80 times.⁷²³

721 Закон України “Про міжнародні договори України” (Відомості Верховної Ради України, 2004, № 50, с. 540), as amended in 2014. However, see Judge Shapoval’s dissent in Рішення Конституційного Суду України № 14-рп/2004, Справа № 1-14/2004, 7 July 2004, in which he stated that “(...) the Constitution of Ukraine does not establish the primacy of international treaties or international law in general. In the case of non-compliance, for example, between the law of Ukraine and international treaties of Ukraine, one can only speak about inconsistencies and determining such inconsistencies is essentially a question of law and not within the powers of the Constitutional Court of Ukraine.”

722 Закон України “Про виконання рішень та застосування практики Європейського суду з прав людини” (Відомості Верховної Ради України, 2006, № 30, с. 260), as amended between 2011 and 2014.

723 Letter from the Secretariat of the Constitutional Court of Ukraine № 4-17-17/317 of 27 February 2015, on file with Nash Mir.

The courts have referred to other international treaties ratified by Ukraine in their judgments on occasion, although have never made a decision based solely on the provisions of a treaty, instead using the treaty as an additional source in reaching their decision. Customary international law has no formal status in Ukraine (unless it is in some way connected to a particular treaty provision) and has not been considered by the courts.⁷²⁴ Cases in which the courts have referred to international treaties are not commonplace, although there are a few useful judgments. In 2012, for example, the Constitutional Court referred to equality and the unacceptability of discrimination as “fundamental values of the international community” referring to instruments such as the Universal Declaration of Human Rights (UDHR) and the ICCPR.⁷²⁵ However, the relevant provisions of the treaties themselves were not interpreted or even spelled out, the Court merely referring to the Article numbers, rather than the text; instead, the provisions were referenced as a means of bolstering the importance the Court attached to the rights to equality and non-discrimination as protected in the Constitution. At the lower level, in 2010, the Kyiv District Administrative Court considered that the CRPD formed part of the national legislation of Ukraine and reviewed particular provisions of the Convention in determining the state’s obligations.⁷²⁶ These cases are rare. Indeed, the review of jurisprudence in section 3.4 of this report finds scant reference, let alone usage, of the international treaties ratified by Ukraine when courts are faced with cases of discrimination.

3.2 National Law

In addition to a certain degree of protection from discrimination in the Constitution, Ukraine also has comprehensive anti-discrimination legislation, two further pieces of legislation which specifically seek to tackle inequality on the basis of gender and disability respectively, and a variety of standalone

724 Equal Rights Trust interview with Professor Mykola Kozyubra, Head of the Department of General and Public Law at National University of “Kyiv-Mohla” Academy and former judge of the Constitutional Court of Ukraine, 27 February 2015; Letter from the Secretariat of the Constitutional Court № 4-17-17/317 of 27 February 2015, on file with Nash Mir.

725 Рішення Конституційного Суду України № 9-рп/2012, Справа № 1-10/2012, 12 April 2012.

726 Київський апеляційний адміністративний суд, Справа № 2а-4637/10/2670, 12 August 2010.

non-discrimination provisions within pieces of legislation regulating various fields of activity. This section contains an analysis of constitutional and legislative provisions both in terms of their substance and their impact in practice.

3.2.1 The Constitution

The Constitution of Ukraine in force was adopted in 1996 replacing an earlier version adopted by the Ukrainian SSR in 1978. While the legislation repealing the former Constitution and enforcing the new Constitution was not promulgated until mid-July 1996, the Constitutional Court has held that the new Constitution took effect at the time when the result of the vote of the Verkhovna Rada adopting the Constitution was announced, namely 9 am on 28 June 1996,⁷²⁷ a day now celebrated as Constitution Day. Rules for amending the Constitution are restrictive, intended to preserve it, and Article 157 provides that the Constitution cannot be amended so as to abolish or restrict human rights and freedoms, or if the amendments are oriented towards liquidation of the independence or violation of the territorial indivisibility of Ukraine.⁷²⁸

The preamble to the Constitution states that the Constitution is adopted, in part, in order to provide “for the guarantee of human rights and freedoms and of the worthy conditions of human life”. The substantive text of the Constitution itself contains a number of provisions protecting the rights to equality and non-discrimination. Paragraph 2 of Article 3 (one of the “General Principles” in Chapter I of the Constitution) provides that:

Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State.

727 Рішення Конституційного Суду України № 4-зп, Справа № 18/183-97, 3 October 1997.

728 According to Chapter XIII, the Constitution can only be amended by draft law introduced into the Verkhovna Rada by the President or by no less than one third of all deputies and with at least two thirds of all deputies voting in favour of it unless it amends Chapter I (General Principles), Chapter III (Elections and Referendums) or Chapter XIII itself, in which case it cannot take effect unless it is also supported by a majority of voters at a referendum.

Building upon this, Chapter II of the Constitution sets out the rights, freedoms and duties of “persons and citizens” (“людини і громадянина”) in Ukraine.⁷²⁹ Accordingly, Chapter II sets out a series of rights, freedoms and duties, the majority of which are guaranteed to all persons, and a small number of which are guaranteed only to citizens.

The first of these, Article 21, is clearly based upon the first sentence of the UDHR, stating that “[a]ll people shall be free and equal in their dignity and rights”. Article 21 also provides that “[h]uman rights and freedoms shall be inalienable and inviolable”.

The first paragraph of Article 22 provides that the “[p]ersons’ and citizens’ rights and freedoms affirmed by this Constitution shall not be exhaustive”. Through Article 22, paragraph 1, the Constitution, in theory at least, guarantees rights which are not explicitly enumerated, although it makes no provision as to how further rights protected by the Constitution are to be determined. The second paragraph of Article 22 provides that “[t]he constitutional rights and freedoms shall be guaranteed and shall not be abolished”, reinforcing Article 157. Nor can legislation be used to limit the rights in the Constitution, the third paragraph of Article 22 providing that “[t]he content and scope of existing rights and freedoms shall not be diminished by the adoption of new laws or in the amendment of laws that are in force”.

Article 24 is the most significant constitutional provision protecting the rights to equality and non-discrimination:

Citizens shall have equal constitutional rights and freedoms and shall be equal before the law.

There shall be no privileges or restrictions based on race, skin colour, political, religious, and other beliefs,

729 While “людини і громадянина” is most commonly translated as “men and citizens”, it is not intended to be a gendered phrase as the rights apply to either everyone or citizens and not to only men or citizens. Accordingly, we use the more accurate interpretation of “persons and citizens” throughout.

gender, ethnic and social origin, property status, place of residence, linguistic or other characteristics.

Equality of the rights of women and men shall be ensured by providing women with opportunities equal to those of men in public, political and cultural activities, in obtaining education and in professional training, in work and remuneration for it; by taking special measures for the protection of women's health and occupational safety; by establishing pension benefits; by creating conditions that make it possible for women to combine work and motherhood; by adopting legal protection, material and moral support of motherhood and childhood, including the provision of paid leave and other privileges to pregnant women and mothers.

The first paragraph of Article 24 sets out the right to equality, as protected by the Constitution. It is most obviously problematic in that it provides only that “citizens” have “equal constitutional rights and freedoms” and are equal before the law, thus excluding non-citizens from its protection. This is mitigated somewhat by Article 26 which provides that foreigners and stateless persons in Ukraine enjoy all the rights and freedoms, and also bear all duties, of citizens of Ukraine, save for exceptions expressly provided for by the Constitution, national legislation or international treaties of Ukraine. As noted below, many of the rights and freedoms listed in the Constitution are guaranteed to “everyone”, but there are a small number which are explicitly guaranteed only to “citizens”. One of these is the right to equality, as according to the first paragraph of Article 24, this right is guaranteed to “citizens” and is thus an exception to the general proposition that both citizens and non-citizens enjoy the rights and freedoms listed in the Constitution. Having said this, a decision of the Constitutional Court discussed in section 3.2.4 below appears to suggest that Article 24 taken with Article 26 may be interpreted as providing the right to equality to non-citizens too, at least in certain circumstances.⁷³⁰ The right to equality ought to be guaranteed to all persons, regardless of citizenship, as is made

⁷³⁰ See above, note 725, as discussed at section 3.4.2 below.

clear both in Principle 9 of the Declaration of Principles on Equality⁷³¹ and in the international treaties to which Ukraine is party,⁷³² subject to certain limited exceptions, discussed below.

The scope of Article 24 is also narrower than is demanded by international best practice and Ukraine's obligations under the international treaties to which it is party. The right to equality as protected under Article 24 encompasses two areas: (i) equal constitutional rights and freedoms and (ii) equality before the law. The right to equality, as defined in Principle 1 of the Declaration of Principles on Equality, however, is much broader, including (i) the right to recognition of the equal worth and equal dignity of each human being; (ii) the right to equality before the law; (iii) the right to equal protection and benefit of the law; (iv) the right to be treated with the same respect and consideration as all others; (v) the right to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. The right to equality as protected by Article 24 recognises only the second of these, the right to equality before the law. Although it does also provide for "equal constitutional rights and freedoms", it thereby takes a subsidiary approach, requiring a pre-existing right or freedom before the right to equality "kicks in". This is in contrast to the approach taken by Principle 1 of the Declaration which does not require the right to equality to be based on or related to the enjoyment of any other human right. Article 21 stating that ("[a]ll people shall be free and equal in their dignity and rights") arguably meets the first of the five elements in Principle 1 of the Declaration, although it is seldom utilised by the courts who invariably refer to Article 24 in cases involving discrimination.

Article 26 of the ICCPR provides that "all persons are equal before the law" and that all persons are "entitled without any discrimination to the equal

731 Principle 9 reads "[t]he right to equality is *inherent to all human beings* and may be asserted by *any person* or a group of persons who have a common interest in asserting this right." (emphasis added) (The Equal Rights Trust, *Declaration of Principles on Equality*, London, 2008, p. 8.)

732 See, for example, Article 26 of the ICCPR which provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to *all persons* equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (emphasis added)

protection of the law". The first paragraph of Article 24 recognises only the first of these and does not provide for "equal protection of the law".

Perhaps the most significant gap in the second paragraph of Article 24 is that it only prohibits "privileges or restrictions", thus falling far short in its content in defining all acts which would constitute discrimination as understood under both the Declaration of Principles on Equality and under the international treaties to which Ukraine is party. Under Principle 5 of the Declaration of Principles of Equality, states are required to prohibit three forms of discrimination: direct discrimination, indirect discrimination and harassment. The definition of "direct discrimination" in Principle 5, namely "when (...) a person or group of persons is treated less favourably than another person or another group of persons, has been, or would be treated in a comparable situation" or where "a person or groups of persons is subjected to a detriment" is far broader than a simple prohibition of "privileges or restrictions". It is also difficult to see how "privileges or restrictions" could be interpreted to prohibit all forms of indirect discrimination, defined in Principle 5 as "when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary". While it is possible that "restrictions" could materialise indirectly against persons due to their possession of a particular characteristic, the term "restrictions" is far narrower than "disadvantage", thus precluding prohibition of all forms of indirect discrimination. Further, there has been no interpretation of the term "privileges or restrictions" by the Ukrainian judiciary as including indirect as well as direct discrimination. Finally, it is difficult, if not impossible, to interpret "privileges and restrictions" as including harassment, defined in Principle 5 as when "unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment".

The list of protected characteristics in the second paragraph of Article 24 explicitly lists race, skin colour, political, religious, and other beliefs, gender, ethnic and social origin, property status, place of residence and language. This list largely, but not entirely, corresponds to the list of grounds upon

which discrimination is prohibited under Articles 2(1) and 26 of the ICCPR and Article 2(2) of the ICESCR. Some are identical: the second paragraph of Article 24 includes “race”, “colour”, “sex”, “political or other opinion” and “property”. Some are similar, but not identical: the second paragraph of Article 24 includes “linguistic characteristics” instead of “language”; “religious beliefs” instead of “religion”; and “ethnic or social origin” rather than “national or social origin”. One characteristic is absent entirely – “birth” – and there is one characteristic included not found in the ICCPR or the ICESCR – “place of residence”.⁷³³

Further, the second paragraph of Article 24 omits several grounds which either or both of the HRC and the Committee on Economic, Social and Cultural Rights (CESCR) have, in interpreting the ICCPR and the ICESCR respectively, recognised as falling within “other status” in Articles 2(1) and 2(2) of the respective Covenants, namely disability, age, nationality, marital and family status, sexual orientation, gender identity, health status and economic and social situation.⁷³⁴ In addition to these characteristics, the Declaration of Principles on Equality also requires discrimination be prohibited on the basis of descent, pregnancy, maternity, carer status, association with a national minority, and genetic or other predisposition toward illness.⁷³⁵

The second paragraph of Article 24 does, however, provide for an open list of characteristics upon which discrimination is prohibited, through the term “or other characteristics”, allowing for further characteristics to be recognised (including those not explicitly mentioned above), thus mirroring internatio-

733 The United Nations Committee on Economic, Social and Cultural Rights has, however, stated that “other status” in Article 2(2) includes, *inter alia*, place of residence: United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, 2009, Para 34.

734 *Ibid.*, Paras 8, 29, 30, 31, 32, 33 and 35; United Nations Human Rights Committee, *Edward Young v Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000, 2003 (sexual orientation); *Ibrahima Gueye et al. v France*, Communication No. 196/1985, UN Doc. CCPR/C/35/D/196/1985, 1989 (nationality).

735 “Descent” is a protected characteristic under Article 1 of the ICERD; “association with a national minority” is a protected characteristic under Article 14 of the ECHR and Protocol No. 12 thereto.

nal best practice⁷³⁶ and the international treaties to which Ukraine is party.⁷³⁷ For a characteristic not explicitly mentioned in Article 24, there are two ways to determine whether it is included: either by applying to the Constitutional Court for an official interpretation of the Constitution, or by initiating legal proceedings in an ordinary court for infringement of Article 24. It is also possible for Article 22 to be cited in such circumstances, providing as it does that the list of rights and freedoms referred to in the Constitution is not exhaustive, thus allowing for the rights contained therein to be expanded upon. However, there is no provision which contains any guidance on how further rights are to be determined. In addition, the right to appeal to the Constitutional Court for individuals is very limited and only permitted, in practice, where there is inconsistent application of the provisions by the courts. As such, it is difficult for individuals to obtain an official interpretation of the constitutional provisions on grounds of discrimination not explicitly mentioned.

It is unclear from the second paragraph of Article 24 whether the prohibition on “privileges or restrictions” based on the protected characteristics includes privileges or restrictions which are based upon an association with a person with a protected characteristic (discrimination by association) or where they are imposed due to a perception that a person has a particular protected characteristic (discrimination by perception). There has been no jurisprudence by the Constitutional Court on either of these

736 See Principle 5 of the Declaration of Principles on Equality which provides that, in addition to being prohibited on the explicitly listed characteristics, “[d]iscrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’ rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.” (See above, note 731, p. 6.)

737 See, for example, Article 26 of the ICCPR which provides that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination *on any ground* such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*.” (emphasis added). See also Article 2(1) of the ICCPR and Article 2(2) of the ICESCR which require the rights in the Covenants to be guaranteed “without distinction of any kind” (in the case of the ICCPR) and “without discrimination of any kind” (in the case of the ICESCR) and, in both cases, in addition to the explicitly listed characteristics, on any “other status”. See also Article 14 of the ECHR which requires enjoyment of the rights in the Convention to be secured “without discrimination on any ground” and, in addition to the explicitly listed characteristics, on any “other status”. Article 1 of Protocol No. 12 to the ECHR uses identical language save that it refers to enjoyment of “any right set forth by law”.

issues. Both the Declaration of Principles on Equality⁷³⁸ and the international treaties to which Ukraine is party require that both of these forms of discrimination be prohibited.⁷³⁹

It is also unclear from the second paragraph of Article 24 whether the prohibition on “privileges or restrictions” based on the protected characteristics includes privileges or restrictions based upon a combination of characteristics (multiple discrimination). There has been no jurisprudence by the Constitutional Court on this issue. Both the Declaration of Principles on Equality⁷⁴⁰ and the international treaties to which Ukraine is party require that multiple discrimination be prohibited. The Committee on Economic, Social and Cultural Rights, for example, has noted that some individuals or groups of individuals, such as women with disabilities, face multiple discrimination on two or more protected grounds, and has stressed that “such cumulative discrimination merits particular consideration and remedying”⁷⁴¹.

The third paragraph of Article 24 is the Constitution’s only provision specifying measures to be taken by the state which could be termed “positive action” measures. It provides a long list of measures which the state is required to take in order to ensure “equality of the rights of women and men”:

- Providing women with opportunities equal to those of men in public, political and cultural activities, in obtaining education and in professional training, in work and its remuneration;

738 See Principle 5 of the Declaration of Principles on Equality which provides that “Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.” (See above, note 731, pp. 6–7).

739 The United Nations Committee on Economic, Social and Cultural Rights, for example, has said in its General Comment No. 20 that: “Membership [of a protected group] also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group)”. (See above, note 733, Para 16.)

740 See Principle 12 of the Declaration of Principles on Equality which provides that: “Laws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground.” (See above, note 731, p. 10.)

741 See above, note 733, Paras 17 and 27.

- Taking special measures for the protection of women’s occupational safety and health;
- Establishing pension benefits;
- Creating conditions that make it possible for women to combine work and motherhood;
- Providing legal protection, material and moral support of motherhood and childhood, including the provision of paid leave and other privileges to pregnant women and mothers.

Ukraine is required under its international treaty obligations to implement positive action measures; it is also international best practice, with Principle 3 of the Declaration of Principles on Equality making clear that “[t]o be effective, the right to equality requires positive action” and that:

Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.

Principle 3 mirrors the obligations under the international treaties to which Ukraine is party. The HRC has stated, for example, that:

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.⁷⁴²

Similarly, the CESCR has stated that:

In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent rea-

742 United Nations Human Rights Committee, *General Comment No. 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.1 at 26, 1989, Para 10.

*sonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.*⁷⁴³

It is the Committee on the Elimination of Discrimination against Women (CEDAW Committee), however, which has given the most detailed guidance on the use of temporary special measures to ensure equality between women and men. The CEDAW Committee has stated that the purpose of these temporary special measures is:

*[T]o accelerate the improvement of the position of women to achieve their de facto or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation.*⁷⁴⁴

The CEDAW Committee has also made clear that temporary special measures are not an “exception to the norm of non-discrimination” but “part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms”.⁷⁴⁵

While the third paragraph of Article 24 does not provide for the measures to be taken thereunder to be considered as exceptions to the general right to non-discrimination in the second paragraph of Article 24, all five of the

743 See above, note 733, Para 9.

744 United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25: on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, UN Doc. HRI/GEN/1/Rev.7 at 282, 2004, Para 15.

745 *Ibid.*, Para 18.

measures are, however, problematic. The first, providing women with “opportunities equal to those of men” in particular fields is laudable but is not a requirement to take positive action measures; rather, it is a statement for the need for equal opportunities to be available to women and men.

To the extent that the state takes special measures in respect of women’s health, this, too, cannot really be considered a positive action measure; it is simply recognition of the particular health needs of men and women and so ensuring that women’s health needs are met, as, indeed, should be men’s particular health needs.

Special measures taken in respect of women’s occupational safety are potentially problematic. While during pregnancy and the postnatal period women will have particular needs that may require adjustments in their work conditions, women do not, *per se*, have any particular occupational safety requirements that men do not have, or vice versa. The Article betrays an approach which is likely directly discriminatory on grounds of sex. This is evident elsewhere in the law, e.g. the Code of Labour Laws which restricts women who are pregnant or with young children from undertaking certain forms of work, even if they are fit and willing to do so.

The establishment of pension benefits is also not a positive action measure. Different pension benefits for men and women constitute *ipso facto* discrimination, and ought to be prohibited rather than considered a positive action measure. Indeed, Article 11(1)(a) of the CEDAW provides that:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (...)
(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave (...)

Thus, the CEDAW requires equality between men and women in entitlement to social security, not additional benefits to be provided to women.

The fourth of these, “creating conditions that make it possible for women to combine work and motherhood” is problematic in that difficulties in combining work and parenthood are experienced by both men and women and not women alone (save for during pregnancy and the postnatal period). As such, while well-meaning, this provision reinforces the stereotypical notion that it is women who should be primarily responsible for the bringing up of children and be required to combine work with parenthood, rather than the same being equally true for men. Of course, Ukraine is not alone in this respect. Many states continue to discriminate against men with respect to parenting rights arguably to the detriment of both men and women, as well as children.

Similarly, the fifth and final of these, “providing legal protection, material and moral support of motherhood and childhood, including the provision of paid leave and other privileges to pregnant women and mothers”, while again a common approach to this issue, reinforces the stereotypical notion that it is primarily women who should be responsible for the bringing up of children and be required to combine work with parenthood, rather than the same being equally true for men. Arrangements such as parental leave and pay, assistance in childcare provision, etc., should all be equally available for fathers as for mothers.

The CEDAW does not, of course, require that temporary special measures be set out in the Constitutions of states parties. As such, the weaknesses in the third paragraph of Article 24 do not necessarily constitute a failure of Ukraine to meet its obligations under the CEDAW, particularly as provisions relating to temporary special measures are set out in legislation. Nonetheless, by including a provision on what can be considered as positive action measures, it would be preferable for the third paragraph of Article 24 to be more consistent with the requirements of the CEDAW, particularly as the state is then obligated to act in conformity with the provision when implementing positive action measures through legislation or policy. This is particularly pertinent given that, during the gender analysis of legislation that is required by the Law of Ukraine “On Equal Rights and Opportunities for Women and Men”, provisions of legislation which would otherwise be considered as discriminatory on the basis of sex have been considered unproblematic, in part because they are arguably measures which fall within the third paragraph of Article 24.⁷⁴⁶

746 See section 2.1 of this report.

Further, while the third paragraph of Article 24 requires measures to be taken to ensure gender equality, no measures are required in relation to equality between persons on the basis of other characteristics. Both the ICCPR and the ICESCR, as interpreted by the respective treaty bodies as outlined above, require positive action measures to be taken to ensure equality and to combat discrimination on *all* grounds protected by the Covenants, where necessary. In addition, the Committee on the Elimination of Racial Discrimination (CERD) has stated that states parties are required to take special measures to ensure equality between different ethnic and racial groups.⁷⁴⁷ As such, Article 24's failure to require the state to take measures in respect of equality generally can be considered a weakness.

Article 25 of the Constitution protects Ukrainian citizens from being made stateless, by prohibiting absolutely the deprivation of citizenship, thus meeting, and, indeed, going beyond, its obligations under Article 8 of the 1961 Convention on the Reduction of Statelessness.

As noted above, Article 26 of the Constitution provides that foreigners and stateless persons in Ukraine enjoy all the rights and freedoms (and also bear all duties) as citizens of Ukraine, save for exceptions expressly provided for by the Constitution, national legislation or international treaties of Ukraine. The international human rights treaties to which Ukraine is party do not require *all* rights and freedoms guaranteed to citizens to be guaranteed to non-citizens; however, exceptions to the general principle of equality between citizens and non-citizens are extremely limited.

The ICCPR, for example, provides at Article 2(1) that states parties must ensure the rights contained therein to "all individuals within its territory and subject to its jurisdiction" and guarantees the rights to equality and non-discrimination in Article 26 to "all persons". As the HRC has made clear, "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens".⁷⁴⁸ One category of exceptions are certain political rights contained within Article 25 which are guaranteed only

⁷⁴⁷ United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. CERD/C/GC/32, 2009.

⁷⁴⁸ United Nations Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, UN Doc. HRI/GEN/Rev.1 at 18, 1989, Para 2.

to citizens: the rights (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and (c) to have access, on general terms of equality, to public service in one's country. Further, the right to liberty of movement and to choose one's residence in Article 12(1) is guaranteed only for persons "lawfully within the territory of a State".

The situation with regards to the ICESCR is more complicated. Article 2(2) provides that the rights contained therein must be guaranteed "without discrimination of any kind" and the CESCR has interpreted this to include discrimination on the basis of nationality.⁷⁴⁹ However, this is subject to Article 2(3) which creates an exception for developing countries:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Thus, developing countries may limit economic rights (and economic rights only) in respect of non-citizens. As noted above at section 2.6, however, determining whether a state is a "developing country" is not straightforward as there is no single universal definition of what constitutes a "developing country". With respect to Ukraine, while the Development Assistance Committee of the Organization for Economic Cooperation and Development defines Ukraine as a "lower middle income country" which is therefore eligible for development assistance,⁷⁵⁰ the United Nations Development Programme considers Ukraine to have a "High Development Index".⁷⁵¹

While Article 1(2) of the ICERD provides that "[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State

749 See above, note 733, Para 30.

750 Organization for Economic Cooperation and Development, *Development Assistance Committee, List of ODA Recipients Effective for reporting on 2014, 2015 and 2016 flows*, 2014.

751 United Nations Development Programme, *Country Profiles: Ukraine*, 2014, available at: <http://hdr.undp.org/en/countries/profiles/UKR>.

Party to this Convention between citizens and non-citizens”, the CERD has stated that this provision:

*[M]ust be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (...)*⁷⁵²

The CERD has also highlighted the fact that Article 5 of the ICERD incorporates the obligation of states parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights.⁷⁵³ Since these rights (with some exceptions) are human rights to be enjoyed by all persons, states parties are required to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised under international law. Thus, Article 1(2) of the ICERD cannot be used to detract from states’ obligations to guarantee human rights under other instruments to all persons, regardless of citizenship.

