Promoting equality as a fundamental human right and a basic principle of social justice

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Age Discrimination

"How old are you?"
"Ten," answered Tangle.
"You don't look like it," said the lady.
"How old are you, please?" returned Tangle.
"Thousands of years old," answered the lady.
"You don't look like it," said Tangle.
"Don't I? I think I do. Don't you see how beautiful I am!"

George MacDonald

This conversation takes place in Fairyland, but it makes such a perfect sense to me that when people speak as if aging in the “real” world is some kind of decline, that decline feels like an aberration from reason. It is logical, is it not, that one who is a few thousand years old should be more beautiful, as well as more intelligent, wiser, more just, kinder to people, enjoying a wealth of skills, and certainly happier than us. That the vast majority of us living today will die before reaching a hundred does not change the possibility that as time passes, and perhaps till our last day, we could be moving ever closer to the fullness of life. We are not diminished.

Contrary to this vision of ever-growing personal development, the Greeks considered the age of 40 to be the ἀκμή, the pinnacle, the best age of man, his defining age. The doxographers often mentioned only the ἀκμή of the great men of earlier generations whose “opinions” they were transmitting, and not their birth or death dates which in any case were of no significance.

Is there a best age, an age suitable for a life in an ideal world? In Aldous Huxley’s Brave New World, in which happiness is a manipulated biological destiny, while the right to be unhappy is claimed as the only pathway to freedom, everyone lives until 60, but after reaching maturity, everyone looks like a young adult, frozen in a permanent physical and mental age of bloom, and never deteriorating, until they reach their programmed dead-line. The anti-utopia, consciously or not, reflects the 20th century dream of the best age – that of the cover girl in women’s magazines.

The question so serenely answered by the Greeks may have troubled theologians trying to figure out what apparent age the soul has, once it relocates to paradise – that of the moment of death of its earthly owner, or some
other, perfect age. And while scientists are laboriously deciphering the codes of aging, the question about the “best age”, hurled out of the window by science, has landed in law – namely, in the anti-discrimination law of our day. Crashing down, it has slightly disguised itself, and arrived in the form: “which is the worst age?” More precisely, which age group, if any, is the most disadvantaged, and as such, most in need of protection from discrimination in order to make it equal?

All materials of this edition of The Equal Rights Review devoted to age discrimination are based, one way or another, on some assumption in this regard, which is key for the conceptualisation of discrimination law. Csilla Kollonay Lehoczky is categorical that the elderly are more vulnerable to discrimination than other age groups; from this it follows that, as the purpose of equality law is primarily to protect and elevate the weakest, the personal scope of the right to be free from age-based discrimination should cover the old. She criticises the view that, as long as everyone has an age, and the term “age discrimination” suggests prejudicial stereotyping and treating someone unfavourably because of their age, regardless of what that age is, anti-discrimination law should prohibit discrimination against any age group. This conclusion, in her view, is based on the false premise that persons of any age are equally vulnerable to unfair differential treatment because of their age. She recognises that children, as well as young adults (but not middle-aged adults), are also vulnerable, but argues that childhood, young age and old age should be three separate and very different protected characteristics that cannot be lumped together for the purposes of anti-discrimination law. She emphasises that, unlike with other grounds such as sex or race, it is not the “young” and the “old” that are the two opposite poles; rather, the “mainstream” middle-age group is the opposite group and therefore the comparator to both the old and the young. She further differentiates between relevant rights within the age groups at both ends of the spectrum: while young adults (approximately 18-30 year olds) and older people who are still not that old (60-80?) need protection from age-based less favourable treatment, particularly in employment, children and those of the “fourth age” (above 80) need protection because of their physical and mental vulnerabilities.

Indeed, as Kollonay Lehoczky points out, most of the existing equal treatment provisions at the international, regional and national levels – with the exception of European Union equality law – take an asymmetric approach reflecting the assumed one-way accumulation of disadvantage characteristic of old age. The symmetrical approach of EU equality law is unique in that it provides, in principle, exactly the same type and level of protection to a younger person treated less favourably than an older one, as it does to an older person treated less favourably than a younger one.

Contrary to this view, and in unison with the EU Framework Directive on equal treatment in employment (27 November 2000), Robin Allen seems to suggest, in the Interview section of this issue, that age discrimination provisions should defend equally children, young adults and older persons, as well as everyone in-between who has been treated less favourably due to their age, without objective and reasonable justification. This position is rooted in the universality of human rights: the right to equality must be enjoyed by everyone regardless of their age, whereby age is a protected characteristic analogous, in respect to personal scope, to gender, race, religion, etc.
In my view, each of these positions has at its core a compelling principle and recognizing both principles is important; equality law should try to reconcile them and rest on both. On one hand, the law cannot dismiss the principle that everyone’s individual right to non-discrimination requires equal protection, as doing so would deny the universality of human rights. On the other hand, the progressive understanding of the main aims of human rights law in general, and of equality law in particular – to ensure substantive rather than only formal equality – implies taking the side of the weaker, the more vulnerable, when their right is conflicting with the right of the privileged. There should be no abuse of equality norms by the privileged, be they members of dominant ethnic majorities complaining of affirmative action, able-bodied persons challenging reasonable accommodation of the disabled, the wealthy claiming that economic policies should affect them no less favourably than the poor or, by the same token, middle-aged workers challenging a policy that aims to empower older workers. Legislatures and courts have the difficult task to find a balance: to ensure that the impact of the law is not greater inequality; but at the same time, that a member of even the most powerful group in society could also have a legitimate case when treated less favourably in a way that is not proportional to the purpose of promoting equality.

This balancing act should be performed contextually, i.e. with an eye on the changing balances of power over time and place. In the context of age discrimination law, the disadvantage suffered by the elderly should not be regarded as a timeless truth but as an empirical reality that might well change in the future. Even with respect to the past, I am not sure that ageism targeting the old is a universal cultural bias of all times. While acknowledging the current prevailing negative attitudes to the old, I see so many strengths attached to “older persons” (sic: this somewhat paradoxical category has now become the official term in international human rights) that I must wonder if I am always fair to the young. Simone de Beauvoir wrote, in La vieillesse: “There is only one solution if old age is not to be an absurd parody of our former life, and that is to go on pursuing ends that give our existence a meaning.” Despite my admiration for the author, the statement does not resonate with me, and I wish she knew better. In my youth, I felt that old age meant more power and that the old were lucky. I suspected they were secretly amused at everything people said about “the infirmities of old age”, but mischievously, had no wish to enlighten us. They even, perversely, accepted to be pitied.

Not much of this positive attitude has been subdued by my later experience. The adventure, the risk, the complexity, the delights, the freedom, and the fun of old age remain, for me, as attractive as ever, with the joys of youth paled by comparison. Clearly, these are my own stereotypes, driving my own fallibility. However, the point is that our society’s cultural bias against older persons, while not a writing in the sand, is not written in stone, either.

Despite my – and I think many others’ – admiration for the victory which old age itself represents, personal attitudes must give way to the evidence. Here comes the bad news. Patterns of discrimination against older persons that have been well documented across many societies include: the denial of the right to die with dignity; widespread elder abuse, both in institutions, in the community, and in the family; various types of discrimination in employment, including mandatory retirement irrespective of occupation or personal
capabilities; denial of educational opportunity; institutionalisation in nursing homes and the like; lack of affordable community-based quality health care as well as social care for activities of daily living such as eating, bathing, dressing, grooming, or housekeeping; inadequate or lacking end-of-life care; discrimination in access to financial services such as credit or insurance; and negative stereotypes of older people reinforced by the media. Multiple discrimination affecting older persons based on gender, family status, ethnicity, citizenship, etc., is also widespread, and a breeder of poverty. Because of the cumulative effect of gender inequalities throughout a woman’s life on the enjoyment of rights in old age, intersectional discrimination against older women is an acute problem, which is the worst in societies where systemic gender discrimination is the most entrenched.

The issue of mandatory retirement needs to be, and has been, highlighted as one of the key issues around age discrimination. If one hasn’t been paying attention to recent debates on this issue but reads Kollonay Lehoczky’s article in the Special section, one wonders how it has been possible that mandatory retirement has gone unchallenged for so many generations. Isn’t it quite obvious that a forced retirement at a certain legislated age, regardless of occupation or ability, is unfair? However, it appears that the unfairness has not been obvious to the Court of Justice of the European Union (CJEU), which has deliberately missed every opportunity to condemn mandatory retirement, and which, since 2000 has been able to rely for its position on the exemption provided in the Framework Equality Directive of 27 November 2000. While mandatory retirement has long been outlawed in the United States as non-justifiable age discrimination, in the European Union, the CJEU has placed this matter within the margin of appreciation of states, and given its blessing to their use of macroeconomic interests and social policy to justify violations of the individual right to equal treatment regardless of age.

Acceptable, even laudable, social policy objectives justifying mandatory retirement often included “intergenerational solidarity” understood (or rather misunderstood) as a need for older workers to free up work places for the young. While at first glance this public interest makes sense to anyone who is not a staunch individualist, it is found be based on the so called “lump of labour fallacy”, of which Robin Allen reminds us in the Interview section. This is the common but wrong belief, within an economy, there is a fixed number of jobs, so that, unless older persons cease to work, new entrants into the labour market cannot find jobs. To its great credit, the British government has specifically eschewed this belief in its recent new legislation which abolished mandatory retirement.

Just as one ponders on how the history of a more collectivist, social Europe has made possible the disregard for the fundamental human right to non-discrimination in favour of a broad and problematic public good, enter the European Committee of Social Rights. This body, empowered to supervise compliance with the revised European Social Charter in the 47 member states of the Council of Europe, has recently resolved that mandatory retirement violates the Charter and, as such, member states, including the 28 member states of the European Union in which the CJEU has jurisdiction, are required to abolish it. Attitudes change. And it is my view that Europe will in fact become more, not less “social”, when it finally catches up with the United States on this issue: older persons are also a part of social Europe, after all.

While there is no specific or thematic legally-binding United Nations instrument on the
rights of older persons, they are covered under all general and many thematic treaties; for example, under the Convention against Torture, institutions that care for older people fall within the definition of places of detention, and the right of detainees to be free from torture or other cruel, inhuman or degrading treatment apply to residents of such institutions. It should also be noted that due to the partial overlap between old age and disability, many provisions of the UN Convention on the Rights of Persons with Disabilities are of high relevance to older persons, e.g. the rights to independent living, legal capacity, participation in decision-making, as well as the concepts of reasonable accommodation and universal design.

Since there are patterns of discrimination (such as mandatory retirement) specific to older persons, there is a need for specific provisions of legal protection from discrimination in an instrument focusing on older persons' rights. Agreeing with Alexandre Kalache's opinion expressed in the Interview in this volume, I believe that the best approach to age discrimination is one that combines general principles on equality with specialised group protections. Universal human rights standards, which are currently lacking in detail when it comes to older persons' equality, need to be elaborated to reflect the unique human rights situation of older persons. Such old-age-relevant rights that are key to age equality (not in the sense of belonging exclusively to the elderly but in the sense that they matter most for achieving substantive equality of older persons) have already been articulated by UN treaty bodies as well as civil society groups, and include: the right to live in the community and not in an institution (often referred to as "ageing in place"); the right to services enabling older people to hire individualised care tailored to their changing needs; the right to live in their own homes as long as possible, through the restoration, development and improvement of homes and their adaptation to the ability of older persons to gain access to and use them; the right to non-contributory old-age benefits or other assistance for all persons, regardless of sex or family status, who find themselves without resources on attaining an age specified in national legislation; and of course, the right to choose when to retire; and when and how to die.

A process is currently underway at the United Nations that would hopefully lead up to the adoption of a specific instrument addressing age discrimination against older persons. The beginning of this process, which at this time is taking place in the framework of the UN Open-Ended Working Group on the Rights of Older Persons, may be said to be 1982, when the World Assembly on Ageing adopted the Vienna International Plan of Action on Ageing, containing 62 recommendations. Ten years later, in 1992, the UN General Assembly adopted the UN Principles for Older Persons grouped around five organising values: independence, participation, care, self-fulfilment, and dignity.

In 1995, in its General Comment No. 6, the Committee on Economic, Social and Cultural Rights addressed the Covenant rights of older persons. The year 1999 was proclaimed by the General Assembly as the International Year of Older Persons in recognition of humanity's demographic "coming of age". In 2002, the Second World Assembly on Ageing adopted the Madrid International Plan of Action on Ageing, a UN document intended to design international policy on ageing for the 21st century. UN specialized agencies, especially the International Labour Organization, have also given attention to the rights of older persons in their respective fields of competence.
The 2012 UN OHCHR report *Normative standards in international human rights law in relation to older persons* makes the case for a new human rights instrument on the rights of older persons. The report states that there is a demonstrable inadequacy of protection arising from normative gaps, as well as fragmentation and a lack of coherence and specificity of standards as they relate to the experience of older persons.

One such inadequacy is the absence of “age” from the lists of prohibited grounds of discrimination. Although the lists of prohibited grounds in UN and regional human rights instruments are illustrative, and therefore the open-ended category of “other status” has allowed considering age-related discrimination, the current situation is not satisfactory. First, the practice of considering age as “other status” is far from consistent among human rights bodies, and lacks the benefit of legal clarity. Second,

“[T]he consideration of age as ‘other status’ for the purpose of anti-discrimination still raises the question of the standard of scrutiny employed to decide the claim: even if age might be considered ’other status’ in order to trigger anti-discrimination analysis, if the standard of scrutiny utilised is too deferent, distinctions on the basis of age might be easily justified. Furthermore, as age is in general not explicitly identified as a forbidden ground of discrimination, the need for positive measures to eradicate age-based discrimination might also be challenged.”

The new agenda of addressing age discrimination and promoting age equality takes human rights law to a next, higher level. Equality law, which is integral to the fulfilment of human rights, is evolving in the right direction. Ultimately, a stronger framework, including through the adoption of an international legally binding treaty in the near future, will help create change for older persons, in everything except their calendar age. But, as Jules Renard said long ago, what matters is not how old you are, it’s how you are old.

Dimitrina Petrova

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"The adoption of the ASEAN Human Rights Declaration, the first broad based human rights document in the region, in spite of criticisms, raises the expectations of ASEAN people that their rights will be better promoted and protected."

Sriprapha Petcharamesree
The Standing of National Equality Bodies before the European Union Court of Justice: the Implications of the Belov Judgment

Tamás Kádár

“Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”

(Article 267 Treaty on the Functioning of the European Union)

This article aims to analyse and discuss the implications of the preliminary ruling of the Court of Justice of the European Union (CJEU), delivered on 31 January 2013 in response to a reference for a preliminary ruling by the Bulgarian national equality body, Komisia za Zashtita ot Diskriminatsia (Commission for Protection against Discrimination, KZD). It argues that, by declaring the reference for a preliminary ruling by the KZD inadmissible, the CJEU has missed an important opportunity to interpret the EU’s Race Equality Directive and to further establish itself as a leading human rights court.

The article starts by summarising the preliminary ruling procedure, followed by an analysis of the judgment, in conjunction with the Opinion of Advocate General Kokott delivered in this case on 20 September 2012. Finally, it provides a view on the implications of the judgment and the steps which different actors and stakeholders could take with a view to reducing the potential negative effects of the judgment.

The Reference for a Preliminary Ruling

The KZD was set up pursuant to the EU’s Race Equality Directive. It has a predominantly quasi-judicial character, with the power to issue legally binding decisions and to impose compulsory administrative measures. The powers and mandate of the KZD are set out in Article 47 of the Bulgarian Law on Protection against Discrimination (Zakon za Zatschitita ot Diskrimininsatsia). The KZD is acknowledged as a “B status” National Human Rights Institution in the UN system by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). According to the Statute of the ICC, the Sub-Committee on Accreditation (SCA) has the mandate to consider and review applications for accreditation and to make recommendations to the ICC Bureau members with regard to the compliance of applicant institutions with the Paris Principles. The SCA assesses compliance with the Paris Principles in law and in practice. In accordance with the Paris Principles and the ICC SCA Rules of Procedure, the classifications for accreditation used by the SCA are: “A status” (voting member, in compliance with the Paris Principles); “B status” (observer member, not fully in compliance with the Paris Principles or insufficient information provided to make a determination); and “C
status” (non-member, non-compliance with the Paris Principles).

The SCA considered the KZD’s application for accreditation in October 2011 and recommended that the KZD be accredited with “B status”. The SCA based its recommendation on the following facts:

- the KZD has a mandate to prevent and protect against discrimination, and to promote equality of opportunity but it does not have a mandate to protect and promote all human rights;

- the founding law of the KZD does not provide for the protection from legal liability for actions undertaken by Commissioners in their official capacity;

- the existing legislation does not provide a sufficiently clear, transparent and participatory selection process for the Commissioners of the KZD.10

The case giving rise to the reference for a preliminary ruling was initiated by Mr Belov, a person who describes himself as Roma. He lives in the Ogosta district of the Bulgarian city of Montana. The ChEZ Elektro Balgaria AD (CEB), a company supplying energy, placed meters to measure electricity consumption at a height of 7m above the ground on posts situated on the outside of houses connected to the electricity network in certain districts of Montana which were commonly known to be inhabited primarily by members of the Roma community (in particular in the Ogosta and Kosharnik districts). Outside these districts, the electricity meters were placed at a maximum height of 1.7m, usually in the consumers’ homes, on the outside walls of the building or on surrounding fences.11 Mr. Belov claims that this differential treatment constitutes discrimination on the ground of racial or ethnic origin and turned to the KZD seeking remedy. ChEZ Razpredelenie Balgaria AD (CRB), a company which owns the electricity distribution networks and the State Energy and Water Regulation Commission (DKEVR) were admitted as joined parties in the proceedings by the KZD.12

The KZD decided to stay the proceedings and make a reference to the CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU). This Article enables a “court or tribunal” to request the Court to give a ruling on a question raised before it relating to EU law if the court or tribunal considers that a decision on the question is necessary to enable it to give a judgment.13 The reference in the present case sought an interpretation by the CJEU on material and procedural questions relating to the Race Equality Directive, including an interpretation of its provisions relating to indirect discrimination and the shift of the burden of proof.

The reference is highly relevant in its attempt to further clarify EU equal treatment legislation. It sought to determine the following questions:

1. Whether the case falls within the scope of the Race Equality Directive? (question 1)

2. Whether, as in the Bulgarian Law on Protection against Discrimination, the meaning of “treated less favourably” and “put persons (...) at a particular disadvantage” in Article 2(2)(a) and 2(2)(b) of the Race Equality Directive entails that the treatment has to also infringe, directly or indirectly, rights or interests explicitly defined in law? If the answer to this question is negative, whether the national court is obliged to disregard the national legislation? (questions 2-4)
3. Whether, according to Article 8(1) of the Race Equality Directive, the victim of discrimination has to establish facts that impose an unambiguous, incontestable and certain conclusion or whether it is sufficient if the facts justify an assumption or presumption of discrimination? (question 5)

4. Whether facts such as in the main proceedings can lead to a shift of the burden of proof? (question 5)

5. What form of discrimination could be presumed from facts such as in the main proceedings: direct or indirect discrimination and/or harassment? (question 6)

6. What factors could suffice to justify the measures applied by the defendant companies in the main proceedings? (question 6)

In retrospect, however, it is arguable that the key question raised by this case was one of admissibility, as in the past, according to data available to the author, none of the national equality bodies set up pursuant to the Race Equality Directive have attempted to refer a case to the CJEU for a preliminary ruling. It is important to clarify for the purposes of the forthcoming analysis that such a dilemma would not arise in the case of predominantly promotion type equality bodies, as their mandate and functions, in particular their lack of powers to formally decide on individual instances of discrimination, clarify beyond any doubt that they are not in a position to refer a case to the CJEU. Consequently, the following analysis is focused on, and relevant for, predominantly tribunal type (quasi-judicial) equality bodies only.

In light of their fundamentally different conclusions, it is interesting to compare the different arguments and conclusions of the Opinion of Advocate General Kokott and the judgment of the CJEU on the question of admissibility.

The Status of a Court or Tribunal

The respondents in the domestic case (CEB and CRB) both claimed in their written submissions to the CJEU that the KZD does not have the status of a court or tribunal and therefore its reference to the CJEU for a preliminary ruling was inadmissible. The Bulgarian government and the European Commission both considered in their written submissions that the KZD qualifies as a court or tribunal for the purposes of Article 267 TFEU and therefore its reference to the CJEU was admissible. It is common ground in the Opinion of Advocate General Kokott and in the judgment, as well as a well-known principle developed by the CJEU in its case-law, that assessing the right of a body to refer a question for preliminary ruling is a question governed by EU law alone. A number of criteria are examined by the CJEU in this regard, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedures are in ter partes, whether it applies rules of law and whether it is independent. In addition, a national court may refer a question to the Court only if there is a case pending before it and it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

The Opinion of Advocate General Kokott notes that the KZD’s mandate as an equality body under the Race Equality Directive does not justify an automatic acceptance of its status as a court or tribunal, as Article 7(1) of the Directive requires member states to ensure the defence of rights by way of “judicial and/or administrative procedures.”
The Advocate General also notes that deciding on a number of the criteria mentioned above does not pose any problems in the present case as it is not disputed that the KZD is established by law, is permanent, applies the rule of law or has an *inter partes* procedure.\(^{19}\)

Thus, the Advocate General notes that the main dispute is centred on the issues of the independence of the KZD, the compulsory character of its jurisdiction and the judicial character of its decisions.\(^{20}\)

**The Question of Judicial Character**

The Court notes in its judgment that the KZD, as an equality body responsible for promoting equal treatment, has a number of powers and functions that are clearly not of a judicial character. However, this does not in itself decide its status because, according to the judgment, it is the particular functions which the KZD is required to exercise when a case is referred to it, which determine whether it is classified as a “court or tribunal” within the meaning of Article 267 TFEU.\(^{21}\)

However, the Court notes that a number of factors, including those relied on by the CEB and the CRB, are capable of giving rise to doubts as to the judicial character of the KZD’s procedure. These factors are detailed below, together with the Advocate General’s assessment relating to the same factors.

First, the Court notes that according to Article 50 of the Bulgarian Law on Protection against Discrimination, proceedings before the KZD can be brought: (1) on the application of the person concerned; (2) on the initiative of the KZD; or (3) by complaints from natural and legal persons or state and local authority bodies. In the Court’s view, the main proceedings launched by Mr Belov were based both on paragraph 1 (as a person directly concerned) and paragraph 3 (as he claims to act on behalf of other inhabitants concerned by the measure) of Article 50.\(^{22}\) However, the Court held that the KZD’s procedure is essentially similar regardless of whether it proceeds on a complaint, an application or its own initiative and the KZD has, *inter alia*, extensive powers of investigation in order to gather the evidence necessary to elucidate the facts concerned. Furthermore, the results to which those proceedings are intended to lead, whether initiated by an application, complaint or by the KZD’s own motion, are themselves similar, and are namely: an injunction to cease the discrimination found and an order for the persons responsible to pay fines.\(^{23}\)

The Advocate General adopts a different interpretation and claims that it is immaterial that the decision-making body of the KZD can theoretically proceed on its own initiative, as in the present case the KZD did not take action based on its own initiative, but proceeded based on the complaint of a presumed victim of discrimination. For the analysis of the question regarding whether the KZD can be classified in the present case as a “court or tribunal” within the meaning of Article 267 TFEU, it is not relevant that the KZD has other powers which it has not made use of.\(^{24}\)

Second, the Court notes that the KZD may, as it has done in the present case, join additional parties to the proceedings of its own motion, in particular where the KZD considers that those parties may have to answer for the discrimination alleged by the applicant/complainant and/or be liable to pay a fine on that basis.\(^{25}\)

The Advocate General in this respect holds that the fact that the KZD may join other parties to the complaint procedure before the
members of the Commission does not militate against accepting its status as a court or tribunal, since this procedural possibility is open to conventional administrative courts as well, such as the German Code of Administrative Court Procedure.26

Third, the Court observes that the KZD has the status of defendant in front of the administrative court if its decision adopted after proceedings is appealed, as in the present case. Furthermore, if the decision is annulled by the administrative court, the KZD can appeal this decision to annul.27

The Advocate General places the emphasis on determining the specific capacity in which the KZD is acting, in the particular legal context in which it is requesting a preliminary ruling. With reference to previous rulings, the Opinion states that a single national body may be regarded partly as a court or tribunal and partly as an administrative authority, depending on whether it is performing judicial functions or functions of an administrative nature in a specific case. The Advocate General recalls that in the present case the independent decision-making body of the KZD has made a reference to the Court in a complaint procedure, in which it delivers a decision following an impartial examination of the complaint. The administrative functions performed in other situations, such as providing advice to victims or representing the KZD in the higher courts are, the Advocate General argues, irrelevant in the present case and in deciding on admissibility.28

Fourth, the Court notes that “it seems to follow from the Administrative Procedural Code”, that if an action is brought against a decision, the KZD can revoke its decision given in proceedings such as those at issue in the main proceedings, provided that the party to whom the decision is addressed is favourable.29

The Advocate General also refers to the fact that the KZD can set aside or alter its own decisions. However, given the fact that this possibility is only open with the agreement of both parties, the Advocate General suggests that it does not militate against its status as a court or tribunal under Article 267. The Opinion compares this procedural feature of the KZD’s decisions with the fact that administrative authorities can generally rescind their decisions without the consent or agreement of the parties. Therefore, the Advocate General suggests, the KZD’s procedure can be regarded as a “hybrid” of a conventional administrative authority and a conventional court, as its decisions can only be altered with the consent of both parties. The Opinion suggests that this can be seen as an expression of the dispositive principle in judicial proceedings, according to which parties in such procedures have significant control over the proceedings and can, for example, terminate legal proceedings with a settlement beforehand, without a judgment being delivered.30

The Court’s judgment summarises the above four factors (the possibility of the KZD to proceed on its own motion and its extensive investigative powers; the KZD’s power to join persons to the proceedings on its own initiative; the fact that the KZD is a defendant in court proceedings if its decision is appealed; and the possibility for the KZD to revoke its decisions under the circumstances detailed above) as substantiating the fact that the KZD’s decisions in proceedings on the basis of a complaint or application under Article 50 of the Law on Protection against Discrimination are similar in substance to an administrative decision and do not have a judicial nature within the meaning of the case-law of the Court on the interpretation of the phrase “court or tribunal” in Article 267 TFEU.31
Compulsory Jurisdiction

The Court notes that the Bulgarian Law on Protection against Discrimination put in place two alternative independent procedures enabling an alleged victim of discrimination to seek redress, since besides the administrative procedure before the KZD, they can also bring an action for ceasing discrimination and the payment of damages in front of the District Court.32

Further, the Court argues that the KZD’s decisions can be appealed to the administrative courts and those judgments further appealed to the Supreme Administrative Court. Therefore, according to the Court, these judicial appeals ensure the effectiveness of the preliminary ruling mechanism provided for in Article 267 TFEU and the uniform interpretation of European Union law.33

Although it is not entirely clear what the Court intended by making these additional remarks, it is interesting to contrast its comments with the Advocate General’s arguments relating to the question of compulsory jurisdiction. Referring to the Dorsch Consult case,34 the Opinion recalls that the Court drew a distinction between “compulsory” in the sense of the only way of obtaining legal redress and “compulsory” in the sense of the binding determination of a case. Since the Dorsch Consult case did not go more into detail regarding the relevance and application of the two different interpretations, the Advocate General suggested that the Court should adopt the latter definition of compulsory jurisdiction, meaning only the binding character of the decisions. Following the other interpretation strictly, they argue, would result in neither the KZD nor the district courts having compulsory jurisdiction and therefore the possibility to refer questions for a preliminary ruling to the CJEU.36

A Simplified Analysis

Since, in the Court’s view, the above-mentioned four factors relating to the judicial character of the KZD’s decisions in cases similar to the main proceedings sufficed to establish that the KZD is not a “court or tribunal” within the meaning of Article 267 TFEU, the Court did not see the need to examine whether the other criteria for assessing whether a referring body is a “court or tribunal” were satisfied by the KZD in deciding that it did not have jurisdiction to rule on the referred questions.37

In other words, the Court decided to focus exclusively on the judicial character of the KZD’s procedure and decisions and saw no need to analyse the other factors when determining the status of the organisation as a “court or tribunal”. As pointed out by the Advocate General, the Court in the last decade has had to decide on the admissibility of references for a preliminary ruling from a large number of newly set up independent authorities.38 The depth of the analysis in those cases varies but it is notable that in some cases which were later found inadmissible, the Court decided to focus its analysis on only one or a few factors and did not provide its view on the remaining issues.39

In the RTL Belgium case, the Court restricted its analysis to the question of independence, later finding the reference inadmissible due to the fact that the Belgian Licensing and Control Authority of the Broadcasting Authority was not acting as a third party in relation to the interests at stake and, accordingly, did not possess the necessary impartiality with respect to alleged offenders.40
In the *Syfait* case, the Court analysed the questions of independence and of judicial character. It found the reference inadmissible *inter alia* because there was an operational link between the Greek Epitropi Antagonismou, a decision-making body, and its secretariat, a fact-finding body on the basis of whose proposal it adopts decisions. Furthermore, it also pointed out that the competition authorities of the member states are automatically relieved of their competence where the European Commission initiates its own proceedings and in such cases the proceedings initiated before that authority will not lead to a decision of a judicial nature. It is worth pointing out that there is no reference in the judgment to the European Commission relieving the referring authority of its competence in the case.

By comparison, in the *Abrahamsson and Anderson* case, the Court found the reference admissible based upon its analysis of the body as being established by law, permanent, independent, having an *inter partes* procedure and applying rules of law. It found that the Swedish Överklagandenämnden för Högskolan (Universities' Appeals Board), “although an administrative authority, is vested with judicial functions.”

In the *Österreichischer Rundfunk* case, the Court examined whether the Austrian Bundeskommunikationssenat (Federal Communications Board) was established by law, was independent, had compulsory jurisdiction and an *inter partes* procedure and whether it applied rules of law. It found the reference admissible, however it did not examine whether the Board’s decisions were of a judicial nature.

In the *Westbahn Management* case, the Court considered that the Austrian Schienen-Control Kommission (Rail Supervisory Commission) was a “court or tribunal” based on the fact that it was established by law, permanent, independent, had compulsory jurisdiction and applied rules of law in *inter partes* procedures. It did not, however, examine specifically whether the Commission’s decisions were of a judicial nature.

In the *Dorsch Consult* case, the Court found the reference from the German Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board) admissible on the basis of it being established by law, permanent and independent and applying rules of law. It also noted, showing considerable flexibility, that the requirement that the procedures before the hearing body concerned must be *inter partes*, is not an absolute criterion. Furthermore, it is noteworthy that the Court found that “in this particular instance, the Federal Supervisory Board exercised a judicial function”, focusing strictly on the procedure in question.

Arguably then, if compared to some of the case law referred to above, in the *Belov* case, the Court may have made a “practical” decision in order to shorten the analysis of the case. However, this approach risks omitting the analysis of a number of important factors which, given their interconnected nature, could potentially result in a fundamentally different finding concerning the admissibility of the reference. By way of example, it could arguably prove very difficult or impossible in certain cases to determine the judicial character of the procedure before a body without conducting a careful analysis of its independence (including an analysis of the links between the decision-making body and the administrative body) and compulsory jurisdiction.

At first sight, the clear-cut and fundamental difference in the reasoning and the resulting conclusions between the Opinion of the
Advocate General and the judgment of the Court could seem puzzling. It becomes, however, easier to understand once we discover the essential difference in the process and the premise of the analyses. The Advocate General conducted her analysis carefully, segmenting the procedural and substantive rules relating to the decision-making body of the KZD and those relating to the administrative body within the organisation. She acknowledged that from a functional point of view, there is a clear separation between the KZD’s decision-making body and the administrative body subordinate to it.\(^5\) On this premise, she confined her analysis to the procedural rules relevant to the case in question, those of the decision-making body, and went even further by disregarding the implications of Article 50(2) of the Bulgarian Law on Protection against Discrimination (starting a procedure on own initiative) as it was irrelevant in the case in question.

By contrast, the Court opted for a far less segmented analysis, taking into account provisions relating to the administrative body of the KZD and procedural rules such as Article 50(2) of the Bulgarian Law on Protection against Discrimination which had no concrete relevance in the present case. This stance taken by the Court should be contrasted with other judgments such as that in \textit{Dorsch Consult}, which focused more clearly on concrete cases and concrete procedures, and disregarded other elements.

**Other Factors**

Given her Opinion’s fundamentally different conclusion, it seems all the more important to also look at the Advocate General’s findings regarding the other factors taken into account when proposing to deem the reference from the KZD admissible.

Although the Court focused mainly on the question of judicial character, it did not examine the question of the rules concerning the relationship between the KZD’s procedure and the civil courts’ procedure. The Advocate General suggests that the fact that the KZD may not decide on a complaint if the same case is already pending before a Bulgarian civil court is only an expression of the principle of \textit{lis pendens} – excluding procedures if the same claim is already before another court. The Advocate General suggests that the fact that the \textit{lis pendens} is applicable to the KZD’s procedure is in fact supporting the view that it is a “court or tribunal”\(^5\).

In her Opinion, the Advocate General also analyses the question of independence, arriving at the conclusion that the KZD is sufficiently independent to be regarded as a “court or tribunal” within the meaning of Article 267 TFEU\(^5\). The Advocate General recalls the Court’s settled case-law concerning the existence of an external and an internal aspect of independence. The Opinion demonstrates that there is no doubt as to the KZD’s external independence and protection against external influence and pressure, since members of the KZD’s decision-making body enjoy similar guarantees to judges in ordinary Bulgarian courts and tribunals.\(^5\)

The Advocate General finds that the internal aspect of independence, linked to the question of impartiality, is also guaranteed given the clear separation between the KZD’s decision-making body and the administrative body subordinate to it. Furthermore, advice and support to victims of discrimination even by the administrative body is only provided outside the context of pending procedures, consequently neither part of the KZD is on the side of one of the parties in a pending complaint procedure.\(^5\)

Based on the analysis of its independence, the judicial character of its decisions and its
compulsory jurisdiction, the Advocate General came to a conclusion which the Court did not share, opining that the KZD should be regarded as a “court or tribunal” within the meaning of Article 267 TFEU.  

The Substantive Assessment by the Advocate General

Suggesting that the reference by the KZD should be deemed admissible, the Advocate General’s Opinion goes on to analyse and answer the specific substantive questions raised by the case. This analysis is highly relevant in its attempt to further define and interpret EU equal treatment legislation.

First, the Opinion proposes that, based on the objective of the Race Equality Directive and the existing EU competence in this field, the scope of the Race Equality Directive covers not only the electricity supply per se, but also the conditions under which that electricity supply is provided, including the provision of electricity meters.

