

# More Haste, Less Speed: Developments in the Ukrainian Framework on Equality

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Walking through Kyiv's Independence Square – the “EuroMaidan” as it had become known – in February 2014, it was strange to consider that this was a good time to discuss equality law reform in Ukraine. The square was filled with military-style tents and surrounded by man-made barricades; on a stage, religious leaders led services of mourning for those killed in protests which had ended only weeks earlier; the iconic Christmas tree – requisitioned by the protestors as a symbol of their struggle – still dominated the scene. President Yanukovych, whose refusal to sign a European Union-Ukraine Association Agreement the previous November had sparked months of mass protest in this square, had vacated office less than a fortnight before. The country was still in a visible state of shock, convulsing with the after-shocks of the protest movement, the brutal state response and the sudden, unexpected flight of Yanukovych. A new government was in place, but the spectre of conflict in Crimea and the Donbas region was already clear on the horizon.

Yet as the dust settled, civil society organisations were once again mobilising to lobby for improvements to Ukraine's anti-discrimination legislation. In their view, the appointment of a firmly pro-European government had opened a new window of opportunity for reform, only a few months after the door had been firmly shut when Yanukovych refused to sign the Association Agreement. In the aftermath of regime change, these organisations had identified a crucial moment to press their case.

This experience illustrates the close relationship between the process of equality law reform in Ukraine and the country's negotiations with the European Union about greater integration. In the last five years, Ukraine has passed two laws seeking to improve the system of protection from discrimination: the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”, adopted in 2012 and the Law of Ukraine “On Amendments

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to Certain Legislative Acts of Ukraine on Prevention and Combating Discrimination”, adopted in 2014 to amend the 2012 Law. The main catalyst for both pieces of legislation was the previous and current governments’ desire to comply with conditions of the Ukraine-European Union Association Agreement.

The authors have had the privilege to be close observers – and sometime participants – in the process of anti-discrimination law reform which has taken place in recent years. This article sets out our reflections on both the outcome of that process and on the process itself. The article begins with part one, an overview and assessment of the constitutional and legal framework on non-discrimination in Ukraine prior to the adoption of the 2012 Law. It then examines, in part two, the process whereby the 2012 Law was enacted, and assesses the Law against international best practice standards. Part three looks at the amendments introduced in 2014, once again examining the reform process before assessing the extent to which the amendments addressed gaps, inconsistencies and other problems with the 2012 Law. Finally, part four draws together our reflections on the anti-discrimination law reform process which Ukraine has undergone in recent years, posing questions about how this process has influenced the legal framework on non-discrimination.

## **1. Prior to 2012: A Patchwork of Protections**

Prior to the adoption of the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” in 2012, the framework of legal protection from discrimination in the country was limited, inconsistent and patchy. The principal protections were found in three instruments, all of which continue in force today: the Constitution of Ukraine and two ground-specific anti-discrimination laws, the Law of Ukraine “On the Fundamentals of Social Protection of Disabled Persons in Ukraine” (1991) and the Law of Ukraine “On Equal Rights and Opportunities for Women and Men” (2005). Together, these instruments provided a level and scope of protection for the rights to equality and non-discrimination which fell well below the standard required by the international treaties to which Ukraine is party.

### ***a) Constitution of Ukraine***

The Constitution of Ukraine was adopted in 1996, five years after the country declared independence amidst the breakup of the Union of Soviet Socialist Republics. It replaced an earlier Constitution which had been adopted in the Ukrainian Soviet Socialist Republic in 1978. The most important provision from the perspective of the rights to equality and non-discrimination is Article 24, which provides:

*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, 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.*

Article 24 thus contains three separate provisions: a right of citizens to equal constitutional rights and freedoms and to equality before the law (in paragraph 1); a right to non-discrimination (or, rather, a prohibition of “privileges and restrictions” on certain grounds) (in paragraph 2); and a requirement that the state take steps to ensure equality between women and men (in paragraph 3). Taken together, these three provisions provided a basic – though severely limited – constitutional protection for the rights to equality and non-discrimination.

On a positive note, the Constitution provides both a right to equality – which is not limited to a list of specified grounds or characteristics – and a right to non-discrimination. However, the right to equality provided in Article 24(1) is severely limited in its scope. It has two elements – a right to be equal in the enjoyment of other rights and freedoms set out in the Constitution and a right to equality before the law. The Declaration of Principles on Equality – an instrument of international best practice, which has been endorsed by the Parliamentary Assembly of the Council of Europe<sup>2</sup> – recognises a right to equality which is far broader in scope than Article 24(1). Principle 1 of the Declaration of Principles on Equality states:

*The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.*

Whilst Article 24(1) guarantees equality in respect of constitutional rights and freedoms and equality before the law, it omits well-established notions which are reflected in the Declaration of Principles on Equality, such as equality in dignity and the equal protection and benefit of the law.<sup>3</sup> Moreover, it contains no freestanding right to equality in parallel to the concept

2 Equal Rights Trust, *Declaration of Principles on Equality*, 2008. Parliamentary Assembly of the Council of Europe, *Resolution and Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe*, REC 1986 (2011), 25 November 2011, available at: [http://assembly.coe.int/ASP/Doc/ATListingDetails\\_E.asp?ATID=11380](http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380).

3 See, for example, the Universal Declaration of Human Rights, Article 1, which states that “[a]ll human beings are born free and equal in dignity and rights” and the International Covenant on Civil and Political Rights, Article 26, which states that “All persons are (...) entitled without any discrimination to the equal protection of the law”.

of participation on an equal basis with others in any area of economic, social, political, cultural or civil life. Dimitrina Petrova, in a legal commentary on the Declaration of Principles on Equality, has stated that the element of “equal participation” set out in Principle 1 “goes beyond the understanding of discrimination and equality as necessarily related to an existing legal right”.<sup>4</sup> In contrast, the right to equality in Article 24(1), providing for a right to “equal constitutional rights and freedoms”, takes a subsidiary approach, requiring a connection to another constitutional right or freedom before the right to equality “kicks in”. This said, it should be noted that the Ukrainian Constitutional Court has applied the right to equality in a number of cases since 1996, primarily as an additional means of protection where legislative distinctions between persons are drawn on grounds not listed in Article 24(2) – the right to non-discrimination – or when the distinction is more abstract.<sup>5</sup>