At the regional level, the ECHR requires Ukraine to prohibit discrimination based on language in respect to all Convention rights, by virtue of Article 14, and, by virtue of Protocol No. 12 to the ECHR, to prohibit discrimination in the enjoyment of other right set forth by law.

Despite the narrow exceptions to the general principle that citizens and non-citizens enjoy equal rights, a notable number of rights in the Constitution are guaranteed only to citizens, highlighted in the table below.

752 United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 2004, Para 2.

753 *Ibid.*, Para 3.

Article	Right	Right-Holders
23	The right to free development of his or her personality if the rights and freedoms of other persons are not violated thereby (...)	Everyone
24, para 1	Equal constitutional rights and freedoms and equality before the law.	Citizens
24, para 2	No privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics.	Unclear
25, para 1	The right not to be deprived of citizenship and of the right to change citizenship.	Citizens
25, para 2	The right not to be expelled from Ukraine or surrendered to another state.	Citizens
27	The right to life (para 1) and the right to protect his or her life and health, the lives and health of other persons against unlawful encroachments (para 2).	Everyone
28	The right to respect for one's dignity (para 1), freedom from torture, cruel, inhuman, or degrading treatment, or punishment that violates his or her dignity (para 2) and the right not to be subjected to medical, scientific or other experiments without his or her free consent (para 3).	Everyone
29	The right to freedom and personal inviolability (para 1) and various minimum standards during arrest and detention (paras 2 to 6).	Everyone
30	The right to inviolability of one's dwelling place (para 1) and a prohibition of entry into a dwelling place or other possessions of a person, and the examination or search thereof other than pursuant to a substantiated court decision (para 2).	Everyone
31	The right to privacy of one's correspondence, telephone conversations, telegraph, and other communications.	Everyone
32, para 1	The right to freedom from interference in one's personal and family life, and access to personal information.	Everyone
32, para 2	Prohibition of the collection, storage, use and dissemination of confidential information about a person without his or her consent (with certain exceptions).	Everyone
32, para 3	The right to examine information about himself or herself, that is not a state secret or other secret protected by law, at the bodies of state power, bodies of local self-government, institutions and organisations.	Citizens

Article	Right	Right-Holders
32, para 4	Judicial protection of the right to rectify incorrect information about himself or herself and members of his or her family, and of the right to demand that any type of information be expunged, and also the right to compensation for material and moral damages inflicted by the collection, storage, use and dissemination of such incorrect information.	Everyone
33, para 1	The right to freedom of movement within Ukraine.	Everyone law-fully in Ukraine
33, para 2	The right to return to Ukraine at any time.	Citizens
34	The right to right to freedom of thought and speech, and to free expression of one's views and beliefs (paragraph 1) and to freely collect, store, use and disseminate information by oral, written or other means of his or her choice (paragraph 2).	Everyone
35	The right to freedom of religion.	Everyone
36, para 1	The right to freedom of association into political parties and public organisations.	Citizens
36, para 2	The right to be a member of a political party.	Citizens
36, para 3	The right to take part in trade unions.	Citizens
38, para 1	The right to right to participate in the administration of state affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to the bodies of State power and local self-government.	Citizens
38, para 2	The right to equal access to the civil service and to the service in local self-government bodies.	Citizens
39	The right to assemble peacefully without arms and to hold rallies, meetings, processions, and demonstrations.	Citizens
40	The right to address individual or collective petitions, or to personally recourse to public authorities, local self-government bodies, officials, and officers of these bodies obliged to consider the petitions.	Everyone
41, para 1	The right to own, use, or dispose of his property and the results of his intellectual or creative activities.	Everyone
41, para 3	The right to use the objects of state and communal property in accordance with the law.	Citizens
41, para 4	The right not to be deprived of personal property.	Everyone
42	The right to entrepreneurial activity.	Everyone

Article	Right	Right-Holders
43, para 1	The right to work.	Everyone
43, para 3	The prohibition of forced labour.	Everyone
43, para 4	The right to proper, safe and healthy work conditions, and to remuneration no less than the minimum wage as determined by law.	Everyone
43, para 6	The right to protection from unlawful dismissal.	Citizens
44	The right to strike.	Everyone who is employed
45	The right to rest.	Everyone who is employed
46	The right to social protection, including the right to provision in cases of complete, partial or temporary disability, the loss of the principal wage-earner, unemployment due to circumstances beyond their control and also in old age.	Citizens
47, para 1	The right to housing.	Everyone
47, para 2	Citizens in need of social protection are provided with housing by the State and bodies of local self-government, free of charge or at a price affordable for them, in accordance with the law.	Citizens
47, para 3	The prohibition of forced deprivation of housing without a court order.	Everyone
48	The right to a standard of living sufficient for themselves and their families including adequate nutrition, clothing, and housing.	Everyone
49, para 1	The right to health protection, medical care and medical insurance.	Everyone
49, para 3	An obligation on the state to create conditions for effective medical service.	Citizens
50	The right to an environment that is safe for life and health (para 1) and free access to information about the environmental situation, the quality of food and consumer goods, and also the right to disseminate such information (para 2).	Everyone
51	Equal rights and duties in the marriage and family.	Everyone
52	Equal rights of children regardless of their origin and whether they are born in or out of wedlock.	Everyone

Article	Right	Right-Holders
53, para 1	The right to education.	Everyone
53, para 4	The right to obtain free higher education at the state and communal educational establishments on a competitive basis.	Citizens
53, para 5	The right to receive instruction in their native language, or to study their native language in state and communal educational establishments and through national cultural societies.	Citizens who belong to national minorities
54, para 1	The right to freedom of literary, artistic, scientific, and technical creative activities, protection of intellectual property, their copyright, moral and material interests arising in connection with various types of intellectual activity.	Citizens
54, para 2	The right to the results of his or her intellectual, creative activity.	Citizens
55, para 2	The right to challenge in court the decisions, actions, or inactivity of State power, local self-government bodies, officials and officers.	Everyone
55, para 3	The right to appeal for the protection of his or her rights to the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine.	Everyone
55, para 4	After exhausting all domestic legal remedies, the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.	Everyone
55, para 5	The right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law.	Everyone
56	The right to compensation, at the expense of the State authorities or local self-government bodies, for material and moral damages caused by unlawful decisions, actions, or inactivity of State power, local self-government bodies, officials, or officers while exercising their powers.	Everyone
57	The right to know his rights and duties.	Everyone
58	The prohibition of non-retrospective legislation.	Everyone
59	The right to legal assistance.	Everyone
61	The prohibition of double jeopardy.	Everyone

Article	Right	Right-Holders
62	The presumption of innocence.	Everyone
63	The prohibition of testifying against oneself.	Everyone

Thus, a total of twenty-one provisions guarantee certain rights only to citizens and not to non-citizens (or, in the case of the right to move freely, to persons lawfully within the territory of Ukraine). Some of these demand closer consideration. The limitation of the right to information about oneself that is not a state secret or other secret protected by law, held by bodies of state power, bodies of local self-government, institutions and organisations (paragraph 3 of Article 32) to citizens is problematic. Ukraine has ratified the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data which contains protections securing the right to privacy with regard to automatic processing of personal data relating which must be guaranteed regardless of nationality (Article 1). Further, while Ukraine's international treaty obligations do not contain an explicit right to personal information as such, some elements of such a right can be derived from the prohibition of arbitrary or unlawful interference with one's private life (Article 17(1) of the ICCPR) and the freedom to seek, receive and impart information and ideas of all kinds (Article 19(2) of the ICCPR). Both of these rights are guaranteed to everyone and must be guaranteed "without distinction of any kind" by virtue of Article 2(1) of the ICCPR. As such, to the extent that the right in paragraph 3 of Article 32 reflects the rights in the ICCPR, the limitation of the right to citizens is in violation of the ICCPR. Similarly, such a right can be derived from the right to respect one's private life (Article 8(1) of the ECHR) and the freedom to receive and impart information and ideas without interference by public authority (Article 10(1) of the ECHR), both of which must be secured without discrimination on any ground by virtue of Article 14 of the ECHR. Similarly, to the extent that the right in paragraph 3 of Article 32 reflects the rights in the ECHR, the limitation of the right to citizens is in violation of the ECHR.

The right to freedom of association in political parties and public organisations is guaranteed only to citizens (paragraph 1 of Article 36), in contravention of Article 22(1) of the ICCPR and Article 11(1) of the ECHR which both guarantee the right to freedom of association with others to "everyone". Similarly problematic is limiting the right to be a member of a political par-

ty to citizens (paragraph 2 of Article 36). While the international treaties to which Ukraine is party do not provide for a specific right to membership of a political party, and, indeed, limit certain political rights only to citizens, it is difficult to classify a political party as anything other than an association within the meaning of Article 22(1) of the ICCPR and Article 11(1) of the ECHR. Indeed, in respect of the latter, the European Court of Human Rights stated in *United Communist Party of Turkey v Turkey* that: “In view of the importance of democracy in the Convention system (...) there can be no doubt that political parties come within the scope of Article 11.”⁷⁵⁴ Limiting membership of such parties only to citizens is in all likelihood in contravention of Article 22(1) (even if certain political rights which relate to political parties (such as voting and standing for election) *can* be limited to citizens) and certainly a violation of Article 11(1) of the ECHR.

The limitation of the right to take part in trade unions to citizens (paragraph 3 of Article 36) is a clear contravention of Article 22(1) of the ICCPR and Article 11(1) of the ECHR which both state that “everyone” has the right to freedom of association with others “including the right to form and join trade unions for the protection of his interests”.

Further limits concern certain political rights, namely the right to participate in the administration of state affairs, in national and local referendums, and to freely elect and to be elected to bodies of state power and bodies of local self-government, providing these only to citizens (paragraph 1 of Article 38). These limitations are in accordance with Article 25 of the ICCPR which limits political rights to citizens (as described above). Similar are the limitations of the right of access “to the civil service and to service in bodies of local self-government” to citizens (paragraph 2 of Article 38). While Article 22(1) limits to citizens the right and opportunity “to have access, on general terms of equality, to public service in his country”, the term “public service” is not defined. However, the interpretation of “public service” given in the HRC’s General Comment No. 25 suggests that the term refers to senior public positions rather than the entirety of the civil service.⁷⁵⁵ Further, it could be argued that

754 *United Communist Party of Turkey v Turkey* (Application No. 133/1996/752/951), 30 January 1998, Para 25.

755 United Nations Human Rights Committee, *General Comment No. 25*, UN Doc. CCPR/C/21/Rev.1/Ad.7, 1996, Paras 23–24.

limiting positions in the entirety of the civil service to citizens would likely contravene the prohibition of non-discrimination in the right to work, as protected by Articles 2(2) and 6 of the ICESCR.

The next limitation concerns the right “to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations”, given only to citizens (paragraph 1 of Article 39). This is in contradiction to Article 21 of the ICCPR and Article 11(1) of the ECHR which make no limitations on the basis of citizenship to the general right to peaceful assembly.

A number of rights relating to access to economic and social rights are limited only to citizens in contravention of ICESCR. For example, although Article 7 of the ICESCR does not provide for an explicit right to protection from unlawful dismissal, it does provide for the right “of everyone to the enjoyment of just and favourable conditions of work”. In addition, this right must be guaranteed on a non-discriminatory basis by virtue of Article 2(2). As such, the limitation on protection from unlawful dismissal in Article 43, paragraph 6, is in contravention of Ukraine’s obligations under the ICESCR. Likewise Article 46, paragraph 1’s limitation of the right to social protection to citizens is in clear contravention of Article 9 of the ICESCR which guarantees the right “to social security, including social insurance” to “everyone”. Further, these limitations likely violate Protocol No. 12 to the ECHR which prohibits discrimination in the enjoyment of “any right set forth by law”.

While the right to housing is guaranteed to everyone, the provision of housing for persons in need of social protection by the state is guaranteed only to citizens (paragraph 2 of Article 47). While Article 11(1) of the ICESCR only guarantees a right to housing, and not to state provision of housing, the general right to housing is guaranteed for “everyone”. Thus, any discrimination in the enjoyment of that right, including in determination of who is eligible for state provision of housing, is in violation of Article 2(2) of the ICESCR which requires that the rights in the Covenant be exercised without discrimination of any kind. This limitation also likely violates Protocol No. 12 to the ECHR.

Similarly, while the right to health protection, medical care and medical insurance is guaranteed to everyone, the state is only obliged to create conditions for effective medical service to citizens (paragraph 3 of Article 49). This is in clear violation of Article 12 of the ICESCR which guarantees, at Ar-

ticle 12(1) “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” which requires, via Article 12(2)(d), the state to take steps necessary for the “creation of conditions which would assure to all medical service and medical attention in the event of sickness”. Again, this limitation is likely to violate Protocol No. 12 to the ECHR.

While the right to education is guaranteed to everyone, the right to obtain free higher education in state and communal educational establishments on a competitive basis is guaranteed only to citizens (paragraph 4 of Article 53). This is clear violation of Article 13(2)(c) of the ICESCR which, in addition to guaranteeing the right to education to “everyone” in Article 13(1), specifically requires states to ensure that:

Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

Article 64, paragraph 1 of the Constitution provides that restrictions on the rights contained therein are only permitted when they are stipulated by the Constitution itself, however neither the right to equality in paragraph 1 of Article 24 nor the right to non-discrimination in paragraph 24 of Article 24 provide for any permissible restrictions. This is problematic. The rights to equality and non-discrimination are not absolute and exceptions can be justified in certain circumstances. The HRC, for example, has stated that:

[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁷⁵⁶

The CESCR has also adopted this “reasonable and objective test”, but has elaborated on its practical meaning:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for

⁷⁵⁶ See above, note 742, Para 13.

*differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.*⁷⁵⁷

The European Court of Human Rights has stated that:

*[A] difference in treatment is discriminatory if ‘it has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality’ between the means employed and the aim sought to be realised.*⁷⁵⁸

There are many instances in which unequal treatment is not only permissible but required under the international treaties to which Ukraine is party. The requirements of the CRC, for example, require that children (defined as persons under the age of 18) be protected from certain harmful practices, including child marriage, thus requiring states to impose a minimum age for marriage.⁷⁵⁹ By providing no guidance on where unequal treatment is permissible, the combination of Articles 24 and paragraph 1 of Article 64 risks confusion and a lack of clarity for the courts in interpreting the rights to equality and non-discrimination.

Certain rights can also be limited during a period of “martial law or a state of emergency” under Article 64, paragraph 2; however, again, these rights do not include the rights to equality and non-discrimination as protected by Article

757 See above, note 733, Para 13.

758 *DH v Czech Republic* (Application No. 57325/00), 13 November 2007, Para 196.

759 United Nations Committee on the Elimination of Discrimination against Women and the United Nations Committee on the Rights of the Child, *Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices*, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, 2014, Para 19.

24. This is particularly welcome and, indeed, goes beyond that which is required under the treaties to which Ukraine is party. Article 4(1) of the ICCPR allows derogations in times of a “public emergency which threatens the life of the nation”, including derogations from the rights to equality and non-discrimination in Articles 2(1) and 26, unless they involve “discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

In addition to the general framework on the rights to equality and non-discrimination set out in Articles 24 and 64, there are other provisions in the Constitution which have an impact upon the rights to equality and non-discrimination.

For example, Article 10 of the Constitution regulates language in Ukraine. Paragraph 1 provides that the state language is “the Ukrainian language” and paragraph 2 requires the state to ensure “the comprehensive development and functioning of the Ukrainian language in all spheres of life throughout the entire territory of Ukraine”. However, Article 10 also recognises the importance of other languages, paragraph 3 guaranteeing “the free development, use and protection of Russian and other languages of national minorities of Ukraine. Paragraph 5 provides that “the use of languages in Ukraine is guaranteed by the Constitution of Ukraine and is determined by law”. The relevant “law” is the Law of Ukraine “On the Principles of State Language Policy”,⁷⁶⁰ discussed in section 2.7 of this report.

Article 11 provides that:

The State promotes the consolidation and development of the Ukrainian nation, of its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine.

While welcome in ensuring the development of the “ethnic, cultural, linguistic and religious identity” of all indigenous peoples and national minorities, Article 11 is a “General Principle” rather than an enforceable right, limiting its usefulness.

760 Закон України “Про засади державної мовної політики” (Відомості Верховної Ради, 2013, № 23, с. 218), as amended between 2012 and 2015.

Similarly, Article 12 states that, “Ukraine provides for the satisfaction of national and cultural, and linguistic needs of Ukrainians residing beyond the borders of the State”. Again, this is a “General Principle” rather than an enforceable right, limiting its utility.

Article 52 provides that “[c]hildren are equal in their rights regardless of their origin and whether they are born in or out of wedlock”, thus prohibiting distinctions being made between children based on whether their parents were married or not.

3.2.2 Specific Equality and Anti-discrimination Legislation

As a party to the ICCPR and the ICESCR, Ukraine has an obligation to provide protection from discrimination by state and non-state actors through the adoption of equality legislation. The HRC has stated that under Article 26 of the ICCPR, all states parties have an obligation to ensure that the “law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds”.⁷⁶¹ It has also noted that Article 2 “requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”.⁷⁶² The CESCR has stated that “[s]tates parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights”.⁷⁶³ Under the ECHR, Ukraine is required to prohibit discrimination on the same list of grounds.

Thus, Ukraine has an obligation to ensure that its legislation prohibits discrimination on all grounds which are explicitly listed in Articles 2(1) and 26 of the ICCPR, Article 2(2) of the ICESCR, and Article 14 of the ECHR, together with those characteristics recognised by the relevant UN Committees and by the European Court of Human Rights as covered by “other status”. Therefore, the list of grounds on which Ukraine should provide protection from discrimination includes: race, colour, sex, language, religion, political or other opi-

761 See above, note 742, Para 12.

762 United Nations Human Rights Committee, *General Comment No. 31: The nature of the general legal obligation imposed on states parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 7.

763 See above, note 733, Para 37.

nion, national or social origin, property, birth, family status, nationality, association with a national minority, economic status, sexual orientation, gender identity, age, disability and health status. In order to ensure consistency with international treaties, such legislation should also provide protection from discrimination which arises on the basis of “other status”. Moreover, in order to ensure consistency with the Covenants as interpreted by the relevant Committees, such legislation should prohibit discrimination by association and perception,⁷⁶⁴ and multiple discrimination.⁷⁶⁵

Anti-discrimination law should, as explained by the CESCR, prohibit both direct and indirect discrimination,⁷⁶⁶ incitement to discriminate and harassment.⁷⁶⁷ The CESCR has also stressed that legislation and other instruments should “provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights”.⁷⁶⁸ The HRC, when discussing the general obligations of states arising under Article 2 of the ICCPR, has stated that they “must ensure that individuals also have accessible and effective remedies to vindicate those rights”, and that “the Covenant generally entails appropriate compensation” for breaches of rights.⁷⁶⁹ The ECHR provides in Article 13 the right to effective remedy to victims of violations of all Convention rights, including the right to non-discrimination:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In addition to the general obligations arising under the ICCPR, the ICESCR and the ECHR, as a party to the ICERD, the CEDAW, the CRPD and the FCNM, Ukraine has specific obligations to prohibit discrimination against women,

764 *Ibid.*, Para 16.

765 *Ibid.*, Para 17.

766 *Ibid.*, Para 10.

767 *Ibid.*, Para 7.

768 *Ibid.*, Para 40.

769 See above, note 762, Paras 15 and 16.

against racial or ethnic groups and against persons with disabilities by public and private actors in all areas of activity covered by these treaties.⁷⁷⁰

Until 2012, Ukraine had no comprehensive anti-discrimination legislation. That year, however, the Verkhovna Rada passed the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” which prohibits discrimination on a large number of grounds in various areas of life. In addition, there is also a specific law on gender equality, the Law of Ukraine “On Equal Rights and Opportunities for Women and Men”. There is also a law which is designed to protect the rights of persons with disabilities which, while not strictly a piece of anti-discrimination legislation, nonetheless does prohibit discrimination against persons with disabilities. Finally, there are also standalone provisions which either prohibit discrimination or guarantee equal rights in a number of other pieces of legislation regulating specific fields.

3.2.2.1 *Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”*

The Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”⁷⁷¹ is a short framework law which came into force on 7 September 2012 for the purpose of complying with one of the criteria set down in the EU-Ukraine Visa Liberalisation Action Plan. The law was rushed through the Verkhovna Rada, without considerations of the views of the European Union, experts from the Council of Europe and Ukrainian or international NGOs. As such, the original law contained a number of gaps, deficiencies and weaknesses which were highlighted by, *inter alia*, the HRC in 2013⁷⁷² and the CESCR in 2014.⁷⁷³ The Equal Rights Trust also provided a critical analysis

770 ICERD, Article 2(1); CEDAW, Article 2; CRPD, Article 5(2); Framework Convention on the Protection of National Minorities, Article 4(1).

771 Закон України “Про засади запобігання та протидії дискримінації в Україні” (Відомості Верховної Ради, 2013, № 32, с. 412), as amended by the Закон України “Про внесення змін до деяких законодавчих актів України щодо запобігання та протидії дискримінації” (Відомості Верховної Ради, 2014, № 27, с. 915).

772 United Nations Human Rights Committee, *Concluding Observations: Ukraine*, UN Doc. CCPR/C/UKR/CO/7, 22 August 2013, Para 8.

773 United Committee on Economic, Social and Cultural Rights, *Concluding Observations: Ukraine*, UN Doc. E/C.12/UKR/CO/6, 13 June 2014, Para 7.

and a set of recommendations.⁷⁷⁴ The Law was amended significantly in May 2014,⁷⁷⁵ addressing some, but not all of these issues.

Part I: General Provisions

The Law defines “discrimination” in a potentially confusing manner. Article 1, paragraph 2 contains a definition of discrimination *per se*:

A situation in which an individual and/or group of persons, because of their race, colour, political, religious or other beliefs, sex, age, disability, ethnic or social origin, nationality, family and property status, place of residence, language or other features, whether real or imputed, experiences a restriction in the recognition, enjoyment or exercise of a right or freedom in whatever form prescribed by this law, save where such a restriction is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

This definition bears resemblance to that used in international instruments, such as the ICERD,⁷⁷⁶ the CEDAW⁷⁷⁷ and the CRPD,⁷⁷⁸ as well as that used by

774 The Equal Rights Trust, *Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”*: Legal Analysis, October 2013.

775 Закон України “Про внесення змін до деяких законодавчих актів України щодо запобігання та протидії дискримінації” (Відомості Верховної Ради, 2014, № 27, с. 915).

776 Article 1 defines “discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

777 Article 1 defines “discrimination” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

778 Article 2 defines “discrimination” as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

the HRC⁷⁷⁹ and the CESCR.⁷⁸⁰ Article 5 of the Law then lists five forms of prohibited discrimination (i) direct discrimination; (ii) indirect discrimination; (iii) incitement to discrimination; (iv) assistance in discrimination; and (v) harassment. Although the wording of Article 1, paragraph 2, is unclear, it appears that the reference to “whatever form prescribed by this law” is a reference to these five forms of discrimination. Article 1, paragraphs 3-7 define each of these five forms. The confusion arises in relation to how these definitions interact with Article 1, paragraph 2. Elements of the test contained in Article 1, paragraph 2 and the definitions of some of the sub-categories are repeated. As Ahlund and Sorgdrager have noted, international law and best practice dictate that discrimination should be defined as either “direct” or “indirect” and unambiguous definitions for both have been developed which are widely accepted.⁷⁸¹ There is therefore no need for a separate definition of discrimination *per se* – this risks confusion and misinterpretation.

In the following analysis of the anti-discrimination protection provided under the Law, we turn first to the definitions of the five forms of prohibited conduct before then considering who is protected under the Law and its material scope.

With respect to the definitions of the five forms of prohibited discrimination, given that the purpose of the Law is to fulfil various criteria of the EU-Ukraine Visa Liberalisation Action Plan, it is unsurprising that the definitions used in the Law are virtually identical to the definitions used in the EU’s various anti-discrimination Directives. Given the confusion in relation to how these

779 See above, note 742, Para 7 which defines “discrimination” as “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.

780 See above, note 733, Para 7 which defines “discrimination” at paragraph 7 as “any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights”.

781 Ahlund, C. and Sorgdrager, W., *Comments on the Draft Law on the Principles of Prevention and Combating Discrimination in Ukraine*, 2012. Although the wording has changed since the draft the authors were commenting upon, this aspect of their commentary remains pertinent for the Law as adopted.

definitions relate to Article 1, paragraph 2, our analysis below takes them as stand-alone provisions in the first instance.

Paragraph 6 of Article 1 defines “direct discrimination” as:

A situation in which an individual and/or group of persons is treated less favourably than another person and/or group of persons in a similar situation, because of a specific characteristic, save where such treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

This definition largely reflects international best practice and the definitions used by the UN Treaty Bodies.⁷⁸² However, it is unclear from the wording whether there is a requirement for an actual comparator person or group in a similar situation rather than a hypothetical one to meet this test. Internationally, it has been acknowledged that it can be difficult to establish a comparator in some situations and so a comparator can instead be hypothetical; or rather in order to establish direct discrimination, it is necessary and sufficient to establish whether a person is subjected to a detriment connected to a prohibited ground.⁷⁸³ When legislation is unclear, as in this case, it becomes a matter for the court.⁷⁸⁴ There is currently no case law to indicate whether Ukrainian courts would interpret the definition in line with international best practice. And, with no case law yet on this point, it is arguably preferable for an explicit provision to be included in the legislation.