Second, the Opinion examines the reference of CEB (the electricity supplier) to the Bulgarian legislation stipulating that less favourable treatment exists only where rights or interests defined in law are infringed directly or indirectly. CEB argued that consumers do not have a right to the installation of a free electricity meter and thus less favourable treatment and discrimination could not be taken to exist. The Advocate General’s Opinion makes it clear that neither direct nor indirect discrimination require an infringement of rights or interests defined in law according to the Race Equality Directive, and that it is sufficient to establish that a person or group is treated less favourably than another is, has been or would be treated. The Opinion goes on to state that consequently, such national provisions that are less favourable for the persons concerned fall short of the minimum requirements under EU law and are incompatible with the Race Equality Directive. She concludes that the national court must interpret domestic law in this regard in conformity with EU law and, in cases where this is not possible, the court should disapply national legislation which is contrary to the prohibition of discrimination established as a fundamental right and as a general principle of EU law.

Third, the Opinion confirms that for a reversal of the burden of proof under the Race Equality Directive it is sufficient that persons who consider themselves wronged, because the principle of equal treatment has not been applied, establish facts which substantiate a prima facie case of discrimination. In doing so, the Advocate General compares other language versions with the Bulgarian version of Article 8(1) of the Race Equality Directive, the latter requiring the presentation of facts “from which it can be concluded” that discrimination has occurred. The Opinion states that a similar national practice would be in clear opposition to the objective and the practical effectiveness of the reversal of the burden of proof, rendering this rule practically redundant.

Fourth, the Opinion, though clarifying that the establishment and assessment of the facts and the application of the law is a matter for the KZD, gives useful guidance on the forms of discrimination. This seems especially useful in light of the doubts expressed by the KZD in its reference and in view of the strict case law of the Bulgarian Supreme Administrative Court in similar cases. Based on the fact that the practice of the electricity supplier is likely, in practice, to negatively affect primarily Roma persons, the Advocate General states that there is a prima facie case of indirect discrimination based on ethnic origin.
Fifth, the Opinion examines the possible justification of indirect discrimination, providing useful guidance concerning the proportionality test required under Article 2(2)(b) of the Race Equality Directive. The Advocate General stipulates that preventing and combatting fraud and abuse and ensuring the security and quality of the energy supply in member states can be recognised as legitimate aims.\(^66\) The Opinion leaves it to the KZD to determine whether the measures applied by the defendants are in fact appropriate, i.e. whether they contribute to an “appreciable reduction” in the number of fraudulent and abusive interferences within the electricity network.\(^67\) Examining the question of necessity, the Opinion states that the measures can only be justified if it is proven that the defendants could not, at financially reasonable cost, have recourse to other, equally suitable means which had less detrimental effects.\(^68\) Finally, the Advocate General stipulates that the justification is only possible if the measure taken does not produce undue adverse effects on the inhabitants. In examining this, due account needs to be taken of the risk of an ethnic group being stigmatised and of the consumers’ interest in monitoring their individual electricity consumption by means of a regular visual check of their electricity meters.\(^69\)

**Conclusions**

The importance and relevance of the Belov case stems, on one hand, from the fact that this is the first reference for a preliminary ruling submitted to the CJEU by a national equality body set up on the basis of the EU Race Equality Directive. Thereby, it provided an opportunity to further clarify the Court’s case law relating to the interpretation of the status of “court or tribunal” within the meaning of Article 267 TFEU.

It is unfortunate that the Court decided not to conduct a sufficiently detailed analysis of all the relevant factors relating to the KZD’s status and procedures. This choice is apparent when the judgment is compared to the more detailed analysis in the Opinion of the Advocate General, which resulted in the contrary finding that the KZD should be accepted as a “court or tribunal”. This article argues that the Court’s simplified test could have its drawbacks, mainly due to the interdependent and interconnected nature of some factors.

On the other hand the Court, with its restrictive analysis and decision, has arguably foregone a chance to further establish itself as a leading court for fundamental rights issues at EU level and has missed an important opportunity to interpret the EU Race Equality Directive. The Opinion of Advocate General Kokott usefully answers a number of key questions relating to the scope of the Race Equality Directive, the definition of discrimination, the reversal of the burden of proof, the different forms of discrimination, as well as the possible justifications and the applicable proportionality test for indirect discrimination. The number and scope of the questions in the reference, and the depth of the Advocate General’s analysis testifies to the need for further guidance from the Court on these issues.

It is noteworthy that the Race Equality Directive has so far been subject to only a handful of preliminary rulings.\(^70\) This shortage of preliminary rulings (when compared to the Employment Framework Directive\(^71\)) is more noteworthy in the light of the fact that, for example, cases of racial and ethnic discrimination significantly outnumber cases on all other grounds of discrimination, within the 250 or more important cases reported by the national experts of the EU Network of Legal Experts in the Non-discrimination Field between 2004 and 2010.\(^72\) Based on this, one cannot but suspect that, on the one hand, some domestic courts are rather reluctant to
request a preliminary ruling from the CJEU in the field of discrimination on the grounds of racial and ethnic origin and, on the other hand, a significant number of these cases may be decided by quasi-judicial equality bodies set up pursuant to the Race Equality Directive. This gives even more importance to the work of quasi-judicial equality bodies and would, from the perspective of securing uniform interpretation of EU law, necessitate granting the possibility to these bodies to refer questions for a preliminary ruling to the CJEU. Seen in this light, it is obvious that one of the key drawbacks of the Court’s decision is that, by setting a precedent, it might have a “chilling effect” on future references for a preliminary ruling from national equality bodies, even if their national legislation and role is somewhat different.

Finally, it is noteworthy and encouraging that in the Belov case, both the European Commission and the Bulgarian government considered that the KZD has the character of a “court or tribunal”, and that the Court therefore has jurisdiction to give a ruling on the questions referred to it. It remains to be seen what legislative changes the European Commission, the Bulgarian government and other governments of member states with quasi-judicial equality bodies could and will effectuate in order for these bodies to be considered by the CJEU as national courts or tribunals. It is suggested that a careful and deep analysis of the Belov judgment will necessarily have to be the starting point for any such further action. In order to reach the objectives formulated in the Race Equality Directive, it appears crucial that the European institutions provide further support to national equality bodies, by enhancing and guaranteeing their legal situation including assurances for their independence and effectiveness. The European Commission could play an important role in this quest by proposing amendments to the EU Equal Treatment Directives ensuring detailed and legally binding standards for equality bodies, including assurances for organisational independence and, in the particular case of quasi-judicial equality bodies, ensuring the fulfilment of the criteria used by the CJEU in determining the admissibility of references for preliminary rulings. The European Commission will also have to play a central role in monitoring and enforcing the proper implementation of these amendments. At the same time, member states that decided to transpose the Race Equality Directive by setting up quasi-judicial bodies will have to analyse the substantive and procedural legal provisions pertaining to these bodies in order to ensure that, in instances similar to the Belov case, these national equality bodies are able to successfully refer a case to the Court. Although a failed first attempt, the Belov case can thus pave the way for future successful references, ensuring a better access to justice for victims of discrimination.

1 Tamás Kádár is Senior Policy Officer at Equinet, the European Network of Equality Bodies.
2 Case C-394/11 Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others, CJEU, 31 January 2013.
4 For the obligation of member states to set up a national equality body, see Article 13 of the Race Equality Directive. For the relevant Bulgarian legislation, see the Law on Protection against Discrimination (Zakon za zashtita ot diskriminatsia).
5 For a classification of national equality bodies as predominantly tribunal type (or quasi-judicial) and predominantly promotion type bodies, see Ammer, M., Crowley, N., Liegl, B., Holzleithner, E., Wladasch, K., Yesilkagit,

6 See Equinet European Network of Equality Bodies, Overview, available at: http://www.equineteurope.org/-Bulgaria-

7 Article 47 states that: “The [KZD] shall:
1. record infringements of this Law or other laws on equal treatment and shall determine the person responsible for the infringement and the person concerned; 2. order the prevention and cessation of the infringement and the re-establishment of the initial situation; 3. apply the sanctions provided for and adopt coercive administrative measures; 4. give binding instructions concerning compliance with this Law or with other laws on equal treatment; 5. bring actions against administrative acts adopted contrary to this Law or other laws on equal treatment; bring legal proceedings and intervene as an interested party in cases brought under this Law or other laws on equal treatment; 6. formulate proposals and recommendations to State and local authority bodies for the prevention of discriminatory practices and for the annulment of their acts adopted contrary to this Law or other laws on equal treatment; 7. keep a public record of its decisions in force and its binding instructions; 8. give advice as to whether draft legislative acts are consistent with the legislation on discrimination and recommend the adoption, repeal, amendment or supplementation of legislative acts; 9. provide independent assistance to victims of discrimination when they bring actions; 10. carry out independent studies on discrimination; 11. publish independent reports and make recommendations on any questions relating to discrimination; 12. exercise any other powers laid down in the legislation governing its organisation and its activity.”


10 Ibid., p. 8.

11 C-394/11, Opinion of Advocate General Kokott, 20 September 2012. See also above note 2, Para 17.

12 See above, note 2, Para 20.

13 Article 267 states that “[w]here such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”

14 Equinet, Influencing the law through legal proceedings: The powers and practices of equality bodies, September 2010, p. 28.

15 See above, note 2, Para 37; see also above, note 11, Paras 23 and 25.

16 See above, note 2, Para 38; and above note 11, Para 26.

17 See above, note 2, Para 38.

18 See above, note 11, Para 27.

19 Ibid., Para 28.

20 Ibid.

21 See above, note 2, Paras 40-42 and Para 45.

22 Ibid., Paras 43-44.

23 Ibid., Para 47.

24 See above, note 11, Para 40.

25 See above, note 2, Para 48.

26 See above, note 11, Para 41.

27 See above, note 2, Para 49.

28 See above, note 11, Paras 38-39.

29 See above, note 2, Para 50.

30 See above, note 11, Para 45.

31 See above, note 2, Para 51.

32 Ibid., Para 53.

33 Ibid., Para 52.

34 Case C-54/96 Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH, CJEU, 17 September 1997.

35 See above, note 11, Para 47.

36 Ibid., Para 48.
See above, note 2, Paras 54-55.

See above, note 11, Para 24 and the case law cited in its footnote 15.

Case C-517/09 RTL Belgium SA, CJEU, 22 December 2010.

Ibid., Para 47.

Case C-53/03 Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEV, CJEU, 31 May 2005.

Ibid., Para 33.

Ibid., Para 36.


Ibid., Para 35.

Case C-195/06 Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF), CJEU, 18 October 2007.

Case C-136/11 Westbahn Management GmbH v ÖBB-Infrastruktur AG, CJEU, 22 November 2012.

See above, note 34.

Ibid., Para 31.

Ibid., Para 37.

See above, note 11, Para 34.

Ibid., Paras 42-44.

Ibid., Para 36.

Ibid., Paras 29-30.

Ibid., Paras 31-35.

Ibid., Para 50.

Ibid., Paras 60-67.

Ibid., Para 69.

Ibid., Paras 71-72.

Ibid., Paras 75-76.

Ibid., Paras 80-83.

Ibid., Para 94.

Ibid., Paras 90-91.

Ibid., Para 95.

Ibid., Para 99.

Ibid., Para 102.

Ibid., Para 108.

Ibid., Para 109. See also Para 116, where the Advocate General seems to suggest that, subject to further examination by the KZD, the measures can indeed be considered necessary.

Ibid., Para 125.

See Case C-571/10 Servet Kamberaj v Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others, CJEU, 24 April 2012; Case C-415/10 Galina Meister v Speech Design Carrier Systems GmbH, CJEU, 19 April 2012; Case C-310/10 Ministerul Justiției și Libertăților Cetățenești v Ştefan Agafitei and Others, CJEU, 7 July 2011; Case C-391/09 Małgorzata Runewić-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others, CJEU, 12 May 2011; Case C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, CJEU, 10 July 2008; Case C-328/04 Criminal Proveedings v Attila Vajnai, CJEU, 6 October 2005.


See, by way of example, the number of case files opened each year by the Bulgarian KZD. In 2011 this exceeded 350 and showed an increase. The figures are available at: http://equineteurope.org/IMG//pdf/PROFILE_CPD_BG.pdf.

See above, note 2, Para 37.
Equality, Human Rights and the Public Service Spending Cuts: Do UK Welfare Cuts Violate the Equal Right to Social Security?

Jonathan Butterworth and Jamie Burton

“Too often when countries undertake major consolidations (...) it is the poorest – those who had least to do with the cause of the economic misfortunes – who are hit hardest. Perhaps that has been a mistake that our country has made in the past. This Coalition Government will be different.”

Chancellor of the Exchequer, Rt Hon George Osborne MP (22 June 2010)

1. Introduction

The UK ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976. As such, the UK is legally bound to guarantee the right to social security for everyone without discrimination. In particular, indirectly discriminatory measures, which appear neutral at face value but have a discriminatory impact on the exercise of Covenant rights, are prohibited under Article 2(2) of the Covenant. Even in times of economic crisis, the UK is under a duty to avoid at all times taking decisions which might lead to the denial of economic, social and cultural rights.

In 2010, the UK government announced that it intended to cut the amount it spends each year by at least £83 billion, or around 14% of all public spending, by 2015. Cuts to social security totalling £22 billion have been implemented through a range of changes including the limiting, freezing and capping of a broad range of welfare benefits.

The government stated that the cuts would be fair, evenly spread across all sectors of society and, as such, would not have a disproportionate impact on marginalised and disadvantaged groups. Section 4 of this article examines the legality of the social security cuts and finds that they have been distributed in an indirectly discriminatory manner, having a disproportionate impact on the rights of “at risk” groups, particularly women and disabled people, contrary to Articles 2(2) and 9 of the Covenant.

In turn, section 5 examines whether the cuts may be justified on the grounds of necessity and proportionality. In accordance with guidance issued by the Committee on Economic, Social and Cultural Rights (CESCR), rights infringements amount to rights violations if state parties are unable to demonstrate that the measures in question are both necessary and proportionate. In making this assessment, the CESCR looks carefully...
at, first, whether there is a reasonable justification for the relevant action and second, whether every effort has been made to use all resources that are at a state party's disposal in an effort to realise the full content of the right, and eliminate discriminatory provision, as a matter of priority.14

The government has sought to defend its welfare reforms on the grounds of budget deficit reduction. However, for the reasons presented in section 5, the changes fail to establish a reasonable justification for the infringement of the right to social security. Further, section 5 argues that, by introducing a range of revenue-raising and cost saving measures, the government could have reduced the budget deficit without discriminatorily limiting the right to social security. As such, section 5 concludes that the UK government has failed to use all resources at its disposal to secure the right to social security, free from discrimination, as a matter of priority, contrary to Articles 2(2) and 9 of the Covenant.

2. The Right to Social Security and the Duty of Non-Discrimination

The Right to Social Security

By Article 9 of the Covenant, the UK is obliged to secure the right to social security, which encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, *inter alia*, from lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, death of a family member, unaffordable access to health care or insufficient family support.15

In accordance with CESCGR General Comment No. 19,16 benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realise his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in Articles 10, 11 and 12 of the Covenant respectively.17

The Duty of Non-Discrimination

Under Article 2(2) of the Covenant, the UK is under a duty to guarantee the rights contained in the Covenant, including the right to social security, without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. “Other status” has been interpreted by CESCGR to include disability, nationality, health status, sexual orientation, age and economic and social situation.18

Discrimination constitutes any distinction, exclusion, restriction, preference or other differential treatment that is directly or indirectly based on prohibited grounds, and which has the intention or effect of impairing the enjoyment, on an equal footing, of Covenant rights.19

Under the Covenant, both direct discrimination (when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground) and indirect discrimination (laws, policies or practices which appear neutral at face value, but have a discriminatory impact on the exercise of Covenant rights) are prohibited under Article 2(2) of the Covenant.

Given that everyone has the right to social security, state parties to the Covenant must give special attention to those individuals and groups who traditionally face difficulties in exercising this right. In particular, General Comment No. 19 requires state parties to the Covenant to give special attention to
the rights of women, the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, people with disabilities, older persons, children and adult dependents, domestic workers, home-workers, minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals and prisoners and detainees.\textsuperscript{20}

\textbf{Obligations and Violations}

CESCR recognises that the realisation of the right to social security carries significant financial implications for state parties, but notes that the fundamental importance of social security for human dignity means that the right should be given appropriate priority in law and policy.\textsuperscript{21}

As such, in response to the economic crisis, CESC\textsuperscript{R} declared that state parties should avoid, at all times, taking decisions which might lead to the denial or infringement of economic, social and cultural rights, and emphasised that any proposed austerity measures or public service spending cuts must meet a set of key requirements.\textsuperscript{22}

First, measures must be temporary, covering only the period of crisis.\textsuperscript{23} Second, measures must be necessary and proportionate, in the sense that the adoption of any other policy would be more detrimental to economic, social and cultural rights.\textsuperscript{24} In particular, failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the state parties’ disposal in an effort to address and eliminate the discrimination, as a matter of priority.\textsuperscript{25}

Third, the policy must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis, and to ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected.\textsuperscript{26}

Fourth, the policy must identify, and ensure the protection of, a minimum core content of rights at all times. In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations.\textsuperscript{27}

Beyond this, there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant.\textsuperscript{28} In accordance with General Comment No. 19, if any deliberately retrogressive measures are taken, the state party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the state party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realisation of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there
was an independent review of the measures at the national level.29

3. Public Service Spending Cuts

In 2010, the UK government announced cuts totalling £83 billion which would be implemented by 2015. Overall, these cuts form 14% of all public spending.30 By 2015, annual spending in real terms on local government will be cut by £16 billion, university spending will be cut by £6.4 billion, criminal justice spending will be cut by £5.9 billion, and spending on benefits and tax credits will be cut by £22 billion.31

As such, the cuts to English local government (41.9%), benefits (18.6%), universities (32.1%) and criminal justice (26.4%) together make up about 70% of all cuts, despite only representing 33% of all government expenditure.32 Over 60% of relevant local government expenditure is for social care for children or adults. By 2015 social care in England will have been cut by £8 billion. This is a real term cut of about 33%. Together the cuts to English local government (whose main function is social care) and on welfare benefits (the main focus of which is to reduce poverty) make up 50.8% of all cuts, despite the fact they represent only 26.8% of central government expenditure.33

In contrast, spending on the National Health Service and pensions has been ring fenced. Together they represent over 30% of all government expenditure. In contrast, some departments have been allocated extra funds. Spending on foreign aid will increase by £2 billion (20.7% growth) and spending on the Cabinet office34 and Treasury35 will rise by £2.2 billion (241.9%).36

Against this backdrop, prices have risen sharply, while incomes have remained static and unemployment has grown steadily. For instance, at the end of 2007 there were 122,000 long term Job Seekers Allowance claimants, but at the end of 2011 there were 279,000.37 In the past four years, the official inflation rate has shown prices rising by a total of 15%, but food has gone up by 23% and domestic fuel by 53% - over three times the official rate.38 In contrast, median income in the UK will fall by 1% in real terms, relative to inflation, between 2016 to 2020, ending the decade at 4.5% below its 2010 level.39

Social Security Spending Cuts

Cuts to social security have been implemented through a range of welfare reforms, including the move to Universal Credit,40 introduction of the benefit cap,41 the switch from the Retail Price Index to the Consumer Price Index,42 freezing of housing benefit,43 freezing of child benefit,44 the move from income support to Job Seekers Allowance,45 tax credit alterations,46 abolition of pregnancy grants, restriction of maternity grants47 and replacement of the disability living allowance with personal independence payments.48 Further, the government has time-limited employment support allowance,49 introduced a “bedroom tax”,50 cut the social care budget51 and closed off the Independent Living Fund.52 Overall, these cuts indirectly discriminate against marginalised groups, including women and disabled people, to the extent that they disproportionately impact on their access to the right to social security, as can be seen from the evidence presented in the following sections.

4. Do UK Cuts to Welfare Infringe the Right of Equal Access to Social Security?

In accordance with CESCR General Comment No. 20, indirect discrimination, namely laws, policies and practices which appear
neutral at face value, but have a discriminatory impact on the exercise of Covenant rights, are prohibited under Articles 2(2) and 9 of the Covenant. In particular, the CESCR has declared that states parties to the Covenant must ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected by austerity measures.

Contrary to the UK’s legal obligations under the Covenant, the government’s cuts to welfare are indirectly discriminatory, to the extent that they disproportionately impact on the enjoyment of the right to social security with regards to marginalised and disadvantaged groups, particularly women and disabled people.

4(A) Women

The Covenant pays special attention to the rights of women. Under Article 2(2) of the Covenant, the UK is under a duty to guarantee the rights contained in the Covenant, including the right to social security, without discrimination of any kind as to sex.

Women in the UK are particularly vulnerable to cuts and changes to social security. Women are already at greater risk of poverty than men. For instance, 22% of women have a persistently low income as compared to 14% of men. Further, 64% of low-paid workers are women, 40% of ethnic minority women live in poverty and women experience a full-time pay gap of 14.9%.

As a result of this “gender poverty”, women are more reliant on social security than men. On average, one-fifth of a woman’s income in the UK is made up of welfare payments and tax credits (18% for women) compared to one-tenth for men (8% for men). Further, twice as many women (30%) as men (15%) rely on state support for at least three-quarters of their income.

In sum, women comprise the larger part of the disadvantaged and marginalized groups in the UK. As such, Articles 2(2) and 9 place the UK government under a legal duty to take all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis, and to ensure that the rights of women are not disproportionately affected as a result of indirectly discriminatory measures.

**Discriminatory Impact of Social Security Cuts on Women**

Taken as a whole, welfare cuts disproportionately impact on women’s enjoyment of the Article 9 right to social security. Analysis of the 2010 cuts package by the House of Commons Library found that 72% of social security cuts came from women’s incomes. The cost to women of all tax and benefit changes, particularly when combined with the changes to housing benefit, will be £5.76 billion. In contrast, the cost to men will be £2.295 billion. As such, the changes disproportionately impact on women’s enjoyment of the right to social security.

Women are losing income through the scrapping, freezing, down-rating, limiting and capping of benefits which help to lift low-income women out of poverty. From May to August 2011, there was an 8% drop recorded in women’s incomes from £1,935 (May 2011) to £1,777 (Aug 2011). Single mothers have been particularly affected by the cuts, losing an average 8.5% of their income after tax by 2015 – the equivalent of more than a month’s income each year. This is in stark contrast to the loss of income of 7.5% for single fathers, 6.5% for couples with children and 2.5% for couples without children. Moreover, by
2014-15, lone mothers will lose public services worth 18.5% of their income, compared to 6.8% for the average household and lone parents will lose services worth £1,900 each year due to the spending cuts.\textsuperscript{65} As such, the evidence indicates a pattern of indirect discrimination contrary to Articles 2(2) and 9.

While women are losing out heavily from social security cuts, women’s unemployment has continued to rise. The Office for National Statistics said 32,000 women became unemployed between October and December 2011, compared with only 16,000 men.\textsuperscript{66} During that period, the number of unemployed women also hit its highest level since 1987,\textsuperscript{67} thereby compounding the discriminatory impact of the welfare changes.

Looking in more detail, we can see that women’s enjoyment of social security has been particularly restricted as a result of the move to Universal Credit, introduction of the benefit cap, freezing of housing benefit and child benefit, tax credit alterations, abolition of pregnancy grants and restriction of maternity grants.\textsuperscript{68}

\textbf{Tax Credits}

Childcare in the UK is amongst the most expensive in the world with 33% of average net income going towards childcare.\textsuperscript{69} In 2010, 30% of working mothers depended on paid childcare. This included 56% of lone mothers with a child under five and 34% of mothers with partners.\textsuperscript{70}

The cut in childcare tax credits, detailed in section 3 above, will affect nearly half a million families with the average family losing £436 a year and some losing as much as £1,300 annually.\textsuperscript{71} Cuts and adjustments to tax credits are worth £3,870 per year, or more than £70 per week, to families earning less than £17,000. However, cuts to tax credits for part-time workers will hit women hardest, as nearly three times as many women as men work part-time in the UK.\textsuperscript{72} Government figures show that 212,000 households could be hit, including 470,000 children. Overall, 24% of mothers have had to give up work as a result of the changes.\textsuperscript{73}

On the other hand, while the 2012-13 rise in the personal allowance for income tax\textsuperscript{74} to £8,105 lifts 260,000 people out of taxation, it does nothing to boost the incomes of the 3,769,525 people who earn too little to pay tax, 73% of whom are women.\textsuperscript{75} As a result, the tax credit changes disproportionately impact women’s enjoyment of social security.

\textbf{Child Benefit}

Traditionally, child benefit has been a universal benefit paid to the main carer, which in 94% of cases is the mother.\textsuperscript{76} Due to the freezing and clawing back of child benefit, by 2014, a family with one child will be around £130 a year worse off than if child benefit had been increased each year in line with inflation and a family with three children will be £285 a year worse off.\textsuperscript{77} Figures show that 4.6 million women who receive Child Tax Credit (CTC) will be affected by the changes to the benefit which came in force in January 2013 and 98% of those affected by the changes to Child Benefit will be women, including women caring for a child and working women with children.\textsuperscript{78} In sum, women will be overwhelmingly affected rather than men.

\textbf{Maternity and Pregnancy Grants}

Welfare entitlements are crucial in helping women cope with the costs of pregnancy and a new child, a time when many families are under considerable financial pressure. Families with female heads of house-
hold will be disproportionately affected by these changes. In total, the abolition of the pregnancy grant and the restriction of the maternity grant amount to a loss of £500 for low-income mothers and will affect 150,000 families.\(^\text{79}\)

**Universal Credit**

The introduction of Universal Credit will disproportionately affect women. Currently in the UK, the average second earner, who will predominately be a woman, keeps only 32\% of their earnings once childcare costs are taken into account, compared with 48\% on average in OECD countries. This situation will be exacerbated by the single payment of Universal Credit going to the highest earner, which is disproportionately likely to be a man.\(^\text{80}\) As a result of this “bread-winner bias”, Universal Credit will have a differential impact on women, leaving 150,000 single working mothers up to £68 a week worse off.\(^\text{81}\) As such, the indirectly discriminatory nature of the welfare reforms becomes increasingly apparent.

**Housing Benefit**

The freezing and limiting of housing benefit will hit women hardest. The National Housing Foundation has warned that housing benefit reductions could put 200,000 people at risk of losing their homes.\(^\text{82}\) Single women constitute approximately 50\% of recipients, with couples composing around 20\% and single males 30\%. Overall, almost one million more women claim Housing Benefit than men – many of whom are single mothers at risk of poverty.\(^\text{83}\) It is expected that 60\% of single women, many of whom are lone parents, will receive less housing benefit under the housing benefit cap, compared to 3\% of single men. To compound the matter, between 2011 and 2012 there was a 40\% drop in the proportion of homelessness services specifically targeted at women.\(^\text{84}\) Overall, women stand to lose more than men.

**Benefits Cap**

The cap on total benefits that a family can receive will disproportionately affect women. The Department of Work and Pensions’ own Equality Impact Assessment of this policy recognises that the cap will affect women more than it will affect men:

“Modelling suggests that around 60\% of customers who are likely to have their benefit reduced by the cap will be single females but only around 10\% will be single men. Most of the single women affected are likely to be lone parents: this is because we expect the majority of households affected by the policy to have children and around 50\% to be single parents.”\(^\text{85}\)

The Department argues that these impacts will be mitigated by policies to support lone parents into paid work. However, this will still leave women who are unable to find work, particularly work that fits round their childcare responsibilities, facing a significant drop in income.

In summary, evidence indicates that the government’s agenda of cuts and changes to social security are indirectly discriminatory, contrary to Articles 2(2) and 9 of the Covenant, to the extent that they disproportionately impact on the enjoyment of the right to social security with regards to women.

**4(B) Disabled People**

Furthermore, government cuts and changes to social security are indirectly discriminatory with regards to disabled people, to the extent that the measures disproportionately
impact on disabled people’s enjoyment of the right to social security.

Even without cuts, disabled people are a disadvantaged and marginalised group within society. When the additional costs disabled people face as a result of their impairment are factored in, figures suggest that well over half of disabled people in the UK could be living in poverty. Nearly nine in ten disabled people (87%) say their everyday living costs are significantly higher because of their condition, and 13% of households with a disabled member experience “great difficulty” in “usually making ends meet”, nearly double the number compared with the general population.

A substantially higher proportion of individuals who live in families with disabled members live in poverty, compared to individuals who live in families where no one is disabled. Overall, 19% of individuals in families with at least one disabled member live in relative income poverty, on a Before Housing Costs basis, compared to 15% of individuals in families with no disabled member. In total, 21% of children in families with at least one disabled member are in poverty, a significantly higher proportion than the 16% of children in families with no disabled member. At least five million people have impairments that are so significant that they are currently entitled to attendance allowance or disability living allowance; this is 8% of the population.

As a result, disabled people constitute a disadvantaged and marginalised group in the UK. Thus, Articles 2(2) and 9 of the Covenant place the UK government under a legal obligation to take all possible measures to ensure that the rights of disabled people are not disproportionately affected as a result of indirectly discriminatory measures.

**Discriminatory Impact of Social Security Cuts on Disabled People**

Cumulatively, disabled people have been disproportionately affected by welfare reforms. Disabled people and their carers have experienced a drop in income of £500 million since the emergency budget in 2010. 85% of councils now restrict care to people with “substantial” and “critical” needs, and, as a result, increasing numbers of disabled people are left without care. Overall, Britain’s 3.6 million people claiming disability benefits will be £9 billion worse off from 2010 to the end of this Parliament in 2015.

The Centre for Welfare Reformestimates that in real terms the total level of cuts is equal to £75.2 billion. Given that the population of the UK is 63 million, the mean level of cuts is just over £1,200 per person. In contrast, the overall burden on disabled people will be an average of £4,410 per person. This means the cuts targeting disabled people are 9 times more than those placed on most other citizens. As such, disabled people total only 8% of the population (one in 13) but bear 29% of all cuts. However, the total burden on the 1.3 million severely disabled people who rely on social care will be higher still. On average, severely disabled people will lose £8,832 per person. This means that people with the severest disabilities, 2% of the population (one in 50) bear 15% of all cuts. According to this statistical analysis, the welfare reforms *prima facie* infringe disabled people’s enjoyment of the right to social security.

From the macro to the micro, evidence cited in the sections below indicates that disabled people will be particularly affected by the closure of the Independent Living Fund (ILF), replacement of the disability living allowance with the personal independence payment, time-limiting and means-testing
of employment support allowance, the introduction of Universal Credit and cuts to housing benefit.

**Employment Support Allowance**

In April 2012, 40,000 disabled people lost more than £90 a week as contributory employment support allowance was capped to just a twelve month payment. By April 2013, 10 times that number, 400,000 disabled people, lost some or all of their employment support allowance meaning they face a future of unemployment and on average a £52 a week drop in income.

Disability Benefits Consortium found that more than half of those respondents who had been for a medical assessment for employment support allowance found it stressful, and more than four in 10 said it actually made their health condition or impairment worse because of the stress and anxiety caused. More than half of those respondents who had received a decision on their application for employment support allowance did not agree with the decision and, of these, half planned to appeal against it.

**Social Care**

Social care for working age disabled adults is underfunded by at least £1.2 billion. At the same time, the number of disabled adults needing care and support is increasing. In 2010-11, 1.1 million disabled people relied on the social care system, but by 2020 the number of people in need of care will have risen to 1.3 million. The squeeze on funding is being exacerbated by cuts to local authority budgets. Between 2010-2011 and 2014-2015, local authority budgets will have shrunk by 28%, which will be further compounded by an extra two percent cut announced in 2012.

Regressive cuts are deeply affecting social care services, forcing councils to reduce the numbers of disabled people who are eligible for free care and support. Research shows that at least 36,000 working age disabled people may lose the care and support they currently receive. A further 69,000 disabled people will continue to live at crisis point without even a basic level of care. Overall, more than 105,000 working age disabled people are set to miss out on vital care and support.

Recent evidence has highlighted the discriminatory impact of social care cuts on disabled people. Nearly four in ten disabled adults (36%) are unable to eat, wash, dress or get out of the house due to underfunded services in their area; nearly half (47%) say the services they receive do not enable them to take part in community life and over one third (34%) are unable to work or take part in volunteering or training activities after losing support services. Further, nearly four in ten disabled people seeking support services (38%) say they experienced added stress, strained relationships and overall decline in the wellbeing of friends and family, and over half (53%) say they felt anxious, isolated, or experienced declining mental health, because they had lost care and support services.

**Personal Independence Payment**

The move from to disability living allowance to personal independence payment will save the government over £2 billion, and an estimated 500,000 disabled people are expected to lose out on this vital support as a result. Research suggests a reduction in disabled people's cash incomes leads to an increase in deprivation, but the first working age people undergoing reassessments for personal independence payment risk losing some or all of
their extra costs benefits as soon as October 2013. As the allowance is replaced by personal independence payments, disabled people will be affected by a total budget cut of 20%.\textsuperscript{107}

\textit{Consumer Price Index}

The government has stated that its disability living allowance reforms are intended to help disabled people “with the greatest needs”.\textsuperscript{108} However, the April 2011 change in the indexation from the higher retail price index to the lower consumer price index represents a total loss of £360 per year for higher care claimants.\textsuperscript{109} Even if modest growth returns in the coming years, low and middle income households that receive support from the state will see their living standards fall steadily further behind.

\textit{“Bedroom Tax”}

In April 2013, the government removed the Housing Benefit Spare Room Subsidy, better known as the “bedroom tax”. According to the government, the Spare Room Subsidy has been removed in order to contain growing housing benefit expenditure, encourage mobility within the social rented sector, strengthen work-incentives and make better use of available social housing by introducing size criteria for working age Housing Benefit claimants living in the social rented sector.\textsuperscript{110}

The removal of the spare room subsidy will disproportionately impact on the enjoyment of social security for disabled people. When disaggregated, the data reveals that just under two-thirds of families affected by the bedroom tax include a disabled adult.\textsuperscript{111} In sum, the policy is, \textit{prima facie}, indirectly discriminatory, with regards to its impact on disabled people.