The right to non-discrimination provided in Article 24(2) is arguably more problematic than the right to equality provided in Article 24(1), falling well short of Ukraine’s obligations to prohibit discrimination under international law. The Article provides no definition of “discrimination”. Indeed, paragraph 2 does not even use the word “discrimination”, instead simply prohibiting “restrictions or privileges” which are based on one of the prohibited grounds. Moreover, the scope of prohibited conduct in Article 24(2) is much narrower than the range of acts which would be considered as discrimination at international law. Various UN Treaty Bodies – including most recently the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW) – have indicated that states must prohibit direct discrimination, indirect discrimination and harassment in order to meet their obligations to prohibit discrimination under international instruments.<sup>6</sup> The Declaration of Principles on Equality also calls for each of these forms of discrimination to be prohibited.<sup>7</sup>

Yet Article 24(2) can, at best, be regarded as providing protection for a narrow form of just one of these forms of prohibited conduct – direct discrimination. The definition of “direct discrimination” used by the Principle 5 of the Declaration – and echoed by both CESCR and CEDAW<sup>8</sup> – is far broader in scope than a simple prohibition on “restrictions and privileges”. It reads:

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4 Petrova, D., “The Declaration of Principles on Equality: A Contribution to International Human Rights” in *Declaration of Principles on Equality*, the Equal Rights Trust, 2008, pp. 30–31.

5 See, for example, Decision of the Constitutional Court of Ukraine of 2 November 2004 No. 15-пп/2004 and Decision of the Constitutional Court of Ukraine of 24 December 2004 No. 22-пп/2004.

6 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Paras 7 and 10; 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/GC/28, 16 December 2010, Para 16.

7 Equal Rights Trust, *Declaration of Principles on Equality*, 2008, Principle 5, pp. 6–7.

8 See above, note 6.

*Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment.*

Moreover, it is extremely difficult to envisage how the phrase “privileges or restrictions based on” a listed ground could be interpreted to prohibit indirect discrimination. The definition of indirect discrimination in the Declaration – which again is closely mirrored by both CESC and CEDAW<sup>9</sup> – reads as follows:

*Indirect discrimination occurs 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.<sup>10</sup>*

Whilst 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, the use of the word “based on” implies that the only “restrictions” which would be prohibited by Article 24(2) are those which explicitly reference a protected characteristic, rather than those which have the effect of disadvantaging those with a particular characteristic. Finally, it is difficult, if not impossible, to interpret “privileges and restrictions” as prohibiting harassment, defined in Principle 5 as a situation where “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 personal scope of Article 24(2) is also problematic. The provision explicitly lists race, skin colour, political, religious, and other beliefs, gender, ethnic and social origin, property status, place of residence and language as protected characteristics. This contains some, but not all, of the grounds upon which discrimination is prohibited under Principle 5 of the Declaration of Principles on Equality, omitting descent, pregnancy, maternity, civil, family or carer status, birth, national origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward

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9 *Ibid.*

10 See above, note 7.

illness. With the exception of carer status and genetic or other predisposition toward illness, each of these grounds is protected in international instruments to which Ukraine is party.<sup>11</sup>

This said, Article 24(2) provides an “open-ended” list of grounds, through the term “or other characteristics”, allowing for further characteristics to be recognised by the courts.<sup>12</sup> To date however, the Constitutional Court has not determined any further characteristics to be implied as “other characteristics”. Indeed, the court’s practice is inconsistent and worrying in itself, with the courts in some cases explicitly stating that “age” could not be a protected characteristic.<sup>13</sup>

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11 Descent (International Convention on the Elimination of All Forms of Racial Discrimination, Article 1); pregnancy (Convention on the Elimination of All Forms of Discrimination against Women, Article 11(2)); maternity (Convention on the Elimination of All Forms of Discrimination against Women, Article 11(2)); civil and family status (Convention on the Elimination of All Forms of Discrimination against Women, Articles 1 and 11(2)); *Danning v the Netherlands* (Communication No. 180/1984), UN Doc. CCPR/C/OP/2 at 205 (1990); and *Sprenger v the Netherlands* (Communication No. 395/1990), UN Doc. CCPR/C/44/D/395/1990 (1992); Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 31); birth (International Covenant on Civil and Political Rights, Articles 2(1) and 26; International Covenant on Economic, Social and Cultural Rights, Article 2(2); European Convention on Human Rights, Article 14); national origin (International Covenant on Civil and Political Rights, Articles 2(1) and 26; International Covenant on Economic, Social and Cultural Rights, Article 2(2); European Convention on Human Rights, Article 14); nationality (*Gueye v France* (Application No. 1961/1983), UN Doc. CCPR/C/35/D/196/1985 (1989); *Adam v Czech Republic* (Application No. 586/1994), UN Doc. CCPR/C/57/D/586/1994 (1996); and *Karakurt v Austria* (Application No. 965/2000), UN Doc. CCPR/C/74/D/965/2000 (2002), Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 30); economic status (Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 35); association with a national minority (European Convention on Human Rights, Article 14); sexual orientation (*Young v Australia*, (Communication No. 941/2000), UN Doc. CCPR/C/78/D/941/2000, 2003; Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 32); gender identity (Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 32); age (Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 29); disability (Convention on the Rights of Persons with Disabilities; Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 28); health status (Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 33).

12 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’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.”

13 See, for example, Decision of the Constitutional Court of Ukraine of 16 October 2007 No. 8-пн/2007.

Article 24(3) is the Constitution's only provision including measures which appears aimed at providing for "positive action", though it can only be said to succeed in the narrowest sense. The paragraph sets out a 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;
- 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.

While a number of these elements are unproblematic, the provision does raise two serious concerns. The first is that some aspects appear to reinforce negative stereotypes about women's capabilities and role in society. For example, whilst women require adjustments in their work conditions during pregnancy and the post-natal period – and indeed this is explicitly required by the Convention on the Elimination of All forms of Discrimination against Women<sup>14</sup> – women do not by definition have any particular occupational safety requirements which differ from those of men. Thus, the provision permitting such special measures appears to legitimise the adoption of measures which restrict women's ability to freely choose the means of their employment, a right which is guaranteed by both the International Covenant on Economic, Social and Cultural Rights and the Convention.<sup>15</sup> Indeed, there are provisions in the Code of Labour Laws which restrict both women who are pregnant and those with young children from undertaking certain forms of work, even where they are willing and able to do so.<sup>16</sup> Similarly, the provisions regarding the creation of "conditions that make it possible for women to combine work and motherhood" and the provision of "legal protection, material and moral support of motherhood and childhood" may reinforce stereotypical notions about the parental roles and responsibilities of men and women.