The definition itself is based upon EU Law and the first half of the definition bears much similarity to that used in the EU anti-discrimination Directives

782 See for example Principle 5 of the Declaration of Principles on Equality, above, note 733, p. 7, and United Nations Committee on Economic, Social and Cultural Rights, above, note 733, Para 10.

783 This is recognised both in Principle 5 of the Declaration of Principles on Equality and by the Committee on Economic, Social and Cultural Rights: see above, note 731, p. 7, and above, note 733, Para 16 respectively.

784 For an example of a court using its interpretative function to declare that an actual comparator is not always necessary, see *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, Case C-177/88, [1990] ECR I-3941, 8 November 1990, European Court of Justice. In the case the European Court of Justice held that discrimination against a woman because she is pregnant will always constitute discrimination on grounds of sex, even though there is no obvious comparator.

(“where one person is treated less favourably than another is, has been or would be treated in a comparable situation” on a particular ground).⁷⁸⁵ However, whereas the EU anti-discrimination Directives do not foresee direct discrimination as possible of being justified (with some, limited, explicit exceptions, including on grounds of age in employment), the definition in paragraph 6 of Article 1 permits direct discrimination where it is “objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”. This justification clause was not in the government’s original draft law, but was inserted as an amendment during its passage in the Verkhovna Rada. The possibility of putting forward justifications for direct as well as indirect discrimination therefore puts the Law out of step with EU anti-discrimination law but not, however, those international treaties to which Ukraine is party: both the HRC and the CESC, for example, similarly to the European Court of Human Rights in interpreting the ECHR, accept that both direct and indirect discrimination can be justified, and use the same test for both.⁷⁸⁶

Article 1, paragraph 3, defines “indirect discrimination” as:

A situation where, as a result of the application of formally neutral or legal rules, evaluation criteria, rules, requirements or practices for an individual and/or group of persons put them in a less favourable position, because of a specific characteristic, than other individuals and/or groups of persons, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

785 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2(2)(a); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(2)(a); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 2(a); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 2(1)(a).

786 See above, note 742, Para 13; above, note 731, Para 13; and *Petrovic v Austria* (Application No. 156/1996/775/976), 27 March 1998, Para 30.

The definition largely reflects both international best practice and the definition used by the UN Treaty Bodies.⁷⁸⁷ It also mirrors the definition used in the EU anti-discrimination Directives almost verbatim.⁷⁸⁸ Accordingly, aside from the confusion caused by its relationship with Article 1, paragraph 2, this definition is welcome.

A third form of prohibited discrimination under the Law is also commonly recognised in international and regional law and best practice: “harassment”. Article 1, paragraph 7, defines “harassment” as:

Unwanted conduct for an individual and/or group of persons, related to a certain characteristic, the purpose or effect of which is violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Consideration of harassment as a form of discrimination is in line with international best practice and the requirements of the UN Treaty Bodies.⁷⁸⁹ The definition used in the Law largely reflects international best practice⁷⁹⁰ and reflects, near verbatim, the definition used in the EU anti-discrimination Directives.⁷⁹¹

The remaining two forms of prohibited discrimination are not commonly used in international law. Article 1, paragraph 4, defines “incitement to discrimination” as “directions, instructions or calls for discrimination against an individual and/or group of persons because of their specific characteristics”.

787 See for example, Principle 5 of the Declaration of Principles on Equality above, note 731, p. 7, and United Nations Committee on Economic, Social and Cultural Rights, above, note 733, Para 10.

788 See above, note 785, Articles 2(2)(b), 2(2)(b), 2(b) and 2(2)(b) respectively. It should be noted that Article 2(2)(b) of Council Directive 2000/78/EC of 27 November 2000 contains an exception where as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 of the Directive in order to eliminate disadvantages entailed by such provision, criterion or practice.

789 See above, note 733, Para. 7.

790 Principle 5 of the Declaration of Principles on Equality defines “harassment” as “unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment”. (See above, note 731, p. 7.)

791 See above, note 785, Articles 2(3), 2(3), 2(c) and 2(2)(a) respectively.

This is presumably to reflect the fact that the EU anti-discrimination Directives deem “instructions to discrimination” a form of discrimination, albeit without a definition.⁷⁹² The inclusion of a definition in the Law is welcome. However, acts which fall under this definition would, in any case, be covered by the definition of direct discrimination above. Finally, Article 1, paragraph 5¹, defines “assistance in discrimination” as “any deliberate assistance in the commission of acts or omissions directed at causing discrimination”. This is the only form of discrimination which does not stem from EU anti-discrimination law, although similar provisions can be found in the national legislation of certain states.⁷⁹³ Again, this definition creates no problems from an international legal perspective. However, its inclusion is one of emphasis in the law rather than a distinct offence as such acts would in themselves amount to discrimination under the definitions already included.

Although it is not entirely clear from the drafting, references to “specific characteristics” in the five definitions of the prohibited forms of discrimination are likely intended to refer to the characteristics (or “grounds” of discrimination) found within Article 1, paragraph 2. A number of grounds are explicitly listed: race; colour; political, religious or other beliefs; sex; age; disability; ethnic or social origin; nationality; family and property status; place of residence; and language. These largely correspond to the grounds listed in Article 24 of the Constitution, with four further grounds included: age; disability; nationality; and family status.

Missing, however, are several other grounds recognised as requiring protection under the international treaties to which Ukraine is party and international best practice. One, “birth”, is explicitly listed in the ICCPR the ICESCR, and ECHR; a second, “descent”, is explicitly listed in the ICERD. A further four grounds have been recognised as falling within “other status” in Articles 2(1) and 2(2) of the ICCPR or the ICESCR by the HRC, the CESCR or both, and the European Court of Human Rights, namely sexual orientation,⁷⁹⁴

792 *Ibid.*, Paras 2(4), 2(4), 1(4) and 2(2)(b) respectively.

793 See, for example, section 112 of the United Kingdom’s Equality Act 2010 which provides that: “A person (A) must not knowingly help another (B) to do anything which contravenes [the Act].”

794 See United Nations Human Rights Committee, *Young v Australia*, (Communication No. 941/2000), UN Doc. CCPR/C/78/D/941/2000, 2003; above, note 733, Para 32; and *Smith and Grady v the United Kingdom* (Application Nos. 33985/96 and 33986/96), 27 September 1999.

gender identity,⁷⁹⁵ health status⁷⁹⁶ and economic and social situation.⁷⁹⁷ In addition, Principle 5 of the Declaration of Principles on Equality also requires discrimination be prohibited on the basis of pregnancy,⁷⁹⁸ maternity,⁷⁹⁹ carer status, association with a national minority⁸⁰⁰ and genetic or other predisposition toward illness.

However, Article 1, paragraph 2, uses an open list of protected grounds, through use of the phrase “or other features”, enabling courts to provide protection on grounds not explicitly listed, reflecting the international treaties to which Ukraine is party⁸⁰¹ and international best practice.⁸⁰² As noted below at section 3.4.2, amongst other relevant jurisprudence, the High Specialised Court of Ukraine for Civil and Criminal Cases has stated that Article 1, paragraph 2 (as well as other pieces of legislation which use the phrase “or other features”) includes sexual orientation; however, such a statement is not binding on other courts.

The definition of discrimination in Article 1, paragraph 2 refers to acts made in respect of a person which relate to “their” characteristic, thus appearing to exclude discrimination which takes place against a person because of their association with someone who possesses the protected characteristic, also known as discrimination by association. Both the Declaration of Principles on Equality⁸⁰³ and the international treaties to which Ukraine is party

795 See above, note 733, Para 32, and *P.V. v Spain* (Application No. 35159/09), 30 November 2010.

796 See above, note 733, Para 33, and *Kiyutin v Russia* (Application No. 2700/10), 10 March 2011.

797 See above, note 733, Para 35.

798 CEDAW, Article 11.

799 *Ibid.*

800 ECHR, Article 14 and Protocol No. 12 to the ECHR.

801 See above, note 737.

802 See Principle 5 of the Declaration of Principles on Equality which provides that, in addition to being prohibited on the explicitly listed characteristics, “Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’ rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.” (See above, note 731, p. 6.)

803 See Principle 5 of the Declaration of Principles on Equality which provides that: “Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies.” (See above, note 731, p. 7.)

require that discrimination by association be prohibited.⁸⁰⁴ This limitation is also contrary to EU anti-discrimination law: although the definitions largely mirror those in EU anti-discrimination Directives, the EU Directives do not use the word “their” but simply refer to discrimination “on the grounds of” the characteristics, and have thus been interpreted to include discrimination by association.⁸⁰⁵

The definition in Article 1, paragraph 2 provides that the characteristic upon which the discrimination is based may be “real or imputed” thus prohibiting discrimination based on a perception (whether correct or incorrect) that a person has a particular protected characteristic (discrimination by perception). This is fully in line with both the Declaration of Principles on Equality⁸⁰⁶ and the international treaties to which Ukraine is party.⁸⁰⁷ However, again a lack of clarity remains given the language used in the more specific definitions of prohibited conduct and a conclusion that, in this respect, the Law is in line with international law and best practice is based on the presumption that Article 1, paragraph 2 is to be taken together with those more specific definitions and read as a whole.

It is also unclear whether the Law protects people from discrimination based upon a combination of characteristics (multiple discrimination). There has been no jurisprudence by the Constitutional Court on this issue. Both the

804 The United Nations Committee on Economic, Social and Cultural Rights, for example, has said in its General Comment No. 20 that: “Membership [of a protected group] also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability).” (See above, note 735, Para 16.)

805 *Coleman v Attridge Law and Steve Law*, Case C-303/06 [2008] I-5603, 17 July 2008.

806 See Principle 5 of the Declaration of Principles on Equality which provides that: “Discrimination must also be prohibited when it is on the ground of (...) the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.” (See above, note 731, p. 7.)

807 The United Nations Committee on Economic, Social and Cultural Rights, for example, has said in its General Comment No. 20 that: “Membership [of a protected group] also includes (...) perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).” (See above, note 733, Para 16.)

Declaration of Principles on Equality⁸⁰⁸ and the international treaties to which Ukraine is party require that multiple discrimination be prohibited. The CESCR, for example, has noted that some individuals or groups of individuals, such as women with disabilities, face multiple discrimination on two or more protected grounds,⁸⁰⁹ and has stressed that “such cumulative discrimination merits particular consideration and remedying”⁸¹⁰

Article 6, paragraph 2 and Article 4, paragraph 1, together set out the Law’s material scope. The former provides that discrimination is prohibited where it is carried out by state authorities, authorities of the Autonomous Republic of Crimea, local governments and their officials, legal entities of public and private law and natural persons. The latter sets out the areas in which discrimination is prohibited, namely “the relationship between legal entities in public and private law, the location of which is registered on the territory of Ukraine, as well as individuals on the territory of Ukraine”. Article 4, paragraphs 3–22 set out a number of specific areas to which the Law applies, as part of the material scope:

- Social and political (socio-political) activities;
- Public service and service in local government;
- Justice;
- Labour relations, including the application of the principle of reasonable accommodation by the employer;
- Health;
- Education;
- Social protection;
- Housing;
- Access to goods and services; and
- Other areas of social relations.

Thus, the scope of the Law is a broad one: any kind of social relationship involving legal entities (whether public or private) or individuals. In this re-

808 See Principle 12 of the Declaration of Principles on Equality which provides that: “Laws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground.” (See above, note 731, p. 10.)

809 See above, note 733, Para 17.

810 *Ibid.*, Para 27.

gard, the Law largely complies with international best practice which requires discrimination to be prohibited in all areas of life regulated by law or by public authorities.⁸¹¹ The scope of the rights to equality and non-discrimination under Ukraine’s international treaty obligations varies depending on the treaty. Article 2(1) of the ICCPR prohibits discrimination in the enjoyment of the rights contained within the Covenant, whereas Article 26 has been interpreted by the HRC as “prohibit[ing] discrimination in law or in fact in any field regulated and protected by public authorities”.⁸¹² Article 2(2) of the ICESCR, similarly to Article 2(1) of the ICCPR, prohibits discrimination in the enjoyment of the rights contained within the Covenant. Thus, together, Ukraine is required to prohibit discrimination in the enjoyment of all civil, political, economic, social and cultural rights (through Article 2(1) of the ICCPR and Article 2(2) of the ICESCR) *and* any discrimination in law or in any field regulated and protected by public authorities (Article 26 of the ICCPR). Further, Article 14 of the ECHR guarantees non-discrimination as an accessory right, prohibiting discrimination in the enjoyment of the substantive rights contained within the Convention, and Protocol No. 12 to the ECHR provides a freestanding right to non-discrimination prohibiting both discrimination in “the enjoyment of any right set forth by law” and by public authorities. The broad scope of the Law largely meets these requirements save that it does not prohibit legislation which is itself discriminatory. Under Ukraine’s constitutional and legal framework, discriminatory legislation is only prohibited if it violates the Constitution (see section 3.2.1 of this report).

Article 6, paragraph 3, provides that positive action is not to be considered as a form of discrimination in four cases:

- Special protection by the state of certain categories of persons that require such protection;
- Measures aimed at the preservation of the identity of particular groups of people, where such measures are necessary;
- Subsidies to particular groups of people in cases provided for by the law; and

811 See, for example, Principle 8 of the Declaration of Principles on Equality which provides that: “[t]he right to equality applies in all areas of activity regulated by law.” (See above, note 731, p. 8.)

812 See above, note 742, Para 12.

- Special requirements, provided for by the law, in respect of the exercise of certain rights of persons.

The approach taken in Article 6, paragraph 3 in respect of positive action measures is out of step with the Declaration, international best practice and the international treaties to which Ukraine is party which, as identified above, require rather than permit positive action to be taken.

Part II: Mechanisms for Ensuring the Prevention and Combating of Discrimination

Article 9, paragraph 1, lists the bodies empowered to prevent and combat discrimination: (i) the Verkhovna Rada; (ii) the Ukrainian Parliament Commissioner for Human Rights; (iii) the Cabinet of Ministers of Ukraine; (iv) other state authorities, authorities of the Autonomous Republic of Crimea, and local government; and (v) community organisations, individuals and legal entities. Articles 10 to 14 set out in more detail the specific duties and powers of each of these bodies. The broad range of actors empowered to take steps to prevent and combat discrimination is a particularly positive aspect of the Law although category (v) may be so broad as to create significant implementation challenges.

Article 9, paragraph 2, provides that the bodies can apply positive action measures to achieve the objectives of the Law. This, too, is a welcome aspect of the Law. “Positive action” is defined in Article 1, paragraph 5 as:

Special temporary activities implemented by law and in pursuance of a legitimate, objectively reasonable aim directed at eliminating legal or de facto inequality in the opportunities of individuals and/or groups of persons to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine.

As noted above, Ukraine is required under its international treaty obligations to implement positive action measures. Under international law and best practice this obligation is usually one placed directly on the state. Permitting a large number of different actors to take “positive action”, as the Law does, may be a recipe for disputes between private parties as to whether action taken by one party can be said to be “positive action” or rather prohibited discrimination.

For now, however, there is little evidence thus far of the bodies listed in Article 9, paragraph 1, taking “positive action” measures.

Article 10 provides the Ukrainian Parliament Commissioner for Human Rights with powers of parliamentary control over the observance of constitutional rights and freedoms, their protection in Ukraine, and, within its jurisdiction, duties to prevent any form of discrimination and to implement anti-discrimination measures. These include duties to monitor; initiate discrimination claims before court; maintain records and make proposals for legislative change. The broad range of powers of the Commissioner in respect of combating discrimination is welcome, particularly the ability of the Commissioner to receive complaints of discrimination, to provide submissions in cases of discrimination where requested to do so by a court, and to make proposals for legislative reform. The specific work of the Commissioner is considered below at section 3.4.1.

Article 11 sets out the duties of the Cabinet of Ministers which are largely powers of coordinating the work of government and the extent to which they will be effective depends primarily on the political will of the government of the day. The government is only required to “take into account” the principle of non-discrimination when preparing legislation, for example, but not to ensure that legislation is non-discriminatory. Further, the provision is not enforceable, resulting in a lack of accountability where the Cabinet of Ministers fails to fulfil its duties.

Article 12 sets out powers rather than duties of other public bodies, authorities of the Autonomous Republic of Crimea and local authorities including: preparing proposals for legislative improvements; undertaking positive action measures; and conducting educational activities. The extent to which the powers are exercised will depend upon the political will of the body or local government, and there is no means by which they can be compelled to do so.

Finally, Article 13 sets out rights rather than duties of NGOs, individuals and entities of mixed value. Some of these powers – such as monitoring discrimination and reviewing draft legislation – could be carried out without express statutory authorisation, and so are of little benefit. Others, such as the right to participate in decisions of state and local authorities and to represent individual victims of discrimination in court are of far more utility, and in ac-

cordance with international best practice. Principle 20 of the Declaration of Principles on Equality, for example, provides that:

States should ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.

Part III: Liability for Violations of Legislation on Prevention and Combating Discrimination

Article 14, paragraph 1, provides that a person who believes that they have been discriminated against may file a complaint with the state authorities, the authorities of the Autonomous Republic of Crimea, local governments and their officials, the Commissioner and/or courts, in the manner established by law. The broad range of actors to whom a complaint of discrimination can be brought is, in some sense, welcome. There is, however, a risk of a lack of clarity over precisely to whom a victim should bring their complaint. The Law does not provide any guidance on when a victim should bring their complaint to the Commissioner as opposed to a court, or to a state or local authority as opposed to a court or the Commissioner.

Article 14, paragraph 2, prohibits victimisation, providing that use of the law cannot be grounds for biased treatment and cannot result in any adverse effect on either the person who claimed their rights, or others. This prohibition brings the Law into line with Principle 19 of the Declaration which requires states to prohibit victimisation in legislation as well as the EU anti-discrimination Directives, all of which prohibit victimisation.⁸¹³

Article 15, paragraph 1, provides that a person who has suffered discrimination is entitled to compensation for material and moral damage. Under paragraph 2, the procedure for obtaining such compensation is that set out in the Civil Code and other legislation. Article 16 provides that persons

⁸¹³ See above, note 785, Articles 9, 11, 11 and 24 respectively.

found guilty of violating the legislation on preventing and combating discrimination bear civil, administrative and criminal liability. This is one of the most problematic provisions in the Law since it requires other legislation to be harmonised. Neither the Civil Code, nor the Code on Administrative Offences contains provisions prohibiting discrimination, thus making it difficult for courts to determine precisely what civil, administrative or criminal liability is attached in any particular case.⁸¹⁴ Discussion of the available remedies under the Civil Code and Administrative Code is set out below at section 3.4.1 of this report.

3.2.2.2 *Law of Ukraine “On Equal Rights and Opportunities for Women and Men”*

In addition to the general rights to equality and non-discrimination under Articles 2(1) and 26 of the ICCPR, Article 2(1) of the ICESCR, and Article 14 of the ECHR, Ukraine has specific obligations to ensure equality between women and men primarily through the CEDAW, but also through Articles 3 of the ICCPR and the ICESCR, both of which provide that: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all (...) rights set forth in the present Covenant.” The Law of Ukraine “On Equal Rights and Opportunities for Women and Men”⁸¹⁵ was adopted by the Verkhovna Rada in 2005 and came into force on 1 January 2006 and is Ukraine’s most significant piece of legislation designed to ensure equality between women and men and thus meet these international treaty obligations. The situation created by the continued existence of this Law in parallel with the more recent and comprehensive Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”, which prohibits discrimination on many grounds, including on the basis of sex, rather than having simply been harmonised within the new Law, is not ideal. Many of its provisions are now dealt with in the later law. However, some of its provisions have no equivalent

814 The European Commission has raised concerns that: “[w]hile provisions were introduced referring to the right of appeal before national courts, to compensation claims and to the individual liability of offenders, as well as references to the civil, administrative and criminal responsibilities, it remains to be clarified what sanctions and what type of compensation the respective Codes and legislation provide for acts of discrimination.” European Commission, *Report from the Commission to the European Parliament and the Council, Fourth Report on the implementation by Ukraine of the Action Plan on Visa Liberalisation*, Brussels, COM(2014) 336 final, 27 May 2014.

815 Закон України “Про забезпечення рівних прав та можливостей жінок і чоловіків” (Відомості Верховної Ради України, 2005, № 52, с. 561), as amended between 2012 and 2014.

in the broader anti-discrimination law, such as the requirement to carry out gender-based assessment of legislation, and thus retain their utility.

The Law provides at Article 2, paragraph 2, that “if an international treaty of Ukraine, ratified by the Verkhovna Rada, establishes rules other than those stipulated in this Law, the rules of the international treaty shall prevail”. Thus, to the extent that the Law is inconsistent with the ICCPR, the ICESCR, the ECHR and the CEDAW, courts *should* prefer the requirements of the treaties – this is of course only good news to the extent that international treaty obligations go further than those under the Law. And in practice, there is no evidence of this Article being taken into account in the application of the Law.

Part I: General Provisions

The Law begins by setting out the principles of state policy on ensuring equal rights and opportunities for women and men at Article 3:

- Gender equality;
- Non-discrimination on grounds of sex;
- The use of affirmative action;
- Ensuring the equal participation of women and men in decision-making of public importance;
- Equal opportunities for women and men on a combination of professional and family responsibilities;
- Supporting families with responsible motherhood and fatherhood;
- Education and propaganda among the population of Ukraine of a culture of gender equality, distribution of educational activities in this area; and
- Protection of society against media aimed at sex discrimination.

A number of these terms are defined in Article 1. “Gender equality” is defined broadly as “the equal legal status of men and women and equal opportunities for its implementation, allowing individuals of both sexes equally to participate in all spheres of society”. The definition thus encompasses both formal equality of women and men before the law and equality of opportunity for women and men in all spheres of society.

“Discrimination on grounds of sex” is defined as an “action or inaction that results in a distinction, exclusion or benefit on the basis of sex, and if it limits or prevents the recognition, enjoyment or exercise of equal human rights and freedoms for women and men”. This definition mirrors that of Article 1 of the CEDAW in some respects, although it has been criticised by the CEDAW Committee, in that “it does not explicitly encompass indirect discrimination, in conformity with article 1 of the [CEDAW]”.⁸¹⁶ Indeed, the Law does not prohibit or define different forms of discrimination, and the definition therefore falls far short of international best practice.

“Positive action” is defined as “special temporary measures to eliminate imbalances between women and men to exercise equal rights provided by the Constitution and laws of Ukraine”.

Article 6 is the only provision which provides a substantive prohibition on discrimination, although it simply states that “discrimination based on sex is prohibited”. Article 6 provides for a number of exceptions to the general prohibition:

- Special protection of women during pregnancy, childbirth and breast-feeding;
- Compulsory military service for males;
- Differences in retirement age for men and women;
- Specific requirements for the protection of women and men related to the protection of their reproductive health; and
- Positive action.

The first of these, special protection of women during pregnancy, childbirth and breastfeeding is unproblematic, with the excepted measures solely relating to those elements of maternity which are biologically particular to women. Indeed, the exception is narrower than that permitted by Article 4(2) of the CEDAW which provides that “special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory”.

816 United Nations Committee on the Elimination of Discrimination against Women, *Concluding Observations: Ukraine*, UN Doc. CEDAW/C/UKR/CO/7, 5 February 2010, Para 16.

The second, compulsory military service for males, is clearly discriminatory on the basis of sex in that it makes requirements of men that are not made of women and cannot be justified. The Law of Ukraine “On Military Duty and Military Service” provides that women may be conscripted for military service only where they have a profession related to a relevant military occupational specialty specified in a list approved by the Cabinet of Ministers of Ukraine, and are fit for military service taking into account their health, age and marital status.⁸¹⁷

The third, differences in retirement age for men and women, is also clearly discriminatory on the basis of sex in that it forces men to work longer than women before becoming entitled to retire. Indeed, Article 11(1)(e) of the CEDAW requires states parties “to ensure, on a basis of equality of men and women, the same rights, in particular: (...) (e) the right to social security, particularly in cases of retirement”.

The fourth, specific requirements for the protection of women and men related to the protection of their reproductive health, is clearly justified and, indeed, mandated by Article 12(1) of the CEDAW which requires states parties to “take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning”.

The fifth, positive action, is, as elsewhere in Ukrainian law, considered an exception to the principle of non-discrimination rather than a requirement and, as discuss above, such an approach is not in line with international best practice.

Article 4 establishes “gender-related assessments”, defined in Article 1 as “analysis of the current legislation and draft legal acts, resulting in an opinion on their compliance with the principle of equal rights and opportunities for women and men”. Under Article 4, all existing legislation is to be subjected to a “gender-related assessment”. Where legislation is found to be inconsistent with the principle of equal rights and opportunities for women and men, the results of the assessment are sent to the agency which prepared the legislation. New legislation is required to be drafted with the principle of equal

817 Закон України “Про військовий обов’язок і військову службу” (Відомості Верховної Ради України, 1992, № 27, ст.385), as amended between 1992 and 2015.

rights and opportunities for women and men. Drafts of legislation are also required to be subjected to a “gender-related assessment” to be published alongside the draft legislation for consideration.

In April 2006, the Cabinet of Ministers issued a Decree requiring the Ministry of Justice to develop and approve the form by which legislation would undergo a gender-related assessment.⁸¹⁸ In May 2006, the Instructions on how to conduct gender-related assessments were published by the Ministry of Justice.⁸¹⁹ The Instructions provide that all draft legislation was to be assessed from 1 June 2006 onwards, and existing legislation to be assessed from 1 January 2007 onwards.