\textit{The Closure of the Independent Living Fund}

Ostensibly, the government decided to close the ILF\textsuperscript{112} in order to localise the provision of care:

“Currently some ILF users receive different levels of funding compared to people with similar needs. The government believes that ILF users should have their care and support needs assessed and met in the same way as all other users of the social care system. The Department for Work and Pensions has concluded that delivering this funding through the mainstream care and support system, which is overseen by local authorities, is preferable because this model is a fairer way of distributing this funding and has embedded local democratic accountability.”\textsuperscript{113}

However, evidence put forth by Disabled People Against Cuts (DPAC), a national disability rights campaign, suggests that the closure of the independent living fund will disproportionately impact disabled people’s enjoyment of social security. In particular, the change requires local authorities to increasingly focus upon essential basic care, rather than upon full independent living for service users.\textsuperscript{114} Further, the closure of the ILF and transfer of service duties to local authorities will result in the limiting of social care support to those with critical needs thereby denying the vast majority of disabled people the support they need to maintain decent, healthy and active lives.\textsuperscript{115}
Universal Credit

Whilst some people may be better off under Universal Credit, a recent inquiry identified that several key groups would lose financially under the new system. In particular, 100,000 disabled children stand to lose up to £28 a week, 230,000 severely disabled people who do not have another adult to assist them could receive between £28 and £58 a week less than currently and up to 116,000 disabled people who work could be at risk of losing around £40 per week. This is equivalent to the loss of around £1,500 per year for most families with a disabled child, and means that around 450,000 disabled people could stand to lose out under Universal Credit once it is fully implemented.

The plans for Universal Credit involve a shift in resources to target disabled people with the greatest needs better, for example those in the support group for employment support allowance. However, the abolition of the severe disability premium means even those with the most serious health conditions or the greatest level of impairment will receive £28 less a week if they live on their own.

Moreover, sanctions will become more severe with the introduction of universal credit. Someone who does not take part in mandatory work activity can lose benefits for 13 weeks for a first “offence” and 26 weeks for a second. National charities have raised concerns that sanctions will disproportionately affect disabled people:

“Cases highlight the impact of sanctions on the most vulnerable claimants (...) they are often vulnerable clients with learning disabilities who have failed to understand what is required of them, or who haven’t attended courses or applied for jobs because the options have been inappropriate to their disabilities or levels of literacy.”

In summary, evidence indicates that the cuts and changes to social security are regressive and amount to an infringement of Articles 2(2) and 9 of the Covenant, to the extent that the measures disproportionately impact on disabled people’s enjoyment of the right to social security. Moreover, as outlined in section 5 below, governmental cuts to social security are neither necessary nor proportionate. As such, the measures not only infringe Articles 2(2) and 9 of the Covenant; they also amount to a violation of these rights.

5. Do UK Cuts to Welfare Violate the Right of Equal Access to Social Security?

In accordance with CESCR guidance, rights infringements amount to rights violations if state parties are unable to demonstrate that the measures in question are both necessary and proportionate. CESCR looks carefully first at whether there was reasonable justification for the action and second, whether every effort has been made to use all resources that are at the state parties’ disposal in an effort to realise the full content of the right and to eliminate discriminatory provision, as a matter of priority. In this regard, state parties to the Covenant must demonstrate that no alternative measures are available which would be less detrimental to the enjoyment of the right to social security.

In applying this legal test, the social security cuts and changes can be seen to be neither necessary nor proportionate, and, as a result, amount to an unjustified and discriminatory violation of the right to social security.
Reasonable Justification

Welfare reforms have primarily been justified on the grounds of budget deficit reduction. On 14 June 2012, Work and Pensions Secretary Iain Duncan Smith asserted that the budget deficit was caused by spending on welfare, and therefore that welfare spending must be reduced in order to shrink the deficit: “why we got into such problem in debt and the deficit was that in chasing the [Child Poverty] target it got more and more difficult and more and more money had to be spent.”123 A range of commentators have recently joined the government in arguing that reducing welfare expenditure is one of the necessary courses of action to resolve the current economic crisis.124

However, contrary to the above views, evidence indicates that the financial crisis and budget deficit were not caused by excessive welfare spending. Government expenditure has changed very little as a percentage of GDP in over 40 years. The average percentage is 43% and the two major peaks in expenditure were in 1977 and 1982, but even then it did not exceed 50%.125 Rather than welfare spending, the real cause of the current economic crisis is over-borrowing, in particular by home owners. For instance, the average house price at the end of 1995 was £83,900. At the peak of the housing bubble in 2007 it was £219,843. That is an increase of 260%. Real economic growth for the same period was only 46%. The economic crisis was caused by the bursting of the borrowing “bubble”.126 In sum, the deficit was not caused by welfare spending and social security cuts cannot reasonably be justified on this ground.

In Autumn 2012, the Chancellor argued that, in light of the need to reduce the budget deficit, benefits are too generous and need to be cut: “fairness is also about being fair to the person who leaves home every morning to go out to work and sees their neighbour still asleep, living a life on benefits.”127 However, evidence strongly rebukes this apparent “shirker/striver” dichotomy. On average, the UK public estimate benefit levels to be around a third higher than reality.128 According to the Joseph Rowntree Foundation, benefit levels have halved relative to the average wage since 1979. An unemployed single person over 25 will receive in benefits just 40% of the minimum income standard while a couple with two children will receive 60% of their needs. Only pensioners receive the minimum income standard when solely relying on benefits.129 In short, the “shirker/striver” rationale does not provide reasonable justification for discriminatory social security cuts.

On 20 October 2010, in the House of Commons, the government sought to justify social security cuts as a method of deficit reduction, on the grounds of combating welfare fraud: “we estimate that £5 billion is being lost this way [through benefit fraud] each year.”130 Despite the government’s claim, the correct figure for benefit fraud was at the time £1.6 billion.131 In 2011-12 welfare fraud across the benefit and tax credit system stood at a historically low fraud rate of 0.9%, which is less than the amount underpaid to claimants because of errors.132 The estimated fraud rate for taxation is around four to seven times higher.133 In January 2013, polling indicated that the general public believed that 27% of the welfare budget was being claimed fraudulently; despite the government’s own figures at the time indicating that fraud was as low as 0.7%.134 In conclusion, the regressive and discriminatory nature of the cuts to social security can-
not be objectively justified on the grounds of the combating of welfare fraud.

**Making Full Use of All Available Resources**

The UK has not made every effort to use all resources at its disposition in order to eliminate the discriminatory enjoyment of social security, as a matter of priority. In particular, alternative measures for reducing the deficit are available which are less detrimental to social security.

A range of resources are available to the UK government through cost-saving measures. For example, according to Unison, Britain’s biggest public-sector union, £1 billion could be saved every year by halving the local government agency bill, as has been achieved by high performing councils.¹³⁵ The Public Accounts Committee estimate that £1 billion could be saved every year by eradicating healthcare acquired infections from the NHS,¹³⁶ and on the basis of National Audit Office figures, £2.8 billion could be saved every year by ending the central government use of private consultants.¹³⁷ Further, Unison calculates that £3 billion could be saved in user fees and interest charges every year if private finance initiative schemes were replaced with conventional public procurement.¹³⁸ Finally, the Institute of Fiscal Studies has found that £6 billion could be saved in reduced tax credits and improved tax revenues every year if private companies paid all their staff a living wage.¹³⁹

Revenue-raising measures would also balance the GDP to debt ratio without infringing the rights of women and disabled people. The personal tax system is currently regressive. The poorest fifth of the population pay 39.9% of their income in tax, while the wealthiest fifth pay 35.1%.¹⁴⁰ In the UK, the value of wages has declined from nearly 65% of GDP in the mid-1970s to 55% today.¹⁴¹ Over the same period, the rate of corporate profit has increased from 13% to 21%.¹⁴² Despite this the government recently gave away potential tax revenue by reducing corporation tax to 25% and granting 50% tax relief on business start-ups.¹⁴³ As such, the government could save £4.5 billion every year by reversing its cut in corporation tax to levels lower than the US or any other G7 economy.¹⁴⁴ Moreover, £4.7 billion could be raised every year by a 50% tax on incomes over £100,000,¹⁴⁵ £3.5 billion could be raised every year with a permanent tax of 50% on bankers’ bonuses in excess of £25,000¹⁴⁶ and £5 billion could be raised every year with an Empty Property Tax on vacant dwellings which exacerbate housing shortages and harm neighbourhoods.¹⁴⁷

Addressing the “tax gap” would also provide an alternative method tackling the budget deficit. Figures produced by the Tax Justice Network show that £25 billion is lost annually in tax avoidance and a further £70 billion in tax evasion by large companies and wealthy individuals.¹⁴⁸ An additional £26 billion is going uncollected.¹⁴⁹ Therefore the total annual tax gap stands at over £120 billion (more than three-quarters of the annual deficit).¹⁵⁰ Similarly, Treasury documents from 2006 estimated the tax gap at between £97 and £150 billion.¹⁵¹ £10 billion could be raised every year by reforming tax havens and residence rules to reduce tax avoidance by corporations and non-domiciled residents and £14.9 billion could be raised every year by introducing a 0.05% Major Financial Transactions Tax (or “Robin Hood Tax”) on UK financial institutions. This alone would reduce the annual deficit by between 12.5% and 20%.¹⁵³
By ratifying the Covenant, the UK has promised to prioritise the realisation of all Covenant rights, including the right to social security. However, the total costs of renewing Trident, Britain’s nuclear missile defence programme, over the 30 year lifetime of the system, amount to between £94.7 billion and £104.2 billion. This equates to £3.3 billion per year.

In sum, the UK is not making every effort to use all resources at its disposition in order to eliminate the discriminatory enjoyment of social security. In particular, the UK can cut the deficit without violating the right to social security, by utilising a range of revenue-raising and cost saving measures. Thus, the cuts and changes are neither necessary nor proportionate, and, as a result, they amount to an unjustified and discriminatory violation of the right to social security.

6. Conclusion

The government pledged to ensure that all welfare changes would be fair and evenly spread across all sectors of society, and, as such, would not disproportionately impact on marginalised and disadvantaged groups. However, evidence presented in section 4 demonstrates that the changes have been distributed in an indirectly discriminatory manner, and therefore infringe the rights of “at risk” groups, particularly women and disabled people, contrary to Articles 2(2) and 9 of the Covenant.

Welfare cuts have purportedly been justified on the grounds of reducing the budget deficit. However, data presented in section 5 demonstrates that the measures in question are neither necessary nor proportionate, contrary to the legal tests set out in respect to Articles 2(2) and 9 of the Covenant. In particular, the changes fail to establish a reasonable justification for infringing the right to social security in an indirectly discriminatory manner. Furthermore, this article has sought to demonstrate that the UK budget deficit could be reduced without infringing the right to social security, through a range of revenue-raising and cost saving measures. If this analysis is correct, then the UK has failed to use all resources at its disposition to secure equal access to the right to social security, contrary to Articles 2(2) and 9 of the Covenant.

1 Jonathan Butterworth is co-founder and Director of Just Fair. Jamie Burton is co-founder and Chair of Just Fair. For more information see www.just-fair.co.uk.

2 The Chancellor of the Exchequer is the title held by the British Cabinet minister who is responsible for all economic and financial matters, equivalent to the role of Minister of Finance or Secretary of the Treasury in other nations.


5 See analysis of Articles 2(2) and 9 of the Covenant in section 2 below.

Pilla y, A.G., Chairperson of the Committee on Economic, Social and Cultural Rights, *Open Letter to States Parties to the ICESCR*, 2012, p. 1, available at: http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRto-SP16.05.12.pdf. While letters from the Committee Chairman are not legally binding, they do provide authoritative guidance as to the correct legal interpretation of states parties’ duties under the ICESCR.


See section 3 below for further information regarding each of the relevant welfare reforms.

See above, note 3.

See analysis of Articles 2(2) and 9 of the Covenant in section 2 below.

See above, note 7.


The Committee on Economic, Social and Cultural Rights publishes its interpretation of the content of human rights provisions in the form of general comments on thematic issues. The introduction to Annex III (General Comments) of the Committee’s 1989 report to the Economic and Social Council (E/1989/22) explains the purpose of the general comments as follows: “The Committee endeavours, through its general comments, to make the experience gained so far through the examination of these reports available for the benefit of all states parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the states parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures and to stimulate the activities of the states parties, the international organizations and the specialised agencies concerned in achieving progressively and effectively the full realisation of the rights recognised in the Covenant. Whenever necessary, the Committee may, in the light of the experience of states parties and of the conclusions which it has drawn therefrom, revise and update its general comments.”

See above, note 16, Para 22.

See above, note 6, Par 28-35.

Ibid., Para 7.

See above, note 16, Para 31.

Ibid., Para 41.

See above, note 7.

Ibid.

Ibid.

See above, note 16, Para 60.

See above, note 7.

Ibid.

See above, note 16, Para 42.

Ibid.

See above, note 8.

HM Treasury, *Budget 2013*, 2013, p. 64-69; see analysis by Centre for Welfare Reform, above note 9, p. 12.

See above, note 9, p. 12.

Ibid.

The Cabinet Office is a department of the government of the UK responsible for supporting the Prime Minister and Cabinet of the UK.

HM Treasury is the government’s economic and finance ministry, maintaining control over public spending and setting the direction of the UK’s economic policy.
Universal Credit is a new benefit which will replace six existing benefits (Income-based Jobseeker’s Allowance, Income-related Employment and Support Allowance, Income Support, Working Tax Credit, Child Tax Credit and Housing Benefit) with a single monthly payment. The Government is proposing that for couples, one person should claim Universal Credit on behalf of the family.

A benefit cap is being introduced which will limit the total amount of benefit that people aged 16 to 64 can receive. The cap will apply to a range of benefits, including Bereavement Allowance, Carer’s Allowance, Child Benefit, Child Tax Credit, Employment and Support Allowance, Guardian’s Allowance, Housing Benefit, Incapacity Benefit, Income Support, Jobseeker’s Allowance, Maternity Allowance, Severe Disablement Allowance and Widowed Parent’s Allowance. The level of the cap will be £500 a week for couples (with or without children living with them), £500 a week for single parents whose children live with them and £350 a week for single adults without children. Local councils are introducing the cap between April and September 2013.

Consumer price indices measure the change in the general level of prices charged for goods and services bought for the purpose of household consumption in the UK. In the UK, there are two main measures of inflation - the Consumer Price Index (CPI) and the Retail Price Index (RPI). The CPI forms the basis for the Government’s inflation target that the Bank of England’s Monetary Policy Committee is required to achieve. Historically, the RPI has been used to index various prices and incomes including tax allowances, state benefits, pensions and index linked gilts, as well as the revalorisation of excise duties. However, from April 2011, the CPI is instead being used to index continued benefits, tax credits and public service pensions.

Local Housing Allowance (LHA), a housing benefit paid to people in private rented accommodation, has been capped at £250 a week for a one-bedroom house/flat, £290 for two bedrooms, £340 for three bedrooms, up to an upper limit of £400 a week for a maximum of four bedrooms. Since October 2011 LHA has only covered the bottom 30% of rents rather than the median, and from April 2013 LHA rates have been uprated in line with the Consumer Price Index (CPI) rather than actual local rents.

Child Benefit rates have been frozen until April 2014, and families earning more than £50,000 are no longer entitled to receive Child Benefit. The freezing of Child Benefit until April 2014, when viewed in light of inflation and the rising costs of living, amounts to a real term cut of over 10%.

Measures introduced in the Welfare Reform Act 2012 mean that unemployed lone parents whose children are over five are now moved from Income Support to Jobseeker’s Allowance (JSA) and are therefore required to seek and be available for work. Failure to comply with the work-seeking requirements of JSA can result in removal of benefits.

There were above-inflation increases in the child element of Child Tax Credit in April 2011 and April 2012, which meant an additional £180 in the 2011/12 financial year and £110 in the 2012/13 financial year. On the other hand, the basic rate of tax credit and the rate for people working more than 30 hours a week was frozen for three years from April 2011 to April 2014, and the baby element of tax credits withdrawn. In order to qualify, families with children will have to work for at least 24 hours a week (instead of the current 16) and one of them must work at least 16 hours. The childcare tax credit has also been cut to cover only 70% rather than 80% of childcare costs. Families earning more than £40,000 will start to lose tax credits. The rate at which tax credits are withdrawn as income rises will increase from 39% to 41%.

The Health in Pregnancy Grant was abolished in January 2011. This was a universal grant of £190 available to all mothers to promote child and maternal health and engagement with health services. The Sure Start Maternity Grant was paid to low-income women from the 29th week of pregnancy but is now only payable to women pregnant with their first child thus penalising families who have any subsequent children. The grant is a one-off payment available to low-income households receiving an out-of-work benefit, to help towards the cost of maternity and baby items.

Disability Living Allowance (DLA) is being changed to Personal Independence Payment (PIP). People currently receiving DLA will have to be re-assessed. At the same time the total budget for DLA/PIP is being cut by 20%. The mobility component of PIP is being withdrawn from people living in residential care. New claims will now be dealt with under the PIP system, before current DLA claimants start moving to PIP in October 2013 if their circumstances change or an existing claim ends.
49 Disabled people who have been claiming Incapacity Benefit (IB) will have to undergo an assessment to see if they are eligible for Employment Support Allowance (ESA) which replaces IB. People on ESA will be placed in two groups. Those whose disability is “severe” or who are terminally ill will be in the support group and will not be expected to work. Those whose disability is judged to be less severe are placed in the “Work Related Activity Group” (WRAG) and are expected to take part in work focused activity. Contributory ESA will only be paid to people in the WRAG for one year, after which it will be means tested. If they have savings, assets or a partner who works, then their benefits will stop.

50 In 2013, the government removed the Housing Benefit spare room subsidy in the social rented sector. This change is pejoratively referred to as the “Bedroom Tax”. Housing Benefit claimants living in the social rented sector (which includes local authority tenants, tenants of registered providers of social housing and registered social landlords), generally have no restrictions placed on the size of accommodation that they occupy. On 1 April 2013 the government introduced size criteria for new and existing Housing Benefit claimants living in the social rented sector. The size criteria will replicate the size criteria that apply to Housing Benefit claimants in the private rented sector and whose claims are assessed using the local housing allowance rules. The applicable maximum rent will be reduced by a national percentage rate depending on the number of spare bedrooms in the household. Legislation to allow this is contained in the Welfare Reform Act 2012.

51 The cumulative reduction in adult social care budgets is £1.89 billion – at a time when growing pressures from rising numbers of older and disabled adults continues to grow at three percent per year.

52 The Independent Living Fund (ILF) provides money to help disabled people live an independent life in the community rather than in residential care. Payments from the ILF can be used to employ a carer, personal assistant or care agency to provide personal care and help with domestic duties. In 2013, the ILF was permanently closed to new applicants and in 2015 the ILF will be phased out completely.

53 See above, note 6, Para 10.

54 See above, note 7.

55 See above, note 6.


58 Women’s Resource Centre, Women's equality in the UK – A health check, 2013, p. 130.


60 See above, note 7.

61 House of Commons Library, Gender Audit of Budget, 2010.


64 Ibid.


67 Ibid.

68 See section 3 above for an explanation of each of these social security benefits.


70 Office for National Statistics, Social Trends, 2011, p. 16.

71 See above, note 64, p. 6.

72 UNISON, In Focus, 2012.

73 Working Mums, Mums forced to quit work due to tax credit cuts – survey, 2011, p. 1.

74 Income Tax Personal Allowance is the amount of income one can receive each year without having to pay tax on it.
83 See above, note 59, p. 140.
87 Hardest Hit Coalition, *The Tipping Point: The human and economic costs of cutting disabled people’s support*, 2012, p. 15.
88 Office for Disability Issues, *Disability facts and figures*, 2012.
90 See above, note 7.
91 Demos, *Destination Unknown*, 2012, p. 22.
93 See above, note 92, p. 162.
94 See above, note 9, p. 22.
95 Ibid., p. 23.
97 Ibid.
99 Ibid.
101 Ibid.
102 See above, note 8, pp. 49-50.
104 See above, note 101.
105 Ibid., p. 8.
107 Ibid., p. 3.
108 Ibid.
109 See above, note 88, p. 17.
110 See above, note 107, p. 1.
111 New Policy Institute, *How many families are affected by more than one benefit cut this April*, 2013, p. 3.
112 See section 3 above for further information on the nature and scope of the protection afforded via the ILF.
113 See above, note 107, p. 1.
115 Ibid.
118 Ibid., p. 8.
121 See above, note 7.
122 Ibid.
128 See above, note 58.
130 Chancellor of the Exchequer, House of Commons, 20 October 2010.
131 HM Revenue and Customs, *Tackling fraud and error in the benefit and tax credits systems*, 2010, p. 5.
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141 Trade Union Congress, *Unfair to Middling: How Middle Income Britain’s shrinking wages fuelled the crash and threaten recovery*, 2009, p. 4.
142 See above, note 141, p. 5.
143 See above, note 76, p. 5.
149 *Ibid*.
150 *Ibid*, p. 27.
151 See above, note 134, p. 6.
152 See above, note 146.
The ASEAN Human Rights Architecture: Its Development and Challenges

Sriprapha Petcharamesree

Introduction

Amidst criticisms from international communities and civil society groups within the region, the Association of Southeast Asian Nations (ASEAN) leaders signed and adopted the ASEAN Human Rights Declaration (AHRD) on 18 November 2012 during the 21st ASEAN Summit held in Phnom Penh, Cambodia. In the Phnom Penh Statement on the adoption of the AHRD:

"[The] Heads of state/government of the member states of ASEAN reiterate ASEAN and its member states' commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN member states are parties as well as to relevant ASEAN declarations pertaining to human rights."3

The adoption of the AHRD, the first broad based human rights document in the region, in spite of criticisms, raises the expectations of ASEAN people that their rights will be better promoted and protected.

Three years earlier, in October 2009, under the Thai chairpersonship, the Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015) was adopted by the 10 ASEAN leaders. The leaders agreed, that:

"[The] ASEAN political-security blueprint, the ASEAN economic community blueprint, the ASEAN socio-cultural blueprint and the Initiative for ASEAN Integration (IAI) Work Plan II (2009-2015) shall constitute the roadmap for an ASEAN community (2009-2015), and each ASEAN member state shall ensure its timely implementation."4

The ASEAN leaders, in that same Declaration, also pledged "their resolve and commitment to promote ASEAN peoples to participate in and benefit fully from the process of ASEAN integration and community building".5 The adoption of the three blueprints, according to ASEAN, will be instrumental to building the ASEAN community by 2015. This, together with the ratification of the ASEAN Charter by all ten member states in December 2008, the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in October 2009, the ASEAN Intergovernmental Commission on the Promotion and Protection of the Rights of Women and Children in early 2010 and the recent adoption of the AHRD, makes ASEAN one of the most advanced sub-regions in Asia from a human rights institution building perspective. These institutions and standards constitute what this author calls the "ASEAN human rights architecture".
Although ASEAN seems to be progressing towards institutionalising human rights in the region by giving them due recognition in the ASEAN Charter, the blueprints and the AHRD, its development has not been without challenges. The human rights architecture was designed with a number of shortcomings to becoming an effective (sub)-regional human rights regime. One of the challenges to the development of human rights infrastructure lies on the principles that all ASEAN member states adhere to: “the ASEAN Way” which remains unchallenged.

This paper attempts to examine the way in which the ASEAN human rights architecture was designed and developed. It further assesses the current infrastructure already put in place and attempts to explain and analyse why the infrastructure has been developed in such a way that it might not serve the purpose of the protection and promotion of human rights of ASEAN peoples. Based mainly on desk research, the article starts with a study of the development of the ASEAN human rights infrastructure. The introduction is followed by an examination of the contents of the AHRD and its concepts as well as debates behind some particular provisions. The third section attempts to explain and analyse why the regional human rights architecture has been designed the way it exists now by looking at how ASEAN member states perceive human rights. It concludes by reflecting whether or not the regional human rights architecture could be redesigned and if there are prospects for any effective human rights system in the region.

**Development of a Human Rights Regime in ASEAN**

Established in 1967 as a political and economic entity with seven objectives as stated in the ASEAN Declaration of 1967, ASEAN has never been considered nor considers itself a human rights organisation. The first two objectives as set out in the 1967 Bangkok Declaration were: a) to accelerate economic growth, social progress and cultural development; and b) to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter. The term “human rights” was not explicitly used in the Declaration. However, human rights advocates tend to believe that by affirming adherence to the principles of the UN Charter, the five founding members of ASEAN7 inevitably accepted the purposes and principles set forth therein. Article 1(3) and Article 55 of the UN Charter8 enshrine the universal respect for and observance of human rights and fundamental freedoms and call for international cooperation to achieve such purposes.

Although ASEAN does not have specific legal documents on “human rights”, the term has been mentioned from time to time in a range of non-legally binding documents such as joint communiqués and joint declarations or statements both among its members and with dialogue partners. In the 1990s there were some references to human rights in a number of official statements. In 1991, ASEAN affirmed its original position with regards to human rights in its Joint Communiqué stating that:

“[W]hile human rights are universal in character, implementation in the national context should remain within the competence and responsibility of each country, having regard for the complex variety of economic, social and cultural realities. They emphasised that neither the international application of human rights be narrow and selective nor should it violate the sovereignty of nations.”

Although this 1991 Joint Communiqué demonstrated that ASEAN still guarded against certain concepts of human rights, the universal nature of human rights was more or less accepted by ASEAN leaders (with certain reservations). This same position was repeated in the Joint Communiqué of the 25th ASEAN Ministerial Meeting (AMM) held in Manila in 1992.\(^{10}\)

ASEAN then made a marked change in its position on human rights in 1993. For the first time in ASEAN history, a separate section on human rights was incorporated in their Joint Communiqué. The Joint Communiqué of the 26th AMM held in Singapore in July 1993, one month after the Vienna World Conference, contained three elaborated paragraphs including:

“ASEAN recognises that human rights are interrelated and indivisible, it affirms its commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration. It agreed that ASEAN should consider the establishment of an appropriate regional mechanism on human rights.”\(^{11}\)

The fact that the Joint Communiqué was adopted just a month after the Vienna World Conference on Human Rights in which all ASEAN member states participated suggests that ASEAN’s declaration of its commitment to the Vienna Declaration on Human Rights through its inclusion of a human rights section within a lengthy AMM Joint Communiqué was perhaps more in accordance with the global discourse rather than strong affirmation of its human rights policy. This observation has proved to be true because for the following five years, no section on human rights, or even the term “human rights”, appeared in any ASEAN Joint Communiqué. Only in 1998, when the world commemorated the 50th anniversary of the Universal Declaration of Human Rights (UDHR), did human rights reappear. This happened in two paragraphs of the AMM Joint Communiqué, one noting the establishment of the Working Group for an ASEAN Human Rights Mechanism, and another recognising the importance of international conventions and declarations of human rights, and the rights of women and children in particular.

Another development was the Vientiane Action Program (VAP) adopted in Vientiane in November 2004 by all ASEAN member states. The VAP served as a roadmap for ASEAN to strengthen political, security, economic, social and cultural cooperation among its members between 2004 and 2010.\(^{12}\) This time, ASEAN put forward a much more concrete agenda on human rights. Under the program areas and measures for political development of the ASEAN Security Community, ASEAN committed to promote human rights through, among others activities: the promotion of education and public awareness on human rights; the establishment of a network of cooperation among existing human rights mechanisms; the elaboration of an ASEAN instrument on the protection of the rights of migrant workers; and the establishment of an ASEAN Commission on the promotion and protection of the rights of women and children.

The tireless efforts and initiatives made by the Working Group for an ASEAN Human Rights Mechanism since 1996 must be given recognition. Many of the human rights elements included in the VAP were proposed by the Working Group through different engagements with ASEAN. The accelerated progress made by ASEAN members in the field of human rights (at least in official
documents) has been remarkable and the VAP is one of the most concrete examples of such progress.

After over four decades of its existence, ASEAN has made tangible progress towards the institutionalisation of human rights as follows:

1. The adoption of different ASEAN declarations pertaining to human rights, namely the ASEAN Declaration on the Advancement of Women (1998), the ASEAN Declaration on the Elimination of Violence Against Women (2004), the ASEAN Declaration Against Trafficking in Persons, particularly Women and Children (2004), the ASEAN Declaration on the Protection of the Rights of Migrant Workers (2007) and the ASEAN Human Rights Declaration (2012). The two last documents are the first human rights based documents in ASEAN.

2. The increasing number of national human rights institutions. Between 1987 and 1997, only two National Human Rights Commissions were established – in the Philippines (1987) and Indonesia (1993). However, there has been acceleration, with institutions established in Malaysia (1998), Thailand (1999) and Myanmar (2011). Cambodia has been attempting to establish one since 2000 but has not yet been successful. Singapore and Vietnam are still considering whether to establish institutions.

3. Ratifications of international human rights instruments. Although only two international human rights instruments, the Convention on the Rights of the Child (CRC) and the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), have been ratified by all ASEAN member states, there has been a remarkable increase in ratifications of other major international human rights instruments such as the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), etc. Only the Convention on the Protection of the Rights of Migrant Workers and Their Families and the Convention for the Protection of All Persons from Enforced Disappearance have a limited number of ratifications. Another notable progress made by the ASEAN member states is the withdrawal of reservations made to the different conventions.

4. Positive change can also be seen in the relationship between ASEAN and civil society. The word “people” was used in most, if not all, early ASEAN documents, but it seemed that “people” were, in fact, invisible until 1998 when ASEAN recognised the civil society group, the Working Group for an ASEAN Human Rights Mechanism. In 2000, ASEAN supported the first organisation of an ASEAN people assembly, and then, a few years later, the ASEAN civil society meetings. By engaging with civil society, ASEAN has been taking positive steps to become a “people-centred” organisation. However, ASEAN engagement with civil society groups remains very limited. The phrase “ASEAN people-centred”, as specified in the ASEAN Roadmap, remains rhetoric. In reality, ASEAN and ASEAN member states are still reluctant to allow space for participation of civil society groups.
Charter stated in Kuala Lumpur during the 5th Workshop on the ASEAN Regional Mechanism on Human Rights:

“[R]ecent developments in ASEAN show that human rights emerge as an important concern in the organisation and it is time to go forward rather than recount it. It has been shown that although ASEAN may not make quick progress on human rights there has been some progress. But, only the time and actions to be taken by ASEAN will prove how serious ASEAN is with human rights issues.”

ASEAN “considered” for 15 years from 1993 to 2008 whether to legalise and legitimise human rights and fundamental freedoms in ASEAN by including both concepts and terminologies in the ASEAN Charter. The ASEAN Charter came into force in December 2008 and this was considered to be a turning point in ASEAN becoming “a rules-based organisation” and also a cementing of the “political will” of ASEAN to develop a human rights regime in the region.

The success of ASEAN in including human rights and fundamental freedoms in both the principles and purposes of ASEAN was not without challenges. Consensus was reached with various compromises including: first, the principles of respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice were (counter) balanced by the principles of non-interference in the internal affairs of ASEAN member states; and second, the prescription for the establishment of an ASEAN Human Rights Body in Article 14 was not as specific as it should have been as it was subject to the Terms of Reference which were determined at an ASEAN foreign ministers meeting and were accordingly the result of negotiations and compromises.

As expected, the AICHR established and inaugurated in October 2009 was the result of this compromise. The body is now called the “Intergovernmental Commission” not just the “Commission” as commonly called in other regions. By adding the term “Intergovernmental” the Commission has had to be conscious that it is accountable to the governments and is not an independent body. This fact has been repeatedly emphasised by a number of representatives to the AICHR. Another mechanism which was established six months later – the ASEAN Intergovernmental Commission on the Protection of the Rights of Women and Children – followed more or less the same pathway but with more progressive elements to its terms of reference. In addition to the two commissions, another body of a slightly different nature, the ASEAN Committee on the Implementation of the ASEAN Declaration of the Protection of the Rights of Migrant Workers, was also set up in 2007. In spite of some different elements in their respective terms of reference, they share some common characteristics. None of these bodies has monitoring or investigation powers. ASEAN seems to be allergic to the term and concept of “monitoring”. The bodies are expected by ASEAN member states to focus on the promotional aspect of their mandates, not on protection, although generally speaking they are supposed to promote and protect the rights of ASEAN people.

It is important to note here that ASEAN does not follow the same approach as other regions in the world in that it started with “bodies” rather than “standards” or human rights instruments. A number of NGOs, human rights advocates and academics are of the opinion that, for the region, it would be better not to have, for the moment, regional human rights standards to avoid the risk of having something which may be lower than internationally recognised standards. A
good example is the advocacy made by the Working Group for an ASEAN Human Rights Mechanism. This group has, for years, been advocating for the setting up of an “effective” human rights mechanism in ASEAN rather than pushing for any regional human rights standards. However, since the development of an ASEAN human rights declaration is part of its mandates and functions, the AICHR has strived to deliver. By November 2012, ASEAN adopted the AHRD.

**The ASEAN Human Rights Declaration: An Examination**

The AICHR was equipped with 14 mandates and functions specified in its terms of reference. Paragraph 4.2 mandates the AICHR to:

> “[D]evelop an AHRD with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights”.

There are a few elements included in the particular mandate, namely:

1. The AICHR is expected to develop ASEAN human rights standards;

2. The very purpose of such standards is to provide a framework for cooperation;

3. In order to do so, not only would an AHRD be developed, but various human rights conventions and instruments would be put in place.

The most problematic terminology mentioned in paragraph 4.2 is “human rights cooperation”, as standards, once set, would need to be monitored for compliance. In the international monitoring system, cooperation means “consent”. However, some particular special procedures may not require consent. In ASEAN, cooperation means no confrontation, no questions, no criticisms, as such things may be considered to amount to interference in the internal affairs of member states.

The AICHR took this mandate very seriously and was committed to delivering it. Under the chairpersonship of Cambodia, Prime Minister Hun Sen instructed the Cambodian representative to the AICHR that the AHRD had to be adopted under his chairmanship in Phnom Penh.

The AICHR finally agreed that there would be a two step process. The first step was to set up a drafting team with ten representatives appointed by each AICHR representative. In the discussions, the expertise of the members of the drafting team needed to be taken into consideration. However, with the exception of a few countries, the majority of the members of the drafting team were appointed from amongst government officials by respective governments. This showed the political sensitivity of both the drafting process and the issues to which it related. The drafting team spent seven months producing a very detailed and long draft declaration which was then submitted to the AICHR for negotiations. The fact that the drafting team did not have the full power to negotiate meant that different views and formulations had to be represented in the draft, resulting in a very lengthy draft of the AHRD.

The second step was the negotiation process among AICHR representatives. The meetings and negotiations were intensive until the last meeting in September 2012. The AICHR attempted to have different working groups among interested AICHR representatives, discussing different aspects of the draft. However, in the end all representatives joined each working group, with the exception of
Myanmar which preferred to negotiate the product mainly in plenary. The most controversial sections of the draft were the general principles and civil and political rights sections, both of which took up much of the time of the drafting team and the AICHR.