The second problem is that Article 24(3) is inadequate both as a positive action provision for women, and as a positive action provision more broadly. CEDAW has stated that states party to the Convention on the Elimination of All Forms of Discrimination against Women are required to "take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary special meas-

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14 Convention on the Elimination of All Forms of Discrimination Against Women, Articles 11(2) and 12(2).

15 International Covenant on Economic, Social and Cultural Rights and the Convention, Article 3; Convention on the Elimination of All Forms of Discrimination against Women, Article 11.

16 See, in particular, Articles 174 to 177.

ures”.<sup>17</sup> Article 24(3) is manifestly too narrow and specific to meet this obligation. Moreover, though paragraph 3 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 – a gap which means that the Constitution falls short of its obligations under both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), for example.<sup>18</sup>

**b) Ground-Specific Legislation: Disability in 1991 and Gender in 2005**

As a party to the ICCPR and the ICESCR, Ukraine is obligated to go beyond simply prohibiting discrimination in its Constitution, and to enact legislation specifically directed at prohibiting discrimination.<sup>19</sup> However, until 2012, Ukraine had made only limited progress towards addressing this obligation, enacting only two pieces of legislation focused on the needs of two groups exposed to discrimination – persons with disabilities and women – each of which was also limited in its material scope.

*i) Law of Ukraine “On the Fundamentals of Social Protection of Disabled Persons in Ukraine” (1991)*

The Law of Ukraine “On the Fundamentals of Social Protection of Disabled Persons in Ukraine”, passed by the Verkhovna Rada in 1991, can be considered Ukraine’s first attempt at legislation which seeks to address the needs and disadvantages faced by a group of people exposed to discrimination. However, while the Law has subsequently been amended to address some of its most serious deficiencies, when first enacted, it suffered from two serious deficiencies.

First, it contained only a single provision on discrimination: Article 2 stated simply that “disability discrimination is prohibited and punishable by law” with no further elaboration. Instead, the Law provided for certain types of social protection and concessions for persons with disabilities in various fields of life. Moreover, these benefits and concessions were framed as entitlements or social policy obligations, rather than as rights claimable by persons with disability.

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17 See above, Committee on the Elimination of Discrimination Against Women, note 6, Para 9.

18 Human Rights Committee, *General Comment 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.1 at 26, 1989, Para 5; See above, Committee on Economic, Social and Cultural Rights, note 6, Para 9.

19 Article 26 of the International Covenant on Civil and Political Rights requires states parties to prohibit discrimination in “the law”; in respect of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights has stated that “Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2” (Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 37).



Addressing, in part, this deficiency, a new provision was inserted into the Law in 2014 to provide that “discrimination on the basis of disability”, would have the meaning as in the Convention on the Rights of Persons with Disabilities (CRPD) and the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine”. Unfortunately, these definitions are not the same. The CRPD defines “discrimination on the basis of disability” in Article 2 as:

*[A]ny 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. It includes all forms of discrimination, including denial of reasonable accommodation.*

The Law of Ukraine “On Prevention and Combating Discrimination in Ukraine”, however, does not have a distinct definition of “discrimination on the basis of disability” but has a general definition of discrimination in Article 1, paragraph 2 as:

*A situation in which an individual and/or group of persons, because of their [characteristic] 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.*

Whilst there are some similarities between the two definitions, there are also a number of differences: the definition in the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine” provides for a general justification of different treatment whereas the definition in the CRPD does not; the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine” goes on to define five particular forms of discrimination, each with its own definition, unlike the CRPD; and the CRPD includes “denial of reasonable accommodation” as a form of discrimination whereas the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine” does not. The Law does not specify which definition is to be preferred, risking confusion in the Law’s interpretation and difficult in assessing compliance with the Declaration. (For an assessment of the compliance of the provisions of the Law of Ukraine “On Prevention and Combating Discrimination in Ukraine” with the Declaration, see below).

As such, it is difficult to assess the added benefit of the prohibition of discrimination on the basis of disability in the Law. As noted below, the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” prohibits discrimination on the basis of disability in a wide range of fields of activity. The only conceivable benefit is that it is possible to argue that the definition of discrimination in the Law of Ukraine “On the Fundamentals of Social Protection of Disabled Persons in Ukraine” should be the one contained within the CRPD which, in some ways, is stronger than that in the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”, particularly in that it contains no general justification of different treatment and include denial of reasonable accommodation as a form

of discrimination. However, as noted above, the Law does not make clear which of the two definitions should be used.

The second deficiency of the Law, as originally adopted, was that it reflected an outdated approach to disability. The definition of a person with a disability in Article 2(1) of the Law reflected both the “medical model” of disability focused on the physical disability as the cause for disadvantage and the Soviet approach which defined disability in respect of fitness to work. Article 2(1) stated:

*[A] person with a persistent disorder of bodily functions caused by disease, trauma or congenital defects, leading to disability and the need for social assistance and protection.*

In 2010, Ukraine ratified the CRPD and, two years later, amended the Law in order to improve its compliance with the requirements of the CRPD. The definition of a person with a disability was amended: whilst the new definition focused on barriers with the environment faced by persons with disabilities as the cause of disadvantage it retained the emphasis on the state’s duty to support and protect the individual, thus representing only a partial move towards the “social model”:

*[A] person with a persistent disorder of body functions that can, when interacting with 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 its social protection.*

ii) *Law of Ukraine “On Equal Rights and Opportunities for Women and Men” (2005)*

The Law of Ukraine “On Equal Rights and Opportunities for Women and Men” was adopted by the Verkhovna Rada in 2005 and came into force on 1 January 2006. The Law sets out its purpose boldly as:

*[A]chieving equality of women and men in all spheres of society through legal equal rights and opportunities for women and men, the elimination of gender discrimination and the use of temporary special measures aimed at addressing the imbalance between women and men to exercise equal rights, granted to them by the Constitution and laws of Ukraine.*

Article 6 is only the provision of the Law which provides a substantive prohibition on discrimination, stating simply that “discrimination based on sex is prohibited”. “Discrimination on grounds of sex” is defined in Article 3 as:

*[A]ction 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 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of in some respects and probably reflects the fact that the Law was introduced in part in response to recommendations from the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) in order to ensure compliance with the CEDAW.<sup>20</sup> However it has also been criticised by the CEDAW Committee which has stated that “it does not explicitly encompass indirect discrimination, in conformity with article 1”.<sup>21</sup> Indeed, the Law neither prohibits nor defines different forms of discrimination.

Article 6 provides for a number of exceptions to the general prohibition:

- Special protection of women during pregnancy, childbirth and breastfeeding;
- 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.