The requirement to assess legislation (and draft legislation) for its compatibility with the principles of gender equality has been taken seriously by the Ministry of Justice. The Ministry has issued guidelines on how to conduct gender-related assessments on both existing legislation and draft legislation⁸²⁰ which require assessment both against the CEDAW and other relevant international treaties. Each year, the Ministry of Justice publishes a list of laws to be reviewed during the year, with reports published following the conclusion of each assessment making recommendations for amendments to the legislation if necessary.

Since 2007, the Ministry of Justice has conducted gender assessments of 38 pieces of legislation. Of these, ten were considered to contain provisions which discriminated on the basis of gender and were inconsistent with the prohibition of gender-based discrimination. Of these ten, four have since been amended to remove the gender-discriminatory provisions; however, six have not been amended.⁸²¹

818 Кабінет Міністрів України, Постанова № 504, 12 April 2006, "Про проведення гендерно-правової експертизи".

819 Міністерство юстиції України, Наказ № 42/5, 12 May 2006, "Деякі питання проведення гендерно-правової експертизи".

820 Міністерство юстиції України, *Методичні рекомендації щодо проведення гендерно-правової експертизи чинного законодавства*, available at: <http://www.minjust.gov.ua/15654>; Міністерство юстиції України, *Методичні рекомендації щодо проведення гендерно-правової експертизи проектів нормативно-правових актів*, available at: <http://www.minjust.gov.ua/15653>.

821 See section 2.1 of this report and, specifically, Table 1.

Many of the provisions reviewed under the gender assessment process did, in fact, discriminate against women but the different treatment was considered by the reviewers to fall within the exceptions listed in Article 24, paragraph 3 of the Constitution or Article 6 of the Law, and thus not to be discriminatory for their purposes. Regrettably, this included provisions such as those in the Code of Labour Laws which place restrictions of the types of work that women can do and which have been criticised by, *inter alia*, the CEDAW Committee as having “the sole effect of restricting women’s economic opportunities, and [are] neither legitimate nor effective as a measure for promoting women’s reproductive health”;⁸²² and as creating “obstacles to women’s participation in the labour market”.⁸²³ It is clear from this example that some work is needed for this mechanism to effectively prevent the passing of discriminatory laws without amendment.

Article 5 requires the central executive authority in the field of statistics (the State Statistics Committee of Ukraine) to collect, process, analyse, disseminate, store, protect and use statistical data on the characteristics of women and men in all areas of society, grouped by sex. The collection of statistics, including the disaggregation of relevant data, is in compliance with international best practice⁸²⁴ and the CEDAW Committee’s General Recommendation No. 9.⁸²⁵

Part II: Mechanism for Equal Rights and Opportunities for Women and Men

Articles 7 to 14 establish duties and provide powers for various institutions in respect of ensuring equal rights and opportunities for women and men. Article 7 lists these out as: (i) the Verkhovna Rada; (ii) the Ukrainian Parliament

822 United Nations Committee on the Elimination of Discrimination against Women, *Fifteenth Session Report*, UN Doc. A/51/38, 9 May 1996, Para 286.

823 United Nations Committee on the Elimination of Discrimination against Women, *Twenty-Sixth and Twenty-Seventh Sessions Report, Concluding Observations: Ukraine* UN Doc. A/57/38, 2 May 2002, Para 293.

824 See, for example, Principle 24 of the Declaration of Principles on Equality. (See above, note 731, p. 14.)

825 United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 9: Statistical data concerning the situation of women*, contained in UN Doc. A/44/38, 1989.

Commissioner for Human Rights; (iii) the Cabinet of Ministers; (iv) a specially authorised central executive body on equal rights and opportunities for women and men; (v) executive authorities and local government; and (vi) associations. Article 7 also provides that state authorities and local governments, businesses, organisations and institutions, and civic associations should promote balanced representation of sexes in management and decision-making. In doing so, they are permitted to use positive action. As with the Law of Ukraine “On Principles of Preventing and Combating Discrimination in Ukraine”, the Law, in Articles 8 to 14, sets out the specific duties and powers of these various bodies. The Verkhovna Rada (Article 8) has only powers to define the basic principles of gender policy and to apply the principle of equality between women and men in its legislative activity.

Under Article 9, the Ukrainian Parliament Commissioner for Human Rights has the power to consider complaints of discrimination based on sex and to produce an annual report on equality between women and men. Given that this body has similar powers under the Law of Ukraine “On Principles of Preventing and Combating Discrimination in Ukraine” in respect of discrimination and equality generally, the specific powers in respect of sex now add little.

Article 10 sets out the powers of the Cabinet of Minister which include: to provide a unified state policy on gender equality, to adopt a national action plan and ensure its implementation, to direct the work of other ministries in respect of gender equality, and to consider gender equality when preparing legislation. These are all powers, however, rather than duties and so, while welcome, their actual impact will depend largely on the political will of the particular government of the day.

Article 11 sets out a long list of powers of the specially authorised central executive body on equal rights and opportunities for women and men. These include developing public policy, coordinating the work of ministries and central executive authorities, monitoring discrimination, providing training, considering complaints of discrimination and conducting research. Various powers are also provided to executive authorities and local governments in Article 12; Article 12 also enables executive authorities to appoint a coordinator for equal rights and opportunities for women and men who also has various powers listed in Article 13.

Finally, associations have various rights, some of which do not require statutory authority (such as monitoring discrimination), others which are of more use, such as participating in the decision-making process of executive authorities and local government, and sending delegates to advisory bodies established by state and local authorities.

Part III: Equal Rights and Opportunities for Women and Men in the Social and Political Sphere

Articles 15 and 16 set out specific provisions relating to the social and political sphere. Under Article 15, women and men are guaranteed equal voting rights, and political parties and electoral blocs are required to include representation of women and men in their electoral lists during elections.

The first of these requirements helps meet Article 7(a) of the CEDAW which requires states parties to ensure to women, on equal terms with men, *inter alia*, the right to vote in all elections and public referenda. The second of these, however, is weak in that while it requires political parties and electoral blocs to ensure representation of women and men in their electoral lists during elections, it makes no specific requirement as to what that representation should look like, for example by setting a quota, or mandating “zippered” lists of women and men. As noted in section 2.1 of this report, the proportion of women in the Verkhovna Rada remains extremely low.⁸²⁶

Under Article 16, the civil service and local government are to ensure equal representation of women and men when making appointments. Article 16 also specifically prohibits discrimination on the basis of sex within the civil service and in local government, and allows for positive action measures to ensure a balanced representation of women and men in the civil service and local government.

Part IV: Equal Rights and Opportunities for Women and Men in the Socio-Economic Sphere

Article 17 deals with employment, providing that men and women are to enjoy equal rights and opportunities in “employment, promotion at work, training and re-training”. In particular, employers have a duty:

826 As of May 2015, a total of 11.7% of deputies (49 out of 420) were women.

- To create conditions that would allow men and women to carry out employment on an equal basis;
- To ensure men and women have the opportunity to combine work with family responsibilities;
- To implement equal pay for women and men with the same qualifications and working conditions;
- To take measures to create safe and healthy working conditions; and
- To take measures to prevent cases of sexual harassment.

Article 17 also prohibits job advertisements which advertise vacant positions only for men or women (save when the work can only be performed by persons of a particular sex); and various requirements which give preference to men or women. Article 17 also prohibits questioning applicants about their personal lives or plans for having children. Finally, Article 17 permits employers to take positive action measures to ensure a balanced ratio of men and women.

These requirements help meet Ukraine's obligations under Article 11(1) of the CEDAW which specifically require equal rights in the field of employment. The provision requiring equal pay for women and men "with the same qualifications and working conditions" goes some way to meeting Ukraine's obligations both under Article 11(1)(d) of the CEDAW (which guarantees the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value) as well as under the 1951 ILO Equal Remuneration Convention (Convention No 100). However, the ILO Committee of Experts has highlighted a number of weaknesses in the wording of Article 17:

Section [sic] 17 of the Law on Ensuring Equal Rights and Equal Opportunities of Women and Men, 2006, requiring the employer to ensure equal pay for men and women for work involving equal skills and working conditions is more restrictive than the principle of equal remuneration for men and women for work of equal value as set out in the Convention. Furthermore, by linking the right to equal remuneration for men and women to two specific factors of comparison (skills, working conditions), the Committee considered that section 17 may have the effect of discouraging or even excluding

*objective job evaluation on the basis of a wider range of criteria, which is crucial in order to eliminate effectively the discriminatory undervaluation of jobs traditionally performed by women.*⁸²⁷

Article 18 provides that whenever collective bargaining takes place, any collective agreements reached must include provisions for equal rights and opportunities between women and men. Article 19 guarantees women and men equal rights and opportunities “in business activity”. Article 19 also allows for positive action measures to be taken at the national and regional level to eliminate imbalances between women and men in business, by encouraging entrepreneurship, preferential loans, training and other activities.

Under Article 20, executive bodies, local authorities, businesses, institutions and organisations must take into account the interests of women and men in the implementation of any social security measures. Any less favourable treatment of either men or women in social insurance, pensions or other forms of social assistance is prohibited. This prohibition helps to meet Ukraine’s specific requirement under Article 11(1)(e) of the CEDAW which requires equality between women and men in the field of enjoyment, specifically the right to social security.

Part V: Equal Rights and Opportunities for Women and Men in Education

Article 21 requires the state to ensure equal rights and opportunities for women and men in education. Article 21 also imposes obligations on educational institutions to ensure:

- Equal opportunities for men and women in admission to schools, assessments, grants and loans to students;
- The preparation and publication of textbooks, free from stereotypes about the role of women and men;
- An education culture of gender equality and the equal distribution of work and family life.

⁸²⁷ International Labour Organization, Observation (CEACR) adopted 2010, published 100th ILC session (2011) Equal Remuneration Convention, 1951 (No. 100) – Ukraine.

Article 21 requires the central executive agency for Education and Science to provide examination curricula, textbooks and teaching aids for schools regarding compliance with the principle of equal rights and opportunities for women and men.

Finally, Article 21 also requires the curriculum of higher education, courses and retraining courses to include studying the issue of ensuring equal rights and opportunities for women and men, and an optional study of the legal principles of gender equality through harmonisation of national and international law. These requirements help to meet Ukraine's obligations under Article 10 of the CEDAW which specifically require equal rights in the field of education.

Part VI: Responsibility for Violations of Legislation of Ukraine on Equal Rights and Opportunities for Women and Men

Article 22 provides that a person who has been subjected to discrimination or sexual harassment can file a complaint with state bodies, bodies of the Autonomous Republic of Crimea, local government and their officials, the Ukrainian Parliament Commissioner for Human Rights and/or the courts. Where domestic remedies have been exhausted or the application of such remedies is unreasonably prolonged, people can also bring complaints to the CEDAW Committee. As with the general anti-discrimination law, the broad range of actors to whom a complaint of discrimination can be brought is welcome but with the caveat that more certainty as to whom a victim should bring their complaint is necessary.

Article 23 sets out the remedies available where a violation is found, namely compensation for material and moral damage. Article 24 provides that persons found guilty of violation of the Law bear civil, administrative and criminal liability. Discussion of the available remedies under the Civil Code and Code on Administrative Offences is set out below at section 3.4.1 of this report. As with the general anti-discrimination Law, these are particularly problematic provisions in the Law since they require other legislation to be harmonised. Neither the Civil Code, nor the Code on Administrative Offences contains provisions prohibiting discrimination on the basis of sex, thus making it difficult for courts to determine precisely what civil, administrative or criminal liability is attached in any particular case. Indeed, the CEDAW Committee has expressed its concern "at the lack of clarity of the law with respect

to complaints and sanctions mechanisms in case of sex-based discrimination, which may prevent from its full implementation”.⁸²⁸

3.2.2.3 Law of Ukraine “On the Fundamentals of Social Protection of Disabled Persons in Ukraine”

Ukraine has a broad-ranging obligation under the CRPD “to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability” (Article 4(1)). In addition, it seems clear from international law and best practice that “disability” is a protected characteristic falling within the term “other status” in Article 2(2) of the ICESCR, Articles 2(1) and 26 of the ICCPR and Article 14 of the ECHR.

In addition to protection provided through Ukraine’s general anti-discrimination legislation, the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”, discussed above at section 3.2.2.1, there is also specific legislation on persons with disabilities, the Law of Ukraine “On the Fundamentals of Social Protection of Disabled Persons in Ukraine”.⁸²⁹ The Law was adopted in 1991 and has since undergone significant amendment. As with the Law of Ukraine “On Equal Right and Opportunities between Women and Men”, the adoption of the broader anti-discrimination law which includes disability as a protected characteristic makes many of the provisions of this Law which relate to discrimination redundant now that they have been repeated in the new Law.

However, while containing some provisions related to discrimination, the Law is not anti-discrimination legislation *per se*. Indeed, when originally enacted, the Law contained only a single provision on discrimination (Article 2), stating that “disability discrimination is prohibited and punishable by law”. The Law is primarily a means of setting out various mechanisms by which the rights and interests of persons with disabilities are protected, rather than empowering individual persons with disabilities with an enforceable right to equality.

828 See above, note 816.

829 Закон України “Про основи соціальної захищеності інвалідів в Україні” (Відомості Верховної Ради УРСР, 1991, № 21, с. 252), as amended between 1994 and 2014.

The preamble nonetheless sets out a bold purpose for the Law, namely:

[To] defin[e] the framework for social protection of disabled people in Ukraine and guarantee them equal opportunities to participate in economic, political and social spheres of society with all other citizens, creating the conditions that enable disabled people to effectively implement the rights and freedoms of man and citizen, and enjoy a full life according to their individual capabilities, abilities and interests.

Article 1, paragraph 1, provides that: “[d]isabled people in Ukraine enjoy all socio-economic, political, and personal rights and freedoms enshrined in the Constitution of Ukraine, laws of Ukraine and international treaties ratified by the Verkhovna Rada of Ukraine.”

Article 2 sets out definitions of various terms used in the Law. “Disabled person” is defined in paragraph 1 as:

[A] person with a persistent disorder of body functions that can, when interacting with the environment, result in limitation of the person’s life activity, due to which the State must provide conditions for the person to exercise his/her rights on an equal basis with others and must secure his/her social protection.

The extent to which this definition complies with that under the CRPD would depend on its interpretation. As will be discussed in 3.4.2 below, the courts are generally applying the CRPD when interpreting national laws relating to people with disabilities. The CRPD provides that persons with disabilities “include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

Paragraph 3 provides that the terms “reasonable accommodation” and “universal design” are to have the same meanings as in the CRPD.

Article 2, paragraph 2 provides that: “[d]iscrimination on the basis of disability is prohibited.” Paragraph 3 provides that “discrimination on the basis

of disability” is to have the meaning in the CRPD *and* the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine”. This is confusing as the two definitions are rather different. However, this approach provides an opportunity for lawyers to require that the law is interpreted in line with the CRPD, the most progressive international law on the rights of persons with disabilities.

Despite prohibiting discrimination, the Law’s focus is to set out specific actions designed to ensure equal opportunities for persons with disabilities. In Part IV (Employment, Education and Vocational Training of the Disabled), for example, Article 17 requires the establishment of special jobs for persons with disabilities funded by the State Fund for Special Protection of Disabled People, or by companies, organisations or institutions, including through the adaptation of equipment and technical facilities in the workplace. Article 18 requires the allocation of jobs and the creation of conditions for employment of people with disabilities by all employers, and, if disabled persons are unable to work outside of their home, the public employment service must assist them in finding home-based work. Article 19 requires employers to ensure that at least 4% of employees are persons with disabilities. The CESCR has, however, raised concern that the quota has “a limited impact owing to the lack of compliance by employers”.⁸³⁰ Quotas in such a situation are controversial: the Committee on the Rights of Persons with Disabilities has not criticised the use of quotas,⁸³¹ but organisations representing persons with disabilities have argued that quotas send a message that people with disabilities are employed because they have a disability, while the rest of the employees are employed because of their abilities and that they put too much focus on employment and not enough on career development, leading to an overrepresentation of staff with disabilities among the less skilled and less paid employees.⁸³² Nonetheless, taken together, the provisions go some way to meeting Ukraine’s obligation under Article 27 of the CRPD to “safeguard and promote the realization of

830 See above, note 773, Para 12.

831 See, for example, United Nations Committee on the Rights of Persons with Disabilities, *Concluding Observations, Austria*, UN Doc. CRPD/C/AUT/CO/1, 13 September 2013, Para 27, where the Committee appears to consider the use of a quota for persons with disabilities in employment as welcome, or, at least, not objectionable.

832 See, for example, International Disability Alliance, *IDA contribution to the OHCHR thematic study on work and employment of persons with disabilities*, p. 7.

the right to work, including for those who acquire a disability during the course of employment”.

Part V is devoted to conditions for providing persons with disabilities with access to social infrastructure: vehicles, public transport facilities, airports, housing and other buildings, car parks, etc. It also provides for equipping public transport vehicles with special sound devices to inform passengers of the stops, and duplicating information signs in Braille. These provisions partly meet Ukraine’s obligations under Article 9 of the CRPD to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to various forms of infrastructure. However, the plethora of difficulties faced by persons with disabilities in respect of access to infrastructure highlighted in Part 2 of this report indicate an implementation gap.

This may in part be due to the fact that the Law does not set out any specific mechanisms by which these obligations are to be enforced, instead simply stating that those who violate the law bear financial, disciplinary, administrative and/or criminal responsibility (Article 42). As with the two laws discussed above, the Civil Code, Code of Administrative Offences and Criminal Code have not been harmonised effectively to set out a clear process by which complaints can be brought and heard. In the same way, courts are left to determine for themselves how to approach complaints which are brought under the Law. (Discussion of the available remedies under the Civil Code and Code of Administrative Offences is set out below at section 3.4.1 of this report.)

3.2.2.4 Law of Ukraine “On Combating the Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV) and Legal and Social Protection of People Living with HIV”

While not anti-discrimination legislation *per se*, the Law of Ukraine “On Combating the Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV) and Legal and Social Protection of People Living with HIV”⁸³³ contains provisions which prohibit discrimination against an individual eit-

⁸³³ Закон України “Про протидію поширенню хвороб, зумовлених вірусомімунодефіциту людини (ВІЛ), та правовий і соціальний захист людей, які живуть з ВІЛ (Відомості Верховної Ради України”, 1992, № 11, с. 152), as amended between 1998 and 2012.

her because he or she has HIV or because he or she belongs to a group at risk of HIV infection. Article 14, paragraph 1, states that persons living with HIV and persons in groups at high risk of HIV infection enjoy all of the rights and freedoms under the Constitution, laws and other legal acts. Under paragraph 2, the state guarantees to all persons living with HIV and most-at-risk populations equal opportunities with all other citizens, particularly with regards to the possibility of administrative and judicial protection of their rights.⁸³⁴ Perhaps most importantly, paragraph 3 provides that “discrimination against persons on the basis of their living with HIV or belonging to one of the groups most at risk of HIV infection is prohibited”. Paragraph 3 defines discrimination as:

[A]n act or omission which directly or indirectly creates limitations or divests a person of their proper rights or degrades their human dignity on the basis of one or more grounds related to actual or possible infection of HIV or gives grounds for referring such person to groups at increased risk of HIV.

Article 13 of the Law also makes clear that a person’s HIV status is private information and cannot be shared with third parties.⁸³⁵ However, this provision applies only to the staff of medical institutions, prosecutors and other authorities while carrying out their professional duties, and as such does not prohibit the disclosure of HIV status by others who might have access to the patient’s records. The Law requires that people infected by HIV inform their previous sexual partners of their status (Article 12).

3.2.3 Non-Discrimination Provisions in Other Legal Fields

Given its wide scope, the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”, with the exception of specific provisions in the criminal law, is the primary piece of legislation regulating matters of discrimination. However, some non-discrimination provisions (or guarantees

834 Article 14, paragraph 2 refers to all “people” living with HIV or in high risk groups but then refers to equal opportunities with all other “citizens”, thus making the personal scope of this protection unclear.

835 *Ibid.*

of “equal rights”) are found in legislation regulating some particular fields of activity: family law, employment, education, healthcare, social security, immigration and sports. Such provisions have rarely been utilised by victims of discrimination and are largely symbolic.

3.2.3.1 *Criminal Law*

In general, international best practice requires that discrimination be dealt with as a matter of civil, rather than criminal law. However, adequate protection from discrimination demands that certain more severe discriminatory conducts be recognised as criminal.

Principle 7 of the Declaration of Principles on Equality provides that:

Any act of violence or incitement to violence that is motivated wholly or in part by the victim having a characteristic or status associated with a prohibited ground constitutes a serious denial of the right to equality. Such motivation must be treated as an aggravating factor in the commission of offences of violence and incitement to violence, and States must take all appropriate action to penalise, prevent and deter such acts.

Thus Principle 7 requires states to treat offences of violence and incitement to violence as aggravated where the offence is motivated wholly or in part by the victim having a characteristic or status associated with a prohibited ground.

The Criminal Code of Ukraine,⁸³⁶ which came into force on 1 September 2001, contains a number of provisions in respect of both of these requirements (namely offences of inciting hatred and considering offences motivated by hostility as aggravated), and a further offence of certain forms of discrimination.

Incitement of Hatred and Certain Forms of Discrimination

Article 161 of the Criminal Code creates various offences, namely:

⁸³⁶ Кримінальний Кодекс України (Відомості Верховної Ради України, 2001, № 25–26, с. 131), as amended between 2002 and 2015.

[D]eliberate actions aimed at inciting national, racial or religious enmity and hatred, humiliation of national honour and dignity or insult to the feelings of citizens in connection with their religious beliefs as well as direct or indirect restriction of rights or establishment of direct or indirect privileges for citizens on grounds of race, colour, political, religious or other beliefs, sex, disability, ethnic or social origin, property, residence, language or other grounds.⁸³⁷

Article 161 is thus wide-ranging and prohibits various forms of conduct:

- deliberate actions aimed at inciting national, racial or religious enmity and hatred;
- deliberate actions aimed at humiliation of national honour and dignity;
- deliberate actions aimed at insult to the feelings of citizens in connection with their religious beliefs;
- direct or indirect restriction of rights for citizens on grounds of race, colour, political, religious or other beliefs, sex, disability, ethnic or social origin, property, residence, language or other grounds; and
- the establishment of direct or indirect privileges for citizens on grounds of race, colour, political, religious or other beliefs, sex, disability, ethnic or social origin, property, residence, language or other grounds.

The available sentence for the offence in Article 161 varies depending on who has committed the offence and the consequences.

837 Article 161 did not originally include “disability” as a protected characteristic. “Disability” was inserted by Article I(1) of the Закон України Про внесення змін до деяких законодавчих актів України щодо захисту прав інвалідів (Відомості Верховної Ради, 2014, № 32, с. 1124), which came into force in June 2014.

Perpetrator / Consequence	Sentence
Standard offence	Fine of 200 to 500 tax-free minimum incomes, or restraint of liberty for up to five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.
Offence accompanied with violence, deception or threats; or Offence committed by an official	Fine of 500 to 1,000 tax-free minimum incomes, or restraint of liberty for between two and five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.
Offence committed by an organised group of persons; or Offence causing grave consequences	Imprisonment for between five and eight years.

The first of the five actions prohibited by Article 161 largely meets the requirements of Article 20(2) of the ICCPR. Indeed, Article 161 goes further in that there is no requirement that the action only need incite “national, racial or religious enmity”, i.e. hatred against the group, rather than “discrimination, hostility or violence”.

Alone, Article 161, while meeting the requirements of Article 20(2) of the ICCPR, does not go so far as to meet the requirements of Article 4 of ICERD which requires the prohibition of “dissemination of ideas based on racial superiority or hatred” and “incitement to racial discrimination”. Article 300 of the Criminal Code, instead, meets this gap somewhat. One particular weakness of Article 161, however, is that it only prohibits certain forms of discrimination against citizens, rather than all persons.

Article 161 has been little used in practice. In 2006, the CERD raised concerns over “the absence of any prosecutions under article 161 of the Criminal Code which only applies to cases where intent can be proven and only if the victim of such discrimination is a citizen”.⁸³⁸ The Committee, controversially, urged Ukraine to consider:

838 United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations: Ukraine*, UN Doc. CERD/C/UK/CO/18, 8 February 2007, Para 10.

*[A] relaxation of the strict requirement of wilful conduct set out in article 161 of the Criminal Code in order to facilitate successful prosecutions under that article [and to consider] extending the application of article 161 of the Criminal Code to cases where the victim of discrimination is not a citizen.*⁸³⁹

Similarly, in 2013, the HRC raised concerns that “Article 161 of the Criminal Code (...) which requires proving deliberate action on the part of the perpetrator is rarely used and that such crimes are usually prosecuted under hooliganism charges”.⁸⁴⁰

Although in subsequent years prosecutions have begun to be brought, these are infrequent. Between 2006 and 2009, a total of 11 cases were considered by courts which had been brought under Article 161 (three in 2006, two in 2007, six in 2008 and one in 2009).⁸⁴¹ Of these cases, all but three related to hate speech.⁸⁴² Three cases in 2008 involving violence were the first in which Article 161 was used to punish violent offences motivated by racism. The low number of cases being brought has continued after 2009. In 2013 and the first half of 2014, only three cases were instigated involving violations of Article 161.⁸⁴³ Some NGOs have suggested that prosecutions have been brought only because of substantial public outcry or international pressure on Ukrainian authorities.⁸⁴⁴

839 *Ibid.*

840 See above, note 772, Para 11.

841 United Nations Committee on the Elimination of Racial Discrimination, *Combined Nineteenth to Twenty-First Periodic Reports: Ukraine*, UN Doc. CERD/C/UKR/19-21, 23 September 2010, Para 476.