It was during the second step of the processes that dialogues and consultations were organised. The AICHR was required to report the progress made and challenges faced to the AMM and did so twice. In the AMMs, some particularly controversial issues were discussed, such as whether or not to release the draft AHRD, the use of particular concepts in the draft, given regional and national particularities, the reference to national laws and consultation with civil society groups. Although the draft AHRD was not formally made public, many drafts were leaked to some NGOs. Two regional consultations were organised with sectoral bodies including the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The dialogues could not be considered a success as inputs were very limited due to the fact that the draft AHRD was not shared with those bodies. The AICHR organised two regional consultations with selected national, regional and international human rights NGOs, during which all AICHR representatives agreed that the inputs were meaningful. Some representatives tried to negotiate for the inputs to be integrated into the draft but without much success. In addition to regional consultations, a meeting was held with three regional experts where some particular terminologies and concepts such as "public morality" and "sexual identity" were clarified. Although conceptual clarifications were very much appreciated and accepted, no consensus could be reached to improve or modify the draft. There was resistance from a minority of the AICHR. According to the ASEAN way of working, if even one open objection is made, nothing can move. In ASEAN, minority rule applies rather than majority rule; this is what this author calls "minority hegemony".

In terms of substance, the AHRD which was adopted in November 2012 has some shortcomings. Although some provisions go beyond the UDHR – for example, the inclusion of the right to development, right to peace and some others which are in line with internationally recognised standards – one cannot deny that some other provisions fall short. This section briefly examines the content of the current AHRD.

It is of note that, when the Universal Declaration of Human Rights (UDHR) was drafted in 1947, according to Asbild Samnoy, there were five facilitating factors to reach the “compromise” on the content of the UDHR: a) rejecting controversial issues; b) using general and vague formulations; c) explicit use of limitations clauses; d) avoiding philosophical justifications; and e) moderating crosscutting cleavages. It is interesting to point out that in the process of negotiations of the AHRD, those factors were not really applied; rather, some issues which were considered controversial, such as the attempt to include limitations clauses, or philosophical and conceptual justifications, were subjected to heated debates. A number of provisions in the final text of the AHRD cannot be said to be the result of “compromise” but are a minority imposition made possible due to the ASEAN principle of consultation and consensus. This principle requires that when one country says “no” or expresses its desire to change some particular items, the rest are obliged to compromise if things are to progress.
The first critical shortcoming is reflected in the general principles, especially those expounded in Articles 6, 7, and 8. The text which was adopted by the ASEAN leaders includes:

“[P]rovisions that subject the enjoyment of fundamental rights to a ‘balancing’ against government-imposed duties on individuals. The Declaration also challenges the principle of universality of human rights by making them subject to regional and national contexts. In addition, it allows for broad and all-encompassing limitations on rights, including those that may never be restricted under international law.”

The quoted views were shared by many organisations, including the Office of the High Commissioner for Human Rights (OHCHR).

Criticisms of the wide-ranging limitations on rights were particularly strong in relation to limitations on the basis of “national security” and “public morality”. Arguments and debates on these matters during the negotiation process were heated but did not result in a change in stance of some representatives who insisted on the inclusion of the clauses in spite of strong objections not only from experts and civil society but also from within the AICHR itself. More positive formulations were proposed, such as deleting the phrase that “[t]he enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties”. It is recognised that the term “balancing” is not used in international human rights law and definitely falls below international standards. It was repeatedly suggested during the negotiations that the wording from the Vienna Declaration and Programme of Action (Paragraph 5) should been used in Article 7. However, all these suggestions were met with objections by one or two representatives. In ASEAN/AICHR, this was enough to result in the text remaining unchanged.

The second serious concern that was raised was that, in a number of articles, the formulation “in accordance with law” or “as prescribed by law” is used (Articles 11, 18, 19). Elsewhere, rights are defined “in accordance with national law”, or “as determined by national laws”, e.g. Articles 25, 27 and 30 which risk being used by governments as a justification to go below international human rights standards. Of particular concern is Article 11 (right to life). The wording “save in accordance with law” could be understood as encompassing international as well as national law. This has attracted a lot of criticism from the international community due to the fundamental nature of this right upon which all other rights depend. The main argument of those supporting the limitation clause to this fundamental right is based on Article 6 of the International Covenant on Civil and Political Rights (ICCPR). The proposal made by some representatives for the AICHR to use either the formulation used in the UDHR or ICCPR was not accommodated.

Another concern relates to non-discrimination. Although the principle of non-discrimination is enshrined in the general principles (Articles 1, 2, and 3), Article 34 departs from the general principles by allowing member states to discriminate against non-nationals by determining the extent to which they protect the economic and social rights of non-nationals. Even though the formulation used in the text of the AHRD follows that of in the International Covenant on Economic, Social and Cultural Rights (ICESCR), it deserves serious criticism. The proposal to delete the whole paragraph in order to guarantee the non-discrimination principle common to all international human rights instruments.
was rejected by a number of representatives. When it comes to the protection of the rights of non-nationals, the AHRD, although listing some groups such as migrant workers and vulnerable and marginalised groups in Article 4, risks excluding some groups from the list, as the non-discrimination formulation may be interpreted as exhaustive. Efforts made by a few representatives to add reference to indigenous peoples, given the support of ASEAN member states for the Declaration on the Rights of Indigenous Peoples, were in vain.

Moreover, by examining some of the provisions in the ADHR which apply directly or indirectly to non-nationals, the position of non-nationals under the Declaration becomes clear.

First, Article 12 guarantees the right to personal liberty and security. There were negotiations to include references to enforced disappearance and exile and to reformulate the article to cover "any other arbitrary form of deprivation of liberty". This was not accepted. Also, the draft does not include specific guarantees such as habeas corpus and judicial control over arrest, as contained in Article 9 of ICCPR:

"Anyone who is arrested or detained is entitled to due process and to access to a court which may decide, without delay, on the lawfulness of his detention and order his or her release if the detention is not lawful".

These omissions disproportionately impact on non-nationals, given the tendency in the region for refugees, asylum-seekers, and stateless persons to be arbitrarily or indefinitely detained for immigration offenses.

Secondly, Article 16 relates to the right to seek and receive asylum. The way the provision is formulated is rather unusual as it provides that the right to seek and enjoy asylum is only "in accordance with the laws of such state and applicable international agreements". Through this article ASEAN member states deny the fundamental principle of non-refoulement, which is legally binding on all states under customary international law and applies to all persons. This clause is almost meaningless considering the fact that only a few countries in ASEAN have ratified the 1951 Convention relating to the Status of Refugees and its Protocol and only a few member states are equipped with national law recognising refugee status.

In Article 18 on the right to nationality, the clause "as prescribed by law" is included again. In the negotiations, a few representatives tried to get agreement for the words "no one shall be rendered stateless" to be included in the provision but this was rejected. The provision could have followed the formulation of Article 15 of the UDHR, Article 9 of CEDAW or Article 7 of the CRC considering the fact that all ASEAN members adopted the UDHR and ratified CEDAW and CRC.

In addition, non-nationals, according to Article 25 of the AHRD, are denied some political rights, namely the right to vote and to participate in the government, as the Article uses the term "every citizen" and "every person who is a citizen of his or her own country", rather than "every person", as commonly used throughout the document. As already pointed out, Article 34 states that:

"ASEAN member states may determine the extent to which they would guarantee the economic and social rights found in this Declaration to non-nationals, with due regard to human rights and the organisation and resources of their respective national economies."
With a different formulation from Article 2 of ICESCR, the provision clearly allows discrimination against non-nationals.

In summary, whilst the principle of non-discrimination is clearly recognised as a general principle under the AHRD, a number of its other provisions do not comply with that principle.

The above mentioned shortcomings in the AHRD can be better understood by the examination of ASEAN’s perceptions about human rights.

**Human Rights in ASEAN: Perception and Misperception**

To understand the way the ASEAN human rights architecture (which includes both human rights institutions and standards) was designed and crafted, it is important to examine how ASEAN governments perceive human rights. This will help elucidate why the established ASEAN human rights mechanisms are not equipped with monitoring power and why the AHRD includes some provisions which do not accord with international human rights standards.

According to Tommy Koh, “[there was no] issue that took up more of our time, [no issue] as controversial and which divided the ASEAN family so deeply as human rights.”

According to Tay and Estanislao:

“[M]uch of ASEAN’s credibility and attraction to the outside world was built on the economic success of many of its members (...) ASEAN’s other strong points were the stability in the region and a good measure of cohesion among its members.”

These comments are still relevant today and most understand that such success and cohesion are based on at least two pillars, which include the written norms of non-interference and the principle of consensus. These founding principles were stated in the 1976 Treaty of Amity and Cooperation in South East Asia and are clearly repeated in the ASEAN Charter.

Three of the principles stipulated in Article 2(2) emphasise: respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN member states; non-interference in their national affairs; and respect for the right of every member state to lead its national existence free from external interference, subversion and coercion. ASEAN has long emphasised that the promotion and protection of human rights by the international community must recognise national sovereignty, national borders and non-interference in another state’s affairs. ASEAN views human rights as an internal affair. Nevertheless, events since the early 1990s, especially since the advent of ASEAN 10, have posed difficulties for ASEAN in dealing with new challenges. ASEAN is still divided on the issue of human rights. It is hard to imagine how these differences can be bridged, especially while the concept of “Asian values” is still alive. This observation is confirmed by Tommy Koh’s advocacy of a “human rights definition in an ASEAN context”.

Including human rights clauses in the Charter has not helped ASEAN to develop a human rights discourse or to change its perception of human rights. Koh reminds us of the perceptions of ASEAN governments, which are reflected in official documents such as AMM Joint Communiqués. First, ASEAN governments believe that human rights are not universal. While ASEAN leaders accept the concept of the Universality of human rights, they argue that there are differences between international human rights stand-
ards and practices in the region. For ASEAN, human rights are shaped by each society’s specific history, traditions, cultures and religions. All these elements form the basis for social values. This idea is reflected in the Joint Communiqué of the 25th AMM in 1992:

“[B]asic human rights, while universal in character, are governed by the distinct culture and history of, and socio-economic conditions in each country, and that their expression and application in the national context are within the competence and responsibility of each country.”

This discourse was repeated by Singapore’s foreign minister at the 1993 World Conference on Human Rights in Vienna when he emphasised that “universal recognition of the idea of human rights can be harmful if universalism is used to deny or mask the reality of diversity.” The same was reiterated by Prime Minister Hun Sen in 2006 when he said that “there is no such universality and international standard. Each country has its own standard.” This perception is clearly reflected in Article 7 of the AHRD.

Second, one category of rights is prioritised over another. Some ASEAN governments are not comfortable with the concept of the indivisibility of human rights. Many prefer advocating for economic, social and cultural rights rather than civil and political rights. ASEAN claims that political rights and civil liberties could be a hindrance to economic development and social or public order. There has always been a trade-off in which economic, social and cultural rights have been given priority over political and civil rights. Leaders of ASEAN seem to agree with Jieng Zemin, the then Chinese leader, who said that “rights of the survival of China’s population are more important than political rights.” They are reluctant to admit that violations of one set of rights will impact on others. Examples demonstrate that violations of economic, social and cultural rights are often the result of the political system. In ASEAN the typical sequence of development is first the economic take-off and then political freedoms. The sensitivity of political and civil rights was felt during the process of the drafting and negotiations of the AHRD and pronounced in a number of provisions provided for by the AHRD as already explained in the above section. The fact that the provision on the right to freedom of assembly was removed from the draft AHRD just before its adoption is evidence of ASEAN’s perception on human rights.

Third, in most ASEAN countries there has been more concern with order and discipline, and more concern with duties than with rights. A citizen has responsibilities towards his or her society. Many ASEAN governments believe that individual rights must give way to the demands of national security and economic growth. They believe that duties or responsibilities to the state and to other citizens come before the need to respect individual human rights. In this regard, the former Prime Minister of Singapore, Lee Kuan Yew, said in 1993 that “society has always been more important than the individual. I think that is what saved Asia from greater misery.” Here again, Article 8 of the general principles of the AHRD is the reflection of the way ASEAN governments perceive rights and duties.

Fourth, as noted above, since its inception, the working principles within ASEAN have been based on non-intervention and freedom “from external interference in any form or manifestation in order to preserve their national identities”. These principles have been confirmed and reconfirmed throughout the history of ASEAN. Article 2 of the Trea-
ty of Amity and Cooperation in South East Asia provides guiding principles for ASEAN members in their relations with one another that they all adhere to: (a) mutual respect for the independence, sovereignty, equality, territorial integrity and national identities of all nations; (b) the right of every state to lead its national existence free from external interference, subversion and coercion; and (c) non-interference in the internal affairs of one another.

The former Thai Minister of Foreign Affairs, Surin Pitsuwan, who recently ended his term as the ASEAN Secretary General, and Anwar Ibrahim, the former deputy Prime Minister of Malaysia, have proposed the concepts of constructive engagement and flexible engagement, respectively. In 1998, Surin said that:

“[I]t is time that ASEAN's cherished principle of non-intervention is modified to allow it to play a constructive role in preventing or resolving domestic issues with regional implications (...) when a matter of domestic concern poses a threat to regional stability, a dose of peer pressure or friendly advice at the right time can be helpful.”

Other ASEAN member states have rejected these ideas. In his paper presented in 1999 to the Asia-Pacific Roundtable, Termsak Chalermpalanupap points out that the “ASEAN way will continue to adapt to the changing situation, but its key principles, specifically of non-intervention, will not change”. For him, “there is no valid reason to change something that has worked successfully for over three decades in ASEAN”.

There has been little observable change in the stance in the period since 1999. Prime Minister Hun Sen affirmed this, not only in the debate on universality and particularity but also on the non-interference principle by saying that:

“Many Asian countries advocate state sovereignty and non-interference in internal affairs. No state can dictate and make judgments on others about human rights. Foreign policies should not be linked to human rights.”

All these principles are enshrined in the ASEAN Charter, the Terms of Reference of AICHR and the AHRD. The principles have been invoked on a number of occasions during discussions in the AICHR, especially when civil society groups send human rights violation cases to AICHR for review. The latest cases of the plight of Rohingya in Thailand and Malaysia and the disappearance of the leading NGO in Laos were submitted to the AICHR. So far, there has been no response. It seems that any reconciliation between the principle of human rights and that of non-interference is not foreseeable in the near future.

Resistance to the universal concept of human rights, a trade-off between two categories of rights as well as rights and duties, and the strict principle of non-interference in internal affairs have prevented ASEAN from setting out any clear human rights policies or including any human rights elements in their cooperation agenda. Until recently, ASEAN was more at ease with using other terms for human rights in official texts.

The inclusion of an ASEAN human rights body in Article 14 of the ASEAN Charter is an act of compromise in the sense that it was included as a “body” without any specific name. The AICHR established in 2009, unfortunately, is not equipped with monitoring and/or investigative powers. It cannot reconcile the principle of non-interference in internal affairs with that of the protection
of rights. It does not work with an accusatory approach, meaning there is no “naming and shaming”. Rather, it upholds ASEAN’s traditional principles, emphasising the need to take into consideration the different histories and circumstances of member states. The question has been asked how, after the adoption of the AHRD, this regional human rights instrument will be implemented and how such implementation is to be monitored. This question is left unanswered.

Conclusions

Thai Foreign Affairs Ministry’s permanent secretary Sihasak Phuangketkeow said:

“Thailand will be working closely with international agencies, including the UN High Commissioner for Refugees, to extend help to 857 Rohingya people found illegally entering Thailand earlier this month. We will proceed in line with laws and humanitarian principle”.

He said the UNHCR, the International Organisation for Migration (IOM), and UNICEF had expressed concerns and the wish to help the Rohingya people, “[s]o, we will have close discussions on what to do next. Otherwise, when the legal process in Thailand is completed, we will have to consider deporting them.” In fact, the Thai government still has no clear long term policy on the issue of Rohingya. The same is true of ASEAN and the AICHR who both remain silent on the issue. The adoption of the AHRD has not prompted AICHR or ASEAN to do more than before.

The AHRD is just another reflection and confirmation of the ASEAN perception of human rights as already explained. It took AICHR quite some time to agree on the section covering civil and political rights. The section on economic, social and cultural rights, although easier, contains some limitations. The notion of national sovereignty was pronounced throughout the text in the forms of the reference to national laws, the inclusion of limitation clauses as well as the emphasis on the responsibilities of the individual vis-à-vis society and state and the direct reference and repetition of the principle of non-interference in internal affairs. Although ASEAN shows some political commitments and one could take the adoption of AHRD as another step towards the development of a human rights architecture in ASEAN, one has to be realistic as any steps towards effective human rights mechanisms and stronger human rights standards will take a long time.

There has been criticism that the AHRD “bolsters the position of those who think that the half a billion people in the ASEAN region do not deserve the same human rights protections as the rest of the world”. Although this criticism may be partly correct in the sense that some provisions of the AHRD could be considered sub-standard, it does not do justice to the AHRD which does recognise, to a certain extent, many rights enshrined in international instruments. One cannot deny, though, that the AHRD has its deficiencies, not least of which is the fact that it could be interpreted and used to discriminate against some groups who deserve the same human rights protection as the rest of ASEAN.

The ASEAN human rights infrastructure at present seems to be full of defects and therefore is not effective. However, whether or not ASEAN is ready to re-design the regional human rights architecture depends on a number of factors including a review of the ASEAN Charter and a review of the Terms of Reference of the AICHR and other specialised human rights bodies. It is time for all stakeholders to push ASEAN to change its
The perception of human rights as well as to enable greater space for ASEAN people to participate in ASEAN’s decision-making process on matters which will impact their lives.

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2 A brief background of ASEAN is available at: http://www.asean.org/asean/about-asean/history (last accessed 2 September 2013).
3 Phnom Penh Statement on the adoption of the ASEAN Human Rights Declaration, 18 November 2012.
5 The Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015).
6 Part of this section was modified from Chapter I of the research report “Towards an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children” written by the author (and the team) and published by the Working Group for an ASEAN Human Rights Mechanism, May 2009.
7 Indonesia, Malaysia, the Philippines, Singapore and Thailand.
8 UN Charter, Article 1 Para 3 stipulates that states resolve “to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language, or religion.” Article 55 further reiterates that “the United Nations shall promote (…) c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion.”
13 Statement delivered by Tun Sri Musa Hitam, 5th Workshop on ASEAN Human Rights Mechanism, Kuala Lumpur, Malaysia, 29 June 2005.
14 Myanmar, the Philippines, Indonesia and Thailand in particular.
16 ASEAN Human Rights Declaration 2012, Article 6: “The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN member states to promote and protect all human rights and fundamental freedoms.”
17 Ibid., Article 7: “All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”
18 Ibid., Article 8: “The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.”

Article 6 of ICCPR states that “[e]very human being has inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” (International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 1966)

See above, note 16, Article 34: “Member states may determine the extent to which they would guarantee the economic and social rights found in this Declaration to non-nationals, with due regard to human rights and the organisation and resources of their respective national economies.”

*Ibid.*, Article 12: “Every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.”

*Ibid.*, Article 16: “Every person has the right to seek and receive asylum in another state in accordance with the laws of such State and applicable international agreements.”

*Ibid.*, Article 18: “Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.”

In terms of nationality and birth registration, language could be: (1) Everyone has the right to acquire and change their nationality. No one shall be arbitrarily deprived of their nationality (Article 15, UDHR); (2) Women shall have equal rights with men to acquire, change or retain their nationality, and to pass on nationality to their children (Article 9, CEDAW); (3) A child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents. Birth registration shall, in particular, be ensured for children who would otherwise be stateless (Article 7, CRC).


Prof. Tommy Koh is Ambassador-at-Large and Director of the Institute of Policy Studies, Ministry of Foreign Affairs, Singapore. He gave a talk at the Seventh Workshop on an ASEAN Human Rights Mechanism, Singapore, 12-13 June 2008.


ASEAN 10 refers to ASEAN since 1998, composed of 10 members: Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

See above, note 27.


See above, note 10.


Statement by Prime Minister Hun Sen during the meeting with the Working Group, 26 September 2006, Siem Reap, Cambodia.


Mr Termsak from Thailand has been special assistant to the ASEAN Secretary General and works full time at the ASEAN secretariat. See Chalermpalanupap, T quoted in Sutthisunsanee, S., above note 31, p. 24.

See above, note 34.


See above, note 19.
1. Introduction

In a previous article in this journal in 2012, we wrote that:

”[The] European Union is facing a major test of its sincerity and commitment to the UN Convention on the Rights of Persons with Disabilities (CRPD). Current and positive proposals from the European Commission designed to bring the EU Structural Funds into alignment with the CRPD are under pressure from Council. Failure to take the CRPD seriously will needlessly expose the EU – and its member states – to international legal liability if the Funds are used to build new institutions. And such failure will amount to a wasted opportunity to harness the Funds to ease a major process of transition needed to embed the right to community living for all.”

Our language was stark only because of the imperative to move the EU’s professed commitment to human rights away from the level of polite mythology to reach into and transform the sinews of EU power – especially its financial power. Unless and until human rights inform, shape and control these operations systems, they will remain mired at the level of myth and breed even further cynicism about the European project. That is why so much turns on the current negotiations over the next programming period in the EU Structural Funds (the Funds) which have the potential to do great good especially for marginalised groups such as persons with disabilities. What makes disability an especially interesting case is the fact that the EU, in addition to the majority of its member states, has actually ratified (technically “confirmed”) the CRPD.

This update recounts the latest developments in the negotiations which are, overall, trending positively. A final climatic vote is expected at a plenary session of the European Parliament in October 2013. Our view is that there is still room for improvement in the draft text. This is, in no way, to decry the outstanding contribution of the European Parliament thus far. Instead, our observations aim to give better effect to the intentions of Parliament which will have a dramatic effect on the shape of social Europe into the next decade.

2. Backstory

One of the core rights in the CRPD is the right to live independently and be included in the community (Article 19). This involves three related elements: the right to choose with
whom to live and where; the right to person-
alised services; and the right to have com-

munity based services made accessible to
persons with disabilities in the community.
The core principle at play is that of human
flourishing in community and connected
with others – precisely what has been denied
to so many citizens with disabilities in the
past (as well as to others). Note the relevant
provision is crafted with a positive philoso-
phy in mind – flourishing through choice as
well as connectedness in the community. The
word "deinstitutionalisation" is not expressly
mentioned. But it is obvious that the positive
philosophy implies its converse – namely the
need to transition away from congregated
or institutional setting to enable community
living to happen – and to release the massive
amount of funds tied up in institutions to in-
vest in community-based resources.

This transition has not been helped by the
fact that the Funds have been used in the
past to refurbish and even build new in-
stitutions. The underlying Structural Fund
Regulations (the Regulations) governing the
Funds were lax enough to permit this to hap-
pen in the recent past. Put more positively,
the transition could be massively eased for
many member states in difficult financial
circumstances if the Funds were channelled
positively to move the recipient states in the
right direction.

There is no doubt that the relevant obliga-
tions of the CRPD touch the Funds and that
the EU will be held to account at some point.
Indeed, to put the matter beyond doubt, the
instrument of ratification ("confirmation"),
which the EU lodged with the UN, outlined
several areas in which the EU recognised
that it had competence relevant to the trea-
ty. Explicitly included within this list were
the Regulations. The Regulations are re-neg-
gotiated at the outset of new programming
periods which generally last seven years.
The current set is due for renewal by the
end of 2013, with partnership contracts be-
tween the European Commission and mem-
ber states already being negotiated and
finalised in anticipation of the 2014-2020
programming period.

The European Commission’s original propos-
als for the new set of Regulations contained
a number of elements which were extremely
positive in the context of disability rights,
both within the overarching common provi-
sions regulations and the individual regul-
ations intended to govern the European Social
Fund and the European Regional Develop-
ment Fund. Of particular importance was the
inclusion of ex ante conditionalities which
are basically requirements which recipient
member states must comply with in order to
be in a position to access funding. These pro-
visions were outlined and analysed in detail
in our previous article.

However, at the time of writing our previous
article, we noted that on 24 April 2012, the
EU General Affairs Council adopted a “par-
tial general approach” which saw the mem-
ber states adopt an amended version of the
original text. The Council text purported to
remove key ex ante conditionalities, includ-
ing the general conditionalities on anti-dis-


crimination, gender equality and disability,
as well as the thematic conditionality enti-
tled “Promoting social inclusion and combat-
ing poverty” which required member states
to demonstrate the “existence and the imple-
dmentation of a national strategy for poverty
reduction”. A “criteria for fulfilment” for this
strategy would be the inclusion of “measures
for the shift from residential to community
based care”. It should be noted that this cri-
terion is not limited to persons with disabili-
ties and applies to all groups who are, or are
at risk of being placed in institutions rather
than provided with support and services in the community. This would apply equally to children as well as older people.

In our previous article, we stated that:

“Removing the *ex ante* conditionalities will inevitably and predictably lead to a use of the Funds that cannot be squared with core obligations under the CRPD and hence merely stores up needless international legal exposure for the Union and its member states. It would be much better – and much more prudent from the perspective of avoiding international legal liability – to restore the conditionalities and other similar safeguards.”

Indeed, the Concluding Observations of the UN Committee on the Rights of Persons with Disabilities have already alluded to the manner by which the Funds have been spent in one recipient EU country – thus setting the stage for the examination of the EU’s first or initial report to that Committee due by the end of 2013.

3. The Negotiations since 2012

Events have moved on since we wrote in 2012. Trilogue negotiations between the Council, Parliament and Commission took place from late 2012 into mid-2013 based on the established mandates of those institutions. Such negotiations are informal tripartite negotiations between the Council, the European Commission and the European Parliament. They are used to broker compromises where an impasse has been reached. These negotiations sought to address points of divergence on the content of the proposed regulations. The question concerning the retention (or reinstatement) of the aforementioned conditionalities was one of the issues under discussion.

To its immense credit, the European Parliament delegation in the Trilogue process held its ground and insisted on retention of the relevant *ex ante* conditionality. Following the outcome of these negotiations (presumably agreed to by Council negotiators) the European Parliament Regional Development Committee received a report from its Rapporteurs which proposed that the Committee adopt a thematic conditionality along the following lines:

**[Draft Headline Ex Ante Conditionality]**

(...) existence and the implementation of a national strategic policy framework for poverty reduction (…)"which"(…)

**[Draft Criterion of Fulfilment]**

"*depending on the identified needs*, includes measures for the shift from institutional to community based care(...)”. [Emphasis added.]

The Regional Development Committee voted to adopt the reports and the amended language as agreed at Trilogue on 10 July 2013. The Common Provisions Regulation is tabled for a first reading and plenary vote at the European Parliament. At the time of writing this update the vote is scheduled to take place on 22 October 2013.

4. Adequacy of the Draft Text

It is obvious that the insistence of the European Parliament delegation on the retention of the relevant *ex ante* conditionality and criterion of fulfilment has paid dividends in the Trilogue negotiations. This is hugely to the credit of the Parliament. The final vote on 22 October 2013 is awaited with eagerness, especially in recipient member states. There is still space for proposals for amendments that would both clarify and strengthen the relevant criterion of fulfilment.
More specifically, a number of improvements could still be made to the language of the relevant criterion of fulfilment in order to narrow down the possibility for any use of the Funds that could potentially violate the CRPD and, more positively, to ensure the Funds generate real European added-value in helping recipient states transition away from institutions and towards a community living model for all.

Firstly, it must be noted that the phrase “depending on the identified needs” may have been meant to suggest that subvention may only be needed in some recipient member states and not in others. However, if so, then the phrase is a tautology. It serves no meaningful purpose and is apt to give rise to the impression that the legal obligation under the CRPD to engage in a process of transition away from institutions and towards community based living is somehow contingent on some examination of actual needs on the ground. This is certainly not in conformity with Article 19 of the CRPD which foresees no such contingency. Since it is obvious that the relevant criterion applies to those recipient member states with institutions, the phrase can be deleted with no adverse impact on the intention of the framers.

Secondly, the new element of contingency in the phrase “depending on the identified needs” does not easily coexist alongside existing EU policy which is itself framed more categorically. For example, the EU has committed itself, in its European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe under the action line of “Participation”, to work to:

“[P]romote the transition from institutional to community-based care by: using Structural Funds and the Rural Development Fund to support the development of community-based services and raising awareness of the situation of people with disabilities living in residential institutions, in particular children and elderly people.”

It goes on to state that the EU will support national activities to:

“[A]chieve the transition from institutional to community-based care, including use of Structural Funds and the Rural Development Fund for training human resources and adapting social infrastructure, developing personal assistance funding schemes, promoting sound working conditions for professional carers and support for families and informal carers.”

Thirdly, the new element of conditionality introduces a new layer of problems which simply cloud the relatively straightforward legal implications of Article 19 of the CRPD. Who (or what) is to identify needs? What exactly are these needs and how do they intersect with the rights under Article 19? Which criteria or assessment tools are to be used? Who (or what) will police the process? Are member states to be judges in their own case?

Due to these ambiguities, it seems likely that the question of “identifying the need” for transition from institutional care to services provided in the community will be a matter which member states should themselves adjudicate upon. The result of such discretion being afforded to countries, which have in the past, demonstrated less than strident efforts to carry out this process, will inevitably be more delays and obfuscation, with vulnerable social groups counting the cost. It would be better to eliminate the element of contingency in the first place.

Fourthly, the phrase “measures for the shift from institutional to community based care”
is itself subtly paternalistic. It will be recalled that the underlying philosophy of Article 19 of the CRPD is not “care”. Rather, it is to empower people make their own choices, to ensure that services are increasingly personalised, to optimise the chances that personal choices will actually be respected and to open up and make generally available community services more accessible. It would therefore be preferable to delete the word “care” and to reflect in the draft language some sense of the right (not need) of the person to live in the community, the transition needed to develop personalised services and the related need to make generally available services in the community more accessible. The services are there to give efficacy to a right – they are not there as ends in themselves or as an aspect of care.

The retention of the concept of an ex ante conditionality and the relevant criterion of fulfilment is to the immense credit of the European Parliament. But we submit that somewhat more space is needed to reflect on whether the draft language is fully fit for purpose. This requires a careful marriage of EU law with the underlying philosophy of the CRPD. At the risk of repetition, we summarised this philosophy as follows:

“Article 19 requires putting in place a web of personalised supports to meet the personal circumstances of the person. This is not so much about needs and services, it is more about the silent revolution in traditional understandings of welfare which should move away from gross proxies of need (with equally gross services) and to focus instead on the life plans and ambitions of the person. And Article 19 requires that community services be fully inclusive of, and accessible to persons with disabilities. This requires a transition away from institutions (and locking away scarce public money in institutions) and unbundling resources to enable genuine community living to occur.”

We continued:

“Article 19(b) provides for the right of persons with disabilities to access a range of community-support services. The design and delivery of social services in the past left much to be desired throughout the world and particularly in developed countries that could afford an elaborate social security safety net. For one thing, they were largely crafted around proxies of ‘need’ – ideal images or categories of need that paid scant regard to individual circumstances. The result of these practices has been services that fail to address the myriad of extremely personal factors that can only be taken into account in more personalised services. The result has also been the provision of costly services that may not map onto actual need but which are held on to by individuals (and their families) out of fear of not having an assured level of access when the need actually arises. (...) So Article 19 is not just about a home of one’s own – it is about the social services needed to enable individuals to imagine and lead the lives they want. And that increasingly calls for not just a new philosophy of services that is clearly animated in the CRPD but also a new kind of personal assistance – a transfer of emphasis onto a new kind of social support that takes the individuals’ preferences seriously.”

The language contained in this conditionality should therefore speak more explicitly of rights, not needs. This is not only consistent with the requirements of the CRPD but is also a coherent continuation of the EU’s stated policy in this area and its commitments to smart, sustainable and inclusive growth as outlined in Europe 2020.
5. Conclusion

There is still an opportunity for the European Parliament to clarify and strengthen the relevant criterion of fulfilment. Amendments are still possible during the plenary session in October. This is in no way to deny or decry the laudable work done by the Parliament already. But a clarification and strengthening of the criterion of fulfilment would ensure a lasting legacy for the Funds as a real agent of change in Europe and to give better expression to the intention of Parliament. Nothing is lost by eliminating a tautology. One final push is needed to get the optimal result – the correct mix between power and principle – and to generate the added value from EU financial instruments that citizens are entitled to demand, especially in times where every cent counts.

1 Gerard Quinn is Director of the Centre for Disability Law and Policy at the National University of Ireland Galway. Suzanne Doyle is Research Associate at the same Centre (www.nuigalway.ie/cdlp).
4 Ibid., p. 58.
5 See above, note 2, pp. 81-91.
6 Ibid., p. 85.
7 Ibid., p. 86.
8 UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial periodic report of Hungary, adopted by the Committee at its eighth session (17-28 September 2012), 22 October 2012, CRPD/C/HUN/CO/1, Paras 33-35.
10 Ibid., p. 40.
11 European Parliament, Committee on Regional Development, Minute Meetings, 10 July 2013, from 09.00 to 12.30 and from 15.00 to 18.30, and 11 July 2013, from 9.00 to 12.30 Brussels, REGI_PV(2013)0710_1, p. 3., available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-516.638%2b01%2bDOC%2bPDF%2bV0%2f%2fEN (last accessed 30 August 2013).
12 Procedure File: Structural instruments: common provisions for ERDF, ESF, Cohesion Fund, EAFRD and EMFF; general provisions applicable to ERDF, ESF and Cohesion Fund, 2011/0276(COD).
14 Ibid., p. 6.
15 Ibid.
16 See, for example, European Coalition for Community Living, Wasted Time, Wasted Money, Wasted Lives ... A Wasted Opportunity? – A Focus Report on how the current use of Structural Funds perpetuates the social exclusion of disabled people in Central and Eastern Europe by failing to support the transition from institutional care to community-based services, March 2010.
17 See above, note 2, pp. 73.
18 Ibid., pp. 75-76.
“The abolition of mandatory retirement is a sine qua non of the genuine prohibition of age-discrimination.”

Csilla Kollonay Lehoczky
Age discrimination is a late child within the non-discrimination family. As such, it faces the advantages and disadvantages of being the youngest child in a large family. It gets less, never sits at the elegant place of a first-born, but also gains from getting experience, learning, and inheriting this and that from its older siblings.

Robert Neil Butler, a gerontologist, holds the title of being the creator of the word “ageism”, which he used in his much quoted 1969 article to describe the widespread hostile prejudice that he observed was faced by elderly persons. The word clearly and sensibly expresses the similarity with “racism” and “sexism”, associating “ageism” with the two most severe and outrageous forms of historic discrimination.