As with Article 24(3) of the Constitution, some of these exceptions reflect negative stereotypes about the role and position of women in society. The provision limiting the application of the right to non-discrimination to exclude compulsory military service for males, clearly permits direct discrimination on the basis of sex. It does so by making requirements of men that are not made of women. Similarly, differences in retirement age for men and women are also clearly discriminatory and reflective of stereotypes or prejudices about the roles of men and women.

Furthermore, while the fact that the Law permits positive action is to be welcomed, it is noteworthy that positive action is considered an exception to the principle of non-discrimination, rather than as an obligation, required to give effect to the right equality. As noted above, Principle 3 of the Declaration of Principles on Equality provides that “[t]o be effective, the right to equality *requires* positive action”, while the CEDAW Committee has noted that parties to the Convention on the Elimination of All forms of Discrimination against Women are required to take special measures where appropriate.<sup>22</sup>

### c) Summary

Thus, it is clear that the legal framework on discrimination and inequality before 2012 was inadequate to meet Ukraine’s international legal obligations to respect, protect and fulfil the rights to equality and non-discrimination. The Constitution of Ukraine provided strictly lim-

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20 See, for example, Committee on the Elimination of Discrimination against Women, *Concluding Observations: Ukraine*, UN Doc. A/57/38, 15 September 2002, Paras 281–282.

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

22 See above, Committee on the Elimination of Discrimination Against Women, note 6, Para 9.

ited rights to equality and non-discrimination, with minimal provision for position action. The right to equality was limited to a subsidiary right while the right to non-discrimination provided protection only from some – but not all – forms of direct discrimination, and is too restrictive to prohibit indirect discrimination or harassment. The list of grounds on which discrimination was prohibited was limited and while the Constitution provided an open-ended list, this had not been successfully used to expand the list of protected characteristics. Only two groups of persons vulnerable to discrimination benefited from any protection from discrimination beyond that provided in the Constitution: persons with disabilities and women. Yet as we have seen, both of the laws aimed at addressing the situation of these two groups suffered from severe deficiencies, providing only minimal protection from discrimination.

## **2. 2012: Towards Comprehensive Protection**

In 2012, the system of legal protection from discrimination in Ukraine improved radically, with the enactment of the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine” (the 2012 Law). While imperfect, with many inconsistencies, omissions and limitations, the 2012 Law nevertheless represented a step-change in the protection from discrimination in Ukraine, marking a decisive move towards comprehensive protection from discrimination.

In contrast to the conventional legislative process, the adoption of this Law came about neither from the government’s commitment to legislate on the issue nor as a consequence of sustained campaigning by those it would benefit. Rather, the Law was enacted solely for the purpose of complying with one of the criteria set down in the EU-Ukraine Visa Liberalisation Action Plan to allow for easier access for Ukrainian citizens the European Union. A draft was submitted to the Verkhovna Rada by the government in May 2012. The Law was adopted, unamended, in September 2012, and came into force shortly thereafter.

The process by which the Law was adopted was widely criticised, both before and after its enactment. The Coalition on Combating Discrimination – an umbrella organisation comprising many non-governmental organisations across Ukraine – expressed concern, in particular, over the speed at which the Law was adopted and the failure to consider expert opinion. As the Coalition set out in a statement issued shortly after the Law’s enactment:

*The Law was drafted by the Ministry of Justice without any consultations with civil society and NGOs. When the Law was submitted to the Parliament, NGO managed to provide comments and suggestions to the Parliament Committee on Human Rights, National Minorities and International Relations. The Committee established a working group to discuss NGOs comments. Ombudsman office also actively participated in the working process and presented its comments to the draft law. On the initiative of the Ombudsman the Law draft for send to the Council of Europe (ECRI) for comments. The Committee speakers clearly promised to continue work on the Law draft taking into account NGOs, Ombudsman recommendations. But despite these previous negotiations, despite the fact that ECRI made a commitment to pro-*

*vide their analysis of the Law draft by September 17, 2012 (the Committee was informed on this), the draft was urgently submitted for the second hearing and voted by the Parliament on September 6, 2012. NGOs comments, suggestions to continue work on the draft and proposal to include several missing aspects to make the Law effective were completely ignored by the Committee and the Parliament.*<sup>23</sup>

Largely as a result of this flawed process, the 2012 Law retained a number of serious gaps, deficiencies and weaknesses. These problems were first highlighted by the Council of Europe in 2012 in its review of the draft Law<sup>24</sup> and then, after the Law was enacted, raised by both the UN Human Rights Committee (the HRC) in 2013<sup>25</sup> and the UN Committee on Economic, Social and Cultural Rights (the CESCR) in 2014.<sup>26</sup>

The 2012 Law included both a general definition of “**discrimination**” in Article 1(2) and definitions of four prohibited forms of discrimination. In Article 1(2), discrimination was defined as:

*[D]ecisions, actions or inactions, which are directed to establish restrictions or create privileges to an individual and/or a group of persons on grounds of race, colour, political, religious or other beliefs, sex, age, disability, ethnic or social origin, marital and property status, place of residence, language or other characteristics (hereinafter – certain attributes) if they preclude the recognition and exercise of human and citizen’s rights and freedoms on equal grounds.*

There were two significant problems with this definition of discrimination, both of which were highlighted by the Council of Europe’s Experts in their analysis of the Law. First, international law and best practice dictates that discrimination should be defined as either “direct” or “indirect” and clear and unambiguous definitions for both have been developed, utilised and widely accepted internationally. The Council of Europe argued that a separate definition of discrimination risked creating confusion and inconsistencies in inter-

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23 Coalition on Combating Discrimination, “Anti-discrimination developments and shortcuts in Ukraine – statement on behalf of the Coalition for combating discrimination in Ukraine”, 3 October 2012, available at: <http://noborders.org.ua/en/about-us/news/anti-discrimination-developments-and-shortcuts-in-ukraine-statement-on-behalf-of-the-coalition-for-combating-discrimination-in-ukraine>.

24 Ahlund, C. and Sorgdrager, W., *Comments on the Draft Law on the Principles of Prevention and Combating Discrimination in Ukraine*, 2012, available at: [http://www1.ombudsman.gov.ua/en/index.php?option=com\\_content&view=article&id=1383:comments-on-the-draft-law-on-the-principles-of-prevention-and-combating-discrimination-in-ukraine&catid=217:2012&Itemid=226](http://www1.ombudsman.gov.ua/en/index.php?option=com_content&view=article&id=1383:comments-on-the-draft-law-on-the-principles-of-prevention-and-combating-discrimination-in-ukraine&catid=217:2012&Itemid=226).