842 Organisation for Security and Cooperation in Europe, *Observations re hate crimes and racism manifestations in Ukraine – “No Borders” Project*, Social Action Centre (Ukraine), HDIM. NGO/0284/11, 3 October 2011.

843 High Specialised Court of Ukraine for Civil and Criminal Cases, *EU Experts and HSCU Judges Discussed Ukrainian Legislative Norms Concerning Counteraction to Discrimination*, 11 February 2015.

844 Joint Report submitted for the Universal Periodic Review: Ukraine, 2012, Para 9, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session14/UA/JS2_UPR_UKR_S14_2012_JointSubmission2_E.pdf.

In 2010, the Criminal Code was amended in several places to deal with crimes motivated by racial, national or religious intolerance.⁸⁴⁵ Article 300 was amended to prohibit the importation, creation and distribution of various works which cause social harm, including those that promote intolerance and discrimination on grounds of race, nationality or religion:

[T]he importation into Ukraine of works that promote violence and cruelty, racial, national or religious intolerance and discrimination, with the purpose of sale or distribution, or production, storage, transportation or other relocation of them for the same purpose, or sale or distribution of them, and also compulsion to participate in their creation.

Thus, Article 300 goes a long way to meeting the requirements of Article 4 of ICERD.

Offences Motivated by Hatred

Prior to its amendment in 2010, Article 67 of the Criminal Code was the only provision recognising racial, national or religious hatred as an aggravating factor. Article 67 applies to all offences, stating that racial, national or religious hatred is a general aggravating factor (alongside many others) at the sentencing stage, without making any specific requirement as to an increased penalty.

In 2010, however, a number of existing offences in the Criminal Code were also amended to provide for aggravated forms of six violent offences with higher sentences where they were motivated by racial, national or religious intolerance: murder (Article 115); intended grievous bodily harm (Article 121); intended bodily injury of medium gravity (Article 122); battery and torture (Article 126); torture (Article 127); and threats to kill (Article 129).

⁸⁴⁵ Закон України “Про внесення змін до Кримінального кодексу України щодо відповідальності за злочини з мотивів расової, національної чи релігійної нетерпимості” (Відомості Верховної Ради України, 2010, № 5, с. 43).

Article	Offence	Regular Sentence	Aggravated Sentence
115, para 2(14)	Murder	Imprisonment of between seven and 15 years.	Imprisonment of between 10 and 15 years.
121, para 2	Intended grievous bodily harm	Imprisonment of between five and eight years.	Imprisonment of between seven and 10 years.
122, para 2	Intended bodily harm of medium gravity	Correctional labour for up to two years or restraint of liberty of up to three years or imprisonment of up to three years.	Imprisonment of between three and five years.
126, para 1	Beating and torture	Fine of 50 minimum incomes, or community service for up to 200 hours, or correctional labour for up to one year.	Restraint of liberty or imprisonment for up to five years.
127, para 2	Torture	Imprisonment of between two and five years.	Imprisonment of between five and 10 years.
129, para 2	Threats to kill	Restriction of liberty of up to six months or imprisonment for up to two years.	Imprisonment of between three and five years.

These offences go some way to meeting international best practice, with two significant shortfalls: first, they provide for aggravated forms of only some, not all, violent offences; secondly, the aggravated forms only apply where the offence was motivated by hostility on the basis of race, national origin or religion, and not any other characteristics.

3.2.3.2 *Family Law*

While family relationships are generally considered to be private relations and thus outside of the scope of rights to equality and non-discrimination both under Ukraine's international treaty obligations and international best practice,⁸⁴⁶ where relationships are in some way regulated by law (for examp-

⁸⁴⁶ See, for example, above, note 742, Para 12, where the Human Rights Committee interpreted Article 26 as "prohibit[ing] discrimination in law or in fact in any field regulated and protected by public authorities"; and Principle 8 of the Declaration of Principles on Equality which provides that: "The right to equality applies in all areas of activity regulated by law." (See above, note 731, p. 8.)

le rights and responsibilities which arise through marriage, parenthood or rights upon divorce), such rights and responsibilities must be enjoyed on an equal basis and in a non-discriminatory manner. For example, Article 16(1) of the CEDAW requires states parties to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations”. Similarly, Article 23(4) of the ICCPR requires states parties to “take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution”.

Family law in Ukraine is largely regulated by the Family Code.⁸⁴⁷ Depending on the family members in question, the Code regulates both “personal non-property and property relations”.⁸⁴⁸ Article 7, paragraph 5 contains a general prohibition of discrimination, stating that:

A participant of family relations may not have privileges or restrictions on grounds of race, colour, sex, political, religious or other beliefs, ethnic or social origin, property, place of residence, language and other grounds.

In the absence of guidance notes or jurisprudence interpreting this provision, its application is unclear. It creates an important principled protection if it relates to the way in which family disputes are to be settled by state authorities. However, it would be a restriction on the right to private and family life and so contrary to international human rights law, to prohibit individuals from discriminating against each other in areas of their lives not regulated by law.

Within marital relations, Article 7, paragraph 6, provides that: “Women and men have equal rights and responsibilities in family relations, marriage and family.” While the provision is potentially unproblematic from the perspective of sex discrimination, its scope, which is unclear, may be problematic as “responsibilities” are not clearly defined. The same is true in relation to Article 141 which, in respect of parenthood, provides that mothers and fathers have equal rights and responsibilities for their children, regardless of whether they are married to each other. Article 142 provides that children have equal

847 Сімейний Кодекс України (Відомості Верховної Ради України, 2002, № 21–22, с. 135), as amended between 2003 and 2015.

848 *Ibid.*, Article 2.

rights and responsibilities towards their parents. The meaning of this Article is unclear, but in any case, giving children legal responsibilities towards their parents without further clarification is problematic.

In addition to these provisions, as noted above in section 2.2 of this report, the Family Code itself contains provisions which discriminate against persons on the basis of sexual orientation and gender identity through the failure to recognise relationships between same-sex couples and the prohibition of same-sex couples and transgendered persons to adopt children.

3.2.3.3 *Employment Law*

Article 6(1) of the ICESCR guarantees the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. Article 7 of the ICESCR guarantees the right of everyone to the enjoyment of just and favourable conditions of work. Both of these rights must be guaranteed “without discrimination of any kind” by virtue of Article 2(2).

As discussed above in section 3.2.2.1, the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” prohibits discrimination in labour relations. Given its broad scope, it is likely to be the primary law relied upon by those seeking to enforce their right to non-discrimination at work. However, work and employment are regulated in Ukraine by the Code of Labour Laws and this also contains two provisions on discrimination in employment.⁸⁴⁹ Article 2¹ (inserted in 1991) provides a general principle of equality:

Ukraine guarantees equality of labour rights of all citizens regardless of their origin, social and property status, race, nationality, sex, language, political opinions, religious beliefs, type of occupation, place of residence or other factors.

The most problematic aspect of this provision is its limitation of the guarantee of equality of labour rights only to citizens. This is in clear contradiction to the ICESCR which provides the right to work and the right to enjoyment of

⁸⁴⁹ Кодекс законів про працю України (Затверджується Законом № 322-VIII від 10.12.71 ВВР, 1971, додаток до № 50, ст. 375), as amended between 1973 and 2015.

just and favourable conditions of work to “everyone” and without discrimination of any kind, including on the basis of nationality.

A more specific prohibition of discrimination is found in Article 22, as amended in 1995:

The unjustified denial of employment is prohibited.

According to the Constitution of Ukraine, any direct or indirect restriction of rights or establishment of direct or indirect benefits when concluding, changing and terminating labour contracts, based on the origin, social and property status, race, nationality, sex, language, political opinions, religious beliefs, membership in trade union or other association of citizens, type of occupation, or place of residence is not permitted.

Requirements regarding the age, education and health of workers may be established by legislation of Ukraine.

In contrast to the open list of grounds upon which discrimination is prohibited under the Constitution, Article 22 contains a closed list, thereby preventing the prohibition of discrimination on other grounds not explicitly mentioned. No definition of discrimination, or the different forms it can take, is provided. Furthermore, as section 2.1 of this report has identified, elsewhere in the Code there are a number of discriminatory provisions on the ground of gender.

That said, one valuable provision of the Code from an equality perspective is Article 172 which requires employers, in cases established by law, to create jobs and the necessary conditions for persons with disabilities to work.

3.2.3.4 Education Law

Article 13(1) of the ICESCR guarantees to “everyone” the right to education and this is a right which must be enjoyed without discrimination of any kind. The Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” prohibits discrimination in education. The Ukrainian education system is regulated by a number of laws and specific education laws do

not add significantly to its content or scope. Article 3 of the Law of Ukraine “On Education”,⁸⁵⁰ for example, states that:

Citizens of Ukraine have the right to free education in all public schools, regardless of gender, race, nationality, social status, wealth, type of occupation, philosophical beliefs, membership of parties, attitude towards religion, creed, health status, place of residence and other circumstances.

Article 6 of the Law of Ukraine “On General Secondary Education” and Article 9 of the Law of Ukraine “On Out-of-School Education” are similarly worded.⁸⁵¹ Article 5 of the Law of Ukraine “On Vocational Education” provides simply that “Citizens of Ukraine have the equal right to vocational education in accordance with their abilities and inclinations”.⁸⁵² The Law of Ukraine “On Higher Education”, however, contains no anti-discrimination provisions.⁸⁵³ Although these laws refer only to “citizens” rather than “everyone”, some of the laws also include provisions stating that foreign nationals and stateless persons enjoy the same rights as citizens.⁸⁵⁴

850 Закон України “Про освіту” (Відомості Верховної Ради УРСР, 1991, № 34, с. 451), as amended between 1993 and 2014.

851 Закон України “Про загальну середню освіту” (Відомості Верховної Ради України, 1999, № 28, с. 230), as amended between 2000 and 2014, and Закон України “Про позашкільну освіту” (Відомості Верховної Ради України, 2000, № 46, с. 393), as amended between 2002 and 2015, respectively.

852 Закон України “Про професійно-технічну освіту” (Відомості Верховної Ради України, 1998, № 32, с. 215), as amended between 1999 and 2013.

853 Закон України “Про вищу освіту” (Відомості Верховної Ради, 2014, № 37–38, с. 2004), as amended between 2014 and 2015.

854 Article 6, paragraph 4 of Закон України “Про загальну середню освіту” (Відомості Верховної Ради України, 1999, № 28, с. 230), as amended between 2000 and 2014, provides that: “Foreigners and stateless persons who are lawfully in Ukraine shall receive secondary education in the manner prescribed for the citizens of Ukraine”; similar provisions can be found at Article 6, paragraph 3 of Закон України “Про позашкільну освіту” (Відомості Верховної Ради України, 2000, № 46, с. 393), as amended between 2002 and 2015; Article 5 of Закон України “Про професійно-технічну освіту” (Відомості Верховної Ради України, 1998, № 32, с. 215), as amended between 1999 and 2013, and Article 4, paragraph 2 of Закон України “Про вищу освіту” (Відомості Верховної Ради, 2014, № 37–38, с. 2004), as amended between 2014 and 2015.

3.2.3.5 Healthcare Law

Article 6(н) of the Law of Ukraine “Fundamentals of Legislation of Ukraine on Health Care” provides “legal protection from any illegal forms of discrimination related to the health status”.⁸⁵⁵

In addition, the Law of Ukraine “On Combating the Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV) and Legal and Social Protection of People Living with HIV”⁸⁵⁶ provides specific protection for persons living with HIV not to be discriminated against. This is particularly welcome since the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” does not explicitly include “health status” as a protected characteristic, despite this being a requirement under Ukraine’s international human rights obligations.⁸⁵⁷

Article 4, paragraphs 6 and 14 of the Law on HIV impose a requirement on the state to encourage non-discrimination and tolerance towards persons living with HIV. Article 13 prohibits medical staff from sharing information about the HIV status of a patient with other people, except under the decision of a court in cases set down by law. Article 14 guarantees equal rights and opportunities, and prohibits discrimination against persons living with HIV and persons belonging to groups at risk of HIV infection. Discrimination is defined in paragraph 3 as:

[A]n act or omission that directly or indirectly creates restrictions, depriving an individual of their rights or humiliating their human dignity on the basis of one or more attributes associated with the actual or potential presence of HIV, or giving reason to attribute the person to being in a group at risk of HIV infection.

The list of groups at risk of HIV infection are specified in an Order of the Ministry of Health as: (i) injecting drug users; (ii) persons who provide sexual services for payment; (iii) men who have sex with men; (iv) sexual partners of injecting drug users; (v) customers of persons who provide

855 Закон України “Основи законодавства України про охорону здоров’я” (Відомості Верховної Ради України (ВВР), 1993, № 4, с. 19), as amended between 1993 and 2015.

856 See above, note 833, Article 14.

857 See above, note 733, Para 33.

sexual services for payment; and (vi) those who are partners of men who have sex with men.⁸⁵⁸

Article 15 provides that persons with HIV are also entitled to compensation for damage caused to them by the revealing of information about their HIV status, and the right to free provision of essential drugs. Article 16 prohibits dismissal from work, denial of employment, denial of access to educational, social or medical institutions, and any restriction of the rights of persons with HIV. It also ensures an opportunity to bring cases to court on the basis of misconduct by officials who violate the rights of persons with HIV and their families and friends. Article 17 guarantees the right to compensation for damage caused to the health of a person caused by exposure to HIV during medical procedures or official duties. Statistics on the number of prosecutions and cases brought under the Law are not available, making it unclear to what extent the provisions are realised and enforced in practice; however, if utilised, such provisions present a strong degree of protection for victims of discrimination based on their HIV status as well as for unauthorised disclosure of their status.

3.2.3.6 *Social Security Law*

The major Ukrainian legislation on social protection, the Law of Ukraine “On Social Services”, prohibits discrimination occurring from persons providing social services, stating, at Article 11, that: “Persons who provide social services must (...) respect the dignity of citizens, [and] prevent abusive and discriminatory practices against people receiving social services.”⁸⁵⁹ However, there is no further elaboration within the Law about what should happen where such discrimination takes place, rendering it a rather symbolic (and weak) protection.

3.2.3.7 *Immigration Law*

The Law of Ukraine “On the Legal Status of Foreigners and Stateless Persons” contains no provisions which explicitly prohibit discrimination against indi-

858 Міністерство охорони здоров'я України, Наказ, 8 February 2013, № 104, “Про затвердження Переліку та Критеріїв визначення груп підвищеного ризику щодо інфікування ВІЛ”.

859 Закон України “Про соціальні послуги” (Відомості Верховної Ради України, 2003, № 45, с. 358), as amended between 2004 and 2012.

viduals on the basis of their nationality or lack thereof.⁸⁶⁰ However, Article 3 of the Law provides that:

- i. Foreigners and stateless persons staying in Ukraine on legal grounds enjoy the same rights and freedoms and also bear the same responsibilities as the citizens of Ukraine; exceptions are established by the Constitution, the laws or international treaties of Ukraine.*
- ii. Foreigners and stateless persons who are under the jurisdiction of Ukraine, irrespective of the legality of their stay, are eligible for recognition of their legal and fundamental rights and freedoms.*

These provisions essentially repeat Article 26 of the Constitution. As noted above, the international human rights treaties to which Ukraine is party do not require all rights and freedoms guaranteed to citizens to be guaranteed to non-citizens, but exceptions to the general principle of equality between citizens and non-citizens are very limited.⁸⁶¹

3.2.3.8 Sports Law

There is no specific right to engage in physical training or sport under Ukraine's international treaty obligations, although the promotion of physical activity and sport among all segments of society may be considered a means of promoting and protecting the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, guaranteed under Article 12(1) of the ICESCR. In any case, where any field of activity is regulated by law, international best practice requires that the rights to equality and non-discrimination apply.⁸⁶²

Article 3, paragraph 1, of the Law of Ukraine "On Physical Culture and Sports" states that "citizens have the right to engage in physical training and sports reg-

⁸⁶⁰ Закон України "Про правовий статус іноземців та осіб без громадянства" (Відомості Верховної Ради України, 2012, № 19–20, с. 179), as amended between 2013 and 2015.

⁸⁶¹ See the discussion in respect of Article 26 of the Constitution above at section 3.2.1 of this report.

⁸⁶² Principle 8 of the Declaration of Principles on Equality. (See above, note 731, p. 8.)

ardless of grounds of race, colour, political, religious or other beliefs, sex, ethnic or social origin, property, residence, language or other characteristics”.⁸⁶³

The most significant gap in this non-discrimination provision is that it only applies to “citizens” rather than “everyone”. However, this limitation may be of little consequence in practice since the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” guarantees the right to non-discrimination to everyone, in all social relations involving legal or natural persons, which would likely include sport and related physical training.

3.3 National Policies Impacting on Discrimination and Inequality

Ukraine does not have a current comprehensive national policy on equality or non-discrimination, although there are national policies in relation to certain groups vulnerable to discrimination, including women and persons with disabilities. Policies are developed by particular ministries before being approved by the Cabinet of Ministers. Measuring their success is difficult as there is little available assessment of their implementation and results during and after the period covered by the policy. Nonetheless, the fact that such policies are produced at all does indicate some willingness on the part of the government to make progress in these areas.

The **State Programme on Ensuring Equal Rights and Opportunities of Women and Men until 2016** was adopted by the Cabinet of Ministers in September 2013, and is the successor to the State Programme on Gender Equality in Ukrainian Society 2006–2010.⁸⁶⁴ Unfortunately, there was a three year gap between the closing of the first State Programme and the finalisation of the second. The government has stated that, after 2010, the number of central executive agencies and civil servants was cut by the government in order to recover from the financial crisis of 2008–2009. One agency cut was the Ministry of Youth and Sport which was responsible for gender equality policies. This had a negative impact on national gender me-

863 Закон України “Про фізичну культуру і спорт” (Відомості Верховної Ради України, 1994, № 14, с. 80), as amended between 1994 and 2015.

864 Кабінет Міністрів України, Постанова, 26 September 2013, № 717, “Про затвердження Державної програми забезпечення рівних прав та можливостей жінок і чоловіків на період до 2016 року”.

chanisms, causing a loss of coordination between the different elements of the system and weakening the effectiveness of any gender equality mainstreaming action. Eventually, in 2011, government functions on the issue of gender equality were transferred to the Ministry of Social Policy, but the absence of a central authority for the coordination of gender equality activities from 2009 to 2011 resulted in a significant delay in the adoption of the second programme of action, leaving the country without a policy for gender equality for three years.⁸⁶⁵

The government has noted that the State Programme is based on the Millennium Development Goals for Ukraine, the Concluding Observations of the CEDAW Committee, results of national and civic monitoring of the previous State Programme, and best practice from other European jurisdictions.⁸⁶⁶ It also draws inspiration from the EU Strategy for Equality between Men and Women 2010–2015.⁸⁶⁷

The State Programme identifies the most significant problems to be:

- the gap between the number of men and women participating in the political, economic and social decision-making of the country;
- the gender pay gap and the segregation of women at the lower-level positions of the labour market;
- the low numbers of women in entrepreneurial activity and business;
- the lack of conditions which allow women to combine their work and family life; and
- the presence of gender stereotypes in society and in the media.

In response to these problems, the State Programme sets out an ambitious number of steps to be taken in the years 2013–2016:

865 Ukraine National Review, Implementation of the Beijing Declaration and Platform for Action (1995) and the outcomes of the twenty-third special session of the General Assembly (2000) in the context of the twentieth anniversary of the Fourth World Conference on Women and the adoption of the Beijing Declaration and Platform for Action (2015), April 2014.

866 *Ibid.*

867 Кабінет Міністрів України, Розпорядження, 21 November 2012, № 1002-р, "Про схвалення Концепції Державної програми забезпечення рівних прав та можливостей жінок і чоловіків на період до 2016 року".

- improvement of the regulatory framework relating to opportunities for women and men, bringing it up to date with international and EU standards;
- implementation of measures to meet the UN Millennium Development Goals with particular reference to the promotion of gender equality and empowerment of women;
- the provision of information to employers on EU legislation and standards on gender equality at work;
- taking measures to reduce the gender pay gap;
- awareness-raising campaigns promoting equal sharing of family responsibilities and child-raising;
- training to develop women's leadership skills and capacity to participate in the political, social, and economic life, with a particular attention to the needs of women from minorities, women living in rural areas, and disabled women;
- campaigns to promote awareness of equality of opportunity of women and men among experts;
- mainstreaming gender within the education system;
- awareness-raising campaign addressing media, schools and other institutions to overcome gender stereotypes;
- developing mechanisms to protect the right to non-discrimination on the grounds of gender and to review claims of discrimination;
- implementing international obligations in respect of gender equality; and
- collaboration with international organisations and NGOs pursuing equality between men and women.

The State Programme has a total budget of 5,897,140 hryvnia (approximately 250,000 euro) and in 2014 the first tranche of the funding was made available.⁸⁶⁸ Whether it will achieve its aims remains to be seen.

In February 2010, the Cabinet of Ministers approved the **Plan of Action to Combat Xenophobia and Racial and Ethnic Discrimination for the Period 2010–2012**. The Plan of Action listed 38 activities to be carried out du-

⁸⁶⁸ Кабінет Міністрів України, Постанова, 26 September 2013, № 717, "Про затвердження Державної програми забезпечення рівних прав та можливостей жінок і чоловіків на період до 2016 року".

ring its implementation which include review and improvement of existing legislation; educational activities to tackle xenophobia and racism in school and amongst young people; preventing hate crimes; inter-religious dialogue; training for public officials on best practice for preventing xenophobia and racism; and public awareness-raising campaigns. Its efficacy has not been assessed, making it difficult to determine the extent to which its laudable aims have been realised.

In August 2012, the Cabinet of Ministers approved the **National Plan of Action for the Implementation of the Convention on the Rights of Persons with Disabilities up to 2020**.⁸⁶⁹ The Plan of Action seeks to ensure the enjoyment by persons with disabilities of the rights protected under the CRPD through various activities including awareness-raising of the needs of persons with disabilities; legislative reform to ensure compliance with the CRPD; improved access to infrastructure; improving the conditions of remuneration for educational and rehabilitation specialists who work with children with disabilities; and strengthening the rights of persons with disabilities including through greater responsibility for failure to eliminate barriers.

Particularly welcome is the Action Plan's elucidation of clear and mostly measurable targets towards better inclusion of people with disabilities. The Action Plan aims that:

- the proportion of infrastructure, landscaping, transport infrastructure and road service meeting the needs of persons with disabilities reaches 15% by 2015, 35% by 2018 and 50% by 2020;
- the proportion of routes in the country which can be used by vehicles adapted to transport persons with disabilities reaches 15% by 2015, 35% by 2018 and 50% by 2020;
- the proportion of broadcasts which are accessible for persons with hearing difficulties reaches 15% by 2015, 35% by 2018 and 50% by 2020;
- 100% of all government websites are accessible for persons with visual and hearing difficulties by 2015;

869 Кабінет Міністрів України, Постанова, 1 August 2012 № 706, "Про затвердження Державної цільової програми "Національний план дій з реалізації Конвенції про права інвалідів" на період до 2020 року".

- from 2013, all technical and other rehabilitative needs for persons with disabilities are met;
- the number of children with disabilities enrolled in primary, secondary, vocational and higher education increases to 107,000 by 2015, 122,000 by 2018 and 138,000 by 2020; and
- the number of persons with disabilities in employment reaches 706,200 by 2015, 750,300 by 2018 and 794,600 by 2020.

The Action Plan has a total budget of 14 bln hryvnia (approximately 600 mln euro), all of which comes from the state budget. While on its face the Action Plan is positive, the NGO Expert Council of Public Organisations has criticised its implementation, noting that although it was developed with the involvement of public organisations of persons with disabilities, there is a lack of proper monitoring, financing and responsibility of those implementing the Action Plan.⁸⁷⁰ The Action Plan's effectiveness is also hindered by the lack of reliable statistics on persons with disabilities and the continued use of a medical model with regards to disability, rather than a social model.

In April 2013, the Cabinet of Ministers approved the **Strategy for the Protection and Integration of the Roma national minority into Ukrainian society up to 2020** and, in September 2013, published a **National Action Plan (NAP) on Implementation of the Strategy**.

The Strategy aims to:

- create conditions for the implementation of the recommendations towards EU visa regime liberalisation for Ukraine;
- ensure the integration of the Roma national minority into Ukrainian society;
- prevent discrimination against the Roma;
- increase the educational level of the Roma;
- improve the health conditions of the Roma;
- improve the housing conditions of the Roma;
- ensure the enhancement of employment of the Roma;

⁸⁷⁰ *The "Lost" Rights: An alternative report by public organizations on compliance with the UN Convention on the Rights of Persons with Disabilities, 2012, Para 12.*

- solve problems experienced by the Roma while obtaining identity documents, proof of citizenship and certificates of state registration of civil status; and
- ensure the preservation and development of the cultural originality of the Roma.

The Strategy contains a mix of realistic goals with declaratory statements of intent; however, the fact that the Strategy was adopted at all is a positive step in and of itself.