Lots of symptoms suggest that Butler was right and at the same time over-optimistic and over-ambitious, when suggesting that the place of ageism was within the same box as racism and sexism. One of these symptoms is the difference in the ways in which authors are writing on, and advocating for, the elimination of age discrimination. Papers often start by acknowledging that differential treatment on the grounds of age may sometimes serve a useful purpose, followed by the statement that “nonetheless” such differentiation might be based on incorrect presumptions and prejudice and therefore should be prohibited. No paper on racial or sex discrimination would start with such a concession. In spite of the clear “relationship”, the prohibition of age discrimination cannot share the clear and undisputed status of race and sex in the family of grounds of discrimination, while it continues to be marked by ambivalence in the law and jurisprudence. This article attempts to detect some of the conceptual reasons why age is different from its “older siblings”, on the basis that clear recognition of some of the unique attributes of age discrimination might facilitate a stabilisation of its place within the family.

The birth date of the notion of age discrimination marks a key difference between it and its “older siblings”: it arrived too late (in the late 20th and early 21st Century) to benefit from inclusion in the system of the post-World War II human rights protection. Perhaps it is not only a late, but also an “unwanted child”. Its conception is frequently explained as being the result of the revolutionary demographic and economic changes which took place in the second half – especially the last two decades – of the 20th Century and which necessitated appropriate legislation. The “ageing population” syndrome resulted in social and economic problems and the inclusion of ageing persons in paid work and taxation in order to preserve the long term balance of the social security budget. These realities, coupled with globalisation and de-
mographic differences, above all, lie behind the increased interest for protecting the human rights of older persons.3

Since this late child is still young, its genuine attributes have not yet entirely unfolded. Frequently, the child has to wear clothes and shoes that do not fit, thus it looks clumsy and limping.

One of the unique attributes of age not yet properly explored is that age is not a static but a dynamic attribute. It has a temporal dimension, a one-way, progressive and irreversible nature. This dynamic nature makes age discrimination substantially different from race, sex, religion and even disability discrimination and disregarding this attribute might cause confusion in the protection of the aged.

A second attribute of the prohibition of age discrimination is the almost inseparable combination of the right to equal treatment and the right to accommodation and assistance, both different forms of non-discrimination; however, assistance is a relationship that may imply or generate inequality and therefore is, in the public mind, distinguished from equality. The combination of these two specific attributes demands to be clearly addressed along the temporal line – change in time – that is a third and unique attribute of the personal and material scope of the legal protection.

This article will briefly discuss these conceptual issues, in addition to looking at the main international instruments prohibiting discrimination on the ground of age, and paying particular attention to the first regulation regarding non-discrimination in employment, the United States Age Discrimination in Employment Act (ADEA). The age discrimination legislation of the European Union will not be discussed, apart from occasional comments regarding some general or basic issues of age discrimination.

Part One explores the place of age discrimination in the non-discrimination family, and tries to find an explanation as to why it is considered by many less important than its siblings. Part Two provides an overview of the personal scope of the protection in order to see clearly the groups to be covered, the subgroups and their attributes. This article contends that the law should protect all persons from age discrimination, and should not be restricted to those within a specific age group. The one-way and progressive nature of ageing has to be “discovered” and henceforth old age and young age have to be distinguished as two separate protected attributes. Part Three starts the mapping of the “material scope”, namely the protection of the right to equal treatment in employment, presenting some features of the US ADEA. Part Four discusses a separate issue of non-discrimination in employment: mandatory retirement – a controversial issue revealing the difficulties on the road to consistent prohibition of age discrimination. Part Five provides a brief overview of the possibilities of protecting the elderly outside employment in the so called “fourth age”: when the right to equal dignity necessitates positive measures, the provision of social services, sometimes costly, provokes sharp questions about what society means by equality and how equality is distributed. The brief summary draws mainly on the relevant case law of the Revised European Social Charter (RESC).

Part I: The Place of Age in the Hierarchy of Protected Attributes

Age discrimination in the human rights world does not enjoy the same place and vigour as race or sex discrimination. Language reflects
the mind. The occasional timid approach to age discrimination reflects the overall ambivalence to the issue which is connected to its informal lower status in the hierarchy of various prohibited discrimination grounds. Whilst some may deny that there is a hierarchy and/or that age has a lower status, considering the reasons for its perceived low ranking might be useful when contemplating effective guarantees of the equal rights of the elderly.

The late arrival and consequent lower rank is signalled primarily by the fact that international conventions that set up the post-World War II human rights system did not include age into their catalogues of “suspect” classification. Neither the Universal Declaration of Human Rights (UDHR), nor the two main UN treaties – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), mention age in their catalogue of protected attributes.4

The African Charter on Human and Peoples’ Rights (ACHPR) adopted in 1981 is mentioned in surveys of international treaties as the exception, explicitly including the prohibition of discrimination on the ground of age. However, such reading of the Charter is misleading. Article 18 of the ACHPR on the “Protection of the Family and Vulnerable Groups” prohibits discrimination against women, while the aged and the disabled are provided with “right to special measures of protection in keeping with their physical or moral needs”. With the lack of clear distinction between protection by special measures and prohibition of discrimination, such reference, like the provision itself, rather underlines and contributes to the mixed and irresolute nature of age discrimination.

Similarly to the ACHPR, when age is mentioned in international treaties, it is meant as a ground for permitted classifications of persons in order to “protect” older or younger people who are seen as “vulnerable”, or in order to “protect” the public from attributes associated with age (e.g. lower age limits for drivers’ licences or lower ages for certain occupations).5 Such a protective approach is a further factor in the ambiguity surrounding the application of age discrimination.

In Europe, age is not included either in Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), or in Article E of the RESC.6 No doubt, in principle the open-ended wording of the lists of discrimination grounds within these treaties permits the addition of further grounds.7 When listing the grounds upon which a person may be protected from discrimination, the phrase starts with “such as” and ends with “other ground” or “other status”, indicating that the list of enumerated characteristics, including sex and race for example, is non-exhaustive. Thus, age could be added through case law by the adjudication of compliance monitoring bodies. But it is not.

By the explicit inclusion or non-inclusion in the given catalogue, these treaties classify and thereby set up a hierarchy between “suspect” and “non-suspect” grounds.8 The distinction between “suspect” and “non-suspect” grounds almost naturally results in a differentiation of rigour in the application of the prohibitions in general, and in the case of age in particular. As states are granted a broader margin of appreciation and respect, reluctance or uncertainty emerges regarding the inclusion of age among the protected attributes.

As a result, age as a discriminatory distinction remains little discussed in the case law of adjudication bodies supervising
the implementation of human rights treaties with cases more likely to be brought or decided on other grounds such as the gender of the applicants or, even, extending the catalogue of prohibited grounds, on grounds of sexual orientation in relation to age-distinctive legislation.

Further weakening the status of age-discrimination is the existing divide between civil and political rights on the one hand and social and economic rights on the other. The aged, or to put it more accurately, the “elderly”, are protected predominantly by conventions on economic and social rights, whose hierarchical status is seen by many as lower than that of civil and political rights conventions, in contradiction with the principles of universality and indivisibility of human rights.

The ECHR prohibits discrimination only in respect of the enjoyment of the rights guaranteed by the Convention. Social and employment rights, where protection against age discrimination is the most relevant, remain outside the material scope of civil and political human rights and their equal rights check. Protocol 12 to the ECHR which prohibits discrimination in any context could be a vehicle to bringing equality regarding social rights within the scope of the ECHR. However, this Protocol has only been ratified by a minority of member states.

The case of Brooks v Netherlands before the UN Human Rights Committee was a promising milestone case and a potential “promoter” for the Protocol 12 idea in as much as it extended the scope of equal treatment to social and economic rights by declaring that the state’s obligation to observe equal treatment is not dependent on the subject matter of the legislation. Although sovereign states are not obliged under the ICCPR to adopt any social legislation, if they decide they are bound by Article 26, they must ensure that the law prohibits “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”.

Relying on Article 26, the Committee found that Dutch legislation violated the rights of Ms Brooks to old age benefits on equal footing with men. Even though the case related to pension rights, it cannot be considered as an extension of the prohibited grounds to cover age, as the decision of the Committee was based on sex discrimination rather than age discrimination or the pension rights of the elderly.

Moving from the international level to the federal and “quasi-federal” (supranational) level of the United States and the European Union, the hierarchy is more hidden, but nonetheless can be discovered and traced, though less so in the US, where the issue of hierarchy gets minor attention. In both legal systems, age is one of the grounds which gained legal recognition later and is separate from the classic grounds such as race, sex and religion. The US Civil Rights Act 1964 did not include age in its Title VII protecting groups subjected to historic, egregious discrimination. At a short distance in time and spirit from the original discrimination grounds, age discrimination was addressed in 1967 in a separate piece of legislation, the US Age Discrimination in Employment Act (ADEA). This legislation, in spite of its strong reliance on the wording of Title VII, has resulted in a different interpretation, with a slightly but clearly lower level of scrutiny in comparison to race, sex or religion cases.
At a longer distance in time from the original grounds of sex and nationality, EU legislation addressed age discrimination in one of its pieces of legislation which separated race/ethnicity from the “other” new grounds and differed from sex or race discrimination in respect to the scope of application and the permitted exceptions. The distance in time ultimately was an advantage with regard to the content of the provisions. Sex and nationality discrimination (“the oldest children” in the family) produced, over the years, a significant amount of case law, eventually resulting in sophisticated interpretations of the prohibitions. This process has clearly helped shape the sound development of the newborn concept of age discrimination.

The prohibition of age discrimination is included in Directive 2000/73/EC of 27 November 2000 (the Framework Directive) on establishing a general framework for equal treatment in employment and occupation, to combat certain types of discrimination on “other” grounds, in addition to sex and race (ethnic origin). The implied ranking in the legislative instruments has been confirmed by the European Court of Justice (ECJ, later CJEU).

The Charter of Fundamental Rights of the European Union, which entered into force (in a limited sense) with the Lisbon Treaty in 2009, includes age in its list of 14 prohibited grounds of discrimination. Furthermore, in Article 25, it recognises the rights of the elderly (inserted between the rights of the child and the integration of persons with disabilities in Articles 24 and 26).

The existence of a hierarchy within the prohibition on discrimination is not disputed in the analysis of EU anti-discrimination legislation. On the other hand, opinions are divided about the impact and possible “ranking” or “levelling” of the hierarchy. It might also be telling that the issue of hierarchy is mainly discussed in academic articles, when dealing with one of the “newer” and perhaps “weaker” (or supposedly weaker) protected grounds, such as religion, sexual orientation and disability. While the presence of a hierarchy, either in international human rights law, or in EU anti-discrimination legislation, is seen as a fact, views diverge about its assessment. Some find it “worrisome”, some have a neutral view, or see potential risks for certain “strands” both in treating the grounds as equal and in establishing a hierarchy. Dagmar Schiek, seeing problems both in the current hierarchy under the Framework Directive and its planned legislative extension, makes a proposal for a novel approach, a “heterarchical” instead of “hierarchical” system of organising the principle of non-discrimination around “nodes”. In that system, age discrimination is placed around the “node” of disability since age “often leads to a reduction in bodily functions and associated prejudice”.

Since EU age discrimination legislation prohibits discrimination against the young, just as it prohibits discrimination against the elderly, this grouping raises serious questions with regard to age discrimination: how the “lower end” of the age-scale connects to the group of the disabled. At the same time, this categorization beneficially directs the limelight to one of the principal issues for this article: whether the concept of age discrimination is a symmetric, two-way model or can it reasonably and consistently guarantee protection if it is perceived as an asymmetric notion.

The next part will address the need for further specification of the personal scope of the prohibition of age discrimination.
Part II: Who Is Covered by Age Discrimination Provisions? – Personal Scope of the Protection

Who should be protected by provisions on non-discrimination on the ground of age? Within what limits should “young age” and “old age” be recognised? These apparently simple questions receive sharply differing answers from legislation, the courts and from academia.

One of the reasons for the doubts regarding the nature of the prohibition of age discrimination is rooted in the personal scope of the concept. Not only because of the conflicting answers but also, and mainly, because of the specific group characteristics of those protected, this class of persons is distinguished from all other protected classes in the equal rights world. Looking into these specificities not only helps to confirm our views on age discrimination but may also help clarify some concepts of discrimination on other grounds or discrimination in general.

Everyone has an age, be it young or old. The term “age discrimination” suggests prejudicial stereotyping and treating someone unfavourably because of their age, regardless of what that age is. Since such stereotyping and disparate treatment violates the dignity of the person, age discrimination should be prohibited against any age group.

This conclusion is based on the false premise that persons of any age belong to a category or group which shares characteristics which can be the basis for their differential treatment. Evidently this is not the case. The harms of negative stereotypes, such as presumed reduction of physical and intellectual capacities and growing inflexibility, are attached to the upper age groups, the elderly. Thus, the category of persons most exposed to discriminatory treatment and needing protection from age discrimination legislation are the elderly, the upper age groups along the age-scale.

1. Protection of the Young with Respect to their Age

From time to time young persons are also subject to discrimination either due to a real or presumed lack of physical, intellectual or moral maturity, or because of the lack of autonomy or autonomous responsibility. The public mind, as well as the prevailing socio-cultural attitudes and legal approaches, associate autonomy with “maturity”, at least at the lower end of the age ladder; and maturity is measured by the number of years the person has lived.

Thus, identifying a person as young has been used in law first and foremost to regulate their protection rather than their equal treatment. Equal treatment is a secondary and scarcely regulated topic, not only in respect to children but also to young persons.

In international treaties, young age is subject to regulation primarily with a protective intention, setting minimal ages for activities that, at an early age, would be harmful for the young person or would bring risk for others. A clear example is provided by the prohibition of child labour, the subject of a core convention and related legal instruments of the International Labour Organisation (ILO). Further, Article 10(3) of ICESCR not only obliges state parties to prohibit child labour, but also requires national legislation to protect children from “economic and social exploitation”, i.e. from discriminatory wages and working conditions. Both the ILO conventions and the ICESCR merely require states to legislate on a minimum age limit without specifying the acceptable minimum...
age. The RESC, in order to guarantee the right to special protection against the physical and moral hazards for children and young persons, sets the minimum age for admission to employment at 15 years, while the minimum age for admission to dangerous or unhealthy occupations is set at 18 years.

Further, international treaties set a minimum age for a number of activities which impact on other fundamental human rights (such as the rights to marry or to move freely) or other activities and autonomous choices. The analysis of the limitation of the autonomy of under-age persons in order to protect children and young persons, and occasionally others (e.g. minimum age for driver’s licence), is beyond the scope of this article. These examples are mentioned in order to illuminate the complexity of protection and autonomy when considering age in human rights and non-discrimination law.

All these limitations might sound discriminatory within the sphere of thoughts on age discrimination. They are based on assumptions, setting fixed dates that do not permit individual assessment. Still, such norms, protecting the young, especially those under full age are not considered “discriminatory”.

The markedly different nature of young age is expressed in the unquestioned international consensus about the need for limitations. We may conclude that a benevolent protective aim behind a limitation eliminates or neutralises the discriminatory nature of a provision.

Thus, we should look at age as a bipolarity (two opposite poles) and a (temporal) continuum at the same time. While in the context of other grounds of discrimination, especially gender discrimination, feminist theorists argue that “[s]ex in nature is not a bipolarity; it is a continuum. In society it is made a bipolarity”, resulting in the unattainable requirement to be the same as others at the same pole, and setting the standard pole in order to provide for equality.

Contrary to the binary nature of race, sex or other discriminations, here there is a one-way path that might connect the group of the young and its comparator group, or the group of the old and its comparator group, but not the young and the old. A person of a majority race is different from a person of a minority race exactly as much as the minority person is different from the majority person. Similarly, a woman is different from a man as much as a man is different from a woman. Any difference (especially hierarchy) established between the different race (or sex) groups is suspect classification. The path between the two race (or sex) groups is equal, back and forth. By contrast, in considering the two poles of the age scale, it is clear that the “young” is differently different from the “elderly” than the “elderly” is from the “young”. There is no equal way back and forth, because, in the context of non-discrimination, they are not comparable groups. Their comparator is the “adult”, the “mainstream adult”. (See below in section 2.)

This is an important element to clarify in order to correctly identify the personal scope of age discrimination. With the exception of the age-neutral approach of EU age-discrimination legislation, which is unique in its kind, and apart from protective limitations, it is difficult to find comprehensive protection for the right to equal treatment of the young at the international level. This is particularly missing in respect to the early years of adulthood when protection against age discrimination and the guarantee of the right to equal treatment would be the most important.
2. Everyone Has an Age?

Age discrimination is considered primarily to concern protecting the aged against treatment which is not based on the merits of the individual, but is instead based on presumptions and prejudice connected to the category. The need for such legislation is clear and is addressed in detail in the human rights literature. In spite of the broad and convincing arguments, age discrimination is, as discussed above in Part I, surrounded by doubt as to whether ageing persons are, indeed, a category in need of the same protection as other, classic categories.

Above, we have seen how misleading the statement “everyone has an age” is in respect to age discrimination. Another similar, misleading objection against prohibiting discrimination on grounds of age is the statement that “ageing affects everyone”, i.e. the disadvantages are distributed equally and there is no one group that can be demarcated as “vulnerable” or “inferior” and thus requiring protection.

While it is a trivial truth that with time old age reaches everyone, this does not mean that all age groups are “equal” and we do not find a division between “dominant” and “minority” groups, the superior and inferior in the social context of all discrimination. These groups are also present along the age scale. However, it is important to emphasize again that it is not the “young” and the “old” that are the two opposite poles here; rather, the “mainstream” (“normal”) age is the comparator and the opposite group to the “ageing” or “older”. Or, in the context of discrimination on the ground of young (full) age, the young adult has to be compared to the mainstream adult, underlying again that “old age” and “young age” are two different grounds of discrimination.

Another recurrent argument is that it is difficult to talk about social disadvantages faced by the elderly as a class. The social status and material conditions of life are changing with ageing. Some people are better off while being younger, some reach better conditions by their older years, and therefore it would be difficult to associate the differences with discrimination. Further, it is argued that age is not an attribute that is unchangeably a part of the identity of the person, determining social contacts, cultural identity, creating a “discrete and insular” minority lacking access to political power. Conversely, political and economic power can be rather associated with older age groups.

This is misleading again. In spite of individual differences, the elderly, especially when not having regular income anymore, are worse off as a group, at any point in time. Arguing “fluctuation” overlooks the irreversible, progressing nature of ageing. Even if everyone is ageing, at any given time there is a dominant and a “minority” group. This is, indeed, a dynamic phenomenon, which however does not support the statement that the advantages and disadvantages of life are distributed among age groups equally.

Ageing is a one-way, progressing and irreversible process that is coupled with certain disadvantages at any point in time and these disadvantages are increasing, creating the need for equal treatment, protection and balance. Such a dynamic of growing and decreasing is not an attribute of any other discriminatory grounds. At the same time, the fact that ageing reaches everyone expresses the one-way character of the attribute which underlines its irreversible and irresistible nature and powerfully underlines the importance of nuanced protection, adequate and proportionate, against all forms of discrimination on the ground of age.
A legal framework which enables adequate, complex and proportionate protection of the category differentiation within the group is needed in order to protect against various manifestations of age discrimination and to protect the equality and dignity of individuals throughout the various phases of the ageing process. The elderly are not a homogenous category. The group is comprised of two main subcategories: the elderly of working age (the limits of which are individual and not fixed to a specific number of years) and those beyond working age. For those who are of working age and want to work, learn and develop, non-discrimination legislation should establish firm employment protection, equal access to employment, job security and equal treatment in the workplace. These guarantees are crucial and are the core of non-discrimination. At some point in time, the need for protection against employment discrimination gives way to the phase of life when non-discrimination in health care and social services is of particular importance together with the right to conditions of maintaining a life in dignity and independence. This latter age might be associated with the so-called “fourth age”, although no clear borderline can be drawn.

The differentiated scope *ratione personae* dictates a differentiated *ratione materiae*. Failure to properly distinguish the two subcategories and adjust legislation to their needs may weaken protection for both and may contribute to the persistence of the obscurities around age discrimination.

While emphasising the importance of the distinction between the two subcategories and of an adequate legal framework, it is also important to underline that no normative definitions or borderlines are acceptable, especially not years of age. Statistical categories are used for approximate distinction. Regulatory borderlines provide an indication of years. Policies which rest on the criterion of biological age, such as a birthday, and not on substantive factors or capabilities such as when a person is losing her or his capacities and competences, would be fundamentally undermining the principle of individual assessment of all persons, which is a core concept of equal rights.

At this point, the distinction between two different groups of older persons protected against “ageism” raises the need to try to clarify how protection and non-discrimination are and should be present in the guarantee of equal dignity and in the creation of an integrated society, whereas the inclusion of the young in non-discrimination legislation further complicates the understanding of age discrimination.

**Part III: The Material Scope of the Prohibition of Age Discrimination – Protection in Employment**

The material scope of the prohibition of age discrimination can be said to cover two major areas: prohibiting discrimination in employment, and, outside employment, providing assistance while prohibiting discrimination. These two different areas correspond to the above mentioned internal grouping of the affected population:

1) those of working age (i.e. those who are able and willing to participate in the labour market, regardless of age), and

2) those who, being beyond working age and detached from the workplace, still have a right to a full life in health and dignity, integrated and participating in society and in all kinds of human activity, as much as possible and for as long as possible.
The distinction between the two areas is essential when looking at the existing legislation protecting the elderly from discriminatory differentiation. A brief international review shows that where legislation provides stronger protection to the ageing population in the first area (i.e. in employment), like in the US, the protection of equal opportunities in the second area (i.e. beyond working age) is weaker; and vice versa, the extended protection of life opportunities and provision of social services beyond working age in Europe is coupled with more permissive legislative and/or judicial approach to coercive ending of the labour market career of a person.39

At a risk of simplification, the strong protection in employment for those above a certain age is the model adopted in the US, while protection outside employment and beyond the working age is rather found on the European continent. The focus of the following sections will be on this division, whilst also exploring EU norms on age discrimination in employment.

1. ADEA: the Exemplary Statute

The US ADEA40 is an early and, still, the clearest example of statutory protection of ageing workers against discrimination in employment. Age discrimination legislation in the US was an early, welcome and non-discriminated child: the Congressional reason behind ADEA was to uphold the constitutional right to equality of individuals in this group. In contrast to other parts of the world, there was no reference to numerous demographic and economic exigencies necessitating the protection of the equal rights of the elderly. The US Congress, in its statement on the purpose of the proposed legislation, referred primarily to the contrast between “rising productivity and affluence” in the country and the disadvantages faced by older workers in their efforts to retain and, especially, to regain employment when displaced from jobs due to discriminatory employment practices, especially those of setting arbitrary age limits.41 The problems affecting older people due to the deterioration of their skills, morale and acceptability to employers resulting from longer unemployment, were also mentioned.42 No mention was made of the (already at that time) ageing society or to the needs of the labour market or pension budgets.

Second, the timing of adoption of ADEA and its terms also expressed the very close relationship with civil rights equality protected by Title VII of the Civil Rights Act. ADEA was adopted fairly soon after the adoption of Title VII, in the wake, and as another result, of the rising civil rights awareness of the decade. Its language was almost identical to that of Title VII and its exceptions tailored similarly narrowly.

A different and more elastic approach is reflected in the EU Framework Directive, especially in its Recitals 6-8. These considerations are include the point that the “social and economic integration of the elderly and disabled people” (Recital 6) is necessary for the achievement of their substantive equality. The reference in Recital 7 to the coordination of employment policies of EU member states, and, particularly, the text of Recital 8, referring to the 2000 Employment Guidelines, as well as further references to labour market policies, imply a goal of “combating discrimination” as a social phenomenon and as a labour market policy instrument.

An apparent second difference between the US and EU approaches is the consistency of the prohibition. The Bona Fide Occupational
Qualification (BFOQ) defence under US law offers narrow and specifically worded exceptions which have been narrowly interpreted. By contrast, the text of the Framework Directive establishes quite a host of exceptions.43 Some of the exceptions related to public safety are similar to those included in the definition of “employee” in ADEA.44 However, the US Act gives a concrete catalogue of those positions. Furthermore, the specific old age exceptions (employment policy and social security) are entirely missing from ADEA.

The US ADEA protection originally covered persons between 40 and 65 before being extended to 70. Later, ADEA was amended to remove any upper limit. The Act prohibits discrimination on the ground of age in decisions relating to recruitment, discharge, promotion and other treatment, including financial benefits. The transfer of the administration of the Act from the Department of Labour to the US Equal Employment Opportunity Commission (EEOC)45, the administrative agency with broad power to enforce the most important equal treatment legislation of the US, indicates an intention to ensure effective enforcement.46

In the US, with its employment-at-will system in which employees hardly have any protection other than through anti-discrimination laws, especially in respect to hiring, promotion and dismissal, the adoption of age discrimination legislation had a distinctive impact on the status of people over 40.47

Despite the apparently strong protection granted by ADEA, some flaws still tarnish the tight system. One is the limitation of the personal scope of the Act through the concept of “employer”. The first limitation is based on the size of the employer expressed in the number of employees, based on a legally set calculation of an average. Only employers employing 20 or more workers are “employers” for the purpose of the Act, obliged to obey the non-discrimination rule.48 Thus, employees working for an employer having fewer than 20 employees are deprived of the right to non-discrimination based on age. This questionable limitation is not dissimilar to the approach to discrimination of Title VII, where the limitation is to employers having 15 or more employees. The limitations express the hesitant intervention of a liberal state into private relations (private employment), which would be incompatible with the nature of human rights from a European point of view.49

Restrictions depending on the size of the employer do not feature in the European equality Directives, contrary to the continuous and consistent special attention paid to small and medium size enterprises in the labour and employment law of the European Union. Any concession based on the size of the employer is incompatible with the principle of equal treatment followed by the CJEU even before the adoption of the equality directives.

2. Differential Treatment of ADEA and Title VII?

With the broadening opportunities to litigate against discrimination on different grounds relying on different pieces of legislation (for example race and age – protected by different legislative instruments both in Europe and in the US), the question might arise: reliance on which of the grounds is most likely to result in a successful outcome? Such a question might imply testing the “force” of the different laws.

In the EU, the proliferation of grounds of discrimination, i.e. the addition of further grounds (race, ethnicity, religion or belief, disability, age and sexual orientation) to the
original two (nationality and sex) by the so-called "Article 13" Directives, coupled with the stratification of the grounds, has been said to result in a preference in discrimination lawsuits for "newer" grounds. Claims in cases where discrimination is present on multiple grounds are more likely to be won in relation to the newer grounds. Dagmar Schiek points to the Kürçüdeveci case to illustrate this observation. In this case, the formal age discrimination claim overshadowed the originally referred ethnic discrimination (Turkish accent) and veiled the probably present impact of gender. In Coleman, the disability ground was clearly joined by the gender aspect; however, gender was not covered by the judgement.

Contrary to the example of the EU, where the "new", and – as mentioned above – "weaker" grounds – seem to be preferred, in the US, in spite of the almost identical language of the US ADEA with the text of Title VII, we seem to be confronted with the opposite case. In addition to the comparative usefulness of grounds protected under ADEA and Title VII, a further incentive to comparison of the effectiveness of the two Acts has been that surveys on the impact of ADEA relating to the type of cases and affected classes of persons have shown somewhat unexpected results, which were not contemplated when ADEA was adopted. For example, the composition of the cases is notable. The vast majority of the cases concerned wrongful (discriminatory) discharge of workers or forced retirement. There have been significantly fewer cases litigated in relation to discriminatory experiences in job seeking, discriminatory employment conditions, such as promotion or demotion, compensation and benefits.

Surveys on the subject demonstrate that typically white males, mainly in managerial positions or professionals over the age of 50, have taken advantage of ADEA. Women and racial minorities in older ages are under-represented. It has been argued that one possible reason for this is that these groups are more frequently in lower positions than white males and have less to lose or gain. However, there are a number of other possible explanations. First, it may be the result of the difference between available damages and compensation under ADEA and Title VII, which makes it more attractive for women and racial minority employees to pursue a Title VII claim. The remedies available for a violation of ADEA are weaker than those available under the Civil Rights Act. Violations of ADEA fall within the remedial rules of the Fair Labour Standard Act, which limits remedies to lost pay (back pay and anticipated future pay) and reinstatement. Compensatory (for emotional distress or pain) and punitive damages are not available to age discrimination victims. This difference might create a silent incentive to claim discrimination under Title VII if both are available.

There appears to be a preference by plaintiffs covered by multiple non-discrimination protections to pursue a claim based on a more traditional suspect ground, where they have more of a chance to be successful with their claims under Title VII than under ADEA. The difference in the burden of proof and the available defences under each system might be crucial for the success of the claim.

The similar language of Title VII and ADEA has raised the question – to which there is no unequivocal answer – of their analogous or different interpretation by the courts. A quick review of the allocation of the burden of proof in two specific discrimination situations, in disparate impact cases and in so-called "multiple ground" cases, show that the original "equal treatment" of ADEA and Title VII by the courts has given place to "differential treatment" of
the two statutes, raising the burden of proof on ADEA plaintiffs higher in comparison to Title VII victims of discrimination.

In 1973 the US Supreme Court established a clear test, the so-called “McDonnell Douglas test”, for Title VII (race or sex) discrimination cases, intended to facilitate the difficult task that plaintiffs face of proving discriminatory intent in the invisible mind of the employer. The McDonnell Douglas test assists plaintiffs by shifting the burden of proof between the plaintiff and the defendant employer. Once the employee establishes a *prima facie* case of discrimination – e.g. being rejected and someone else being preferred, the burden shifts to the employer to produce evidence that the rejection or preference was for a non-discriminatory reason. Then the plaintiff should provide evidence that the employer’s asserted justification is false. This test has been applied in ADEA cases by several Circuits, based on the similarity of its language with Title VII; however, the US Supreme Court has not yet ruled on its applicability.

A different, less promising approach is reflected in the courts’ treatment of ADEA and Title VII cases in assessing so-called “disparate impact cases”. The original aim of admitting disparate impact litigation (similar, but not identical, to indirect discrimination in the EU) under Title VII was to ease the burden of proof on plaintiffs by allowing the plaintiff to prove disparate intent through statistical and other circumstantial evidence. Employers could then defend themselves by referring to business necessity and to the reasonableness of their measures, a defence which would then be explored to examine whether alternative options which impacted less on the protected class were available.

In the controversial *Smith v City of Jackson* case, a group of senior police officers claimed that a salary increase plan that advantaged those who had less than five years of service over those who were more senior constituted age discrimination. In the *City of Jackson* case the Supreme Court found that the aim of the employer “to make junior officers’ salaries competitive with comparable positions in the market” was reasonable and did not violate ADEA. The much criticised, controversial and, indeed, absurd aspect of the judgment was that, on the one hand, the Court, referring literally to the analogous language of ADEA and Title VII, accepted that a claim for disparate impact can be submitted both under Title VII and ADEA. However, on the other hand, referring to a difference in the language of the two Acts regarding the available defence for employers, the Court found it “clear that the disparate-impact theory’s scope is narrower under the [ADEA] than under Title VII”. The reason for this seemingly self-contradicting argumentation is that ADEA permits employers to take actions with disparate impact affecting workers above 40 if there is a “reasonable factor other than age”, an opportunity not available to defendants under Title VII. In addition, since the textual difference between the two Acts resulted from a 1991 amendment of Title VII expanding the room for disparate impact claims, which was not replicated in ADEA, the Court interpreted the decision of Congress as consistent with the fact that age, unlike Title VII’s protected classifications, has relevance to an individual’s capacities.

The difference between the treatment of claims under Title VII and ADEA cases finally received confirmation by a 2009 milestone (or rather bumping stone) case. In *Gross v FBL Financial Services*, the Supreme Court excluded so-called “mixed-motive” claims from US ADEA by, again, distinguishing the language and interpretation of ADEA from Title VII.
Similarly to the introduction of the McDonnell Douglas test and disparate impact claims, the intention behind admitting mixed-motive claims had been to make the onerous, occasionally insurmountable, burden of proof lighter on discrimination victims. In mixed-motive cases, when the differential treatment has both legitimate and discriminatory reasons, the plaintiff has the burden of showing that discrimination was one of the motivations substantiating the employer’s action, and then the burden shifts to the employer to convince the court that they would have taken the same action without the discriminatory motive present. This saved the plaintiff from the difficulty of proving that “but for” the discriminatory intention, the employer would not have taken the same action.

In Gross v FBL Financial Services, a case where there were legitimate reasons mixed with discriminatory consideration based on age, surprisingly for many, the Supreme Court decided not to permit the application of the mixed-motive approach. Mr Gross, a 54 year old employee of FBL, was transferred to another position, while his former job was assigned to a younger employee, previously his subordinate. He claimed that this reassignment took place due to his age, therefore it violated ADEA. FBL defended its action by asserting that the transfer was due to company restructuring and the new position more was closely aligned with Mr Gross’ skills. Since the facts of the case pointed at the presence of legitimate, non-discriminatory reasons as well as the consideration of the age of the employee, the Supreme Court decided that this was a mixed motive claim, and that the mixed motive analysis developed under Title VII was not applicable under ADEA. As a result of the judgment, where there are multiple reasons for an employer’s action, a plaintiff will only be successful if they can persuade the court that their employer would not have acted in this way “but for” their age.

3. Reverse Discrimination – Younger and Older

The lack of clarity around age discrimination, especially the principle of its one-way protection, and the necessity of separation of young age and old age discrimination as two different grounds, have led to uncertainties under ADEA in the US and, in the future, may lead to uncertainties in the EU as well. The European Framework Directive prohibits age discrimination against a person at any age, in comparison with those who are either older or younger. There is no distinction either in the language of the Directive or in the case law so far between discriminating on the ground of older age and discriminating on the ground of younger age. In spite of the lack of symmetry and the non-binary nature of age discrimination, this has not caused a problem so far. There was no competition or clash between the younger and older protected groups, in contrast to the case law under ADEA, where the question arose as to whether the protection of the younger against the older was covered by the statute. Taking the cases that have been decided so far by the CJEU on discrimination on the grounds of young age, the discrimination was not in favour of older persons, no older comparators were present and in both cases the actual age of the applicants was not at issue.

ADEA, by setting 40 years of age as the lower limit of the personal scope of the Act and excluding from protection anyone younger than 40, clearly creates two groups: the protected and the non-protected. There is, however, a clear difference between someone in their early 40s and someone in their late...
60s or older. Several cases have reached the courts on the basis of ADEA where the discrimination has occurred within the protected group. These cases raised the question of whether discrimination within the protected group is prohibited and, particularly, whether discrimination within the protected group is prohibited not only against the older, but also against the younger person, in favour of an older person ("reverse discrimination").