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

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

pretation.<sup>27</sup> Secondly, the definition of discrimination provided in Article 1, paragraph 2, referred to “decisions, actions or inactions, which are directed to establish restrictions or create privileges”. Use of the word “directed” appeared to require intent for discrimination to be established<sup>28</sup> contrary to international best practice, as indicated in the Declaration of Principles on Equality, which provides that “[a]n act of discrimination may be committed intentionally or unintentionally”.<sup>29</sup>

As noted, this general definition of discrimination appeared alongside Article 6 which prohibited four specific forms of discrimination: direct discrimination, indirect discrimination, incitement to discrimination and harassment. The Law defined **direct discrimination** in Article 1(6) as:

*[D]ecisions, actions or inactions which result in instances whereby an individual and/or group of persons are treated less favourably based on certain attributes than other persons in a similar situation.*

Comparing this definition of direct discrimination in with the definition in Principle 5 of the Declaration of Principles on Equality,<sup>30</sup> two significant weaknesses can be identified. First, it used the present tense as opposed to the terminology used in Principle 5 – “is treated less favourably than another person or another group of persons is, has been, or would be treated. As such, the definition in the Law excluded from its scope both historic and pre-emptive claims. Secondly, the definition did not include the second situation in Principle 5’s definition, namely “when, for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment”. As such, it failed to provide protection “in situations where a person suffers harm because of their possession of a particular characteristic, but is unable to identify another person who benefits or does not suffer the harm because of the absence of such a characteristic”.<sup>31</sup>

Article 1(3) of the Law defined **indirect discrimination** as:

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27 See above, note 24, Para 11.

28 *Ibid.*, Para 6.

29 See above, note 7.

30 Principle 5 provides that “Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.”

31 The Equal Rights Trust, *Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”*: *Legal Analysis*, October 2013, Para 51, available at: <http://www.equalrightstrust.org/ertdocumentbank/ERT%20Legal%20Analysis%20of%20Anti-Discrimination%20Legislation%20in%20Ukraine%20%28English%29.pdf>.”

*[D]ecisions, actions or inactions, legal provisions or evaluation criteria, conditions or practices which are formally the same, but during their exercise or implementation restrictions or privileges in respect of an individual and/or a group of persons appear or may appear on grounds of certain attributes, unless such decisions, actions or inactions, legal provisions or evaluation criteria, conditions or practices are objectively justified by the aim of ensuring equal opportunities to an individual or groups of persons to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine.*

There is a broad international consensus on the core definition of indirect discrimination. Principle 5 of the Declaration of Principles on Equality sets out the following definition:

*Indirect discrimination occurs 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.<sup>32</sup>*

This definition has been adopted by, *inter alia*, the CESCR in its interpretation of Article 2(2) of the ICESCR.<sup>33</sup> The first half of the definition used in the 2012 Law was broadly in line with this definition. However, as the Equal Rights Trust highlighted when reviewing the Law in 2013, the second half of the definition appeared to have been badly drafted:

*[T]he terminology of the exception in Article 1(3) appears to confuse justifiable indirect discrimination with positive action. It creates an extremely high threshold of justification, such that a very large number of provisions, criteria or practices which would not be considered discrimination in any other jurisdiction would have to be defined as indirect discrimination in Ukraine. Therefore, ERT believes that the definition in Article 1(3) creates an unrealistic burden on all potential defendants, risks confusion and misinterpretation, and potentially injustice if the definition is not amended.<sup>34</sup>*

Reviewing the 2012 Law in June 2014, the CESCR criticised the definitions of both direct and indirect discrimination in the 2012, expressing concern that the Law did not “provide for a definition of direct and indirect discrimination consistent with article 2, paragraph 2, of the

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32 See above, note 7.

33 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc. E/C.12/GC/20, 2009, Para 10.

34 See above, note 31.

Covenant”.<sup>35</sup> Nonetheless, it should be noted that, unlike the treatment of direct and indirect discrimination, the definition of **harassment**, provided in Article 1(7) of the Law, was consistent with international and European Union standards.

Despite prohibiting discrimination on grounds of disability, one key omission in the 2012 Law was the absence of any reference to **reasonable accommodation**. As a party to the Convention on the Rights of Persons with Disability, Ukraine is required to prohibit discrimination on the basis of disability, which is defined in Article 2 as including “all forms of discrimination, including denial of reasonable accommodation”. Although, as noted above, the Law “On the Fundamentals of the Social Protection of the Disabled in Ukraine” makes reference to the definition of discrimination found in the Convention, it does not explicitly recognise failure to make reasonable accommodation as a form of discrimination. Thus, neither the 2012 Law nor the Law “On the Fundamentals of the Social Protection of the Disabled in Ukraine” clearly set out failure to make reasonable accommodation as a form of prohibited conduct – a major shortcoming of the legal framework.

Article 1(2) of the 2012 Law expressly listed a large number of **grounds** on which discrimination should be prohibited: 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 corresponded to the grounds listed in Article 24 of the Constitution, with four further grounds included: age; disability, nationality and family status. Missing, however, were various grounds recognised as requiring protection under Principle 5 of the Declaration of Principles on Equality, specifically descent, pregnancy, maternity, civil or carer status, birth, national origin, economic status, association with a national minority, sexual orientation, gender identity, health status, genetic or other predisposition toward illness. In August 2013, the HRC expressed its concern over the failure explicitly to include sexual orientation and gender identity as protected grounds.<sup>36</sup>

It should be noted however that Article 1(2) did include the phrase “or other features”, thus providing an open-ended list of grounds and enabling courts to provide protection on grounds not explicitly listed.<sup>37</sup> In its 2013 analysis of the Law, the Equal Rights Trust welcomed the use of an open-ended list, but expressed concern at the lack of qualifying criteria for determining the admission of new characteristics. The Trust argued that in the absence of such criteria “the Law lacks certainty as to which further groups having certain characteristics are likely to be recognised and protected by the courts among rights-holders, duty-bearers and

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35 See above, note 26, Para 7.

36 See above, note 25, Para 8.

37 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’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.”



those responsible for the Law's implementation and enforcement".<sup>38</sup> However, there have subsequently been some positive signs in this regard: in 2014, the High Specialised Court of Ukraine for Civil and Criminal Cases wrote a letter to all lower courts stating that Article 1, paragraph 2 (as well as other pieces of legislation which use the phrase "or other features") includes sexual orientation, however there has been no further judicial recognition of further grounds as being included within the phrase "or other features".