A number of weaknesses in the Strategy have been highlighted. Although neither the Strategy nor the NAP were subject to consultation with OSCE and the Council of Europe, both were discussed with local civil society.⁸⁷¹ The development of regional action plans by regional administrations has been hindered by a lack of reliable data on the number of Roma living in each region and the lack of knowledge on which indicators to use.⁸⁷² Further, the Strategy and the NAP have been criticised for not guaranteeing adequate resources and for lacking a strong coordination body and monitoring system.⁸⁷³ According to the European Roma Rights Centre, neither the Strategy nor the NAP were developed with the sufficient participation of Roma representatives; the NAP does not provide for any budget responsibilities or allocations; the NAP lacks concrete targets in many areas, and contains no indicators for successful monitoring of its implementation; and no nation-wide monitoring mechanisms were created.⁸⁷⁴

Ukraine also has two Action Plans promoting integration of migrants and refugees respectively: the **Action Plan on Integration of Migrants into Uk-**

871 Note, however, that civil society opinions and recommendations were not included in the approved text. European Commission, *Report from the Commission to the European Parliament and the Council: Third report on the implementation by Ukraine of the Action Plan on Visa Liberalisation*, Brussels, 15 November 2013, COM(2013) 809 final.

872 European Roma Rights Centre and Chiricli, *Written Comments concerning Ukraine for consideration by the Committee on Economic, Social and Cultural Rights at the 52nd Session (28th April to 23rd May 2014)*.

873 European Commission, *Report from the Commission to the European Parliament and the Council: Third report on the implementation by Ukraine of the Action Plan on Visa Liberalisation*, Brussels, 15 November 2013, COM(2013) 809 final, p. 25.

874 European Roma Rights Centre, *Written Comments concerning Ukraine for Consideration by the Committee on Economic, Social and Cultural Rights at the 52nd Session (28th April to 23rd May 2014)*, March 2014, p. 4.

rainian Society for 2011–2015⁸⁷⁵ and the **Action Plan on Integration of Refugees and Persons in Need of Complementary Protection into the Ukrainian Society for the Period until 2020**.⁸⁷⁶ These are both short Action Plans which set out various steps to be taken at the national and local level in an effort to integrate migrants, refugees and others into Ukrainian society.

As of May 2015, the government of Ukraine was also in the process of developing a **National Human Rights Strategy** and published a draft in March 2015.⁸⁷⁷ The final strategy will cover the period 2015 to 2020. This is the first strategy in this field to be set up since the new government and President were elected in 2014. Indeed, the preamble to the draft Strategy recognises the recent events:

In their turn, developments of Maidan proved irreversible commitment of Ukrainian people [sic] towards shaping a true constitutional and democratic state, where rights and freedoms of each and every person are respected. New challenges are occupation of the part of Ukraine's territory and military conflict in eastern Ukraine.

The draft Human Rights Strategy is divided into 27 “strategic areas” covering a broad range of human rights. One of the principles governing the draft Strategy is “non-discrimination, which envisages equal rights and freedoms for everyone without any limitations”. The draft Strategy contains a number of sections in respect of the rights to equality and non-discrimination.

Section 9 covers non-discrimination. The draft Strategy recognises that the practical implementation of anti-discrimination norms is complicated because of the absence of an effective mechanism for the right not to be subjected to discrimination and prejudices and stereotypes prevalent in society. The goal of this section is bold: “to combat discrimination on any

875 Кабінет Міністрів України, Розпорядження, 15 June 2011, № 653-р, Про затвердження плану заходів щодо інтеграції мігрантів в українське суспільство на 2011–2015 роки.

876 Кабінет Міністрів України, Розпорядження, 22 August 2012, № 605-р, Про затвердження плану заходів щодо інтеграції біженців та осіб, які потребують додаткового захисту, в українське суспільство на період до 2020 року.

877 Ministry of Justice of Ukraine, *National Strategy on Human Rights*, available at: <http://old.minjust.gov.ua/file/44710>.

grounds in all areas of public and private life, to develop and implement efficient mechanisms for prevention and combating discrimination". The section does not specify the means which will be taken to achieve this goal, only the expected outcomes:

- comprehensive legislation is adopted aiming at prohibition of discrimination in all areas and at prohibition of incitement of hatred;
- an effective mechanism for protection and combating all forms of discrimination is provided; and
- programmes on raising awareness on equality and non-discrimination are implemented.

The draft is disappointingly weak on the means by which these outcomes will be achieved. While recognising the key obstacles to an effective legal framework (namely the need to refine the existing legislation and to ensure effective mechanisms to combat discrimination), simply stating these without any further detail on precisely what amendments to legislation are needed and what sort of mechanisms will be established renders the policy far too short on detail.

Separate from the general strategic area of non-discrimination, section 10 relates to equality between women and men. The draft Strategy notes that there is a problem of unequal access of men and women in exercising their rights. The goal, similarly bold, is "to ensure equal rights and opportunities for women and men in all areas of public life". The outcomes are similarly broad:

- international and national laws on protecting women's rights and gender equality are duly implemented in national policies and programmes;
- the national mechanism for ensuring equal rights and opportunities for women and men is strengthened;
- conditions are provided for balanced participation of women and men in the political and public decision-making;
- provisional special measures are implemented to combat gender discrimination; and
- the opportunities and conditions for overcoming gender stereotypes and sexism are provided.

There is nothing in this section which cannot already be found in existing legislation (particularly the Law of Ukraine “On Equal Rights and Opportunities for Women and Men”) and policies (particularly the State Programme on Ensuring Equal Rights and Opportunities of Women and Men until 2016). While welcome to see the issue of gender equality included in the draft Strategy, it contains nothing new in its substance.

3.4 Enforcement and Implementation

While there is a relatively comprehensive legal framework protecting the rights to equality and non-discrimination in Ukraine, the extent to which the Constitution and legislative provisions can be said to be effective depends on how they are enforced and implemented in practice. As this section identifies, there are many areas in which their enforcement and implementation needs to be strengthened.

3.4.1 Enforcement

States do not meet their obligation to protect people from discrimination by simply prohibiting discrimination in the law. They must also ensure that the rights to equality and non-discrimination are effectively enforced in practice. This means that, in addition to improving legal protection from discrimination, Ukraine must also put in place mechanisms which guarantee victims of discrimination effective access to justice and appropriate remedies. According to Principle 18 of the Declaration of Principles on Equality:

Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.⁸⁷⁸

878 See above, note 731, Principle 18, p. 12.

Access to Justice

Access to justice will only be effective where victims of discrimination are able to seek redress unhindered by undue procedural burdens or costs. Remedies must be “accessible and effective”⁸⁷⁹ and legal aid must be provided where necessary. Rules on standing which allow organisations to act on behalf, or in support, of victims of discrimination are particularly important in overcoming the disadvantages faced by individuals in the justice system. It is also important to allow groups of victims who have experienced similar discriminatory treatment to bring claims on behalf of a group, if the systemic nature of discrimination is to be effectively addressed.

The means by which individuals in Ukraine are able to enforce equality and non-discrimination provisions depend on whether the provision is found in the Constitution or in legislation.

Access to Justice under the Constitution

Although the Constitution of Ukraine sets out a number of rights and freedoms, and establishes a Constitutional Court as the “sole body of constitutional jurisdiction in Ukraine” (Article 147), Article 153 of the Constitution delegates “the procedure for the organisation and operation of the Constitutional Court of Ukraine, and the procedure for its review of cases” to be set out in legislation. The Law of Ukraine “On the Constitutional Court of Ukraine”⁸⁸⁰ provides the framework under which the claims to the Constitutional Court can be brought, including claims alleging a violation of the Constitutional provisions protecting the rights to equality and non-discrimination (primarily Article 24).

Article 42 of the Law provides that appeals can be brought to the Constitutional Court for official interpretations of the Constitution *and* legislation in order to ensure the exercise or protection of constitutional rights and freedoms, and the rights of a legal entity. Such an appeal can be brought by citizens of Ukraine, foreigners, stateless persons and legal entities. Article 94 of the Law,

879 See above, note 762, Para 15.

880 Закон України “Про Конституційний Суд України” (Відомості Верховної Ради України, 1996, № 49, с. 272), as amended between 2006 and 2014.

however, limits the circumstances under which appeals can be brought by providing that:

The reason for a constitutional appeal on the official interpretation of the Constitution and laws of Ukraine shall be the presence of non-uniform application of the Constitution or laws of Ukraine by Ukrainian courts or other public authorities, if the subject of the right to constitutional appeal considers that this can lead, or has led, to a violation of his constitutional rights and freedoms.

In accordance with Article 46, the decision as to whether or not the case will be taken up is at the discretion of the Constitutional Court sitting in a plenary session.

It appears from the Law that standing to bring an appeal is limited to individuals and legal entities. It is not clear, however, whether legal entities are only able to bring cases on their own behalf (i.e. because the legal entity has itself suffered a violation of a constitutional right) or also on behalf of individuals who have suffered such a violation. Principle 20 of the Declaration of Principles on Equality states that:

States should ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.⁸⁸¹

If legal entities are only able to bring an appeal when the entity itself has suffered a violation, this would limit standing more narrowly than international best practice would suggest.

Notwithstanding its discretion as to whether or not it will initiate proceedings following receipt of a constitutional appeal, Article 45 provides for four

881 See above, note 731, Principle 20, pp. 12–13.

specific grounds upon which the Constitutional Court can refuse to initiate proceedings: where the Constitution of Ukraine or the Law do not provide for a right to constitutional appeal; where a constitutional appeal does not meet requirements envisaged by the Constitution of Ukraine or the Law where the Constitutional Court of Ukraine has already decided on an analogous constitutional appeal; and where the Constitutional Court of Ukraine has no jurisdiction over issues raised in a constitutional appeal.

In addition to bringing cases to the Constitutional Court, Article 55 of the Constitution provides that individuals are able to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers. Further, everyone has the right to appeal for the protection of his or her rights to the Ukrainian Parliament Commissioner for Human Rights. Finally, after exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to “the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant”.

Access to Justice under Legislation

For cases brought under ordinary civil proceedings, rather than the Constitution, individuals are able to bring cases in the local courts. A third party has the right to join a case, either on the side of the claimant or the defendant, “if a decision of the case could affect their rights or obligations relative to either of the parties”.⁸⁸² If a person opposes the third party being added to the case, the court will decide whether or not they should be added.⁸⁸³ It appears that, although organisations cannot bring cases on their own behalf in civil proceedings, they may be able to join the case with the approval of the court. Nevertheless, this provision does not fully guarantee the ability of associations, organisations and other legal entities to engage in litigation, since their involvement is subject to the acceptance of the other party or the approval of the court.

882 Цивільний процесуальний кодекс України (Відомості Верховної Ради України, 2004, № 40–41, 42, с. 492), as amended between 2005 and 2015, Article 35, para 1.

883 *Ibid.*, Article 36, para 5.

The Law of Ukraine “On Amendments to Some Legal Acts of Ukraine on Prevention and Combating Discrimination”⁸⁸⁴ inserted new subparagraph 6¹ into Article 5, paragraph 1 of the Law of Ukraine “On Court Fees”, which provides that claimants are exempt from paying court fees in cases involving discrimination.⁸⁸⁵ As such, cases brought under the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” do not require the payment of any court fees.

In addition to appropriate procedures, effective access to justice requires an independent and impartial judiciary. Many criticisms have been made of the judiciary in Ukraine. In 2006, the HRC expressed concern that “corruption remains a persistent problem, and the process for appointment of judges is not transparent”⁸⁸⁶ The state has made some attempts to deal with these concerns. In 2010, the Verkhovna Rada passed the Law of Ukraine “On the Judicial System and Status of Judges”⁸⁸⁷ with the aims of safeguarding the independence of the judiciary and helping to prevent, or reduce, the level of corruption in the judicial system. The Law provides for a more transparent, competitive process for selection of judges and institutes new disciplinary procedures. In 2011, the Law of Ukraine “On Principles of Preventing and Combating Corruption” was adopted to address wider concerns of corruption in the country.⁸⁸⁸ Between 2008 and the start of 2012, criminal proceedings for offences of corruption were brought against 63 judges with 45 convicted.⁸⁸⁹

Despite these reforms, in 2013, the HRC iterated its concern that “judges still remain vulnerable to outside pressure due to insufficient measures to guarantee the security of their status” and that Ukraine “still does not fully ensu-

884 See above, note 771.

885 Закон України “Про судовий збір” (Відомості Верховної Ради України, 2012, № 14, с. 87), as amended between 2012 and 2015.

886 United Nations Human Rights Committee, *Concluding Observations: Ukraine*, UN Doc. CCPR/C/UKR/CO/6, 28 November 2006, Para 17.

887 Закон України “Про судоустрій і статус суддів” (Відомості Верховної Ради України, 2010, № 41–42, № 43, № 44–45, с. 529), as amended between 2011 and 2015.

888 Закон України “Про засади запобігання і протидії корупції” (Відомості Верховної Ради України, 2011, № 40, с. 404), as amended between 2013 and 2015.

889 United Nations Human Rights Council, *National Report: Ukraine*, UN Doc. A/HRC/WG.6/14/UKR/1, 13 August 2012, Para 58.

re the independence of judges from the executive and legislative branches of government and that their status is not adequately secured by law”.⁸⁹⁰

Evidence of state interference with the judiciary continues to emerge. In March 2014, the Verkhovna Rada recommended that the General Prosecutor initiate criminal proceedings against a number of judges who, in September 2010, declared the Law of Ukraine “On Introducing Amendments to the Constitution of Ukraine” unconstitutional. This interference by the state was criticised by the International Commission of Jurists as “inconsistent with respect for the independence of the judiciary and the rule of law”.⁸⁹¹

Legal Aid System

Ukraine’s obligations under international treaties to which it is party only provide for a limited explicit right to legal aid. Article 14(3)(d) of the ICCPR, for example, requires states parties to provide legal assistance in criminal proceedings only, and only “in any case where the interests of justice so require” and “if he does not have sufficient means to pay for it”. Similarly, Article 6(3)(c) of the ECHR requires states parties to provide free legal assistance in criminal proceedings where a person “has not sufficient means to pay for legal assistance” and “when the interests of justice so require”. In respect to the CEDAW, however, the CEDAW Committee has stated that:

*States must further ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary.*⁸⁹²

In addition, Article 2(3)(a) of the ICCPR requires states parties to ensure that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”. Article 13 of the ECHR likewise requires effective remedy when Convention rights are violated. Without effective access to jus-

890 See above, note 772, Para 17.

891 International Commission of Jurists, “Ukraine: Dismissal and criminal prosecution of judges undermine independence of the judiciary”, 20 March 2014.

892 United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28: On the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/2010/47/GC.2, 2010, Para 34.

tice, including legal aid where the person cannot otherwise afford to bring a claim, it is arguable that the state is failing to ensure an “effective remedy” for violations of the rights to equality and non-discrimination as guaranteed under Articles 2(1) and 26 of the ICCPR. International best practice requires “appropriate legal aid” to be provided in cases where an individual asserts their right to equality or non-discrimination.⁸⁹³

The legal aid system in Ukraine has only relatively recently been established. Despite Article 59 of the Constitution providing that “[e]veryone has the right to legal assistance” and that such assistance “is provided free of charge in cases envisaged by law”, the implementing legislation was only adopted in 2011 (the Law of Ukraine “On Free Legal Assistance”)⁸⁹⁴ and will not be fully in force until 2017.

The law makes a distinction between primary and secondary legal assistance. Primary legal assistance covers the provision of legal information and advice, explanations on legal issues and assistance in drafting statements, complaints and other documents of a legal nature in both civil and criminal proceedings. All people are entitled to free primary legal assistance. Secondary legal assistance includes legal representation in court and the drafting of legal documents. Only certain low-income and vulnerable groups are entitled to free secondary legal assistance, namely:

- i. *persons with low incomes, specifically those whose average monthly family income is lower than the minimum subsistence level or, where the person has a disability, where their pension (or allowance) is less than two minimum subsistence levels;*⁸⁹⁵
- ii. *orphaned children, children whose parents have had their parental rights and responsibilities removed, and children that are, or may become, victims of family violence;*

893 See above, note 731, Principle 18 p. 12.

894 Закон України “Про безоплатну правову допомогу” (Відомості Верховної Ради України, 2011, № 51, с. 577), as amended between 2012 and 2014.

895 Закон України “Про прожитковий мінімум” (Відомості Верховної Ради України, 1999, № 38, с. 348), as amended between 2005 and 2012. See above, note 113.

- iii. *persons who are under administrative detention*,⁸⁹⁶
- iv. *persons who are under administrative arrest*,⁸⁹⁷
- v. *criminal suspects detained by investigation agencies;*
- vi. *persons taken into custody as a form of preventive measure;*
- vii. *persons whose cases must be pleaded in the presence of a lawyer in accordance with the provisions of the Criminal Procedural Code of Ukraine;*
- viii. *persons covered by the Law of Ukraine “On Refugees” until a decision is made on granting them refugee status or if the person appeals against the decision on granting refugee status;*
- ix. *war veterans and persons indicated in the Law of Ukraine “On the Status of War Veterans and Guarantees of their Social Protection”, persons with special merits, those who have rendered special labour services to the country, and victims of Nazi persecution;*
- x. *persons in relation to whom the court is considering restriction of their civil capacity, recognition of the individual as incapacitated, and recovery of the person’s civil capacity;*
- xi. *persons in relation to whom the court is considering rendering forced psychiatric care; and*
- xii. *persons rehabilitated in accordance with the legislation of Ukraine.*

The provisions on free primary legal assistance came into force in 2011. The provisions on free secondary legal assistance are being staged in with groups (iii) to (vii) being able to receive free legal assistance as of 1 January 2013, and the remaining groups from 1 July 2015, although in October 2014, the government put forward a draft law which would delay this until 1 January

896 Administrative detention is a form of preventative measure whereby a person is detained at the discretion of various state agencies such as the police or the State Border Guard Service for a maximum of three hours, and in some exceptional cases up to seventy two hours (at which point the agency may apply for judicial authorisation for further detention).

897 Administrative arrest is a punishment for having committed an administrative offence whereby a person is detained for up to 15 days.

2017. The legal aid scheme is coordinated by the National Legal Aid Coordination Centre and the services are delivered by 27 regional centres across the whole of Ukraine.⁸⁹⁸

Evidence and Proof

International law recognises that it can be difficult for a person to prove that discrimination has occurred, and thus requires that legal rules on evidence and proof are adapted to ensure that victims can obtain redress. Principle 21 of the Declaration of Principles on Equality states that:

*Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (prima facie case), it shall be for the respondent to prove that there has been no breach of the right to equality.*⁸⁹⁹

As this principle indicates, international law requires that the “burden of proof” in cases of discrimination be transferred to the defendant, once a prima facie case that discrimination has occurred has been made. The CESCR has stated in its General Comment No. 20 that:

*Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.*⁹⁰⁰

898 Namoradze, Z. and Romanov, R., *Access to Justice Advances in Ukraine*, Open Society Justice Initiative, 13 February 2013, available at: <http://www.opensocietyfoundations.org/voices/access-justice-advances-ukraine>.

899 See above, note 731, Principle 21, p. 13.

900 See above, note 733, Para 15.

As noted above at section 3.2.2.1, the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Prevention and Combating Discrimination”, *inter alia*, amended Article 60 of the Civil Procedure Code to introduce a reversal of the burden of proof in discrimination cases. Article 60 now provides:

In cases relating to discrimination, the claimant must provide evidence that discrimination has taken place. After bringing such evidence, the burden of proof lies with the defendant.

The reversal of the burden of proof in discrimination cases is formulated in Principle 21 of the Declaration of Principles on Equality as well as international best practice: both the CESC and the CERD recommend that states provide for a reversal of the burden of proof in discrimination proceedings,⁹⁰¹ and such provisions can be found in all European Union anti-discrimination Directives.⁹⁰² Article 60 appears to comply with these stipulations, although the lack of clarity around the extent of the evidence to be provided before the burden shifts under Article 60 means a higher threshold may be applied under Ukrainian law than is applied under international best practice, which requires only *prima facie* evidence to be presented by the claimant.

Remedies and Sanctions

Principle 22 of the Declaration of Principles on Equality sets out the importance of appropriate remedies and sanctions where the rights to equality and non-discrimination are violated:

Sanctions for breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, or-

901 See above, note 733, Para 40, and above, note 752, Para 24.

902 See above, note 785, Articles 8, 10, 9 and 19 respectively.

ganisational, or policy change that is necessary for the realisation of the right to equality.

At the international level, the HRC has stated that remedies must be “accessible and effective”⁹⁰³ while the CESCR has said that “effective” remedies include compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies.⁹⁰⁴

The Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” and the Law of Ukraine “On Ensuring Equal Rights and Opportunities for Women and Men” both only provide for compensation for material or moral damage where the Law has been violated. However, both also provide that those who violate the Law bear civil, criminal and administrative liability.

With respect to civil liability, the available remedies are set out in Article 16, paragraph 2 of the Civil Code which lists 10 specific remedies a court may grant:

- i. Recognition of a right;*
- ii. Recognition of a legal action as invalid;*
- iii. Termination of an action which violates a right;*
- iv. Restoration of the situation prior to the violation;*
- v. Enforcement of the fulfilment of obligations in kind;*
- vi. Modification of legal relationship;*
- vii. Termination of legal relationship;*
- viii. Damages and other means of compensation for material damage;*
- ix. Compensation for moral (non-material) damages;*
and
- x. Recognition of a decision, actions or inaction of a state authority, the Autonomous Republic of Crimea or of local self-government, as well as their officials and employees, to be unlawful.*⁹⁰⁵

903 See above, note 762, Para 15.

904 See above, note 733, Para 40.

905 Цивільний кодекс України (Відомості Верховної Ради України, 2003, №№ 40–44, с. 356), as amended between 2004 and 2015.

A court may protect a person's civil right or interest in any other way established by agreement between the parties or legislation.

Where administrative liability is found, the court has various powers listed in Article 162, paragraph 2 of the Code of Administrative Procedure:

- i. To invalidate the decision, act or omission challenged;*
- ii. To require the defendant to perform certain actions;*
- iii. To require the defendant to refrain from certain actions;*
- iv. To order recovery of funds from the defendant;*
- v. To impose a temporary ban (suspension) of certain types or all activities of an association;*
- vi. To force the dissolution (liquidation) of an association;*
- vii. To force the expulsion of a foreigner or stateless persons from Ukraine; and*
- viii. To recognise the presence or absence of jurisdiction (authority) of a particular power.*

Article 162 also provides that the court “may adopt another resolution that would ensure compliance and protect the rights, freedoms and interests of citizens, other actors in the field of public law relations from violations by government entities.”⁹⁰⁶

The list of available remedies is largely drawn from international best practice and, in particular, those which have been referred to by the UN Treaty Bodies. The HRC has stated in its General Comment No. 31 that:

[W]here appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations (...) In general, the purposes of the Cov-

906 Кодекс адміністративного судочинства України (Відомості Верховної Ради України, 2005, № 35–36, № 37, с. 446), as amended between 2005 and 2015.

enant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.⁹⁰⁷

The CESCR has stated in its General Comment No. 20 that:

[I]nstitutions should (...) be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented.⁹⁰⁸

The CERD has stated in a General Recommendation that:

[T]he right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.⁹⁰⁹

The CEDAW Committee, in relation to Article 2(b) of the CEDAW, has stated in its General Recommendation No. 28 that:

907 See above, note 762, Paras 16 and 17.

908 See above, note 733, Para 40.

909 United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 26: Article 6 of the Convention*, UN Doc. A/55/18, annex v. at 153, 2000, Para 2.

This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.⁹¹⁰

While the specific remedies available under the Civil Code and Code of Administrative Procedure do meet many of those required to be available under Ukraine's international human rights obligations, some do not, particularly remedies which go beyond the specific victim and seek to ensure the structural or policy changes necessary to ensure non-repetition of the discrimination. However, both Codes provide for a general power of courts to provide any other remedy necessary to provide redress to the complainant. This general power in respect of remedies, in theory at least, would enable courts to provide the sorts of remedies required by Ukraine's international human rights obligations.

Where complaints are brought to the Ukrainian Parliament Commissioner for Human Rights, however, the Commissioner, unlike the courts, has no power to impose any sanctions or remedies, but rather may apply to other government agencies in order to remedy the violation.

The Ukrainian Parliament Commissioner for Human Rights

Principle 23 of the Declaration of Principles on Equality highlights the important role of specialised bodies in the protection of the right to equality:

States must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independ-

910 See above, note 892, Para 32.

*ent status and competences of such bodies in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.*⁹¹¹

The importance of specialised bodies has also been highlighted by, *inter alia*, the CESCR which has stated that:

*National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, **national human rights institutions and/or ombudspersons**, which should be accessible to everyone without discrimination.*⁹¹² (Emphasis added)

While Ukraine has not established a specialised body focussed on the protection and promotion of the right to equality, it does have a National Human Rights Institution (NHRI), the Ukrainian Parliament Commissioner for Human Rights, which was established in December 1997 by the Law of Ukraine “On the Ukrainian Parliament Commissioner for Human Rights”.⁹¹³ Nina Karpachova, a former deputy of the Verkhovna Rada, was appointed the first Commissioner in 1998. In 2012, after three terms, Valeriya Lutkovska took over the position. Initially accredited as a “B” status NHRI by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights in 2008, it was upgraded to “A” status in 2009, a status reaffirmed in 2014.