Contradictory interpretations by courts at different levels in "reverse discrimination" cases resulted in almost two decades of uncertainty. This uncertainty raises more general issues as to the nature of two-way age discrimination, such as whether the protection is provided equally in both directions (from young to old and from old to young) and thus whether age discrimination is comparable to other grounds in this respect. Discriminating against a man in favour of a woman is not less prohibited than vice versa, but is the same true of age discrimination, i.e. is discriminating against the young in favour of the old prohibited the same way as vice versa? The non-binary character of the personal scope (see Part II, section 1 above) of age discrimination also necessitates a consideration of what difference is required for a finding of age discrimination. How much younger or older should the claimant be than the comparator in order to get protection? The issue of retirement (especially early retirement or deferred pensions) gives an additional twist to the issue of the "two-way" discrimination. These questions have been answered under ADEA case law and might contain some message for the interpretation of the unlimited definition of age discrimination by the European Framework Directive.71

The issue of two-way discrimination had already arisen in a case in 1988. In Karlen v City Colleges of Chicago,72 the plaintiffs, who were over 40, claimed that the employer's early retirement plan discriminated against them on the basis of their (younger) age. The case was decided in favour of the defendant employer, and the Seventh Circuit Court clearly rejected any symmetrical view of the two possible directions under ADEA. The Court stated "[title VII protects whites and men as well as] blacks and women, but [ADEA] does not protect the young as well as the old, or even, we think, the younger against the older."73 The Court added that permitting such claims would end the possibility of early retirement plans, unless such plans were open for employees from 40.74 The wording of ADEA, by referring repeatedly to "older" persons, seemed to indicate that the prohibition was only in one direction, even within the broad age category of over 40.

This decision was followed by divergent analyses by the courts. In 1991, the EEOC issued a regulation acknowledging that, although ADEA prohibits discrimination in both directions, it does not permit favouring one person, be they older or younger, over another merely on the basis of age if both are over 40.75 However, this regulation was not followed by the majority of the courts.

The divergence between the EEOC and the majority of courts deciding cases of reverse age discrimination culminated in, and was ended by, a US Supreme Court decision in the case of General Dynamics Land Systems, Inc. v Cline.76 Cline, together with other 196 workers, all between 40 and 49, claimed that General Dynamics discriminated against them on grounds of age by entering into a collective agreement that abolished the provision of health benefits to retired workers except for workers who were 50 years of age or older on 1 July 1997. Upon a survey of the former reverse discrimination claims and arguments presented, the Court found that
the meaning of the word “age” is determined by the context of “discrimination” because of the age of an individual. This context, as interpreted by the Court, revealed the intent of the drafters to protect the old from employers arbitrarily favouring the young. The Supreme Court decided the case in favour of the employer. It held:

“[T]he ADEA’s text, structure, purpose, history, and relationship to other federal statutes show that the statute does not mean to stop an employer from favouring an older employee over a younger one.”77

The EEOC amended its regulation and adjusted it to the decision, and according to the amended text:

“It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older, unless one of the statutory exceptions applies. Favouring an older individual over a younger individual because of age is not unlawful discrimination under the [ADEA], even if the younger individual is at least 40 years old. However, the [ADEA] does not require employers to prefer older individuals and does not affect applicable state, municipal, or local laws that prohibit such preferences.”78

One of the arguments accepted in the Cline decision was that:

“[R]ecognising reverse age discrimination would limit the freedom of employers to offer any sort of benefit to the oldest workers, whether it is to encourage them to retire or to reward them for years of service.”79

Indeed, the two-way prohibition of age discrimination (without clearly distinguishing between “ageism” and the protection of the young), not only contributes to the uncertainties accompanying age discrimination but is also a barrier in the way of prohibiting the most frequent form of age discrimination – mandatory retirement.

Part IV: Mandatory Retirement

If we say that employment discrimination, and particularly age-based discharge from employment, constitutes the bulk of age discrimination claims, mandatory retirement is at the very crux of the age discrimination debate. Mandatory retirement arrangements either in law or in collective agreements mainly serve to assist employers in avoiding the legal and financial costs of discriminatory termination of employment. Notwithstanding legal enactment, the discriminatory nature of mandatory retirement stays there.

1. Arguments for and against Abolishing Mandatory Retirement

With the process of ageing, working life inevitably comes to an end at some point in time. Who is competent to determine when this should be? The most rational and most fair answer to this question is that the individual is best placed to know when this should happen.

The formal retirement age has been a result of the historic changes coming with the industrial era: the social and institutional separation of the place of work (wage-earning) from the home and the consequent need for institutionalised income replacement when wage-earning became impossible. Before this separation, no formal (lower or upper) limits of working age were known; the gradual growth of the child and its capacities, and, similarly, the gradual reduction of capabilities resulted in natural and gradual increase or decrease of the participation in
the work of the family or larger community while permanently having a share in the results of the family work.80

Formalisation of retirement resulted in the legal entitlement to retire, i.e. to receive an income replacement from the state.81 On the other hand it brought a compulsion, too, to detach from the workplace and the labour market. While it is undisputed that the entitlement to retire and to receive an income replacement needs a formal lower age limit and the entitlement cannot be connected to the actual state of working capacity of the individual,82 the issue of when and how the worker might be compelled to leave the workplace is not at all undisputed.

From a non-discrimination point of view such a compulsion is unfavourable treatment, and if discrimination is prohibited on the ground of age, then such compelled retirement must be prohibited.

Mandatory retirement refers to two main ways of ending employment. The first is termination of employment upon the initiative of the employer, with reference to a retirement age that cannot be legally challenged by the employee. This might be based on the law (in systems where termination requires just reason), or on a provision of a collective agreement or contract.83

The second way is the automatic termination of employment by law, whereby no action is required by the employer. Such automatic termination might be assimilated to the loss of legal capacity of that person for at least that position, similarly to losing, in the wake of a criminal charge, a medical qualification enabling one to work as a medic, or the clean criminal record for a job where such record is a requirement.

Numerous arguments are brought up in favour of permitting involuntary retirement (or against the abolition of forced retirement) and this article does not explore all of them. To summarise, the arguments are clustered around two key justifications. Firstly, reference is made to the need for fair distribution of job opportunities, having regard to the chances of younger generations. Secondly, a reference is made to safety considerations (e.g. in the case of airplane pilots, fire-fighters, etc.). Both arguments might have some limited relevance in certain professions and occupations, but they are of no general value.84

A frequent benign argument is that automatically ending employment at a certain age pays more respect to the dignity of the employee than referring to (and eventually proving) a decrease in their capacities and in the quality of their performance. It could be argued, however, that the ageing person is able to decide and choose the best way for their own interests.

Notwithstanding a degree of rationality in all these arguments, the normative indication of a date as the compulsory upper limit of a person’s working capacity and of their right to work is incompatible with the principle of non-discrimination, at the core of which is the right to individual assessment. Therefore, the abolition of mandatory retirement is a *sine qua non* of the genuine prohibition of age-discrimination.

2. Plain Prohibition in the US and Complacency in the EU

The attributes, similarities and differences of the US and the EU treatment of the issue of mandatory retirement have their roots in the divergent social security systems: the contract (collective agreement) based
insurance, as well as the generally more individual and freedom-oriented US system, compared to the top-down, mandatory protection that can be traced back to the Bismarck social security system which forms the foundation of social security in continental Europe. Similar to pensions, in the US the mandatory retirement system was established by a system of contracts, while in Europe it was established by protective social legislation originating the famous Bismarck social security legislation of the last decades of the 19th Century.85

Under both systems, the termination of employment on the ground of an assumed decline of physical and intellectual capacities was considered a valid constitutional solution. The fact that such a restriction on the right of the individual to freely choose and exercise a profession was a violation of a constitutional right was not considered by the courts, which accepted mandatory retirement as constitutional.86

The idea and need for the abolition of mandatory retirement came around the same time as the introduction of a legal prohibition of age discrimination, which in the US meant the time of the introduction of ADEA (and finally with its 1986 amendment); and in the EU this meant the time of introducing the Framework Directive in 2000.

If we compare the case law of the ECJ and the US courts developed on the basis of the respective legislation, the apparent difference is that while US courts do not accept the automatic retirement age, the ECJ has a significantly more deferential attitude towards regulations in member states forcing employees to retire involuntarily. The apparent difference is mainly attributed to the different background of, and motivation behind, the legislation. While in the US, ADEA was motivated by a strong respect for individual free choice and the intent to eradicate unfair stereotyping, in the EU Framework Directive, the anti-stereotyping intent was coupled with a broader social and economic consideration and the intent to react to the problems of “ageing society”, as well as to labour market and budgetary (social security) problems. Thus, while the US courts do not treat the issue of mandatory retirement any differently from other issues of age-discrimination under ADEA, the ECJ treats mandatory retirement differently, submitting it to different tests.

The US Supreme Court’s approach was established in Western Airlines Inc. v Criswell, a mandatory retirement case for airline pilots and engineers, in which the Court held that age cannot serve as a proxy for the possession of high level safety-related job qualifications. The Federal Aviation Administration regulation prohibited persons aged 60 or over from serving on an airplane as a pilot, co-pilot or cockpit engineer for safety reasons. Accordingly, Western Airlines required the plaintiffs to retire upon reaching their 60th birthday. While it was not disputed that the high level safety requirements were relevant and that ageing may affect the ability to meet these, the Court held that the employer must establish either (a) that it had reasonable cause to believe that all, or substantially all, persons over the age of 60 would be unable to perform safely the duties of the job, or (b) that it is highly impractical to deal with older employees on an individualised basis. The Court emphasised that Congress, when adopting ADEA, subjected differentiating decisions to the objective justification of the BFOQ test which demands the “reasonable necessity” of the measure for it to be permitted, a test which is a higher requirement than “reasonableness”.

When appreciating the high level of scrutiny applied in this case, especially in comparison with the more lenient tests applied by the ECJ – which is more receptive towards references to labour market reasons legitimising regulatory efforts by the member states to set time limits of the retirement of older workers91 – certain things must not be forgotten.

First, in 1985, when the case was decided, the US ADEA still contained an upper limit on the prohibition of discrimination. When a person reached their 70th year, the protection finished. In other words, there was a retirement age foreseen by the legislation and it made it possible to make no distinction between mandating retirement and other age-based differentiation as long as it remained below the legislative end of the (protection of the) working career. By contrast, the ECJ was confronted with a legislative situation not setting any upper limit, where a ceiling to the infinite prohibition of age discrimination could only be set by court interpretation.

Another uncertainty for the ECJ might have derived from the symmetric approach followed by the Framework Directive, i.e. where discrimination is prohibited not only against the older but in the reverse way too. As discussed above, while ADEA only prohibits discrimination against older persons, even within the protected age group, the EU Framework Directive protects everyone. This naturally raised uncertainties for drafters of the Directive and resulted in references to social security benefits as well as pension age in Recitals 13 and 14 of the Directive, protects everyone. This naturally raised uncertainties for drafters of the Directive and resulted in references to social security benefits as well as pension age in Recitals 13 and 14 of the Directive, protecting everyone. However, if one perceives these references as merely a precaution against the young (or at least those below the national pension age) claiming discrimination, the interpretation by which they are seen to permit mandatory retirement seems exaggerated.

The difference in the motivation and the text of the US and EU legislation almost naturally led to a difference in the interpretation and case law based on these legislative instruments. Unlike in Europe, the respect for the free choice of the individual lying behind the US non-discrimination rules permits exceptions from the prohibition of differential treatment on the basis of age to only a limited extent, submitting any exception to the strict BFOQ test and apparently not permitting the use of age as a proxy for the lack or loss of the appropriate qualification.

3. Article 24 of the European Social Charter

Not unlike other human rights treaties, the ESC does not expressly mention age in its Article E prohibition of discrimination. Containing a non-exhaustive list of grounds ending with “other status”, Article E is open for interpretation as covering other grounds of discrimination. Recent developments in the case law are shifting towards a more individual and free-choice oriented interpretation of several provisions of the Charter.92 For example, in its 2012 cycle of supervision, the European Committee of Social Rights (ECSR), the independent expert body supervising the implementation of the Charter and the compliance of state parties with their obligations under the Charter, has developed its interpretation of Article 24 in a new and stronger non-discrimination spirit.

Article 24 guarantees the right of employees to protection in cases of termination of their employment. Among others, states must adopt legislation that guarantees the right of all workers not to have their employment terminated without valid reason. The
text specifies two sorts of reasons that are considered valid: reasons connected either with the capacity or the conduct of the employee; and operational requirements of the employer. The Appendix to the Charter (an integral part of it and equally binding) enumerates the reasons that “in particular” may not be considered valid under the Charter.93 The text makes it clear that further reasons might join this list.

Age is not enumerated among the prohibited reasons, and the assessment of national laws permitting age as a legitimate ground for termination of employment (i.e. mandatory retirement) was unclear in the first cycles assessing Article 24.94 This changed with the 2012 cycle and the issued statement of interpretation.

The ECSR confronted (or matched) with each other the open-ended list of prohibited reasons in the Appendix and the exhaustive definition of valid reasons in Article 24 and said that a new ground – age – can be added to the automatically illegitimate reasons; however, no ground can be added to the defined legitimate grounds (those connected with the conduct or capacity of the employee or the operation of the enterprise). Thus, the ECSR established that under Article 24, dismissal of the employee on the ground of having reached the normal pensionable age (the age when an individual becomes entitled to a pension) will be contrary to the Charter, unless the termination is properly justified with reference to one of the valid grounds expressly established by this provision of the Charter.95 At the same time, the statement of interpretation emphasised that such termination is prohibited only when it is initiated by the employer; and situations where a mandatory retirement age is set by statute, as a consequence of which the employment relationship automatically ceases by operation of law, do not fall within the scope of this provision.

This distinction between the above-mentioned two kinds of “mandatory retirement” is based on the text of the Appendix that declares that for the purposes of Article 24 the term “termination of employment” means termination of employment at the initiative of the employer. It is important to add that legislation that makes the retirement “mandatory” for the employee, but provides the employer with the privilege to retain and continue employing the employee, is not considered to be a statutory exception from the Charter.

On the ground of this new position of the ECSR, in the 2012 cycle of assessing the compliance with the Charter, a total of six countries96 were declared to be violating their obligations under Article 24, specifically by not observing the prohibition of termination by the employer merely on the ground of age without the presence of any valid reason. In view of the novelty of the clear requirement of having mandatory retirement abolished, the situation could not be unequivocally assessed due to the lack of information in the reports on a number of countries. With respect to these countries, the 2012 “deferral” of conclusion on that point and the request for more information on the prohibition of mandatory retirement might result in a negative conclusion in the 2016 cycle when reports on Article 24 will next be assessed.

Following the above-mentioned 2012 cycle, a pending collective complaint alleging a violation of Article 24 in general, and the prohibition of involuntary retirement in particular, must be mentioned. Follesforbundet for Sjøfolk (FFFS) v Norway97 concerns the mandatory retirement at the age of 62 for seamen under the Norwegian Seamen’s Act.
The claim was declared admissible and the case is still pending and is to be watched with interest.

4. Conclusion: Two Preconditions for a Natural Ending of Working Life

We cannot reject the fact that working capacity decreases with age and the prohibition of age discrimination would not mean that persons who are objectively not capable of performing certain tasks might not be transferred to jobs more adjusted to their capacities or have their employment terminated. Mandatory retirement is nevertheless incompatible with a principled approach to equality and its broad acceptance undermines non-discrimination on the basis of age.

In place of mandatory retirement, two preconditions are necessary to remove the bias and reluctance. First, objective, accurate and systematic evaluation systems must be in place at the workplace. Apart from the potential impact of such systems on the efficiency of management and the workplace atmosphere, employers should be interested in developing them with the understanding that such systems are critical in age discrimination legislation, as a key-point in building the evidence either in favour of or against the defendant employer. The objective and accurate evaluation system promotes the avoidance of judgements on the basis of impression and presumption, ensuring that anyone can work and be useful as long as they continue to contribute.

The second precondition is to promote genuine voluntary retirement through the provision of adequate incentives. These incentives should include a social security and pension systems that make it possible for persons to retire, voluntarily or in agreement with the employer, at the age when work performance and the daily challenges of the workplace become burdensome. These systems can guarantee a smooth, flexible and, above all, dignified career end.

Issues of human resource management, just reasons for terminating employment, as well as the proper regulation of the social security and pension systems go beyond the scope of this article.

Part V: Discrimination outside Employment

1. Legislative Acknowledgement of the Right to Dignity beyond Working Life

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 extends to the period following the age of paid work. The start of this period is individual and its end is the end of life. Those who, at some stage, live their everyday life with the assistance of others, have the right to be equal in dignity and to have equal protection and benefit of the law. At older ages, the right to live in dignity not only implies a right to choose between different options, but also requires material conditions and services facilitating independent life and the social participation of the aged person.

The need to specify the meaning of equality of protection of the law for persons far beyond working age and to acknowledge the right to such equality was recognised late in international human rights law. While some forms of social care for the elderly, sympathy and charity were present in different forms historically, no one had a right to care or benefits and no one in such care had the right to be an equal member of society. Institutions of care frequently became institutions of ostracism.
It was as late as in 1988 when an Additional Protocol to the European Social Charter, in its Article 4,\textsuperscript{100} guaranteed, for the first time in an international human rights treaty, the right of elderly persons to have social protection, live in dignity preserving their independence and autonomy, and enjoy integration and participation in society. (This provision is now Article 23 of the RESC.)

Later, in 1995, the Committee on Economic, Social and Cultural Rights (CESCR) adopted its General Comment No. 6 on the economic, social and cultural rights of older persons,\textsuperscript{101} without any enforceable legal content, without clearly outlining the required measures regarding the two distinct age groups, and mentioning rights in an undifferentiated way that might be relevant only to one or the other group.

2. The Covered Age Group

The language of the Additional Protocol clearly refers to persons in the post-working period of life, even if only indirectly, by enumerating the needs that generally occur in the last phase of life.\textsuperscript{102} The norms contained in the Additional Protocol, guaranteeing non-discrimination and equalising life opportunities outside of employment, are norms which typically reflect the issues faced by those who are already detached from the labour market but still have a need and a right to live a healthy and fullest possible human life.

Section 9 of CESCR's General Comment No. 6 refers to persons in this stage of life as being in the “fourth age”. The term is taken from the literature that divides human life into four ages: childhood, working age, post-working age and the “fourth age”.\textsuperscript{103} The third age is estimated to be between 65 and 80 and the “fourth” age starts between 80 and 85. The age-defined borderlines between the categories are merely indicative and are not fixed. Anyone in any age might belong to any of the three adult-groups.\textsuperscript{104} Someone in their late 60s might be \textit{de facto} in the “fourth age” and conversely, someone might be still working well over the age of 80.\textsuperscript{105} The second and third ages are one group for the purpose of age discrimination law: this is when the prohibition of discrimination in employment on the ground of age is vital, including the prohibition of mandatory retirement.

The aim of looking at these categories is to find the most adequate and proportionate legal measures to guarantee equality. Nonetheless, sectioning old age into “working age” and “beyond working age”, especially when the latter is labelled “fourth age” (which might sound stigmatising), might raise objections. Any sectioning, any categorisation implies associated stereotypes and possible discrimination.

However, treating old age as one undifferentiated section of human life would be as unjust as unfair differentiation. As Aristotle says, it is an injustice not only to treat those who are alike differently, but also to treat as alike those who are different. If combating ageism is nothing more than an unlimited guarantee of equal treatment in employment, even for those who are not capable of working anymore, we are far from the idea of equality. The different phases of ageing should be reflected in different forms of guaranteeing equality, with respect to the differences of the phases. Equal access to health, financial benefits and social services comes to the forefront. The second subject area of age discrimination legislation is about requiring positive measures to remove obstacles to an equally dignified life at any age and any stage.
This must amount to a requirement to do more than just removing and abolishing stereotypes in society. Human life may come to a stage when the individual is incapable of functioning independently and is no longer able to have an active role in society. These persons have the right to live in dignity, not because of who they are or because of what they have achieved in the past. The dignity of human society makes this right indispensable.

3. The Content of “Equal Protection” in the Fourth Age

Having identified the “fourth age” category and its main characteristics, the differences of its members from the majority advise the content of the requisite protection. In regulating non-discrimination in this area, the focus is on mandating positive measures for the provision of services, and on the support to ensure material conditions necessary to facilitate the continued participation and integration in society and preserve independence and autonomy.

Article 23 of the RESC lays down a set of broad and at the same time specific obligations on states that can guarantee the effective exercise of the fundamental right of elderly persons to social protection. The obligations could be categorised into three main areas. First, whether in work or not, elderly persons should be guaranteed adequate resources to enable them to live a decent life and continue to take active part in public, social and cultural life. Resources, together with the provision of information about services and facilities available to elderly persons, guarantee the uninterrupted full membership in society.

Second, elderly persons have the right to health care and services necessitated by their state, as well as the right to housing suited to their needs, with the aim of enabling them to freely choose their lifestyle and live independently in their familiar surroundings as long as they wish and are able to do so. Third, states have the obligation to provide appropriate support for elderly persons living in institutions and, at the same time, to guarantee respect for their privacy as well as their participation in the decisions concerning living conditions in the institution. As the statement of interpretation of this provision underlines, the “measures envisaged by this provision, by their objectives as much as by the means of implementing them, point towards a new and progressive notion of what life should be for elderly persons”. The predominant “service provision” nature of the obligations requires an underlining of the guaranteed individual liberty and freedom of the person provided with assistance that is an inherent requirement of Article 23.

There might be an odour of discrimination at the bottom of any positive action to protect disadvantaged groups. This calls attention to a balanced and proportionate approach to life situations at any time when the legislature steps beyond the formal concept of equality and, particularly, when social justice requires positive safeguards of equal protection and equal dignity. The “provision” and “service” nature of the rights and obligations regulated by Article 23 is not opposite to the right to non-discrimination, but rather norms built on the requirement of equality.

Prohibiting discrimination was not an express part of the above provisions, nor of the accompanying documents – demonstrating the ambivalence related to “protection” and “equality”. The original form (questionnaire) for reports, while requiring a description of the legal framework, did not expressly require non-discrimination legislation to be in place. Although the ECSR declared that
non-discrimination legislation should exist “at least in certain domains”;\textsuperscript{111} there was no consistent scrutiny of the legislative framework of the state parties. At the same time, pervasive discrimination against elderly persons has been reported in health care, services (especially in the financial industry such as banking and insurance), travel, education, the use of facilities, participation in civil dialogue, allocation of resources, etc.\textsuperscript{112}

In its 2009 cycle, the ECSR, with reference among others to the European Old People’s Platform’s report, started conducting an examination of the legislation of state parties, requiring all state parties to Article 23 to ensure that their national law explicitly prohibits discrimination on the ground of age in areas beyond employment.\textsuperscript{113} A general prohibition of discrimination declared in the Constitution or in a piece of legislation would not satisfy this requirement. For example, Sweden was found in violation of Article 23, because its new anti-discrimination legislation, in force from 2009, prohibits discrimination in a wide range of areas of society on all grounds of discrimination except age.\textsuperscript{114} The prohibition of age discrimination was limited to work, occupational and educational areas. Similarly, in the Czech Republic and Denmark, the legal framework was found inadequate for protecting against age discrimination outside employment.\textsuperscript{115}

The new case law of the ECSR provides an opportunity not only for more effective implementation of the right of the elderly to equal treatment but also for further clarification and development of the concept of “non-discrimination”. The identification of non-discrimination with the combined concept of formally equal treatment and a broad scale of positive measures (regardless of whether such measures require financial resources as well) opens the door to a genuine substantive equality – not yet universally accepted or practiced. This combined concept may also contribute to dismantling the association of service provision and assistance with absence of equality. Thus Article 23 – adopted primarily to provide protective services – is reframed as a genuine non-discrimination human rights provision. The next round of examining countries’ reports on the implementation of Article 23 is in 2013. The Conclusions adopted by the end of the year may (and hopefully will) reflect the above position.

**Conclusion**

The purpose of this article was to find the real place of age discrimination in the world of anti-discrimination law. The review of the key issues related to age discrimination revealed that the uncertainties around it are due, in part, to general conceptual issues of anti-discrimination law, and that analysing age-discrimination might also contribute to the clarification of more general issues of this area of law.

First, the two opposite groups relevant to age discrimination – majority (mainstream) and minority, dominant and subordinated, perceived as superior and as inferior – had to be identified. Even if no real comparator is required for the finding of discrimination, in order to find discrimination as classification of a group, it is necessary to point to the two opposite groups. It has to be clearly seen that, for the prohibition of age discrimination, these are not the “young” and the “old”; rather, for both vulnerable groups, the “mainstream” age-group is the opposite, the dominant. This also might require a decision that, within the “mainstream” group, no age discrimination can occur. Furthermore, in contrast to the other grounds of discrimination, age cannot be seen as a “symmetric” ground.
Second, the minority groups, both young and old, comprise further sub-groups, with regard to the necessary legal measures adjusted to the level and nature of their vulnerability. Within both groups, we find a group whose members merely need non-discrimination in order to achieve what is corresponding to their personal merits, in particular in employment. For the other, increasingly vulnerable, subgroup, protection against exclusion, abuse, exploitation or degradation has to share the main role with enforced prohibition of discrimination in order to preserve a person's dignity. At the lower end of the age ladder, the sub-groups are “the under-age” (children) and “young adults”, while at the upper end, the sub-groups are the elderly in working age and the elderly in the “fourth age”. Obviously, no clear age limits may be set between both the age groups and sub-groups; the borderlines must be left to the individual attributes and inclinations, in order to avoid artificial stereotyping that would confirm rather than abolish discrimination. The exception here is the group of young persons, where the borderline between full age and under-age ought to be set by formal rules.

Third, while everyone is ageing, and social and economic advantages and disadvantages may fluctuate with age, this cannot make “age” a relative and fluctuating concept. This nature of age explains, in part, the lack of symmetry in the concept of age discrimination and, consequently, the permissibility of reverse discrimination: the prohibition of discrimination does not necessarily prohibit unfavourable treatment of the younger in favour of the older. There are significant differences between the vulnerabilities of young persons and old persons and their subcategories, which ought to incur differences in the regulation of their equality and equal opportunities. Youth decreases over time and therefore the young have a decreasing need for protection, while the opposite is true of old age. The two extreme poles, the child-age and the “fourth age” or its later stage, may show similarities in the need for care, support, control, institutional care and assistance in decision making. One of the core concerns addressed by construing ageing as a one-way process is to avoid a reverse process in terms of legal guarantees of equal rights and equal dignity. The child also has rights and dignity and these become full when the child reaches full age. The dignity of the adult remains full and intact until the end of life.

Fourth, at the international level, there is a need to adjust legal instruments to the changed perception of human rights, equal rights and the rights of the elderly. Similarly to the more recently “discovered” rights of categories of persons such as children and the disabled, the rights of the old need to be recognised through the adoption of a specific convention. The clarification of key concepts might promote a more uniform concept of age discrimination and a consensus on related legislation.

In Europe, the increasing human rights edge of the application of the RESC may promote a progressive concept of age discrimination. Although this article has expressed some concerns with the application of the EU Framework Directive, a clarification of its concepts and application may be expected in due course from the jurisprudence of the CJEU.

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4 The lists of prohibited grounds are identical in the Universal Declaration of Human Rights and the two UN Covenants and include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2 UDHR, Articles 2(1) and 26 ICCPR and Article 2(2) ICESCR).
5 While some conventions set age limits for certain situations, without a general provision permitting age-based differentiation, Article 23 of the American Convention on Human Rights indicates age as a ground that might establish exceptions from the rights enumerated in that article. In other words, it permits differentiation on the basis of age for national legislations.
6 These two conventions prohibit discrimination on the same grounds, except that the RESC includes one additional ground, health.
8 Ibid.
9 Andrle v the Czech Republic, Application No. 6268/08, Judgment of 17 February 2011, European Court of Human Rights. The case related to pension age and the Court found no violation of Article 14 of ECHR. The divorced applicant got custody of his two children, aged 13 and 15, and cared for them until they reached the age of majority. His early retirement pension request, based on the right to have a lowered retirement age according to the number of children, was dismissed, since only a woman’s retirement age could be lowered. His complaint regarding discrimination with respect to his property rights was dismissed by the Court.
10 B.B v The United Kingdom, Application No. 53760/00, Judgment of 10 February 2004, European Court of Human Rights. In this case the applicant claimed that he was discriminated against on grounds of his sexual orientation by the existence of, and by his prosecution under, legislation that made it a criminal offence to engage in homosexual activities with men under the age of 18 whereas the age of consent for heterosexual activities was fixed at 16 years of age. He also complained that he was discriminated against on the grounds of age by the decision to prosecute him while failing to prosecute the 16-year-old boy who would technically have been as guilty as he was of the same offence. Assessing the case and drawing on the case of Sutherland v United Kingdom (Application No. 25186/94, Judgment of 27 March 2001) the European Court of Human Rights found a violation of Article 14 of the Convention in conjunction with Article 8 for discrimination on the grounds of sexual orientation (also a non-listed ground). The Court did not consider it necessary also to consider the complaint of age discrimination.
11 As of August 2013, 18 countries out of the 47 member states of the Council of Europe had ratified it.
13 A further step forward was the case of Kavanagh v Ireland, Communication No. 819/1998, Views of 4 April 2001, in which the Human Rights Committee interpreted Article 26 of the ICCPR, which guarantees the “right to equality before the law and to the equal protection of the law”, as implicitly suggesting that it is not necessary to identify any specific ground for discrimination.
15 The prohibition of age discrimination is limited to employment, similarly to discrimination based on religion, disability and sexual orientation, and in contrast to race discrimination which is prohibited in the broader area of work, education, social security, public services and business services, and to sex discrimination, which is also prohibited in the provision of services.
16 The genuine and determining occupational requirements – an exception for all kinds of discrimination – is supplemented here with the “public security” exception in Article 2(5), i.e. discriminatory measures in respect of grounds under the Directive are permitted if necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. The “armed forces” exception in Article 3(4) exempts from disability and age discrimination. In addition, age-specific justification is permitted in Articles 6(1) and 6(2), with reference to employment policies and occupational social security schemes.
17 This was clearly manifested in the multiple references in age discrimination cases to earlier gender discrimination cases. See, for example, Case C-476/99 Lommers v Minister van Landbouw, Natuurbeheer en Visserij, 2002, referred to in Case C-144/04 Mangold v Helm, 2005, and the Marshall and another case referred to in Case C-411/05 Pulacios de la Villa v Corteefiel Servicios SA, 2007. Similarly, the experience from Case C-15/96 Schöning-Kougebetopoulou, 1998, which was a nationality discrimination case, was relied upon as a basis for the new ground.
See the classification of discriminatory grounds by Ruth ben Israel in 1993 establishing families centred around the main grounds. This approach is similar to D. Shiek’s “nodes” approach but differs by setting up a hierarchy: 1. Race, 2. Sex, 3. Religion, and 4. “Others”. According to this approach, age is categorised together with disability, the recognition of both rising in the 1980s. See Ben-Israel, R., “Equality and Prohibition of Discrimination in Employment”, in Blanpain, R. (ed.), Comparative Labour Law and Industrial Relations in Industrialized Market Economies, Kluwer, 1998, pp. 254-259.

20 2010/C 83/02.


22 Olivier de Schuettet sees hierarchy in European human rights law as a fact, without negative or positive comments. See above, note 7, pp. 5 and 14-16.

23 As it was presumably intended by the EU legislation.


27 European Social Charter (Revised), Strasbourg, 9 May 1996, Article 7(1).

28 Ibid., Article 7(2). Under the 1961 Charter, this minimum age was 16.

29 Age is only mentioned in the Universal Declaration of Human Rights in Article 16(1) which declares the right of men and women of full age to marry. 30 Especially in the areas of reproductive freedom, consumption, driving, etc.

31 While international and national rules on minimum ages and the substantive limitations of the autonomy and free choices of the individual also raises questions, in part addressed by the UN Convention on the Right of the Child, the analysis of these limitations with regard to eventual discriminatory elements goes beyond the scope of this article.

32 Race discrimination likely falls into this category as well.


34 Ibid., p. 85.


36 The phrase became famous and much cited as a footnote by Justice Stone to an 1938 US Supreme Court case (United States v Carolene Products Company, 304 U.S. 144 (1938)) defining the grounds for so called “heightened scrutiny” of legislative acts.

37 Individual examples of members of any discriminated group reaching high status in society do not evidence the lack of social exclusion or group disadvantages.

38 While statistical categories are based on predominant pension ages (60-65 – forecast to go higher), their regulatory origin nonetheless is evident. The category for which equal treatment outside employment is increasingly needed due to increasing disadvantages, called in some cases the “fourth age”, is assessed to start from 80. (See Committee on Economic, Social and Cultural Rights, above note 3, Para 9.)


41 Ibid., Congressional Statement of Findings and Purpose, § 621(a).

42 Ibid., § 621, section 2(a)(1)-(3).

43 This Directive protects against discrimination on several grounds – religion, disability and sexual orientation besides age, and the exceptions had to be adjusted to all these grounds. Therefore, in addition to the “genuine and determining occupational requirement” exception, which is very similar to the BFOQ defence, the Directive sets up further exceptions not prescribed for sex and race. See above, note 18.

44 The term “employee” does not cover persons in elected public offices or persons chosen by them, fire-
fighters, and law enforcement officers. (29 U.S.C. § 630(b)(1) and (2), (i), (j) and (k).)  