In other respects, the personal scope of protection provided in the 2012 Law fell short of international law and best practice. Thus, the 2012 Law prohibited neither **discrimination by association** nor **discrimination on the basis of perception**, whereas Principle 5 of the Declaration of Principles on Equality provides for both. In addition, the Law did not explicitly provide protection from discrimination based upon a combination of characteristics (**multiple discrimination**). Principle 5 of the Declaration of Principles on Equality requires that multiple discrimination be prohibited,<sup>39</sup> while both CESCR and the CEDAW Committee have interpreted the instruments which they are responsible for interpreting as requiring protection from discrimination arising because of the intersection of two or more characteristics.<sup>40</sup> Given the inconsistent approach of the Ukrainian courts when approaching the question of the personal scope of non-discrimination provisions, it is clear that an explicit prohibition of multiple discrimination would have been preferable.

Together, Article 6(2) and Article 4(1) together set out the 2012 Law's **scope**. The former provided that discrimination was prohibited where it was carried out by state authorities, authorities of the Autonomous Republic of Crimea, local governments and their officials, legal and natural entities. The latter set out the fields of activity in which discrimination should be prohibited, namely "social relations",<sup>41</sup> followed by an illustrative list of areas in which discrimination would be unlawful. This appears largely consistent both with Principle 8 of the Declaration of Principles on Equality, which requires discrimination to be prohibited in "all areas of life regulated by law",<sup>42</sup> and with Article 26 of the ICCPR, which the HRC has stated "prohibits discrimination in law or in fact in any field regulated and protected by public authorities".<sup>43</sup> One exception is that the Law did not prohibit discrimination in legislation

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38 See above, note 31, Para 35.

39 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."

40 See above, note 6, Committee on Economic, Social and Cultural Rights, Para 17; Committee on the Elimination of Discrimination Against Women, Para 18.

41 The Ukrainian term could also be interpreted as "public relations".

42 See, for example, 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."

43 Human Rights Committee, *General Comment 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.1 at 26, 1989, Para 12.

itself: under Ukraine’s constitutional and legal framework, discriminatory legislation is only prohibited if it violates the Constitution.

Article 6(3) of the Law addressed **positive action**, stating that such measures would 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
- Special requirements, provided for by the law, in respect of the exercise of certain rights of persons.

In its 2013 analysis of the Law, the Equal Rights Trust was highly critical of this provision, highlighting two significant weaknesses:

*First, positive action is permissible rather than obligatory. Second, positive action is only permissible where it is aimed at eliminating inequality “in the opportunities (...) to exercise the equal rights and freedoms granted by the Constitution and laws of Ukraine”. This severely limits the situations where positive action measures may be taken, restricting its application to only those situations where access to Constitutional and legal rights is at issue. This definition excludes positive action measures being taken in other areas of life where legal or de facto inequality exists.<sup>44</sup>*

In respect of the procedural elements of anti-discrimination law, the 2012 Law had both strengths and weaknesses. Article 14, making provision for **access to justice** for victims of discrimination and prohibiting **victimisation** largely reflected the standards set out in the Declaration of Principles on Equality. However, the provisions on remedies, sanctions and burden of proof all presented both legal and practical problems. Article 15(1) of the 2012 Law limited **remedies** in discrimination claims to compensation for material and moral damage – a much narrower range of remedies than international law and best practice would dictate. Indeed, in their periodic reviews of Ukraine, both the HRC and the CESCR recommended that the Law be amended to provide for “effective and appropriate” remedies.<sup>45</sup>

A further problem related to liability and **sanctions** in discrimination claims. Article 16 provided that “[p]ersons guilty of violation of legislation on preventing and combating discrimination shall bear responsibility in accordance with the laws of Ukraine.” The “laws of Ukraine” include the Criminal Code of Ukraine, which, at Article 161, establishes an offence of, *inter alia*:

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44 See above, note 31, Para 80.

45 See above, note 25, Para 8, and note 26, Para 7.

*[D]irect or indirect restriction of rights or direct or indirect privileges on grounds of race, colour, political, religious or other beliefs, sex, ethnic or social origin, property, residence, language or other features.*

The application of criminal liability for discrimination was criticised as inconsistent with the requirements of equality law. As the Equal Rights Trust pointed out in its critique of the Law, there are a number of reasons for limiting liability in discrimination cases to civil liability:

*First, discrimination does not require intent and may, indeed, be entirely unintentional, whereas a key principle of criminal law is the presence of mens rea, i.e. that the person had an intention to commit the offence (or was at least negligent or reckless). In cases where the discrimination was entirely unintentional, criminal liability would not be appropriate. Second, a key evidential requirement in discrimination cases is the reversal of the burden of proof (...) Third, the focus of criminal proceedings is on punishment of the offender, whereas a key purpose of anti-discrimination law is to provide the victim with an effective remedy.*

Finally, the 2012 Law contained no provisions on regarding the **reversal of the burden of proof** in civil proceedings on discrimination cases, whereas Principle 21 of the Declaration of Principles on Equality provides 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.*

The failure to include a provision for the shift of the burden of proof was another of the concerns raised by the CESCR in its review of Ukraine's implementation of the ICESCR.<sup>46</sup>

### 3. 2014: Another Step Forward?

The adoption of the 2012 Law was met with criticism from a number of actors, who together highlighted many of the deficiencies and inconsistencies in the Law which are discussed in part 2 above. Efforts to amend the Law began almost immediately after its entry into force, with both the government and civil society putting forwards proposals for amendments. Much of this effort focused on the Eastern Partnership Summit, to be held in November 2013, at which it was hoped that Ukraine and the European Union would sign an Association Agree-

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<sup>46</sup> See above, note 26, Para 7.

ment, one of the conditions of which would be ensuring legislative compliance with the European anti-discrimination directives.

As early as February 2013, a Draft Law (the 2013 Draft) was submitted to the Verkhovna Rada by the government of Mykola Azarov. In the period to November 2013, parliamentarians, civil society and international actors engaged in discussion about the need to reform and amend the 2012 Law and about the merits of the 2013 Draft. Ukrainian civil society organisations, under the banner of the Coalition on Combatting Discrimination, advocated throughout for the 2012 Law to be progressively amended, focusing in particular on the need to provide explicit protection from discrimination on the basis of sexual orientation and gender identity. In August, the UN Human Rights Committee informed Ukraine that it:

*[S]hould further improved its anti-discrimination legislation to ensure adequate protection against discrimination in line with the Covenant and other international human rights standards. The State Party should explicitly list sexual orientation and gender identity among the prohibited grounds for discrimination and provide victims of discrimination with effective and appropriate remedies.<sup>47</sup>*

The authors observed many of these developments first hand. Between March and November 2013, we, together with our colleagues at the Equal Rights Trust, participated in eight different workshops and meetings to support advocacy for improvements to the Law. A few weeks before the Eastern Partnership Summit, the Trust convened a high-level seminar on equality law reform in Kyiv and issued a detailed Legal Analysis of the 2012 Law and the 2013 Draft, setting out recommendations to bring Ukrainian anti-discrimination law into line with international standards.