The Commissioner has general competence over “parliamentary control over the observance of constitutional human and citizens’ rights and freedoms and

911 See above, note 731, Principle 23, p. 13.

912 See above, note 733, Para 40.

913 Закон України “Про Уповноваженого Верховної Ради України з прав людини” (Відомості Верховної Ради України, 1998, № 20, с. 99), as amended between 2008 and 2015.

the protection of every individual's rights on the territory of Ukraine and within its jurisdiction".⁹¹⁴ Its purposes are:

- i. *The protection of human and citizens' rights and freedoms envisaged by the Constitution of Ukraine, the laws of Ukraine and international treaties of Ukraine;*
- ii. *The observance of and respect for human and citizens' rights and freedoms by public authorities and their officials;*
- iii. *The prevention of violation of human and citizens' rights and freedoms or the facilitation of their restoration;*
- iv. *The facilitation of the process of bringing legislation of Ukraine on human and citizens' rights and freedoms in accordance with the Constitution of Ukraine and international standards in this area;*
- v. *The improvement and further development of international cooperation in the area of the protection of human and citizens' rights and freedoms;*
- vi. *The prevention of any forms of discrimination in relation to fulfilment of person's rights and freedoms; and*
- vii. *The promotion of legal awareness of the population and protection of confidential information about a person.*⁹¹⁵

The Law sets out that the Commissioner must perform their duties independently from any state bodies and officials and the Commissioner themselves must be free of any incompatibility with the post (e.g. by holding positions at other state bodies, or belonging to a political party).⁹¹⁶ The Commissioner is appointed or dismissed by the Verkhovna Rada by a secret ballot for a term of five years, with dismissal only permitted in specific circumstan-

914 *Ibid.*, Article 1.

915 *Ibid.*, Article 3.

916 *Ibid.*, Articles 4 and 8.

ces.⁹¹⁷ The criteria for appointment of the Commissioner do raise concerns from the perspective of age discrimination. The Commissioner must be a citizen of Ukraine aged 40 years or older, have a good command of the state language, have high moral qualities, have experience in human rights protection, and have resided in Ukraine for the previous five years.⁹¹⁸ The Commissioner has a Secretariat and may set up the Advisory Board comprising persons with “practical experience in the area of protection of human and citizens' rights and freedoms”.⁹¹⁹

Funding for the Commissioner comes from the state budget, at that the Commissioner her/himself work out her/his budget and submit it to the Verkhovna Rada for its approval.⁹²⁰ In 2013, the HRC expressed some concern at possible inadequacy of financial and human resources allocated to the Commissioner, which would undermine its effectiveness.⁹²¹

The Commissioner has a number of specific powers:

1. To be received by the President of Ukraine, the Chairman of the Verkhovna Rada, the Prime Minister, the chairmen of the Constitutional Court, the Supreme Court and higher specialised courts of Ukraine, the Prosecutor General, the heads of other state bodies, bodies of local self-government, associations of citizens, enterprises, institutions, organizations;
2. To attend sessions of the Verkhovna Rada, the Cabinet of Ministers, the Constitutional Court, the Supreme Court, higher specialised courts, collegiums of prosecutors' offices and other collegiate bodies;
3. To appeal to the Constitutional Court with regard to: conformity of the laws of Ukraine and other legal acts issued by the Verkhovna Rada, acts issued by the President, acts issued by the Cabinet of Ministers, and legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea concerning human and citizens' rights and freedoms under the Constitution, and the official interpretation of the Constitution and the laws of Ukraine;

917 *Ibid.*, Articles 5 and 9.

918 *Ibid.*, Article 5.

919 *Ibid.*, Article 10.

920 *Ibid.*, Article 12.

921 See above, note 772, Para 7.

4. To make proposals for improvement of legislation in the sphere of protection of human and citizen's rights and freedoms;
5. To visit bodies of state power, bodies of local self-government, enterprises, institutions, organisations and be present at their sessions;
6. To review documents, including those which contain classified information and obtain copies from bodies of state power, bodies of local self-government, associations of citizens, enterprises, institutions, organisations, and bodies of prosecution, including court cases.
7. To demand from officials and officers of bodies of state power, bodies of local self-government, enterprises, institutions and organisations facilitation in conducting inspection regarding the activity of enterprises, institutions and organisations under their control and subordination;
8. To invite officials and officers, citizens of Ukraine, foreigners and stateless persons to submit oral and written explanations with regard to cases under review;
9. To visit places of detention, psychiatric institutions, temporary refugee accommodation, units for passenger transit at checkpoints, institutions where children are housed, neuropsychiatric centres, boarding houses for senior citizens and persons with disabilities, houses for war and labour veterans, and rehabilitation centres;
10. To interview persons who stay in such places and obtain information on their treatment and living conditions;
11. To attend court sessions of all instances;
12. To appeal to a court so as to protect human and citizens' rights and freedoms of persons who cannot do this on their own due to reasons of health or any other appropriate reasons, and also attend judicial proceedings personally or through a representative pursuant to law;
13. To submit to respective bodies documents containing the response of the Commissioner to instances of violation of human and citizens' rights and freedoms, for taking respective measures;
14. To supervise the observance of established human and citizens' rights and freedoms by respective bodies of state power, including those who conduct investigative activities, make proposals for improving activity of such bodies in this area pursuant to established procedure; and
15. To exercise control over the ensuring equal rights and opportunities for women and men.⁹²²

922 See above, note 913, Article 12.

Additionally, the Commissioner can receive complaints by citizens of Ukraine, foreigners, stateless persons or persons acting in their interests if the appeal is not under review in court.⁹²³

The Commissioner has absolute discretion over how it utilises its various statutory powers. In addition to those contained within the Law of Ukraine “On the Ukrainian Parliament Commissioner for Human Rights”, the Commissioner also has various powers in relation to discrimination set out in Law of Ukraine “On Principles of Preventing and Combating Discrimination in Ukraine” and, more recently, in other fields of human rights including personal data and freedom of information. The Commissioner also acts as the National Preventive Mechanism on torture under CAT-OP. Concerns have been raised by, *inter alia*, the HRC that the Commissioner will need additional financial and human resources with its expanded role in order to ensure that it can carry out all of its functions effectively.⁹²⁴

Within these broad fields of activity and the various powers, the Commissioner has prioritised four key areas, one of which is non-discrimination. Within this, the Commissioner has prioritised education and provides training to judges, police officers and lawyers on non-discrimination.⁹²⁵

The Commissioner publishes an annual report (as well as special reports) highlighting the number of cases and complaints received, as well as assessing the general human rights situation in Ukraine. Since 2012, these reports have contained distinct sections on discrimination, and assessed progress (or lack thereof) in this area. The 2014 report also contained figures for the number of complaints made relating to discrimination to the Commissioner. As can be seen, the overwhelming majority of complaints relate to religious or other beliefs.

923 *Ibid.*, Article 17.

924 See above, note 772, Para 7.

925 Equal Rights Trust interview with Serhii Ponomaryov, Deputy Head of the Department for Discrimination, Ukrainian Parliament Commissioner for Human Rights, Kyiv, 25 February 2015.

Ground of Complaint	Number of Complaints
Race	3
Colour	1
Ethnic Origin	18
National Origin	24
Association with a National Minority	17
Political Beliefs	1
Religious or other Beliefs	1,788
Language	11
Social Origin	3
Residence	9
Age	4
Sex	37
Other Attributes	21
“Equality Before the Law”	20
Freedom and Development of the Ukrainian Language	5
Freedom to Use Minority Language	75
Freedom of Religion	34
Total	2,051

As part of its work to combat discrimination, in 2014, the Commissioner developed a Strategy for Preventing and Combating Discrimination in Ukraine for the period 2014–2017, supported by an Action Plan. As of the end of 2014, the Commissioner had taken various steps as part of the Action Plan including the review of legislation and regulations from the perspective of non-discrimination, the review of draft legislation and the provision of opinions to relevant committees within the Verkhovna Rada, and monitoring the work of executive bodies and local government in the field of non-discrimination.⁹²⁶

Overall, the Commissioner plays a critical role in the promotion of the rights to equality and non-discrimination in Ukraine. As an A-rated NHRI with an ext-

⁹²⁶ Ukrainian Parliament Commissioner on Human Rights, *Report on Realization in 2014 of the Action Plan toward implementation of the Strategy for Preventing and Combating Discrimination in Ukraine in 2014–2017*.

remely broad range of powers in the field of equality and non-discrimination (as well as on human rights more broadly), the Commissioner can be considered as meeting Ukraine's international human rights obligations. Though it is arguable that its remit is unachievably broad for one body, the fact that the Commissioner has prioritised tackling discrimination is very welcome.

The Commissioner for the Rights of People with Disabilities

In December 2014, the position of Commissioner for the Rights of People with Disabilities was established in Ukraine by a Presidential Decree.⁹²⁷ The Decree specifies seven main tasks for the Commissioner:

1. monitoring the observance of the rights and interests of persons with disabilities, the implementation of Ukraine's international obligations, and making proposals to the President to eliminate and prevent any limitations on such rights and interests;
2. taking measures to establish cooperation between executive and local authorities on the rights and interests of persons with disabilities;
3. submitting proposals to the President on draft laws and decrees on protection the civil, social economic and cultural rights and interests of persons with disabilities;
4. participating in drafting legal acts on the protection of the rights and interests of persons with disabilities, establishing the conditions for the realisation of their civil, social, economic and cultural rights, non-discrimination and equal opportunities in all areas of life;
5. participating in the examination of laws submitted for the signature of the President which relate to the rights and interests of persons with disabilities;
6. preparing and organising of events involving the President, including international events, on the rights and interests of persons with disabilities; and
7. public awareness-raising on the implementation of the constitutional powers of the President to ensure the observance of the rights and interests of persons with disabilities.

927 Указ Президента України № 902/2014 "Про Уповноваженого Президента України з прав людей з інвалідністю", 1 December 2014.

The first Commissioner appointed was Valeriy Sushkevych, President of the National Paralympic Committee of Ukraine, and Head of the National Assembly of the Disabled of Ukraine.⁹²⁸ Given the short period of time between the establishment of the position and the publication of this report, it is too early to make any conclusions as to the effectiveness of the Commissioner in enhancing the protection of persons with disabilities from discrimination. The specific tasks for the Commissioner, while welcome, focus largely on reviewing legislation and making proposals for legislative and policy change rather than overseeing their implementation. If the Commissioner is able to put forward proposals which would tackle discrimination and disadvantage faced by persons with disabilities and takes an active role in seeing them implemented, there is the potential for the role to have a positive impact.

3.4.2 Jurisprudence on Equality and Non-Discrimination

Any analysis of the jurisprudence on equality and non-discrimination must, at its starting point, take into account the legal system of Ukraine. Ukraine has a civil law system, similar to the majority of countries in Europe, and thus no formal recognition of precedent comparable to common law countries. As such, the focus must be on the text of the relevant constitutional or legislative provisions as little weight is given to interpretation of these provisions. Indeed, only the Constitutional Court is empowered to give official, authoritative interpretations of the Constitution and legislation which are binding upon other courts.⁹²⁹ Any review of jurisprudence in Ukraine must therefore take into account both the limited role of jurisprudence within the legal system, and the fact that only decisions of the Constitutional Court will be legally binding on judicial practice. As such, this section examines and analyses the relevant decisions of the Constitutional Court. It also examines a small number of decisions of lower courts of general jurisdiction; while they carry no formal precedential power, they nonetheless provide examples of how the courts of general jurisdiction have sometimes approached issues of equality and non-discrimination when faced with them.

928 President of Ukraine, “President appointed Valeriy Sushkevych to the post of Commissioner for the Rights of People with Disabilities”, *president.gov.ua*, 3 December 2014.

929 Article 13 of Закон України “Про Конституційний Суд України” (Відомості Верховної Ради України, 1996, № 49, с. 272), as amended between 2006 and 2014.

The few cases decided by the Constitutional Court paint a mixed picture. While there are some, albeit not many, judgments in which the Constitutional Court has used principles of equality and non-discrimination, it has failed to engage in any detailed analysis of what the rights to equality and non-discrimination require. The same can also be said of the courts of general jurisdiction. Further, while courts are generally willing to make reference to international treaties to which Ukraine is party in reaching their decisions, there is little, if any, discussion of the specific requirements of the treaties, their interpretations by relevant treaty bodies, and their specific application to the question faced by the court.

Constitutional Court of Ukraine

The Constitutional Court of Ukraine has only made one decision considered an official interpretation of the most important provision of the Constitution from the perspective of the rights to equality and non-discrimination (Article 24) in a case from 2012. It has also, however, made a number of decisions which included interpretation of Article 24 and thus give guidance on the extent to which Article 24 protects the rights to equality and non-discrimination.

Official Interpretation: Equality of Opportunity to Participate in Civil Legal Proceedings

Decision of the Constitutional Court of Ukraine of 12 April 2012 No. 9-пп/2012

Facts: Troyan Anton Pavlovych was a Ukrainian citizen and convicted prisoner who wanted to attend, in person, a trial in the civil courts in which he was a party. However, as a convicted prisoner, he was prevented from doing so. Mr Troyan argued that the fact that he was prevented from attending the trial due to his status as a serving prisoner was discriminatory and in violation of his constitutional right to equal access to justice.

Decision: The Constitutional Court held that the prevention of Troyan's attendance in person in civil proceedings in which he was a party constituted a violation of various articles of the Constitution, including Article 24, paragraph 1.

Reasoning with respect to equality/non-discrimination: The Constitutional Court began its analysis by reference to Article 24, which provides that citizens have equal constitutional rights and freedoms and are equal before the law (paragraph 1) and that privileges or restrictions based upon a protected characteristic are prohibited (paragraph 2). It also stated that, under Article 26, foreigners and stateless persons enjoyed the same rights and freedoms as citizens save where the Constitution, a law, or international treaties ratified by Ukraine provided otherwise.

The Court noted that equality and the unacceptability of discrimination were not only constitutional principles of the Ukrainian legal system, but fundamental values of the international community, emphasised in international instruments for the protection of rights and freedoms, including the ICCPR, the ECHR and Protocol No. 12 thereto, and the UDHR.

As the Constitution guaranteed equality of all “people” in their rights and freedoms, this implied the need to provide them with equal legal opportunities, of both a material and procedural nature, for their realisation. In a state based upon the rule of law, the ability to apply to a court was a universally recognised mechanism of protecting those rights, freedoms and a person’s legal interests.

The Court also made reference to Article 63 which provides that a convicted person enjoys all human and citizens’ rights, with the exception of restrictions determined by law and established by a court verdict. The Court noted that although legislation guaranteed the right of persons to participate in legal proceedings, legislation did not regulate the procedure by which persons could participate in person where they were serving a sentence of arrest, confinement, or detention in a penal establishment for a set period or for life imprisonment.

Taking into consideration Article 24 of the Constitution, as well as Article 55 (which provides that every person has the right to appeal decisions, acts and omissions of public authorities, local authorities, officials and public servants) and Article 129, paragraph 2, (which provides that one of the main principles of judicial proceedings is equality before the law and the court of all participants in a trial), the Constitutional Court concluded that every person, whether citizen, foreigner or stateless person, has equal rights, guaranteed by the state, for the protection of their rights

and freedoms in the judicial order and participation in consideration of their case in a manner established by legislation, in courts of all jurisdictions, specialisations and instances, including convicted persons serving a sentence of imprisonment.

In its decision, the Constitutional Court chose to go beyond a simple consideration of the rights to a fair trial and to participate in a trial, instead taking into consideration equality and discrimination arguments, particularly the discrimination faced by convicted prisoners in being unable to participate in person at trials in civil courts. Although a matter not relevant for the facts of the case it was deciding, the Court also appeared to accept that foreigners and stateless persons are, by virtue of Article 26 of the Constitution, also entitled to equality in Ukraine. However, the judgment is unclear on this point. While the decision itself makes use of general principles of human rights rather than a detailed analysis of the arguments put forward, it is nonetheless a positive example of using equality and discrimination arguments in a case which could have been decided more narrowly on fair trial arguments.

Age Discrimination

The Constitutional Court has been faced a number of times with challenges to legislation argued to constitute discrimination on the basis of age. A number of these cases challenged minimum and maximum age requirements set out in legislation for particular positions, although others have examined age qualifications in other fields of activity. The decisions indicate significant inconsistency and a lack of clarity in the legal analysis and approach of the Court. We give a detailed focus here to this line of jurisprudence as it demonstrates some serious problems with the way in which Article 24 is being interpreted by the Court.

The first decision, from 2000, related to the position of the Ukrainian Parliament Commissioner on Human Rights.

**Decision of the Constitutional Court of Ukraine
of 18 April 2000 No. 5-ππ/2000**

Facts: Forty seven deputies of the Verkhovna Rada asked the Constitutional Court to examine the constitutionality of Article 5 of the Law of Ukraine “On the Ukrainian Parliament Commissioner on Human Rights” which states that the Commissioner must be at least 40 years old on the date of his or her election.

Arguments: The deputies argued that the age requirement was contrary to various provisions of the Constitution including:

- Article 8, paragraph 1 (the principle of the rule of law is recognised and effective);
- Article 19 (requirement that bodies of state power and bodies of local self-government and their officials act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine);
- Article 23 (all people are free and equal in their dignity and rights);
- Article 23, paragraph 3 (the content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force);
- Article 24, paragraph 1 (citizens have equal constitutional rights and freedoms and are equal before the law);
- Article 24, paragraph 2 (no privileges or restrictions based on protected characteristics);
- Article 43, paragraph 1 (the right to labour);
- Article 43, paragraph 2 (requirement that the state must create conditions for citizens to fully realise their right to labour); and
- Article 64, paragraph 1 (constitutional human and citizens’ rights and freedoms shall not be restricted, except in cases envisaged by the Constitution of Ukraine).

The deputies argued that the age requirement was contrary to these provisions of the Constitution as Article 101 did not set out an age limit for citizens to fill the position of the Ukrainian Parliament Commissioner on Human Rights.

Both the Chairman of the Verkhovna Rada and the Ukrainian Parliament Commissioner on Human Rights, however, referred to Article 85, paragraph 17, of the Constitution which empowers the Verkhovna Rada to “appoint to office and dismiss from office the Ukrainian Parliament Commissioner on Human Rights”. They argued that this provision was not able to specify everything relating to the complex office of the Commissioner and that special legislation was therefore required. It was consistent legislative practice to set out minimum age requirements in Ukraine.

Decision: The Constitutional Court held that the requirement that the Commissioner must be at least 40 years old on the date of their election was not unconstitutional.

Reasoning: Although the Constitution did not use the term “qualifications”, it did, in many instances, make age requirements for persons to hold certain positions of public office, including deputies, judges and the President. Legislation, similarly, often imposed age requirements for persons to hold other positions of public office. Qualification requirements are dictated by the nature and type of activities required of the particular officials and, therefore, cannot be deemed as restricting citizens’ equal rights to access to public service.

Setting out qualification requirements in the Constitution and legislation does not, *per se*, violate the constitutional principle of equality in Article 24 since all citizens compliant with those specific qualification requirements are eligible for occupation of positions.

Qualification requirements in legislation must, nevertheless, comply with Article 24. Given the special importance of the Commissioner’s activities, namely parliamentary control over the observance of constitutional rights and freedoms of man and citizen, the Verkhovna Rada was empowered to establish qualification requirements for the person who apply for the position. Article 101 of the Constitution did not prohibit this. These qualification requirements include experience and social maturity, which are possessed only by persons of a certain age. The Court held that “[t]he criterion for establishing legislative requirements of a qualifying age is expediency”.

In its decision, the Constitutional Court made reference only to domestic legislation and not to those international human rights treaties to which Ukraine

was party (although as of 2000, age was not generally recognised as a ground upon which discrimination was prohibited at the international or European level).⁹³⁰ The Court correctly asserted that qualification requirements for certain positions in public office, *per se*, did not constitute a violation of the right to equality but that any qualification requirements must nonetheless not be discriminatory and violate Article 24. However, the Court's reasoning fell short when determining that "only persons of a certain age" could have the experience and social maturity required of the position of the Commissioner. While experience and social maturity are valid requirements, being above the age of 40 does not, in and of itself, guarantee that a person would have sufficient experience and social maturity; similarly, being under the age of 40 does not, in and of itself, preclude an individual from having sufficient experience and social maturity. The Court failed to go into any reasoning as to why only persons over the age of 40 could have a sufficient degree of experience and social maturity, thus failing to establish a sufficiently close link between the age requirement and the aim the requirement sought to meet. Indeed, the only test set out by the Court as to when age qualifications would be justified was "expediency".

One judge, Mykola Kozyubra, dissented. While accepting that qualifications for the position of Ukrainian Parliament Commissioner on Human Rights could be established in order to ensure a certain level of maturity and relevant social experience and skills, Judge Kozyubra considered that an explicit age requirement was not permissible as, unlike in the cases of minimum age requirements for deputies to the Verkhovna Rada (Article 76), the President (Article 103), judges (Article 127, paragraph 3) and judges of the Constitutional Court (Article 148, paragraph 3), such a requirement was not explicitly provided for in the Constitution. Judge Kozyubra concluded that Article 5 of the Law was unconstitutional and criticised the majority's decision as opening the door to introducing qualifications not explicitly permitted by the Constitution.

Both the majority judgment and the dissent in this case are out of step with international best practice with respect to minimum and maximum age requi-

930 One exception to this general position was discrimination in employment where the International Labour Organization's Recommendation No. 162 of 1980 (Older Workers Recommendation) called upon states to prohibit discrimination on the basis of age in employment. This recommendation, however, as its name suggests, was targeted at protecting older workers rather than prohibiting minimum age requirements for positions.

rements as criteria for applicants for a particular post, the legitimacy of which has been almost universally rejected. It is also indicative of the failure to understand the nature of the comparator in discrimination cases: the alleged discrimination was on the ground of age, and the comparison in determining whether discrimination had occurred should have been between persons below and above 40. However, in its reasoning, the Court effectively compared persons above 40 with other persons also above 40, and was satisfied that there was equality among persons of this group “since all citizens compliant with those specific qualification requirements are eligible for occupation of positions”.

A year later, the Court examined an age qualification in legislation governing the return of savings to those who had lost money between 1992 and 1995 following the collapse of the USSR and the establishment of an independent Ukraine.

**Decision of the Constitutional Court of Ukraine
of 10 October 2001 No. 13-пп/2001**

Facts: The Ukrainian Parliament Commissioner on Human Rights asked the Constitutional Court to examine the constitutionality of the Law of Ukraine “On State Guarantees of Restoration of Savings of Citizens of Ukraine” which differentiated on grounds of the age of the depositor in determining the way in which money lost following independence (for example because it had been held by the Savings Bank of the USSR which collapsed and fell into liquidation in 1991) would be returned.

Arguments: The Ukrainian Parliament Commissioner on Human Rights argued that the process by which money would be restored at different times depending on the age of the depositor violated Article 24 of the Constitution. The First Vice Prime Minister argued that it was not possible to return all money in one instance and that it was necessary to stagger the return.

Decision: The Court held the Law violated the requirement under Article 24 of the Constitution that rights and freedoms – specifically the right to property – be guaranteed on an equal basis.

Reasoning: The Court analysed the provisions of the Constitution relating to the right to property (Article 41) before turning to Article 24. The

Court simply noted that Article 24 guaranteed citizens equal rights and freedoms. Therefore the right to property in Article 41 had to be guaranteed on an equal basis for all citizens. As such, the distinction in the way in which money would be returned based on the age of the depositor violated Article 24.

The Court did not explicitly state that age was a characteristic protected under “other circumstances” in Article 24, paragraph 2, instead making its decision on the basis of Article 24, paragraph 1 which guarantees equal rights and freedoms of all citizens. As such, while leaving the question of whether age discrimination was prohibited by Article 24, paragraph 2, the Court’s decision nonetheless confirmed that distinctions on the basis of age would, at least in some circumstances, fall foul of Article 24, paragraph 1.

Two judges dissented, one of whom, Judge Volodymyr Shapoval, focused his dissent entirely on the majority’s conclusion on Article 24. While the majority had not explicitly stated that age was a characteristic protected under Article 24, paragraph 2, Judge Shapoval rejected any such conclusion, stating that it was “logical and justified” that age was not included in the list of protected grounds. He noted that people moved from one age category to another throughout their lives; as they move on, they may lose certain rights, privileges and restrictions upon rights, but will gain others in later age categories. Judge Shapoval criticised the majority for essentially amending Article 24 by including “age” as a characteristic in paragraph 2, and for delivering a decision which was “inconsistent” with that in Decision No. 5-пп/2000.

In 2004, the Constitutional Court faced a challenge to a law similar to that in Decision No. 5-пп/2000, this time against a minimum age requirement for candidates for the position of head of a higher education institution.

Decision of the Constitutional Court of Ukraine of 7 July 2004 No. 14-pp/2004

Facts: Fifty six deputies of the Verkhovna Rada asked the Constitutional Court to examine the constitutionality of Article 39 part 1, paragraph 2, of the Law of Ukraine “On Higher Education” which stated that higher education institutions could not set a minimum age requirement for the heads of the institutions greater than 65 years old.

Arguments: The deputies argued that this provision was contrary to Article 24, paragraph 1 of the Constitution under which citizens enjoy equal constitutional rights and freedoms, and Article 24, paragraph 2 which prohibits privileges and restrictions on a list of prohibited grounds and which includes the term “or other characteristics”. The deputies argued that “other characteristics” should include “age”. This position was supported by the President of Ukraine.

The Chairman of the Verkhovna Rada argued, however, that Article 24 did not prohibit the legislature from imposing requirements for certain positions, and that the age requirement was due to the specific constraints and nature of the work involved.

The Yaroslav Mudryi National Law University, the Taras Shevchenko National University of Kyiv and the Institute of International Relations Kyiv all argued that the provision was contrary to the Constitution.

The Centre for European and Comparative Law at the Ministry of Justice argued that the provision was contrary to the Constitution of Ukraine, international instruments and the ECHR.