45 Lahey, above note 3, p. 434.  
46 The EEOC was established on the basis of Title VII of the Civil Rights Act 1964 and has significant powers and entitlements on the enforcement of Title VII, in addition to ADEA and other pieces of anti-discrimination legislation. Its powers include submitting lawsuits for alleged victims of discrimination. It can also (but relatively rarely does) prosecute cases.  
47 Similarly to persons with disabilities, whose discrimination on the basis of their disability was declared unlawful by the Americans with Disability Act 1990.  
48 See above, note 40, Section 11(b).  
49 The Hungarian Constitutional Court – in Decision No.49/2009 (III. 27) AB – declared unconstitutional the Labour Code provision setting different (less favourable) norms on compensation for damages to employees caused by the employer, where the latter was a private individual employing less than ten persons. The Constitutional Court reasoned that neither the difference between a private and a corporate employer nor the number of the employees prove weaker economic power or greater vulnerability, and therefore the distinction between categories of employees unconstitutionally violated the right of each person of equality before the law and equal dignity. Even if the right to compensation for damages is not a fundamental right, the unequal treatment violates the Constitution if the reasons for the measure do not proportionately justify the differentiation.  
50 Directive 2000/43/EC (on race and ethnic discrimination) and Directive 2000/78/EC (on discrimination in employment on grounds of religion, disability, age and sexual orientation), were both adopted on the basis of the authorisation in Article 13 of the Amsterdam Treaty.  
51 See above, note 25, pp. 16-17.  
52 Case C-555/07 Seda Kücükdeveci v Swedex GmbH & Co. KG, 19 January 2010.  
53 See above, note 25, pp. 16-17k.  
54 Case C-303/06 S. Coleman v Attridge Law and Steve Law, 17 July 2008.  
55 See above, note 25.  
56 A survey in the mid-1980s has shown that 76% of US ADEA claims were based on termination, 9% on refusal to be hired, demotion made up 6.6% and non-promotion made up 6.3% of the cases. Compensation and benefits cases were altogether 1.9%. (See Schuchmann, A.L., "The Special Problem of the Younger Older Worker: Reverse Age Discrimination and the ADEA", University of Pittsburgh Law Review, Volume 65, 2004, p. 376. She quotes Issacharoff, S. and Harris, E.W., "Is Age Discrimination Really Age Discrimination?: The ADEA’s Unnatural Solution", N.Y.U. L. REV, Volume 72, 1997, pp. 780 and 783: “[t]he numbers are in complete conflict with what had been predicted by the original legislators and are inconsistent with the original intent of the ADEA”.)  
57 See above, note 45, pp. 438-439.  
58 Ibid.  
59 Ibid., p. 435.  
60 ADEA, Section 7(b), 81 Stat. 604, 29 U. S. C. § 626(b).  
63 Smith v City Of Jackson, 544 U.S. 228 (2005).  
64 Ibid., Pars 233, 240.  
65 Congress’ aim in introducing the 1991 amendment of Title VII was to help plaintiffs bring their claim to court even when there were legitimate grounds behind the employer’s action in addition to the grounds enumerated in Title VII. See Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2012). As amended, Title VII allows an employer to limit, but not escape, liability by showing that it would have made the same decision “in the absence of the impermissible motivating factor”.  
68 See above, note 66, Para 169.  
69 In reaction to the Gross v FBL decision, several senators introduced a bill to amend ADEA and other laws “to clarify appropriate standards for Federal employment discrimination and retaliation claims”. The bill is still pending. On 30 July 2013 it was assigned to a congressional committee, which will consider it before possibly sending it on to the House or Senate. It is available at: http://www.govtrack.us/congress/bills/113/hr2852.
The issue of reverse age discrimination is noticeably less addressed in the literature than old-age discrimination. Schuchmann’s brief summary of ADEA reverse discrimination case law draws strongly on the thorough analysis of that case law. (See Schuchmann, above note 56, pp. 339-384.)

The statement of interpretation on Article 8 (1) in the introductory part of the 2011 Conclusions of the European Committee of Social Rights moves away from the fifty-years-old approach and, while obliging states to guarantee the 14 weeks and a minimum six weeks post-natal leave, this has only to be “mandatory” in at least 14 weeks is to be mentioned. Julie Suk associates mandatory retirement with mandatory maternity leave regulations in her critique and comparison between the European and US regulatory attitudes. (See Suk, above note 39.) The statement of interpretation on Article 8 (1) in the introductory part of the 2011 Conclusions of the European Committee of Social Rights moves away from the fifty-years-old approach and, while obliging states parties to guarantee the 14 weeks and a minimum six weeks post-natal leave, this has only to be “mandatory” in the sense of the entitlement of the mother. However, she must have a free choice to return, when she wishes, to the workplace, provided that the legal environment (strong protection against dismissal or transfer) and the level of the maternity benefit together guarantee that the option to continue working is entirely a free choice of the employee.

See above, note 52; see also C-88/08 David Hütter v Technische Universität Graz, 18 June 2009.


91 See O’Cinneide, above note 35, pp. 9 and 37; Suk, above note 39, pp. 93-95.

92 By this token, the change of Article 8(1) requiring the provision of “mandatory” maternity leave of at least 14 weeks is to be mentioned. Julie Suk associates mandatory retirement with mandatory maternity leave regulations in her critique and comparison between the European and US regulatory attitudes. (See Suk, above note 39.) The statement of interpretation on Article 8 (1) in the introductory part of the 2011 Conclusions of the European Committee of Social Rights moves away from the fifty-years-old approach and, while obliging states parties to guarantee the 14 weeks and a minimum six weeks post-natal leave, this has only to be “mandatory” in the sense of the entitlement of the mother. However, she must have a free choice to return, when she wishes, to the workplace, provided that the legal environment (strong protection against dismissal or transfer) and the level of the maternity benefit together guarantee that the option to continue working is entirely a free choice of the
These are in part discriminatory, in part otherwise abusive grounds. The Appendix does not mention discrimination. The reasons that cannot be valid reasons are the following: (a) trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours; (b) seeking office as, acting or having acted in the capacity of a workers' representative; (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (e) maternity or parental leave; (f) temporary absence from work due to illness or injury.

It was first assessed in the 2002 cycle for only five countries. By 2012 it concerned 26 countries.

European Committee of Social Rights, above note 92, p. 10.

Armenia, Azerbaijan, Bulgaria, Ireland, Malta and the Netherlands.


See Suk, above note 39.


The 1988 Additional Protocol supplemented the European Social Charter with four significant rights, showing the increased importance of human rights in the employment and social area: the right to equal treatment without regard to sex, the right to be informed and consulted, the right to take part in decision making on working conditions, and last but not least the right of every elderly person (here not "worker") to social protection. (See Additional Protocol to the European Social Charter, Strasbourg, 5 May 1988.)

This was based on the UN Principles for Older Persons adopted by the General Assembly in 1991, characterised by a lack of regulatory content and broad coverage, including both persons in working ages and beyond.

The Explanatory Report on Article 1 of the Protocol clarifies this, explaining that the elderly have the right to be a "full member", "since (...) the right (...) is not (...) depending on whether an elderly person has retired or is still vocationally active". (See Additional Protocol to the European Social Charter: Explanatory Report, ETS No. 128, Para 54.)


Of course, age 65, the standard pension age, has relevance as much as someone unable to work and showing symptoms characteristic of the fourth age is considered unable, and not “fast-ageing”.

And not only with the help of modern medical technology; well-known is the age-stereotype destroying example of Dandolo, Doge of Venice, who, in 1204, at age 90 and blind, took part in the fourth crusade against Constantinople, leading the Venetian contingent.

With regard to the “optional” character of the RESC that permits state parties to ratify only certain articles or certain paragraphs within articles, Article 23 separates its paragraphs by bullets instead of numbered paragraphs, so that states have to ratify (or not ratify) the whole article. (See above, note 27, Article 23.)

See above, note 27, Article 23, bullet 1.

Ibid., Article 23, bullet 2.

Ibid., Article 23, bullet 3. This article was adopted together with the preceding article, now Article 22 of the RESC, originally Article 3 of the Additional Protocol of 1988. The vocabulary underlines the identical approach: as workers are entitled to participate in decisions determining their working conditions and working environment, similarly, elderly persons living in institutions are entitled to participate in decisions determining their living conditions in the institution.

European Committee of Social Rights, Conclusions Cycle XIII-5, Statement of Interpretation in Article 23, p. 455.

European Committee of Social Rights, Conclusions 2003, for example on France, p. 186; and Conclusions 2005, Sweden, p. 711.


Discrimination in employment on the ground of age is prohibited under Articles 1(2) and 24.

European Committee of Social Rights, Conclusions Cycle XIX-2 (2009), Sweden, pp. 778-779, 783.

Introduction

It is now common for age discrimination to be prohibited by law. This reflects a growing recognition that discrimination based on a person’s age can violate their dignity and be economically wasteful. However, there are times when the use of age distinctions is necessary. Therefore, age discrimination law can be complex. This paper explores some of the issues that arise in this context, and explores how the battle for age equality is assuming ever greater importance in international and European human rights law.

The Prevalence of Age Discrimination

Age is often used unfairly as an arbitrary, irrational and stereotyping tool for making distinctions between individuals. Differences of treatment between different individuals or groups on the grounds of age are often based on generalised assumptions or casual stereotypes, with age used as a “proxy” for other personal characteristics such as maturity, health or vulnerability. For example, younger persons are often assumed to lack maturity, judgment and any commitment to family responsibilities; older persons are often assumed to lack flexibility, motivation, reliable health, and the ability to absorb new ideas.

These assumptions are often the basis for discriminatory decisions in the field of employment and occupation, such as when employers refuse to hire older or younger workers, or refuse to recruit or promote workers of a certain age. Age discrimination based on unfair stereotyping also takes place in other contexts, as when younger persons are subjected to harassment by police or security personnel solely on the basis of their age, or when older persons are assumed to lack decision-making capacity when it comes to medical treatment or the provision of social care. Such age-based stereotyping denies individuals the opportunity to be judged on their own merits. It also violates their dignity by reducing them to the status of a caricature, which ignores their specific attributes, needs and qualities.

Furthermore, age stereotyping can produce negative social consequences. For example, certain age groups often face formidable obstacles when it comes to gaining equal access to the labour market. As a consequence, these groups often suffer social exclusion and high levels of poverty, which in turn imposes substantial economic and social welfare costs upon society at large. In particular, older workers who have lost their jobs, or younger jobseekers that have not been able to gain experience in full-time employment, often struggle to find decent employment. This can have a negative impact on the dignity and self-esteem of the individuals concerned, and can cause the groups affected to suffer serious levels of social exclusion.
Age discrimination can also be viewed as economically wasteful, in that older and younger workers with valuable skills are often excluded from the labour market for irrational reasons. Many of the most common assumptions about different age groups have come under sustained challenge in recent years. For example, using age as an automatic proxy for health, ability to absorb new information or competency is often very questionable, while evidence suggests that, except in a very limited range of jobs, work performance does not deteriorate with age. Even where such assumptions may have some broad statistical validity across a particular age group, they are often based upon stereotyping that does not reflect the diversity of individuals within the relevant age groups, or the individual qualities and abilities of the particular individuals affected.

Employers and service-providers may at times be justified in using age-based distinctions to differentiate between different groups of people – for example, age limits (usually 65) are used to determine who should become entitled to pension benefits, because no other practical or fair way exists of deciding who should qualify. As discussed further below, this distinguishes age discrimination from other forms of unequal treatment, such as race or gender discrimination, where differences in treatment based on the protected characteristic in question will usually only be acceptable where they are necessary by virtue of the nature of the job or mode of service provision in question. However, strong arguments nevertheless exist that employers and service-providers should only be able to differentiate between people based on their age when they can show an objective justification for their actions, in order to combat stereotyping and to ensure adequate respect for the dignity and equality of status of all persons irrespective of age.

The Development of Age Discrimination Law

Law therefore has an important role to play in deterring age-based stereotyping and protecting human dignity. Age discrimination is increasingly viewed as analogous to other forms of prohibited status-based discrimination, albeit one with special characteristics.

As yet, international human rights law does not contain many provisions which specifically address the problem of age discrimination. It can nevertheless be viewed as a form of "other status" discrimination as prohibited by Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of the International Covenant on Social, Economic and Cultural Rights (ICSECR), Article 14 and Protocol 12 of the European Convention on Human Rights (ECHR), and a range of other international and regional human rights instruments.

As a result, the UN Human Rights Committee has recognised that age discrimination could constitute a violation of Article 26 ICCPR. Similarly, in Schwizgebel v Switzerland, the Strasbourg Court recognised that discrimination on the grounds of age could constitute a violation of Article 14 of the ECHR taken together with Article 8, even though it concluded that a refusal to authorise the adoption of a second child by the applicant on the grounds of her age did not constitute a violation of the Convention. The European Committee on Social Rights has also interpreted the provisions of Article 23 of the revised European Social Charter, which protects the specific rights of older persons, as requiring states to have comprehensive age discrimination legislation in place to protect older persons against discrimination in a range of areas outside of employment, such as access to goods, facilities and services in the fields...
of health care, education, housing, social services, insurance and banking.14

Many states have now also introduced age discrimination legislation, which prohibits age discrimination in employment and increasingly in other contexts such as the provision of goods and services, education, and health care. In the United States, the Age Discrimination in Employment Act (ADEA) has prohibited discrimination against older workers since 1967. However, most forms of age discrimination legislation prohibit discrimination against younger and older workers – provisions to this effect can be found in federal and provincial human rights legislation in Canada, the Equality Act 2010 and associated secondary legislation in the UK, the Employment Equality Act 1998 and the Equal Status Act 2000 in Ireland, and the Age Discrimination Act 2004 in Australia.

All member states of the EU have now prohibited all forms of age discrimination in employment, as a result of the provisions of Directive 2000/78/EC (the “Framework Equality Directive”) which require all EU states to prohibit direct and indirect discrimination, victimisation and harassment on the grounds of age in the spheres of employment and occupation; some states such as Ireland, the UK and the Netherlands have gone further and prohibited age discrimination in access to goods and services and other contexts.

Indeed, the Court of Justice of the EU (CJEU) in Mangold confirmed that age discrimination should be treated as broadly analogous to other prohibited forms of discrimination within European law, and recognised that it was encompassed within the general principle of non-discrimination that constituted one of the underlying fundamental norms of EU law.15 This decision was initially controversial, as some commentators argued that there was no pan-European consensus that age discrimination should be viewed as contrary to the principle of equal treatment.16 However, the CJEU confirmed in its subsequent decision in the case of Kükçüdevci17 that age discrimination comes within both the general principle of non-discrimination and also in the prohibition on discrimination set out in Article 21 of the EU Charter of Fundamental Rights.

The Legitimate Use of Age Distinctions

Age discrimination is therefore increasingly acknowledged to be a form of unequal treatment which should be prohibited in law. However, as noted above, there are certain circumstances where the use of age distinctions can be objectively justified. Employers may at times have to make use of age limits for the purpose of workforce planning – for example, it might be legitimate for an employer to refuse to send an older worker who was due to retire in a year on an intensive, time-consuming and expensive training course, on the basis they would not receive an adequate return for their training investment. Similarly, public authorities may need to use age limits to define who is entitled to benefit from specific types of pension arrangements or other social welfare benefits.

Treating different age groups differently may also be necessary to adjust to changing socio-economic conditions and to ensure what the CJEU in the case of Petersen has described as “inter-generational solidarity”, i.e. to strike a fair balance between the opportunities available to different age groups.18 Particular complexities arise in respect of the use of mandatory retirement ages by employers: they are often used by employers to ensure a regular turnover of employees and to open up promotion opportunities for younger workers, despite the fact that they terminate
the employment contracts of older employees solely on the basis of their age.

All of this distinguishes age discrimination from other forms of discrimination. In general, differences of treatment which are directly linked to a person being of a particular gender, ethnic group, religion, etc. will be unlawful, unless having one of these “protected characteristics” is a Genuine Occupational Requirement (GOR) for the job in question, for example when being female is a necessary requirement to perform a particular acting job. However, when it comes to age discrimination, employers, service providers and public authorities may have to be given greater leeway to differentiate between individuals on age grounds, if they can show that it is necessary and proportionate for them to do so in order to achieve a legitimate aim. In other words, age discrimination legislation must make it possible for both direct and indirect discrimination to be objectively justified, unlike other forms of anti-discrimination legislation.

Thus, for example, Article 6(1) of the EU Framework Equality Directive provides that:

“[D]ifferences 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.”

In other words, a rule or a policy which subjects employees to less favourable treatment on the ground of age will not constitute discrimination if it is a) designed to achieve a “legitimate aim”, and b) “appropriate” and “necessary” to achieve that particular aim.19

Similar provisions exist in age discrimination legislation in the US, Canada and other states. So, for example, when applying the age discrimination provisions of the Ontario Human Rights Code, the Canadian Supreme Court in Ontario Human Rights Commission v Eto-bicoke20 confirmed that an employer had to show that the application of an age requirement was reasonably necessary, although the Court recognised that the employer need not show that this standard was justified in respect of each and every employee affected where this was “impractical”.21

Article 6(1) of the Framework Equality Directive proceeds to give a number of examples of such justified differences in treatment, which include the “setting of special conditions on access to employment and vocational training” in order to promote the vocational integration of particular age categories of worker or to “ensure their protection”; the “fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment”; and “the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement”.22

Age Discrimination Law in Action: The Case-Law of the Court of Justice of the EU

The expanding case-law of the CJEU in this field also offers many examples of when the use of age-based distinctions will or will not be objectively justified. It has also set out a detailed analytical framework that serves as a comprehensive guide as to how the objective justification test should be applied in this context, which is serving as the basis for the development of age discrimination law across the EU.
The Court has acknowledged that age discrimination constitutes a specific form of discrimination: differences of treatment on grounds of age may be justified in a wider range of circumstances than is the case for the other non-discrimination grounds. The Court has also given national legislatures and private employers a degree of leeway in choosing how to design employment and vocational training policies, especially when it comes to setting retirement ages. However, the Court has also made it clear that the provisions of Article 6(1) of the Directive constitute a very specific derogation from the general principle of equal treatment. As a result, the objective justification test set out in Article 6(1) has to be applied in a rigorous and demanding manner. Age distinctions which are not rationally linked to achieving a legitimate aim, or which are clearly incoherent, unreasonable, or excessive, will not satisfy the requirements of EU law.

Furthermore, the Court in its judgment in *Age Concern* has emphasised that “Article 6(1) imposes on member states the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification”: while member states enjoy broad discretion in “choosing the means capable of achieving their social policy objectives”, “that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age”. Furthermore, in the same judgment, the Court stated that:

“Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying a derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim.”

In *Fuchs*, the Court also made clear that arguments in support of the use of age distinctions had to be supported by “evidence of probative value”.

The case-law of the Court has thus given a clear interpretation to the provisions of Article 6(1) and ensured that strong protection now exists in EU law against age discrimination in employment and occupation. However, the Court has also taken account of the specific nature of the age ground, and the manner in which the use of age-based distinctions may be appropriate and necessary to achieve a legitimate aim. In so doing, it has tried to strike a delicate balance between enforcing the prohibition on age discrimination and ensuring that member states and employers enjoy some room for manoeuvre in this context.

The first reference concerning the age provisions of the 2000 Directives that reached the Court was the already mentioned case of *Mangold v Helm*, which concerned German legislation which had limited the employment rights of older workers by giving employers greater freedom to conclude fixed-term contracts with workers over the age of 52. When considering whether the German legislation at issue satisfied the first leg of the objective justification test, i.e. whether it was directed towards achieving a legitimate aim, the Court in *Mangold* considered that the purpose of the legislation was “plainly to promote the vocational integration of unemployed older workers” by giving employers an incentive to hire them in preference to younger workers who enjoyed greater employment rights. It took the view that “the legitimacy of such a public-interest objective cannot reasonably be thrown in doubt”
and therefore concluded that objectives of this kind would "as a rule" constitute a legitimate aim under Article 6(1). The Court also accepted that member states "unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy". However, the Court went on to note that the legislation limited the employment rights of all workers who were older than 52, irrespective of their previous employment history. It concluded that the manner in which age had been used as the "only criterion" for defining the disadvantaged group of workers, "regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned", went beyond what was objectively necessary to attain the objective of promoting the vocational integration of older workers.28

In Mangold, the Court thus held that states enjoy broad discretion in setting the national employment policy, but the use of age as a criterion has to be clearly shown to be proportionate and necessary to achieve the policy objectives at issue. Similarly, in the case of Kücükdeveci, the Court concluded that the exclusion of periods of work undertaken by employees under the age of 25 from the calculation of redundancy notice periods furthered the legitimate aim of encouraging employers to hire younger workers but was disproportionate as it applied to all employees, regardless of their age or experience.29

A similar approach was adopted in the case of Hütter v Technische Universität Graz, which raised the question of the compatibility with the Directive of Austrian legislation which provided that periods of work under the age of 18 were excluded when calculating an employee’s grading for salary purposes.30 The Austrian Government asserted that the law in question was designed to achieve two legitimate aims, namely encouraging those under 18 to stay in secondary education while simultaneously promoting the integration of young people who have pursued vocational training into the labour market. However, the Court questioned whether the law could be said to rationally advance either of these two legitimate aims: the age limit applied irrespective of whether students had stayed in secondary education or had undergone vocational training, while it also could "lead to a difference in treatment between two persons who have pursued the same studies and acquired the same professional experience, exclusively on the basis of their respective ages".31 As a result, the national law could not be said to be objectively justified under Article 6(1).

In Andersen,32 the CJEU developed its caselaw further by drawing a distinction between the requirements set out in Article 6(1) that an age distinction had to be both "appropriate" and "necessary". This reference concerned Danish legislation which provided that workers employed in the same undertaking for at least 12 years were entitled to a severance allowance unless, on termination of the employment relationship, they had reached the age at which they were entitled to receive a pension. This legislation was challenged by the applicant, who was dismissed by his employer at the age of 63 but wished to remain in the job market rather than retiring and collecting his pension. The Court accepted the Danish government’s argument that this age-linked restriction was intended to achieve the legitimate aim of ensuring that employers did not pay double compensation to dismissed employees (in the form of the severance allowance and the pension), and concluded that the legislation was not “manifestly inappropriate” when viewed as a means of giving effect to this
objective. However, the legislation did not allow older workers who wished to remain in the labour market to temporarily waive their pension entitlement in favour of obtaining a severance allowance, as Mr Andersen wished to do in this case. This meant that an entire category of employees defined by their age were denied the opportunity of benefiting from the extra income protection provided by the allowance. In the Court’s view, this was “unnecessary” and therefore the legislation was incompatible with the requirements of Article 6(1).

The CJEU again differentiated between “appropriate” and “necessary” measures in the case of Prigge,33 which concerned the provisions of a collective agreement which required Lufthansa pilots to retire at the age of 60. This mandatory retirement age had been agreed by the social partners to ensure the safety of airline passengers. However, the Court noted that national and international legislation set an upper age limit of 65 for pilots, and no evidence has been presented to justify why a lower age limit had been set in the collective agreement. The Court therefore concluded that the measure was not “necessary”.34

In the case of Petersen,35 the Court again concluded that retirement age requirements which were not applied consistently across a profession could not be objectively justified. This reference from the German labour courts concerned an age limit of 68, after which dentists providing public care under the German public insurance system lost their authorisation to continue this work. The German government attempted to justify the age limit on two separate grounds. Firstly, it argued the time limit was justified in order to protect the health of patients obtaining dental care, as “general experience” indicated that dentists suffered a decline in performance after the relevant date. Secondly, the government also argued that the measure was also justified on the basis that it helped to share out employment opportunities across the different generations: the age limit served to open up new career opportunities for younger dentists. In its judgment, the CJEU noted that the age limit did not apply to dentists in private practice. As a result, the Court held that it was inconsistent to argue that an age limit was necessary to protect patients against possible decline in the skills of dentists but not to apply this protection to patients receiving care from private practitioners. It therefore concluded that the age limit was not “necessary” and therefore was not objectively justified. However, the Court also indicated that retirement ages which were designed to open up job opportunities for younger workers and thus to advance “inter-generational solidarity” might in other circumstances be justified.

This recognition that “inter-generational solidarity” may provide an objective justification for the use of age distinctions was applied in the subsequent case of Georgiev,36 where the Court held that restrictions laid down by national legislation on the employment of a university lecturer after the age of 65 could be objectively justified under Article 6(1). The Court considered that these age limits were capable of opening up employment and promotion opportunities for younger academics: it also took the view that these age limits could help to ensure that a mix of generations would exist among academic staff which could enhance the quality of teaching and research.37 As in Petersen, the Court was thus willing to grant states a reasonably wide margin of discretion when age limits are justified on the basis that they promote inter-generational fairness. However, in Georgiev, the Court
nevertheless made it clear that the national courts were still required to assess whether the age limits were necessary in light of the current labour market conditions and were applied consistently across the different categories of academic staff.\textsuperscript{38}

In the case of \textit{Fuchs},\textsuperscript{39} the CJEU adopted a similar analysis. The legislation at issue in this case provided that state prosecutors should retire at 65, subject to a possibility of continuing to work until 68 if it was in the interests of the state. The Court considered once again that such an age limit could be justified on the basis that it established a “favourable age structure” that opened up posts for younger employees.\textsuperscript{40} In general, it concluded that the age limit struck a fair balance between the right to work of older employees and the aim of establishing a balanced age structure in the workplace.

In general, the Court has given states a relatively wide margin of discretion when it comes to setting retirement ages. In the case of \textit{Palacios de la Villa}, an age discrimination challenge was launched against the provisions of a Spanish national collective agreement which established that employees in workplaces covered by the agreement would cease to be employed at the fixed retirement age of 65, subject to a condition that the employees affected had made sufficient contributions under the national social security scheme to become entitled to a full retirement pension. The Court took the view that considered that the retirement age provisions in question could be regarded as objectively justified under Article 6(1) of the Directive, on the basis that they were objectively and reasonably justified by a legitimate aim relating to employment policy and the effective functioning of the Spanish labour market. The Court also went on to note that the measure took into account both the age of employees and also their pension entitlements, as well as allowing collective agreements to modify the operation of the retirement age scheme. Therefore, it concluded that the national legislation in question could be regarded as coming within the “broad discretion” accorded to member states in setting and implementing employment policy.

Subsequently, the Court adopted a similar analysis in \textit{Age Concern}.	extsuperscript{41} This case involved a challenge brought by a civil society organisation against the provisions of the UK Employment Equality (Age Discrimination) Regulations 2006 that had transposed the age provisions of Directive 2000/78/EC into UK law. These Regulations permitted employers to terminate the employment contracts of employees who are older than 65: employees who wished to continue to work after this “mandatory retirement age” can request to stay on, and if they continue to work are protected against unfair dismissal, but employers needed only to “consider” this request. The applicants claimed that these provisions were not compatible with the Directive. However, the Court concluded that the UK legislation could be objectively justified, and reiterated that member states enjoyed a broad discretion in the area of national employment policy.

Similarly, in the case of \textit{Rosenbladt}, the CJEU confirmed that national legislation which permitted employers to terminate employment contracts at the age of 65 was compatible with the provisions of Article 6(1). In this case, the applicant, Ms Rosenbladt, had worked as a cleaner for 39 years at a barracks in Hamburg; when she reached 65, her employment contract was terminated, leaving her only in receipt of a statutory old-age pension of EUR 253.19 per month. However, the Court held that the relevant provisions of the German legislation in question struck
a defensible balance between the needs of older workers and the interests of employers in workforce planning and distributing employment opportunities between different generations. It also reiterated that states enjoyed a wide discretion in this area of employment policy.

Some criticism has been directed against the Court’s case-law on retirement ages, on the basis that it gives states an excessive degree of discretion. The Court has certainly applied the objective justification in a less exacting manner in this context than it has in others. However, in so doing, it has consistently emphasised that states have a legitimate interest in ensuring that an appropriate balance is struck between the interests of older and younger workers. In other contexts, the CJEU has applied the objective justification test with considerable rigour, as illustrated by its judgments in Petersen, Mangold, Kücükdeveci and Hütter.

Its judgments have also influenced the national courts’ application of the objective justification test, as evidenced by the approach of the UK Supreme Court in the leading British age discrimination case of Seldon v Clarkson Wright and Jakes. The age discrimination provisions of EU law have also encouraged national authorities to revise national legislation which makes provision for the use of age-based distinctions. For example, in the UK, the statutory provisions allowing employers to dismiss employees once they had reached 65 were repealed by the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011.

Conclusion: Age Equality and the Expanded Recognition of the Rights of Older Persons

In general, all across the EU as elsewhere across the globe, the use of age distinctions is increasingly coming under legal and political pressure. This reflects the existence of a global trend in favour of age equality. Age discrimination legislation is becoming commonplace, and is increasingly viewed as a necessary element of the “equality spectrum.”

Other related developments should also be noted. There is a move underway in international human rights law to secure greater recognition for the specific human rights of older persons. UN legal standards on the treatment of older persons are in general not well developed. However, the UN Committee on Economic, Social and Cultural Rights has issued a General Comment on the economic, social and cultural rights of older persons which sets out in detail the scope of their rights and entitlements under the ICESCR. Other UN monitoring bodies and mandate holders have recognised that older persons may be particularly vulnerable to multiple forms of discrimination and the denial of social protection. Furthermore, a number of international policy documents setting out recommendations and principles in this field have also been endorsed by the UN General Assembly. These include the Vienna International Plan of Action on Ageing, the United Nations Principles for Older Persons of 1991 (which include 18 recommendations organised on the basis of five underlying principles of dignity, independence, participation, care and self-fulfilment), and the Madrid International Plan of Action on Ageing.

Furthermore, in January 2010, the Advisory Committee to the Human Rights Council released a report on the human rights of older persons. This “Chung Report”, named after the Committee’s rapporteur, concluded that there was a need for a new UN treaty on the human rights of older persons which would close gaps in the existing international standards and ensure that rights of elders re-
ceived more visibility. A report issued by the UN High Commissioner for Human Rights reached similar conclusions, and an open-ended Working Group on Ageing had been established by the General Assembly Resolution 65/182 in December 2010 to explore **inter alia** whether such a treaty is required. Therefore, while UN standards in this area are currently underdeveloped, there is a real possibility that this situation may change in the future.

In addition, the rights of older persons have received recognition in European human rights standards. In *Farbthus v Latvia*, the European Court of Human Rights held that a failure to take into account the age and health of an elderly person (in this case a 86-year old) in imposing a prison sentence upon him for participating in Stalin’s purges in 1940-41 could constitute a violation of Article 3 ECHR. Similarly, Article 23 of the revised European Social Charter requires states to establish a comprehensive floor of protection for the rights of older persons to social protection, which in turn serves to protect their privacy, dignity and independence, as well as their ability to participate in social and cultural life. Article 25 of the EU Charter of Fundamental Rights contains similar provisions.

As a result, it is clear that a growing consensus is developing in international and European human rights law that states are subject to special obligations to take action to vindicate the rights of older people and to address their specific needs and requirements. As yet, a similar momentum does not exist in respect of the rights of younger persons who do not fall within the scope of the UN Convention on the Right of the Child and other children’s rights instruments. However, when taken together with the move towards greater recognition of the importance of combating age discrimination, it is clear that issues related to age equality are assuming greater importance.

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9 The Irish case of Byrne v FAS, DEC-E2002-045 is a good example of a case involving discriminatory and unfair assumptions. A 48-year old woman was refused a vocational training place, and was told at interview that older students were less successful at technical drawing and had more problems reconciling work with family commitments. The Equality Officer found for the claimant, finding that no objective evidence to support these comments had been produced.

10 See above, note 2.

11 For an exception, see the ILO Older Workers Recommendation 1980 (No. 150).


13 Application no. 25762/07, Judgment of 10 June 2010.

14 See European Committee on Social Rights Conclusions 2009, Finland, p. 273.

15 Case C-144/04 Mangold v Helm [2005] ECR I-9981.


19 Advocate General Sharpston in her opinion in the CJEU case of Bartsch suggests that this test allows employers some flexibility in the interests of accommodating changing attitudes towards age discrimination in the EU. (See Case C-427/06 Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH [2008] ECR I 7245.)


21 In British Columbia (Public Service Employee Relations Commission) v BCGSEU [1999] 3 S.C.R. 3, the Supreme Court applied a more rigorous version of this standard, ruling that age-based distinctions would generally be unlawful, except where individualised assessment of employees would impose an undue burden on the employer.

22 Article 6(2) also provides that states may exempt age-limits that govern admission to occupational social security schemes or entitlement to the benefits they provide from the prohibition on age discrimination.


24 The wording of the objective justification test set out in Article 6(1) differs from that set out in respect of indirect discrimination in Article 2(2)(b) of the same Directive, in that the wording of Article 6(1) requires that a difference in treatment be “objectively and reasonably justified” [emphasis added]. However, in Age Concern, the Court made it clear that this difference in wording was not significant. (Ibid, Paras 53-67.)

25 Ibid., Para 67.

26 Ibid., Para 51. The Court here cross-referred to its case-law on the application of the objective justification test in the context of equal pay, citing in particular “by way of analogy” its judgment in Case C-167/97 Seymour-Smith and Perez [1999] ECR I-623, Paras 75-76.

27 Joined Cases C-159/10 and C-160/10, Fuchs and Köhler v Land Hessen, Judgment of the Court (Second Chamber) 21 July 2011, Paras 76-83.

28 See above, note 15, Paras 63-65.

29 See above, note 17.


31 Ibid., Para 39.

32 Case C-499/08 Ingeniørforeningen i Danmark (acting on behalf of Ole Andersen) v Region Syddanmark, Judgment of the Court (Grand Chamber) 12 October 2010.

33 C-447/09 Prigge v Deutsche Lufthansa AG, Judgment of the Court (Grand Chamber) 13 September 2011.

34 The Court also made it clear that the provisions of Article 2(5) as a derogation to the principle of equal treatment had to be interpreted narrowly, again in line with its overall interpretative approach. (Ibid, Para, S6.)
35 See above, note 18.
37 Ibid., Para 46.
38 Ibid., Paras 67-68.
39 See above, note 27.
40 The Court also made clear that the limited number of individuals affected did not prevent the measure from being justified on the basis that it pursued a legitimate goal of public policy. (Ibid., Para 51.)
41 See above, note 23.
48 E/2012/51, 20 April 2012.
50 Application no. 4672/02, Judgment 2 December 2004.
“It is only recently that I learned that I was discriminated against by my primary and secondary school friends. There were times when other students would knock me down and I would rely on teachers to lend a hand to me and put me back on the right path. I didn’t know that this was discrimination. I thought it was normal, just what everyone went through when walking down the corridor at school.”

Leroy Phillips
Living with Visual Impairment in Guyana

Testimony of Blind Persons

In its recent project in Guyana, ERT uncovered widespread evidence of direct and indirect discrimination against people with disabilities, in both law and policy, as well as a multitude of practical barriers to their equal participation in society. Amongst them, but not atypically, members of the visually impaired community in Guyana face difficulties in accessing basic elements of social life including education, employment and transportation. They also encounter societal prejudice and a lack of understanding at an institutional and community level as well as in the family. However, there is a determination amongst the visually impaired community to improve the situation. In 2011, the President of the Guyana Society for the Blind was reported to have said:

“Persons with disabilities do not want pity or charity. We want to be able to live independent lives, to have the freedom to make our own decisions and to be in a position to contribute to our country’s development. We’re meeting outside Parliament at the close of Blind Awareness Month to remind our law-makers of their promises to us and to call for the implementation of the legislation so that we can learn skills for work, the same as anyone else, and have the opportunities to go for jobs, the same as anyone else, only then will we be truly independent.”