Ultimately however, the 2013 Draft was never adopted. While equality advocates had expressed concern that the European Union might proceed to sign an Association Agreement with Ukraine before the country brought its anti-discrimination legislation into line with European Union standards, other factors were in play. At the summit in Vilnius, President Yanukovich refused to sign the Association Agreement, plunging the country into chaos as pro-European activists took to the streets of Kyiv in protest at his decision. In the months which followed, any form of legal reform was off the agenda as Yanukovich tried and ultimately failed to quell the protest movement.

Following the victory of the protestors and Yanukovich's flight from the country, the new, explicitly pro-European government of Arseniy Yatsenyuk moved quickly to improve links with the European Union. As part of this process, a new Draft Law to amend the 2012 Law was introduced into the Verkhovna Rada in March 2014 (the 2014 Law). This Law, adopted two months later, made a series of amendments to improve the 2012 Law, though in an echo

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<sup>47</sup> See above, note 25.

of the 2012 process, the speed with which it was enacted meant that a number of the inconsistencies highlighted by civil society and international actors were not remedied.

Through the 2014 Law, the general definition of “**discrimination**” in Article 1(2) of the 2012 Law was amended to read:

*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.*

With this amended provision, one of the two concerns over the definition from the 2012 Law (the inclusion of a standalone definition of “discrimination” in addition to definitions of specific forms of discrimination) is not addressed. However, the second concern (that of inclusion of the term “directed” in the definition) was addressed, with the new definition making no requirement that discrimination be intentional.

As before, the general definition in Article 1(2) is complemented by further definitions of specific forms of prohibited conduct (now five): direct discrimination, indirect discrimination, incitement to discrimination, assistance in discrimination and harassment. The 2014 Law amended the definition of “**direct discrimination**” in Article 1(6) to read:

*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.*

However, this new definition addressed neither of the concerns raised about the 2012 Law. Instead, the new definition arguably introduces a new weakness, namely a general justification of direct discrimination where the treatment “is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”. This puts the definition further into conflict with Principle 5 of the Declaration of Principles on Equality, which provides for such a general justification only in cases of indirect discrimination.<sup>48</sup>

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48 Ironically, given that the Law was revised with the purpose of bringing it closer to EU standards, the amendment also brings it out of step with the EU anti-discrimination directives which also only allow for a general justification in cases of indirect discrimination (with a partial exception for direct discrimination on the basis of age: of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 6.

The definition of “**indirect discrimination**” in Article 1(3) was also amended by the 2014 Law, now reading:

*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.*

This new definition addressed the concern identified with the original definition provided in the 2012 Law, amending the justification for indirect discrimination to bring it in line with that found in Principle 5, the European anti-discrimination Directives and in the interpretation of the non-discrimination provisions in the ICESCR and other international instruments.

The 2012 Law was also amended to prohibit a further form of discrimination, assistance in discrimination, defined in paragraph 5<sup>1</sup> 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, and nor is it prohibited by Principle 5, although similar provisions can be found in the national legislation of certain states,<sup>49</sup> and can thus be considered a positive step.

One of the amendments introduced by the 2014 Law was the inclusion of the concept of **reasonable accommodation**, though not to any significant extent. The scope of the 2012 Law – set out in Article 4 – was amended slightly to include amongst the list of fields falling within the scope, “labour relations, including the application of the principle of reasonable accommodation by the employer”. However, the amendments did not have the effect of introducing failure to make reasonable accommodation as a form of prohibited conduct, leaving it unclear as to how this provision will provide any enforceable requirement that employers provide such reasonable accommodation.

The 2014 amendments did not address any of the problems identified with the list of **grounds** which are explicitly stated – no further grounds were added, but the list remained open-ended, thus enabling legal challenge to introduce further grounds not listed to receive protection. In respect of **discrimination by association** and **discrimination by perception**, the new definition of discrimination introduced in Article 1(2) appears explicitly to exclude the former and to include the latter. In respect of discrimination by association, use of the word “their” before listing the characteristics, would appear to exclude discrimination by association (although the word “their” is not included in the definitions of direct and indirect discrimination, risking confusion and inconsistent interpretation). Inclusion of the words “whether real or imputed”,

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49 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]”.

however, after the list of characteristics thus provides explicit protection from discrimination by perception. It remains unclear from the revised definition of discrimination in Article 1, paragraph 2, whether discrimination based on the protected characteristics includes discrimination based upon a combination of characteristics (**multiple discrimination**).

The **scope** of the Law, as set out in Article 6, paragraph 2 and Article 4, paragraph 1, was amended, though only slightly. Article 6, paragraph 2 was amended to provide 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. Article 4, paragraph 1 was amended to provide that the 2012 Law applied to “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”. The specific scope of the 2012 Law set out in Article 4, paragraph 1, however, remained the same, save that after the term “labour relations”, the words, “including the application of the principle of reasonable accommodation by the employer” were added. As noted above, however, it is not clear whether this will actually make any difference in practice.

The provision on **positive action** in Article 6, paragraph 3, remains unamended, thus retaining the concern of providing that such measures are permissive rather than mandatory, and considered an exception to the prohibition of discrimination rather than a necessary element of the right to equality.

The provisions on **access to justice** were also amended slightly. Article 14, paragraph 1, was amended to provide that a person who believes that he or she 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 Verkhovna Rada of Ukraine on Human Rights and/or court order by law, thus broadening the range of bodies to whom a complaint of discrimination can be made.

Article 14, paragraph 2, which prohibits **victimisation**, was amended slightly, but continues, importantly, to provide that use of the Law cannot be the basis for prejudice and may not cause any adverse consequences for the person who took advantage of this right or any other persons.

The available **remedies** for victims of discrimination set out in Article 15, paragraph 1 have not been changed: compensation for material and moral damage. As such, the available remedies continue to fall far short of what is required by Principle 22 of the Declaration of Principles on Equality:

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

Article 16 was amended to provide that persons found guilty of violating the legislation on preventing and combating discrimination bear civil, administrative and criminal liability. This amendment may have been made as a result of a recommendation by the Human Rights Committee in 2013 that “[the Law] should also ensure that those responsible for discrimination bear administrative, civil and criminal responsibility in appropriate cases.”<sup>50</sup> However, the explicit inclusion of criminal liability for discrimination means that concerns over criminal liability which were raised in respect of the 2012 Law remain unaddressed.