Decision: The Constitutional Court held that the age requirement amounted to unjustified discrimination on the basis of age, contrary to the rights to equality and non-discrimination (Article 24) and the right to work (Article 43).

Reasoning: The Constitutional Court began its analysis by reviewing the right to work under Article 43 of the Constitution which guarantees the right to work (paragraph 1) and requires the state to guarantee citizens’ equal opportunities in the choice of profession and of types of labour activi-

ty (paragraph 2). The Court noted that the right to work necessarily includes a prohibition of discrimination in entering into employment relations.

The Court also noted that the constitutional principle of equality did not preclude the legislature from regulating employment relations by setting out conditions for certain positions where necessitated by the nature of the professional activity concerned. Legislation already imposed age requirements in respect of law enforcement officials, the military and in local government. The Court referred to its decision No. 5-πΠ/2000 in which it highlighted certain provisions in the Constitution itself which imposed minimum age requirements for certain positions. However, the Court stated that the reason for establishing differences (requirements) in the legal status of workers should be a valid one, and any differences (requirements) established for pursuing that goal, should comply with constitutional provisions, be objectively justifiable, reasonable and fair. Otherwise, the restrictions would amount to discrimination.

In noting this, the Court stated that this interpretation of Article 43 of the Constitution was compliant with international treaties. The Court referred to the ICCPR, Article 4 of which provides that states may subject the rights therein only to such limitations as are determined by law only in so far as this is compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

The Court then turned to the Law itself. Neither the provisions of the Law, nor the arguments of the state authorities, provided for a determination for the reasons for the restriction. However, given the possible purposes which are implied by the Law, the restrictions could not be said to be justified, reasonable and fair. There were less burdensome ways for achieving these purposes other than an automatic deprivation of the right of citizens over the age of 65 to apply for the positions. The provisions of the Law might prohibit persons over 65 from the possibility of applying for the positions, regardless of their abilities, experience or qualifications. Such a conclusion, the Court stated, was consistent with Recommendation No. 162 of the International Labor Organization concerning Older Workers which stated that older workers should, without any discrimination by reason of their age, enjoy equality of opportunity and treatment with other workers, in particular, in access, taking account of their personal skills, experience and qualifications, to employment of their choice

in both the public and private sectors; with age limits permitted only in exceptional cases due to special requirements, conditions or rules of certain types of employment.

The Court also noted that no age limitations were put upon research and educational staff of educational institutions. Indeed, no element of the work of scholars, teachers or the heads of higher educational institutions could provide objectively justified reasons for imposing age limitations.

The provisions of the Law thus imposed an unequal age-based legal condition, restricting the guarantee of equal opportunities in the realisation of the constitutional right to work. The age requirement therefore amounted to discrimination in the realisation of the right to work and was thus contrary to paragraphs 1 and 2 of Article 43 and paragraphs 1 and 2 of Article 24 of the Constitution.

In this majority decision,⁹³¹ the Constitutional Court provided greater clarity on how it would assess whether different treatment could be justified or not. First, the purpose of the different treatment or restriction must be a valid one; secondly, the different treatment or restriction established for pursuing that goal must be “objectively justified, reasonable and fair”. While not explicitly addressing the question of whether “age” was a characteristic upon which discrimination was generally prohibited, by finding that there had been a violation both of the right to work *and* the rights to equality and non-discrimination, the Court appeared to accept that age limitations were, in principle, discriminatory restrictions which required justification.

However, the Court’s progressive judgment in the case stands in contrast to a later decision of 2007 when it examined mandatory retirement for certain positions in the civil service, local government and the diplomatic service.

931 One judge, Volodymyr Shapoval, dissented. Judge Shapoval considered that Article 43 did not guarantee the right to a specific post, or even to apply for specific posts; “age” was not a characteristic which fell under “other circumstances” in Article 24 and this conclusion was “logical and justified” based on the temporal nature of the age characteristic; international law did not support the majority’s conclusion and, in any event, the Constitution did not establish the primacy of international law over national.

**Decision of the Constitutional Court of Ukraine of 16 October 2007
No. 8-пп/2007**

Facts: Forty seven deputies of the Verkhovna Rada asked the Constitutional Court to examine the constitutionality of a number of legislative provisions (Article 23 of the Law of Ukraine “On Civil Service”, Article 18 of the Law of Ukraine “On Service in Bodies of Local Self-Government” and Article 42 of the Law of Ukraine “On the Diplomatic Service”) which prescribed mandatory retirement at 60 years for men and 55 years for women for certain positions in the civil service, local government and the diplomatic service.

Arguments: The deputies argued that the term “other status” in Article 24 of the Constitution should be interpreted to include “age”. The provisions discriminated on the basis of age without any objective justification, and thus amounted to discrimination in the right to work contrary to Articles 24, 38 and 43 of the Constitution.

Decision: The Constitutional Court held that “age” was not a protected ground under “other status” in Article 24 of the Constitution.

Reasoning: The Court began by referring to its earlier Decision No. 14-пп/2004 and the analysis therein on the nature of the right to work under Article 43 of the Constitution.

The Court then looked at Article 38 which guarantees citizens equal right of access to the civil service and to service in bodies of local self-government. The equal right of access to the civil service was a legal opportunity and did not require immediate and unconditional realisation. The setting of age boundaries in legislation for tenure in the civil service was determined by the tasks and functions of the various bodies and the special nature of their activity. Some of the laws being challenged permitted extensions of tenure, taking into account the person’s professional qualities and creative potential once they had reached the maximum age. As such, the age restrictions on holding certain offices within the civil service were not a violation of the principles of equality.

The Court then looked at the rights to equality and non-discrimination in Article 24. Paragraph 1 of Article 24 guaranteed equality of citizens before the law and thus established the equally obligatory nature of a particular

law for all citizens. However, not all distinctions in privileges and restrictions were connected with the characteristics listed in paragraph 2. The general principle by which privileges and restrictions based on social or personal characteristics were prohibited was thus not absolute. Bodies of state power in the field of economic or social policy were able to set restrictions at their discretion on the basis of special requirements, conditions and rules for certain types of work. In reaching this conclusion, the Court referred to its earlier Decision No. 14-пн/2004 and its conclusion that the constitutional principle of equality did not preclude the legislature from regulating employment relations by setting out conditions for certain positions where necessitated by the nature of the professional activity concerned. Thus, Article 24 did not prevent the establishment of differences in the legal regulation of employment for persons belonging to different kinds of activities and categories.

The Court then turned to the question of whether “age” was a characteristic protected under the term “other status” in paragraph 2 of Article 24. The Court noted that age “is a changeable category” and that individuals “sequentially proceed from one age category to the other, forfeiting rights and privileges set for the individuals of one age, disposing of the respective restrictions in rights and acquiring of other rights defined for a particular age category”. On this basis, “all people are equal and differ only by age” and, as such, “establishing age restrictions shall not be considered as infringement of the principle of equality of citizens”.

In defending this conclusion, the Court stated that it was consistent with provisions of international and European Union law:

- Article 4 of the ICESCR which permits limitations on the Covenant rights “as are determined by law” and “in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.
- Article 1.2 of the ILO Convention No. 111 on Discrimination (Employment and Occupation) which provides that: “Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.”
- Paragraph 5(b)(ii) of the ILO’s Recommendation No. 162 concerning Older Workers which provides that “in exceptional cases age limits may be set because of special requirements, conditions or rules of certain types of employment”.

- Article 6 of the European Union’s Council Directive 2000/78/EC which provides that “differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary”.

Thus, the Court concluded, international and European Union law allowed for the possibility of national legislation setting certain age restrictions for particular types of labour activity.

The Court’s decision betrays a lack of understanding of the operation of the right to non-discrimination as well as significant misinterpretations of a number of international and European laws. It also appears impossible to reconcile this decision with the Court’s own earlier and more progressive decision of 2004. While the 2004 decision did not explicitly state that “age” fell within the term “other status” in Article 24, the Court’s analysis implied that restrictions on the basis of age were, in principle, discriminatory and required justification.

Unfortunately, the 2007 decision represents the Court’s most recent ruling on this issue and so is arguably the current legal position. It falls short of international best practice. Despite the Court’s recognition that the relevant international treaties and European Union law both prohibited discrimination on the basis of age and permitted age-based different treatment only in very limited circumstances, its insistence that its decision was consistent with these provisions confuses exceptions to the general prohibition of discrimination on the basis of age with its own conclusion that age-based discrimination was unproblematic, *per se*. The Court failed to note that such discrimination can only be justified under the international and European Union provisions to which it referred in strictly limited circumstances, namely where they are objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary (in the case of European Union law), and if “based on the inherent requirements” of the particular job (in the case of the ILO Convention on Discrimination (Employment and Occupation)). In any event, if the Court’s conclusion was that discrimination on the basis of age was not prohibited by Article 24 of the Constitution, it is not clear

why it felt the need to undertake any analysis of when different treatment on the basis of age was justified.

The Court's key conclusion was that age discrimination was unproblematic even in principle, on the basis that any privileges or limitations based on age would be felt by all people at some point in their lives, and that there was thus no infringement of the right to equality. Such a conclusion is not only out of step with current international and European law, which requires discrimination on the basis of age to be prohibited in principle, but fails to acknowledge the specific harm individuals feel at a certain point in their lives, simply due to their age, and which is not justified solely on the basis that others will experience it similarly when they reach that age (or experienced it when they were that age).

Disability Discrimination

In a decision relating to an adjustment to the requirement to vote in a voting booth, the Court reached the right outcome but using sparse reasoning.

Decision of the Constitutional Court of Ukraine of 24 December 2004 No. 22-пн/2004

Facts: 46 deputies of the Verkhovna Rada asked the Constitutional Court to examine the constitutionality of a number of provisions of the Law of Ukraine "On Peculiarities of the Law of Ukraine 'On the Election of the President of Ukraine' in the second ballot on 26 December 2004", arguing that they imposed unconstitutional restrictions. One of the challenged provisions was Article 6, paragraph 1, which only allowed voting outside of the voting booth for persons with a disability of group I and unable to move unassisted.

Arguments: The deputies argued that Article 6, paragraph 1 limited the rights of many citizens to vote.

Decision: With one judge dissenting, the Court held that Article 6, by allowing only persons with disabilities of group I – and not other persons who were unable to vote in a voting booth – to vote outside of a voting booth, violated Article 24, paragraph 1 of the Constitution.

Reasoning: The Court noted that it was not only persons who had a disability of group I who were unable to vote in a voting booth. Others might be unable to do so including persons with disabilities in other groups or because of their age or health status. Allowing persons with disabilities of group I but not other persons unable to vote in a voting booth violated the principle of equality of citizens guaranteed by Article 24, paragraph 1.

Discrimination on the Basis of Residence

The Court has made a small number of decisions which involved challenges to legislation on the basis that they discriminated on the basis of place of residence. The first was the **Decision of the Constitutional Court of Ukraine of 3 March 1998 No. 2-pp/1998** which related to a Law adopted within the Autonomous Republic of Crimea – the Law “On Public Associations” which permitted political parties to be established which would operate only within the Autonomous Region of Crimea and not across the entirety of Ukraine. The Court held that the Law “On Public Associations” was unconstitutional for a variety of reasons, including that it was inconsistent with Article 24, paragraphs 1 and 2.

In the case, the Court took a particularly strict approach towards the issue of political parties being established in one part of the country. Such political parties are commonplace worldwide, able to highlight the concerns of residents of a particular region within a state. Nothing in international human rights law, which prohibits discrimination based on place of residence, forbids the establishment or operation of political parties only in one part of a particular state. Despite this, and making its decision solely on the basis of the Constitution, the Court struck down this provision. It is possible, given the particular status of the Autonomous Republic of Crimea in Ukraine, that political considerations, too, played a part.

The second case was the **Decision of the Constitutional Court of Ukraine of 28 September 2000 No. 10-pp/2000** which concerned a Law preventing some buildings from being privatised, including certain forms of housing such as housing in disrepair, housing in military bases and housing in the location of the Chernobyl disaster. Deputies alleged this violated, *inter alia*, Article 24, paragraph 2 of the Constitution by discriminating on the basis of place of residence. The Court rejected this submission, holding that for the purposes of Article 24 of the Constitution, “residence” meant the place of residence of a citizen on

a territorial basis (i.e. a village, town, city or other administrative unit) rather than a specific dwelling (such as a house or apartment).

In the third judgment, **Decision of the Constitutional Court of Ukraine of 23 October 2003 No.17-пн/2003**, the Court, at the request of the Ukrainian Parliament Commissioner on Human Rights, examined the constitutionality of Article 30 of the Law of Ukraine “On the Election of Deputies of Local Councils and Village, Town and City Mayors”. Paragraph 3 of Article 30 required candidates for deputies of local councils and village, town and city mayors to live or work in the territory for which they sought to run for office. The Ukrainian Parliament Commissioner on Human Rights submitted that this requirement violated, *inter alia*, Article 24 of the Constitution by discriminating on the basis of place of residence or employment. The Court held that the limitation in paragraph 3 of Article 30 violated Articles 24, 38 and 71 of the Constitution although did so without providing much analysis of the relevant constitutional provisions. The Court did not, for example, enter into any analysis of whether the restriction on the basis of residence could be justified, instead concluding that the limitation was *ipso facto* prohibited by Article 24.

Other Challenges Related to the Right to Equality

In one case, the Court appears to have used Article 24, paragraph 1 – the right to equality – in order to reject distinctions based not on personal characteristics but on other factors and which it deems to be unjustifiable.

Decision of the Constitutional Court of Ukraine of 2 November 2004 No. 15-пн/2004

Facts: The Supreme Court asked the Constitutional Court to examine the constitutionality Article 69 of the Criminal Code which allowed courts to impose sentences lower than those specified by the Criminal Code for moderate, serious or very serious offences committed where there were several mitigating circumstances. In contrast, Article 69 did not provide for such an opportunity for those who had committed minor offences (the four classifications of offences set out in Article 12 of the Criminal Code).

Arguments: One of the arguments raised was that Article 24 of the Constitution guaranteed to all persons who had committed offences equal rights and equal restrictions to those rights.

Decision: The Court held that the distinction made by Article 69 was inconsistent with Article 24 and thus unconstitutional.

Reasoning: The Court considered that equality before the law required consistent principles of establishing liability for criminal offences. However, Article 69 only permitted certain persons who had committed offences to have the court consider the possibility of a sentence lower than that provided for in the Criminal Code (namely those who had committed moderate, serious or very serious offences) and not others, thus only allowing more individualised sentencing for some persons but not others. The failure to allow consistently individualised punishments for all persons who had committed an offence thus amounted to a violation of the principle of equality before the law.

This reasoning is highly problematic. As a matter of international law and best practice, a state may be able to justify taking a different approach to sentencing in respect of minor offences and more serious offences. This is not a matter which distinguishes between groups of people as such but rather between types of offences. There may be reasons to challenge a lack of flexibility in sentencing on other human rights grounds but there appears to be no reason to invoke Article 24 in this case.

High Specialised Court of Ukraine for Civil and Criminal Cases

As noted above, in Part 2 of this report, in May 2014, in the context of Ukraine's requirement to prohibit discrimination on the basis of sexual orientation as part of the Action Plan for Visa Liberalisation, the Ministries of Justice and Foreign Affairs requested that the High Specialised Court of Ukraine for Civil and Criminal Cases provide clarity on whether the Constitution and existing legislation prohibited such discrimination. In May 2014, the Chairman of the High Specialised Court of Ukraine for Civil and Criminal Cases responded to that request by writing a letter to the various heads of the Courts of Appeal.⁹³²

932 Вищий спеціалізований суд України з розгляду цивільних і кримінальних справ, 7 Маю 2014, № 10-644/0/4-14, "Про належне забезпечення рівності трудових прав громадян при розгляді спорів, що виникають у сфері трудових відносин".

High Specialised Court of Ukraine for Civil and Criminal Cases

Letter No. 10-644/0/4-14 of 7 May 2014 on ensuring equality of labour rights in disputes arising from labour relations

Decision: The High Specialised Court of Ukraine for Civil and Criminal Cases determined that in disputes arising in labour relations, the courts should take into account the fact that the list of characteristics upon which privileges and restrictions are prohibited is not exhaustive. The list of characteristics in Article 24, paragraph 2, of the Constitution and Article 2¹ of the Labour Code and Article 1 of the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” was not exhaustive but also included age, skin colour, physical characteristics (weight, height, speech defects, defects of the face), marital status, sexual orientation and so on.

Reasoning: The Court's Head did not reason his decision in any detail. It simply listed a number of relevant documents and their requirements (specifically, the Constitution, the Charter of Fundamental Rights of the European Union, the Labour Code, the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”, the ECHR and Protocol 12 thereto) before concluding that discrimination on the basis of sexual orientation (and other characteristics) in the field of labour relations was prohibited. The Court noted the following provisions of the documents:

- Paragraphs 1 and 2 of Article 24 of the Constitution which provide that citizens have equal constitutional rights and freedoms and are equal before the law; and that there shall be no privileges or restrictions based on race, colour, political, religious and other beliefs, sex, ethnic or social origin, property status, place of residence, linguistic or other characteristics;
- Paragraph 1 of Article 21 of the Charter of Fundamental Rights of the European Union which prohibits discrimination of any kind, including on the grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion, political or other opinion, membership of a national minority, property, birth, reduced disability, age or sexual orientation;
- Article 2-1 of the Labour Code which provides that Ukraine guarantees equal employment rights for all citizens regardless of their origin, social or property status, race and ethnicity, gender, language, political views, religion, type and nature occupation, place of residence and other circumstances;

- Articles 1 and 6 of the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” which (then) prohibited decisions, actions or omissions which resulted in privileges or restrictions on the basis of race, colour, political, religious or other beliefs, sex, age, disability, ethnic or social origin, nationality, family and property status, place of residence, language or other features;
- Article 14 of the ECHR which prohibits discrimination in the enjoyment of the Convention rights on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status; and
- Protocol No. 12 to the ECHR which provides a freestanding right to non-discrimination using the same grounds as the Convention itself.

However, the letter carries no legislative weight, nor is it even an official interpretation of the law, since the right to interpret legislation is exclusively that of the Constitutional Court. Its conclusion that discrimination on the basis of age is prohibited by Article 24 of the Constitution is also in direct contradiction to the Constitutional Court’s explicit ruling in 2007 that age is not a characteristic protected under the term “other characteristics”. This contradiction raises questions as to the inconsistency of approach amongst Ukraine’s judiciary and the resulting lack of clarity as to the interpretation of relevant anti-discrimination provisions.

Courts of General Jurisdiction

The courts of general jurisdiction have dealt with relatively few cases raising discrimination issues, and even fewer which involve interpretation of relevant legislation. As noted above, only the Constitutional Court is empowered to provide authoritative interpretations of both the Constitution and legislation, resulting in courts of general jurisdiction avoiding giving interpretations of the legal provisions relevant to their decision. There are, however, some exceptions, largely in the field of reasonable accommodation for persons with disabilities.

Discrimination on the Basis of Age

In **Decision No. 2018/2-4146/11** on 18 January 2012 the Kyiv District Court in Kharkiv found that a company had violated national law by establishing a

requirement for a position with a requirement that applicants be under 30. The Court noted that Articles 24 and 43 of the Constitution guaranteed citizens an equal constitutional right to work regardless of gender, origin or other characteristics. In addition, Article 4 of the Law of Ukraine “On Employment” (which has since been repealed) and Article 5¹ of the Labour Code prohibited unjustified refusals to hire people. On that basis, the Court concluded that the age limitation applied by the company in the case was unjustified and unlawful.

In reaching its decision, the Court determined that discrimination on the basis of age was included within the term “other characteristics” used in the Constitution and legislation. This cannot be reconciled with the Constitutional Court’s explicit ruling in its Decision No.8-pp/2007 that “age” is *not* a characteristic falling within the term “other characteristics” in the Constitution.

Discrimination on the Basis of Disability

There have been several useful disability cases before the courts and it is arguably the area of discrimination law in which the courts have shown the most progressive approach. Not only do the cases indicate a firm approach to the implementation of national legislative protections for people with disabilities, but they also show that the courts are referring to and applying the CRPD.

In 2010, the Kyiv City District Administrative Court was asked to recognize a failure by the Cabinet of Ministers’ to ensure adequate subtitling and sign language translation of television programmes, films and other forms of communication as unlawful and violating their obligation under the Law of Ukraine “On Fundamentals of Social Protection of the Disabled”. Article 23, paragraph 3 of this Law requires that:

Television and radio companies (regardless of ownership and departmental subordination) shall provide subtitling and translation in sign language for official reports, film, videos, broadcasts and programs in the terms and conditions determined by the Cabinet of Ministers of Ukraine.

The Cabinet of Ministers argued that it had taken sufficient steps to comply with Article 3, paragraph 3. The Court noted that the Cabinet had attempted

to discharge its obligations through Order No. 1480-p “On urgent measures to implement the provisions of Article 23 of the Law of Ukraine “On Fundamentals of Social Protection of the Disabled”. However, the Court held that this Order did not discharge the Cabinet’s obligations under national law and the CRPD and ordered that the Cabinet meet the requirements under paragraph 3 of Article 23. The decision is particularly welcome as the Court examined in some detail the steps taken by the Cabinet and the extent to which they comply not only with Article 23 but also the CRPD. With respect to the CRPD, the Court considered the following articles of relevance to the case:

- Article 9(1), which requires States Parties, inter alia, to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others (...) to information and communications, including information and communications technologies and systems;
- Article 9(2), which requires States Parties, inter alia, to “take appropriate measures to (...) (f) promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information [and] (...) (h) promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost”; and
- Article 21, which guarantees the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and requires States Parties, inter alia, to “[provide] information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost”.

The Cabinet of Ministers was ultimately responsible for Article 23, paragraph 3 being implemented – it is the state which has the main duty to protect human rights according to Article 3 of the Constitution. The Order’s obligation upon the State Committee for Television and Broadcasting and the National Television and Radio Broadcasting Council of Ukraine to develop and submit to the government, within three months, procedures and standards for subtitling and sign language translation in the media was not sufficient. As the procedures and standards had not been developed and submitted, the Cabinet of Ministers was responsible for failure to implement Article 23, paragraph 3.

The Cabinet of Ministers appealed the decision to the Kyiv Administrative Court of Appeal which upheld the decision,⁹³³ and subsequently to the Supreme Administrative Court of Ukraine which, too, upheld the decision.⁹³⁴ As a result this strong and progressive decision, which references both national law and the CRPD, stands. A similarly strong and reasoned approach was taken by the Lviv Oblast Court of Appeal in 2013 in **Decision No. 22-ц/783/6003/13 of 2 October 2013**. The claimant, Andrii Stehnytskyi, a visually impaired lawyer, brought a claim against the Ukrainian Railways (Укрзалізниця) arguing that the website was not sufficiently adapted for persons with visual disabilities. While Mr Stehnytskyi had software on his computer which could convert text to speech, the website distinguished between available and occupied seats when booking tickets through colouring and not by text, thus rendering the software unable to make a distinction. Further, the website did not allow for the discount available for persons with disabilities to be obtained when booking tickets. Mr Stehnytskyi asked Ukrainian Railways to modify their website but they failed to do so. Ukrainian Railways argued that the right to discounted travel required presentation of an original copy of a document proving that the person had a disability and it was simply not possible to adapt the website so as to enable this to be done.

The Court found for the claimant and held that the inaccessibility of the website for persons with visual impairments violated Articles 1, 2, 3, 4, 9 and 21 of the CRPD and Articles 1, 2 and 26 of the Law of Ukraine “On Fundamentals of Social Protection of Disabled Persons in Ukraine”. In addition to finding violations, the Court made an order requiring Ukrainian Railways to upgrade their website such that it would allow persons with visual impairments to purchase tickets with discounts for persons with disabilities and would allow computer software to determine whether a particular seat was available or occupied.

Summary

A court can only make a decision on the case before it and thus the limited jurisprudence from the Constitutional Court on Article 24 is not necessarily a criticism of the Court itself. That being said, the decisions that this Court has

933 Київський апеляційний адміністративний суд, Справа № 2а-4637/10/2670, 21 October 2010.

934 Вищий адміністративний суд України, Ухвала № К-36824/10, 8 December 2010.

made involving Article 24 demonstrate a confused and inconsistent approach towards issues of equality and non-discrimination and, in some cases, a complete misapplication of the principles. Determining what is going wrong in the interpretation is difficult as the Court has been hesitant to provide anything approaching a detailed interpretation of Article 24, instead largely stating whether or not a particular legislative provision is consistent or inconsistent in no more than a sentence or two. The inconsistency of the Court's approach to Article 24 is most clearly demonstrated by its entirely contradictory decision in relation to whether or not age is a protected characteristic under Article 24, paragraph 2. Its misapplication of the principles is clearest in its judgments with respect to the setting up of a political party in Crimea and in relation to the approaches to different types of offences under criminal law.

Some of the stronger and more clearly reasoned decisions have come from the lower courts. However, these do not bind other courts and are, in some cases, impossible to reconcile with the binding precedent of the Constitutional Court. Furthermore, the lower courts have dealt with relatively few cases involving discrimination. Given the civil law system used within Ukraine, interpretation of legislative provisions is rarely considered necessary, although the latter of the two decisions cited in this section demonstrates willingness, on occasion, to go beyond the particular piece of legislation itself and make reference to Ukraine's international human rights obligations in reaching a decision, suggesting that a progressive approach can be seen, albeit seldom.