Finally, the amending legislation also amended Article 60 of the Civil Procedure Code to provide for a reversal of the **burden of proof** in discrimination cases, bringing it into line with Principle 21 of the Declaration of Principles on Equality.

#### 4. Conclusion: More Questions than Answers

Less than a year after the Verkhovna Rada passed amendments to the Law of Ukraine “On Principles of Prevention and Combating Discrimination in Ukraine”, it arguably premature to draw definite conclusions about the legal reform process and the impact which this process had on the shape of the legal framework on equality and non-discrimination in Ukraine. However, our experience in the last two years has raised a number of serious questions which we believe merit further consideration.

One fact is clear. Equality law reform in Ukraine has been driven almost entirely by the European Union, or, more accurately, by Ukraine’s attempts to illustrate compliance with the European Union anti-discrimination Directives. It seems reasonable to conclude that without the influence of the European Union, Ukraine would almost certainly not have introduced anything approaching modern, comprehensive anti-discrimination legislation. On balance, this is an undeniable positive: the 2012 Law and the amendments made to it in 2014, despite the problems identified, have resulted in significantly enhanced and increased legal protection from discrimination. Without these reforms, victims of discrimination on grounds other than gender and disability would have severely limited means of securing redress. As advocates of improved protection from discrimination, we welcome any effort to expand the scope of such protections.

However, our experience has led us to be concerned about a number of the “side-effects” of a legal reform process which was largely driven by an external agent. The first and most obvious problem is that the process itself largely ignored the views of those working with, and on behalf of, groups exposed to discrimination in Ukraine. A consistent complaint from the Coalition on Combating Discrimination and others has been that civil society was marginalised and excluded from a process which was almost entirely top-down. Whether for this or other reasons, there was a failure to address some of the gaps and inconsistencies in the draft which had been highlighted by civil society actors, meaning they have remained in the enact-

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50 See above, note 25, Para 8.



ed law. In addition, the government's failure to engage civil society actors in the reform process means that many organisations which would otherwise have increased their knowledge were left uninformed both of the law's content and its utility in practice. In meetings with civil society over the last two years, there has been a palpable sense of a missed opportunity to engage activists in the process of improving legal protections and bringing the law into effect.

The failure to consult and engage with civil society actors was, in part, attributable to the speed at which the legislation was adopted and amended, and the lack of effort made to subject drafts to any real scrutiny. The 2012 Law was adopted by the Verkhovna Rada in great haste with minimal consultation, leaving inconsistencies within it which might have been addressed had time been taken to heed the views of experts, such as those from the Council of Europe. To take a single example, the inclusion in the Law of a general definition of discrimination which was inconsistent both with international standards and with the Law's own definitions of direct and indirect discrimination, could have been remedied had the Verkhovna Rada waited to receive the comments of Council of Europe experts before enacting the Law.

The speed with which the legislation was adopted and amended might also reflect an apparent lack of interest in its content by the deputies of the Verkhovna Rada. This is exemplified by the fact that many of the problems with the original Law which had been highlighted by organisations such as the Equal Rights Trust were not addressed when the Law was amended in 2014. Thus, for example, the 2014 Law includes a definition of direct discrimination which retains problems identified in the 2012 – and indeed introduces new weaknesses. This highlights the serious issue of a legislature passing legislation in haste to satisfy the requirements of an external agent rather than taking the time and effort properly to scrutinise the proposals before it.

The speed with which both the 2012 and 2014 Laws were adopted appears to have also resulted in problems in embedding the new anti-discrimination legislation within the wider Ukrainian legal system. For example, in a number of meetings with Ukrainian lawyers in 2013, concerns were raised about how provisions requiring the shift of the burden of proof in discrimination proceedings – which all acknowledged were required both by international law and to ensure the effective functioning of the law in practice – could be introduced in anti-discrimination legislation without significant amendments to laws on civil procedure. It is not clear whether these concerns have been fully and properly addressed through the 2014 Law. Further, the failure to consider how court procedures and available remedies and sanctions would need to be adapted has left lawyers and judges in the difficult position of trying to utilise legislation which does not fit neatly within the existing framework.

More broadly, we are concerned that the enactment of equality legislation only as a means to the end of greater European integration contributed to the lack of genuine support for the new law amongst the Ukrainian polity and the public at large. As noted above, the notion of non-discrimination was not alien to Ukraine before 2012. While imperfect, the

Constitution of Ukraine prohibits discrimination and guarantees equal rights, and before 2012 there was legislation in force aimed at addressing disadvantage affecting both women and persons with disabilities. The new anti-discrimination law could have been framed as building upon these existing protections and as being in line with Ukrainian values, thus enabling a greater sense of appreciation for the protections offered by the law. Instead, the law was framed by the government as a demand from Brussels with which they complied only grudgingly. At best, this approach has limited the Law's visibility, resulting in low levels of awareness of the rights and protections which the law has established, both amongst rights-holders and amongst duty-bearers. At worst, it may have fostered opposition to what has been presented as the imposition of new rights from "outside". Indeed, opponents of the European integration process have seized upon the issue of protection from discrimination against sexual orientation as a means of discrediting both the European Union and the government.

Finally, it should be noted that while the objective of ensuring compliance with the European Union Equality Directives has led to a significant expansion in the scope of protection from discrimination in Ukrainian law, even perfect compliance with the Directives would fall short of Ukraine's international obligations in respect of the rights to equality and non-discrimination. It is worth recalling that the Directives themselves are not without problems, not least in their limited personal scope and the absence of protection for a number of grounds in areas of life other than employment. Other countries which have introduced equality law in response to pressure from the European Union have adopted laws which replicate the weaknesses of the EU directives. In Moldova, for example, European negotiators agreed a grubby compromise, allowing the legislature to provide protection from discrimination on the grounds of sexual orientation only in the area of employment, thus complying *de minimis* with the Directives. Such a situation was only narrowly avoided in Ukraine.

As noted above, it is probably too early to draw firm conclusions as to how the reform process which was followed in Ukraine could have been improved and whether and to what extent this would have had an impact on the legislation itself. However, our experience indicates that there will be lessons to be learned as the European Union continues its efforts to integrate countries in its immediate neighbourhood, and so drives the process of equality law reform elsewhere in the region.