In June 2012, ERT spoke to two blind men about their experiences of living with a visual impairment in Guyana. Leroy Phillips, a broadcaster and Public Relations Officer for Guyana’s blind cricket team, spoke of his childhood and experiences in daily life. Ganesh Singh, a Commissioner at the National Commission on Disability, reflected on his own experiences and identified the multiple barriers to equality for other persons within the visually impaired community in Guyana.
Leroy Phillips

I was born in December 1990. I have lived with my paternal grandmother, since I was born. I was raised by my father, his mother and brothers and sisters. I lost my sight when I was only seven years old and still in primary school. My teacher threw the chalkboard eraser at me and shortly after that incident I lost my sight.

I grew up in a big household where I was discriminated against by my aunts and uncle when I did things that displeased them. They would call me names like “blind man” and “blind fool”. I would cry in the corner and felt emotional damage. This went on for a number of years.

Like everyone else, I attended school full time, but I did not receive the additional support needed in order for me to get the education that I should have had. I experienced a lot of discrimination which I didn’t notice at the time because I didn’t have enough knowledge about it. It is only recently that I learned that I was discriminated against by my primary and secondary school friends. There were times when other students would knock me down and I would rely on teachers to lend a hand to me and put me back on the right path. I didn’t know that this was discrimination. I thought it was normal, just what everyone went through when walking down the corridor at school.

Only one or two of my tests were in Braille. I did the majority of my exams with a scribe and a reader. I didn’t have much exposure to Braille in primary school. I spent four years in primary school and I wasted a lot of time there. I didn’t know what was happening or what was expected of me because I was a blind person in a class where all the other students had their sight. So I just went through the motions. I did not receive as much attention as the other students in the class. I was also punished severely, maybe more so than the other students. I can recall being beaten by my primary school teacher with a thick piece of wood for six lashes.

The lack of adequate teaching in Braille continued when I was in secondary school. The school had a lot of blind students but the teachers weren’t qualified to teach us. So the teachers would have us do what they thought was best for us. They only taught us basic Braille. Although we were taught English, social studies, maths, science and history, the teachers didn’t pay much attention to us. It was difficult to access books because other students would pretend to be using them and as a result I could never get work done as the other students did. The teachers never thought to let blind children have their notes taken down on a tape recorder or put
into Braille, or to have one of the teachers sit down with us to pass us the information, so that we could be taught at the same level as everyone else in the class. As a result, a lot of time was wasted.

The resources spent in educating a child with disabilities could have been harnessed to achieve better results. I look back and I can’t help but think that I could have achieved so much more because so much money was being spent on me. But the quality wasn’t there. A lot needs to be done for the blind and for other persons with disabilities so they can enjoy the same rights and education as anyone else. If this situation continues without any improvements, it will be terrible for persons with disabilities and they will have little chance of finding a job.

I have managed to acquire a job through luck. The National Communication Network Inc. started a broadcaster training program in May 2011. I visited the National Commission on Disability and then a volunteer from the UK called and asked me if I would be interested in broadcasting. When she started telling me about the television station, I said, “I’m not sure, the people there are going to be at a much higher level than me and I’m going to be embarrassed – I’m scared – I’ll have to think about it”. She told me I had time to think about it and to let her know when I decided. The very next day I contacted her and told her I was very interested in broadcasting and wanted to be on the radio and learn more about it – and that’s exactly what I did. I got into the business and learned a lot. Even there, information wasn’t very accessible to me, so I had to fend for myself. They never recorded audio versions of information, even though there was a recording studio at their disposal. They kept giving me papers. I would be sitting there for 20 minutes or half an hour just not speaking, trying to meditate about what is being said. I had to strain to come up with a minute promo because I couldn’t read it from a script. In spite of this, I like being on the radio, being heard, sharing my experience, and learning more about broadcasting.

I feel that I can generally participate equally in other areas of life. I have played blind cricket since 2006 and I act as the Public Relations Officer. I am able to speak publically through media and television. If my teammates go to parties, I will go with them. However, my parents don’t take me to places. They say “what would be the point, you aren’t going to see anything anyway”. So I stay at home instead. This makes me distraught and sad, although I try to ignore the fact that I am hurt. A blind person might not be able to see anything but they can still go and enjoy the atmosphere.

I am able to use public transport and get around town. I’m confident and outgoing, particularly because I’ve been living in the same village for 21 years and the locals are very much aware of who I am. I began taking public transport on my own in 2008, when my father left the country to live in Trinidad. Previously, he never allowed me to take public transport on my own, and instead used to pick me up and drive me every day. He still tells me I have to be careful, as the roads are so busy. But I feel confident that there’s a lot of help for me when it’s time to cross the street, and I usually only need to cross a few busy streets. Most of the bus drivers are from my neighbourhood and they all know me. I go to the bus stop early and when they see me, they stop. They even fight for me to take their bus, giving me reasons to travel with them instead of someone else. I also use a lot of taxis and minibuses. I don’t travel outside the region much, although I can do so on my own. I love my white cane. After I was taught how to use it in 2008, I gained a lot of the confidence I needed to travel on my own.
Ganesh Singh

I live in Guyana, where I am a Commissioner at the National Commission on Disability, a Public Relations Officer for the Guyana Council of Organisations of People with Disabilities, a member of the West Indies Blind Cricket Organisation, a member of the Guyana Society for the Blind, and the Coordinator of the Regional Network for Persons with Disabilities and Global Youth Network for Persons with Disabilities.

I acquired my blindness when I was seventeen. I would consider myself somewhat fortunate because I had opportunities in school. However, due to a lack of information and counselling, I was at home for five years as a blind person not knowing what to do or where to turn. There wasn’t anywhere I could go to until I became aware of cricket for the blind and this led to opportunities to be involved in a number of other things. I have tried to register at the University of Guyana, where blind students have previously attended, but I have had some difficulties and will apply again. There is no major discrimination there on that level. I have not experienced any issues with accessibility or with transportation.

My personal experience is unique because my family is very supportive and I am an assertive person. However, this is not representative of everyone else’s experience and does not reflect the general situation in Guyana. I can get things done but other persons with disabilities cannot always get the same things done. The general situation of people living with disabilities in Guyana is bleak because many persons with disabilities cannot enjoy the rights that are inherent to them as human beings, and are enshrined in the Constitution of Guyana.
For instance, the policy is that education is free for all and that everyone ought to have access to education, but no considerations or special needs facilities have been put in place in order to foster education for persons with disabilities. Children who are blind or deaf are able to attend school but due to the lack of adequate support systems, such as having an interpreter or Braille, are prevented from actually getting an education. In Guyana, there are currently two schools for the blind with approximately 35 blind children between them. This number reflects a small minority of the blind children actually present in Guyana, and can be attributed to the lack of access to education for the majority of blind children. This indicates that violations of the rights of a person with disabilities are inherent from childhood in Guyana. If a child does not have access to proper education, then the chances of obtaining a position in the labour market are marginal.

Schools for persons with disabilities are not readily available location-wise and the expensive cost of transportation makes it difficult for families to send their children with disabilities to school, because most families are affected by poverty.

There is widespread discrimination against persons with disabilities. The discrimination is not always intentional and can be attributed to a lack of knowledge, sensitivity and unwillingness on the part of policy-makers to make a change. There are a number of cases where families keep their children at home because dealing with disabilities is a difficult task which requires special attention and knowledge. Since there is no readily available access to proper counselling and rehabilitation, the family has little or no knowledge of how to manage the situation or the opportunities that may be open to children with disabilities. As a result, the child is simply kept at home with no access to education or any other opportunities. This problem is widespread across Guyana. In Guyana, there are 23 organisations for persons with disabilities in eight administrative regions,
and currently fewer than 1,000 persons with disabilities in total are members of one or more of these organisations. In the last year, the Commission on Disability in Guyana started a national registration process. Using the information collected from the Bureau of Statistics which indicates the number of persons with disabilities that live in the various regions in Guyana, in combination with the data collected from the registration process, which has had a poor response, there are currently only 2,500 registered persons with disabilities living in Guyana. These statistics indicate that there are a large number of other persons with disabilities who are in their homes, kept away from the rest of society. A combination of factors such as stigma, insensitivity of families and generally negative culture as it relates to disability, cause persons with disabilities to stay away from society.

Even existing organisations such as the Society for the Blind have very little to offer to persons with disabilities. Such organisations are under-funded and as a result have difficulty in implementing projects that would benefit persons with disabilities.

In relation to access to infrastructure and buildings, there are few facilities or support systems in place to provide for the needs of persons with disabilities. Access to buildings via ramps and rails is a fairly new concept in Guyana. There are very few buildings which have a built-in ramp according to proper specifications able to cater for the needs of persons with disabilities. In most cases, the ramp has been installed for the purpose of conducting business, for example, conveying items and goods on a trolley into the business premises, rather than for assisting persons with disabilities. We have successfully lobbied for ramps to be placed in one or two other places. Most government administrative buildings, agencies and ministries including the Ministry of Labour, Human Services and Social Security, which is responsible for disability issues, do not have any ramps. The cost of putting in a ramp is very small compared to the budgets of the various ministries and this shows the general unwillingness on the part of the authorities to make any changes.

During periods of flooding, the pavements around Georgetown are a nightmare as they have been washed away. Walking as a blind person or someone in a wheelchair is dangerous because they don't know when the pavement is going to drop off. They have to use the roads instead, where there are a number of manholes which are not covered. There are numerous stories about people walking into them. This is a reflection of the infrastructure in Guyana. I am convinced that it would not be expensive to make these changes. There are so many new buildings going up and so much money spent on roads, and yet there has been no consideration into putting a little slope at the end of the pavement to assist persons in wheelchairs, elderly persons or persons with pushchairs for their babies.

Transport is another nightmare. Guyana does not have a state operated transportation system, so persons with disabilities are at the mercy of the privately-operated minibus and taxi operators. They are always in a rush and picking up someone in a wheelchair will take time, and they don't want that. They complain that the wheelchair will scratch the bus or that it takes too long to load it on the bus. Every day you hear stories about companies doing things like this. There are a few that are willing and accommodating, but the majority are not.

With regard to technology, one good thing is that the government of Guyana has a “one laptop per family” programme. When they
launched the project, they did not have a registration form or anything like that. I persuaded them to include persons with disabilities as a category that should be given special priority. The government should be commended for this. I have trained blind persons who have received laptops with the screen-reading software, and the government has also given them headphones and external USB keyboards that make it more user-friendly. They have also subsidised transportation costs for these persons to go to the training.

There are some positive things occurring in Guyana to the benefit of persons with disabilities but these are insufficient to deal with the widespread problems which prevent them from fully enjoying their rights. I think that the disability movement should take a share of the blame. If we were strong and unified in our approach, we could influence a lot of change. Once the politicians feel the pressure, they will have to do something. Of course we are happy when they install a ramp somewhere, but they are really just doing what they are supposed to be doing. No government department is doing you a favour when they fulfil what you are entitled to.

The Persons with Disabilities Act 2010 reflects Guyana’s international obligations and the needs of the country but only to a limited extent. When compared with the Convention of the Rights of Persons with Disabilities (CRPD), there are clearly large gaps in the Act. In some areas such as education and accessibility, the Act is in line with the CRPD. However, in a lot of other areas there is very little if any alignment between the Act and the CRPD.

It is good that Guyana has a Disability Act that requires that the services that a person with disabilities should have must be made available. The disability movement can see that there is an effort. However, now that we have the Act we must work for the development of policies in the various ministries. That is a nightmare because after two years the government is nowhere near implementing the policies and there are no timelines or penalties if they do not. We are at the mercy of the ministries as we cannot force them but rather have to wait for them to act.

Guyana signed the CRPD but has not ratified it yet. The authorities do not see the need for ratification if we have a local instrument. Signing and ratifying is just a formality unless you sign and ratify the optional protocol, which gives the international treaty more teeth – otherwise it is just a piece of paper. Furthermore, even if the government signed the optional protocol, they could back out at anytime, if they thought that they might get into trouble because of discrimination or the violation of rights.

As well as implementing the Act, we need to amend it to make it more comprehensive and provide a much stronger legal framework to protect the rights of persons with disabilities. For example, there have been numerous cases recently reported about the rape and sexual abuse of persons with intellectual disabilities. When persons with disabilities report a crime, the law enforcement officers do not address the issue seriously. They make a mockery of them and laugh, and that is the end of the case. There are numerous examples such as an individual who was raped who went to the station to make a report and nothing was done and a young lady whose brother repeatedly physically abused her and the police did nothing about it.

It is only recently that in Guyana, persons with a mental health issue have been recognised as having a disability. Prior to this, they
were referred to in various ways as psychiatric patients. They were treated as having a severe medical issue and not something that limits their ability to function effectively in society. Other cognitive disabilities like learning disabilities, autism, and dyslexia are only now seen as disabilities. A few years ago, teachers would refer to those students in a derogatory manner, as being slow or dull. At the time, there were no assessment tools to diagnose these children with learning disabilities. Although some work is now being done, there is still no assessment tool or procedure that is specifically aimed at identifying school children with such learning difficulties in order to provide them with specialised teaching. A lot of work needs to be done in order to ensure that persons with mental disabilities are able to enjoy their rights and lead an improved quality of life.

We have a lot of work to do in Guyana to implement the Disability Act and remove discrimination.
“There are specific UN conventions implemented to protect the rights of groups such as women, children, immigrants, and the disabled and indigenous people. Paradoxically, the fastest growing population sub-group, and arguably the most vulnerable, lacks any such internationally agreed legal mechanisms to protect them.”

Alexandre Kalache
Putting Age Discrimination on the Map

Legal protection from unjustifiable age discrimination is a relatively new development and is only available in relatively few jurisdictions around the world. It has taken decades of activism to reach the point which we are at now of recognising the prevalence of prejudicial age-based stereotypes in everyday life and the need to legislate to prohibit them. Yet still, all too often a person’s age continues to be a factor in overlooking them for a job, refusing them full access to healthcare or denying them opportunities for further education. There is much work to do.

However, cognisance of the negative impacts of age discrimination is increasing and corresponding legal protections spreading. For example, there is burgeoning activism at the national level to improve on or introduce legislation prohibiting age discrimination and the calls to adopt an international convention on the rights of elder persons are getting louder and more numerous.

ERT spoke with two experts on age discrimination, both of whom have been instrumental in putting age discrimination issues on the map. Robin Allen QC is a barrister at Cloisters Chambers in the UK and consultant to Age UK and Age International, and Alexandre Kalache is President of the International Longevity Centre in Brazil and Global Ambassador on Ageing for HelpAge International.

ERT: You are widely recognised for your expertise in age discrimination. How did you become involved in this area? What life experiences and major influences played a role in getting you to your present position?

Robin Allen: It has been a journey and one which I am hoping still has a long way to go!

Working as an equality lawyer since the late 1970s I have been very fortunate to have been involved with some of the key moments in the development of equality law in Europe and the UK, and also wider.

The Amsterdam Treaty was the most significant moment when “age” became recognised across Europe as an aspect of individuality entitled to specific protection from discrimination. The Amsterdam Treaty amended the EC Treaty introducing a new Article 13 – now Article 19 of the Treaty on the Function of the European Union – that empowered the Council to legislate to give detailed protection. It was not initially clear how that power should best be used. In 1998 I was asked by the European Commission to help think about this. I wrote the key note speech for a Commission conference in Vienna that year which sketched out what I thought should
and could be done with Article 13. This informed the Commission’s proposals for Race and Framework Directives which were announced at the Conference and which became the Directives of 2000.

However, to be frank, at the time I was very aware that there was a huge amount of work to be done on all areas and that perhaps age was the least developed ground. I was however particularly concerned that Europe did not take the same approach to age as the United States had in enacting the Age Discrimination in Employment Act 1967 (ADEA) by prohibiting employment discrimination only against persons aged 40 years or older. I wanted to see age as a protected ground at all ages, and I am glad to say the Commission took this line in the Framework Directive 2000/78/EC and of course subsequently in the Charter of Fundamental Rights in the same year.

At almost exactly the same time I became involved in some litigation in the UK which sought to challenge the age limitation on protection from unfair dismissal, which was then set at age 65. I had been prompted to be involved in this by two things.

Firstly there had been litigation to equalise the age at which protection was lost for men and women not long before. You will recall that the European Court of Justice in 1993 in *Marshall v Southampton and South West Hampshire AHA* (1) held that the UK were acting in a discriminatory way in legislating different ages at which men and women lost protection. That case led to harmonising legislation but it always seemed to me that it was unfair and wrong to have any limitation at all by reference to age. (I was not alone. Alice Leonard, then chief legal officer at the Equal Opportunities Commission discussed this with me and was keen to see change too.) I was well aware that the rule was based on a stereotype about competence and need. But if a person could be fairly dismissed on grounds of incapacity before they reached 65, I really could not see the reason for not permitting them to work on subject to the same process thereafter. I am well aware that some people think that this is undignified, but I disagree. I think it is more undignified to be shown the door against your wishes without redress even though you are still fit to work.

So this case got me thinking what could be done to change this.

Something else provided an added urgency to my thinking. Some barristers in my chambers focus on clinical negligence cases where knowledge of the statistical tables on expected longevity is essential. These barristers need to be aware of the change in the expected longevity each year in order to prepare schedules of loss and information on this was regularly available at work.

By the late 1990s it had become quite clear to me that not only was longevity increasing fast but in fact the rate of increase was accelerating. That made me resolved to see what
could be done to get rid of the age 65 cap as soon as possible.

As we had no age equality laws we had to see what could be done with other equality laws. With the help of the charity Age Concern (the predecessor to Age UK), and also two other barristers – Rachel Crasnow of Cloisters and Paul Troop of Tooks Court Chambers, I brought a case which sought to challenge the rule as being indirectly discriminatory against men. The basic argument was that it hit men harder than women because men left the labour market about 5–8 years later on average than women and therefore many more men than women worked beyond 65. Statistically this was all entirely true.

This litigation eventually arrived in the House of Lords in 2006, then the highest court in the UK. Sadly the judges did not like my approach to the statistics and, although we had been successful at first instance, ultimately we lost. The House of Lords was not prepared to bring the case within sex discrimination law but they did recognise that it might potentially be age discrimination when the Framework Directive was transposed into UK law.

The case was argued in March 2006 and that was the very moment the UK was consulting on how it should transpose the Framework Directive in relation to age. It actually made the Employment Equality (Age) Regulations 2006 on 3 April 2006 just after.

It will be recalled that the Framework Directive gave member states a power to derogate from their obligations otherwise to provide universal protection from age discrimination. The UK decided when making these 2006 Regulations to take advantage of this power. The Regulations thus introduced afresh a default retirement age at 65 after which employees had effectively no protection from age discrimination. The discussions about this had been going on for some time and I must now go back a few months to the start of the consultation.

The previous year when the consultation was commenced I had met with two friends who then worked for Age Concern – Andy Harrop and Richard Baker. We had decided that we should campaign hard for the abolition of the old 65 rule and against its reintroduction in a new form in the new Regulations. Age Concern led on the political side and had an undoubted partial success since the government announced that the new provision would be subject to review in 2012. Undeterred by the outcome in the House of Lords, indeed spurred on by the suggestion that this might be age discrimination, we resolved that we should do all we could to force the hand of government to bring this restriction to an end.

We had a two pronged strategy – on the one hand we aimed to make employers see the default retirement provisions in the 2006 Regulations was not necessary and on the other we aimed, through a sustained legal challenge, to create uncertainty as to whether this derogation was even lawful. The purpose of this second aim was to encourage employers to face up to this uncertainty by trying out what it would be like to run their businesses without the benefit of the provision.

I am of course delighted that the campaign was successful. As a result of the campaign the government brought forward its review and abolished the default rule with final effect from 1 October 2011.

There are some other aspects to this journey which are also very important.
My work with Richard Baker at Age Concern introduced me to Age Europe and other campaigners for age equality across Europe. Age Europe asked me to draft a proposal for a new Directive to outlaw age discrimination in relation to goods, facilities and services. This work made me think much more deeply about the need to protect against age discrimination in relation to goods, facilities and services and how and why we use age as a proxy. The Directive has played its part in contributing to the debate on a general goods and services directive which is ongoing at present and which has been given some added impetus this year.

More recently I have worked with Age UK and HelpAge International in relation to the proposal for a UN Convention for the rights of Elder Persons and this has brought me into contact with a much wider debate. However, I am not just interested in older persons’ rights but also in the necessary balance between older and younger persons. I have recently been undertaking some really interesting work with the Northern Ireland Equalities Commission and the Northern Ireland Children’s Commissioner on proposals to ensure that in Northern Ireland age discrimination (at least in relation to goods, facilities and services) is outlawed both below and above the age of 18. This has made me think much harder about the nature of this concept across the full age range.

Alexandre Kalache: Experiences from my youth played a large role in igniting my interest in the rights of older people. Having grown up in a large and multi-cultural extended family, I was constantly surrounded by fascinating older relatives. As a child I chose to spend much of my time with these older people rather than with children my own age. They were wonderful storytellers and I loved to listen to the first hand tales from their lives spent living in different times and different cultures. When I was a teenager, my grandmother became ill with terminal cancer. She was cared for at home by the family for three years, rarely visiting the hospital. As I was destined to become the doctor in the family, it was natural for me to be very involved in her care – from small tasks like feeding her to giving her injections ... even playing the piano to calm her down. This was a very profound experience for me and had a huge influence on my later life choices.

I began medical school during the first year of the military dictatorship in Brazil. During this period, I discovered politics, initially through the social doctrine of the Catholic Church (what became known as “liberation theology”), and became passionate about a number of particular social projects in the favelas. I was elected Student Union President during my time at university and, through the late 1960s and the 1970s, I was actively involved in the strong opposition to the dictatorship.

After graduating from medical school in Brazil, I found that it was difficult to find a job in public health given that I was reluctant to...
work for the government, so I went to Britain to gain post-graduate training in social medicine. Witnessing the very different age structure in Britain, which at that time was infinitely older than the population structure in Brazil, opened my eyes. In this period it was difficult to talk about global ageing as population ageing was considered to be a phenomenon that only related to developed countries, and not to developing ones. I decided to pursue a career in this area. Initially, I played the role of an activist, trying to raise awareness of the huge implications arising from the inevitable ageing of developing country populations. Later, when I took up a Directorship at the World Health Organisation, I had a global platform to try to influence change and to champion the rights of older people. I used this role to make it very clear at the United Nations World Assembly on Ageing which took place in Madrid in 2002 that what was needed was to move beyond the standard needs based approach towards a much more appropriate rights based approach. In the aftermath of a milestone international Conference in Brasilia in 2008 the rights of older people have become a priority for many organisations and countries. It was at this conference that the call for a UN Convention on the Rights of Older Persons was loudly expressed for the first time. In order to move forward on this however, there still needs to be a massive worldwide cultural shift. An ageing population is a social triumph and should be viewed as such.

ERT: What do you observe to be the public perception of the concept of age discrimination in your country? And what do you observe the government’s attitude to it to be?

Robin Allen: In my view the public perception of the need for age equality is not yet very profound but it is particularly dynamic. Let me illustrate just how dynamic.

When the government introduced the 2006 Regulations it was generally only in a few exceptional cases that businesses thought that they should actually seek to hire older workers and the general view was that the default retirement age was not merely necessary but was generally desirable as marking an acceptable end to working life. However by the time the default retirement age was removed by legislation this view had changed radically. This can be seen in a survey of employers in Personnel Today on 31 May 2011 as to their wish to use the power given by the amending legislation to continue, on a firm by firm basis, to have an “employer justified retirement age”. The headline said it all: “More than two-thirds of employers (…) intend to allow their employees to retire whenever they wish, following the abolition of the default retirement age”.

This reflected a sea of change in attitudes over a mere five year period. All the old certainties about employment having to have a finite end seemed to have crumbled during the campaign we had launched as the reality of increased longevity dawned.

On the other hand I do not think that the public understand the idea of the lump of labour fallacy nor do they have much idea of what is involved in intergenerational fairness.

And I very much doubt that many older people think that age equality is a principle that applies to younger people just as much as it applies to older people but on the other hand I am more sure that the reverse is true: sometimes younger persons can be more generous about this!

Perhaps making generalisations like this is less important than noting that the debate is beginning to develop on a broader basis, from the concerns expressed about
the treatment by the BBC of its older staff – the treatment of Miriam O'Reilly really brought attitudes to older women in the media to the fore – to the discussion of the less favourable treatment that young people face without any apparent justification. There is even a “foundation” for intergenerational fairness.

Turning to the government’s attitudes, the picture is one of deeper consideration but there is little evidence of a truly coherent strategy. Indeed it is fair to say that despite some really impressive work being done on the consequences of increased longevity there has been little deep thinking about the right way to balance the allocation of resources for social goods between different age groups. I doubt that any minister could answer the question: On what basis should a public authority decide whether to spend a given sum of money on advantages for older persons such as bus passes, free entries, or a universal winter fuel allowance rather than on younger persons in need of assistance in finding new homes or jobs?

The most important work done by government and Parliament has essentially focussed on making national pensions policy work without scaring the electorate too much. The new pensions legislation has reflected this need without stating, what is an undoubted fact, that no legislation can get this right once and for all and that with the current rate of advance in medical science it is more than likely that new pension age rules will be necessary.

**Alexandre Kalache:** Until recently, in relative terms, there were few older people in Brazil. The population was young and there was little in the way of social policy focusing specifically on older people. Ageing was not seen as a priority because the care for the small population of older people was absorbed by the large extended families and in particular, by the women who were expected to stay at home to provide it. Recently however, there has been a rapid increase in the numbers of older Brazilians together with a dramatic change in the family structure. Fewer relatives within families are able or willing to provide care. Brazilian society has not yet absorbed the full implications of these changes. Although there is general public agreement that older people’s needs must be adequately met, the problem is that there is not enough time, and the resources are scarce to replace family care with public sector care.

Over the last 10-12 years, the Brazilian government has increased the emphasis on human rights and taken significant steps to reduce inequality for the entire population. Focus has been placed on the fight to reduce the social gap and inequalities for groups such as women, children and indigenous people.

The protection afforded to older people is greater following the 2003 Elders’ Bill of Rights. The legal framework in place in Brazil provides far better theoretical protection to the rights of older people than the equivalent in many developed countries. Brazil has two critical ingredients in relation to older people that are lacking even in most developed countries. We have the Universal Right to Health which is incorporated into the Brazilian Constitution, and this applies whatever the age. It is true that the public health sector is not as good as it should be, but the fact that the citizen has a stated right to health care regardless of age is providing older Brazilians with far greater reassurance and access to health services. In the past this had been left to the charity sector or the rather unreliable be-
nevolence of the employer. The second important factor which has been consolidated over the past 15 years is the provision of a universal pension. Previously, older people were often completely dependent on their families lacking even a basic income to provide for their immediate needs. As a result of an old age pension that is not linked to formal work contributions, older Brazilians, and in particular poorer older Brazilians, today have a stable and regular income that younger members of their family may not. Clearly, this confers both a degree of autonomy and protection for the individual but it has also resulted in impressive gains in poverty reduction throughout the entire community. Despite these welcome changes however, over the last few years, it seems that the Brazilian government largely perceives inequality in the country to be concentrated among younger women and children. In my opinion, the government is currently neglecting its older citizens, most of whom are also women, because of a lack of specific focus.

ERT: Are there any stereotypes or prejudices that you consider to be particularly harmful?

Robin Allen: Of course there are! Indeed there are so many. People make assumptions about the correlation between a person’s age and their health, wealth, wisdom, energy and desire to work, all the time.

While, of course, a statistician can make statements about the way these things change over time, the range of abilities found in any cohort of persons of the same chronological age is huge and so these are very damaging stereotypes when they are misused. I became very aware of this when successfully arguing against the maximum recruitment age used by the National Air Traffic Control Service. Their argument was based on the premise that at around 45 mental capacities diminished and it took 15 years to become an expert so it was necessary to recruit with sufficient time for someone to become expert before their faculties started to diminish. The evidence showed however that the range of mental capacity within the cohort of 45 year olds was much larger than the difference in the mean or median capacities of 44, 45 or 46 year olds. Indeed it was much larger than between 45 and much older persons. In short, this was a useless stereotype.

I suppose that I consider assumptions that youth is always callow and shallow and persons over 60 feeble and slow the most offensive!

Alexandre Kalache: In comparison to most developed countries, I believe that the overall culture in Brazil is more accommodating towards older people. There is a greater inclusiveness generally and people are quicker to express a positive attitude toward older people. Nevertheless, insidious discrimination and negative prejudice towards older people is still widely prevalent. Brazil is a very youth orientated culture. An exaggerated focus on youthful beauty, body and fitness can easily exclude older Brazilians. There is also a very big educational gap in the country. The educational levels of the young are much higher than those of the older population. Many Brazilians wrongly perceive the older population as having little to contribute. Worldwide, older people are still shamelessly stereotyped by the media. They are routinely portrayed as worthless, helpless, dependent, comical or irrelevant. The vast majority of older people cannot recognise themselves in these crude representations. Such stereotyping and harmful exclusion creates a landscape in which negative attitudes and outlooks towards age and older people breed.
ERT: Could you say a bit about how approaches to age discrimination differ around the world? Is there a country that you think is a particularly good example in this respect?

Robin Allen: I would not hold myself out as the greatest expert on comparative age discrimination law but I have collected some knowledge on this in my work with HelpAge International and their campaign with others to persuade the United Nations to produce a Convention on the Rights of Elder Persons. Another reason I have had to consider comparative age discrimination law is because within England, Scotland and Wales we treat persons under 18 as not entitled to be protected from discrimination on grounds of age in the provision of goods, facilities and services and I have been asked to advise in relation to the steps Northern Ireland should take – whether they should impose the same limitation or should go for a universal rule.

Taking the position of older persons first: one thing that has struck me particularly is that although we in the UK and in Western Europe, when talking about older persons’ rights, tend to think about persons of pensionable age, in many countries of the world the majority of the population still have little prospect of reaching their 60s let alone their 80s or 90s. This leads to some very odd results where legislation defines aged persons or elders as being over 60 because in many parts of the world most people will never benefit from these rights. I have been very impressed with the way in which the South American countries have taken a strong lead in the definition of older persons’ rights. I am also very impressed with the lead taken by Australia, Canada and Belgium in extending the protection from discrimination on grounds of age in relation to younger persons.

In Australia, there is a specific Age Discrimination Commissioner and I would really like to see the establishment of an office of Age Discrimination Commissioner here in the UK as well. To have a specific Commissioner working in this field would provide a real focus for change and the discussion of new norms and ways of approaching the really difficult issues ahead.

In Belgium there is also an important discussion on the extent of, and rationale for, age discrimination.

Alexandre Kalache: I cannot accurately single out any one country that provides an ideal example. Obviously, countries which have a highly developed welfare system are better placed to provide equitable care for their older citizens. It must be borne in mind however, that these countries tend to be richer and have also had much longer to adapt themselves to their ageing populations. Developing countries have had neither the resources nor the luxury of time to respond to their much faster ageing demographics by building such comprehensive systems.

Even within these comprehensive systems in the developed world, there is still very evident and very insidious discrimination. Practical realities within these systems of care routinely illustrate a pervasive cultural prejudice towards older citizens. The care for older persons in developed countries is typically provided by medical and ancillary staff who are recent immigrants – many of whom do not share the same cultural understandings as their patients. Additionally, jobs within geriatric care are often more poorly paid than elsewhere in the health system and are more likely to be filled by less skilled and often less satisfied staff. In my view, geriatric care in most developing countries remains the least considered part
of the system, which in itself is a reflection of a more widespread discrimination. In a multi-centered research I conducted some ten years ago while still working at the World Health Organisation – which we appropriately, I think, called “Missing Voices” – older people referred to this as “institutional abuse and neglect”, pervasive, difficult to pinpoint and yet powerful, eroding one’s self-esteem, self-confidence and dignity.

No legally binding international convention to specifically protect the rights of older people exists. There are specific UN conventions implemented to protect the rights of groups such as women, children, immigrants, and the disabled and indigenous people. Paradoxically, the fastest growing population sub-group, and arguably the most vulnerable, lacks any such internationally agreed legal mechanisms to protect them. To date, most developed countries oppose the notion of such a tailored convention at UN level to protect the rights of older people. To my mind, the high-minded arguments against the proposal basically come down to one thing: ageism. By leading the call for such a convention, developing countries such as Argentina, Brazil, Chile and Uruguay have shown more of a commitment to protect the rights of older people. It is no accident that these countries now attach great importance to the issue of human rights given the transgressions of their recent history when they were plagued with military dictatorships.

ERT: How effective do you think legislation is/will be in bringing about change in your country and beyond?

Robin Allen: There are two great drivers for legislation – the desire of all humans (politicians included!) for a more profound human dignity and economics. In the case of age equality these two are working together to force nations to confront the issues I have been discussing. The question is whether the academic work, the public discourse, the technical work necessary for public administration and the interests of politicians will enable legislation to really get to grips with these issues. The position in the UK is mixed. The abolition of the default retirement age was a triumph but it has been swiftly followed by a much more mixed picture in relation to the protection from discrimination in the provision of goods, facilities and services. It is of course good news that the UK government introduced subordinate legislation to make the promise of protection in the Equality Act 2010 more real.26 However, that new legislation contains a myriad of exceptions.27 Most importantly the government has almost totally failed to protect from age discrimination in relation to financial services. Yet this is an area in which age discrimination is endemic and rarely if ever justified on any acceptable basis. It will have to be confronted sooner or later. I think this exception was a consequence of timidity in the face of the banks and insurance companies and poor political leadership. This has to be challenged.

Alexandre Kalache: Progress such as the creation of the UN Principles for Older Persons and the establishment of an International Day for Older Persons were important. Not only have they brought about an evolution of the relevant principles but have also brought the subject to the forefront in Brazil and other countries.

With regard to the potential for laws to bring about effective change, there are differences of opinion. Developed countries are arguing that current international laws are sufficient. Their view is that the only gap is one of implementation and that there is no need to create new laws for the protection of older people.
I and others argue that unless we address the specific rights of older persons, they are going to be ignored. The problem with relying solely on the non-legally binding Principles to provide protection is that they are not enforceable. Countries can easily choose to ignore them. In practice we need specific protections enshrined in a single legal framework. Unless there are sanctions available to be imposed on countries that fail to observe legally enforceable rights, I do not believe that substantive progress can be made.

ERT: To what extent do you think that the linear nature of age makes this protected characteristic different from others in discrimination law? Should it be treated differently and if so, how?

Robin Allen: Well, we know that within European Union law direct age discrimination may be rendered justifiable. This exception to the general rule that direct discrimination is not justified in Union law can be attributed to the linear nature of age. There are two aspects of this that might be mentioned.

The linear nature of age has been used as a predictive tool in relation to statistical truths about, for instance, the correlation between age and some illnesses. So while age stereotypes are frequently objectionable when applied without consideration to personal characteristics, they are also deployed to great advantage in, for instance, the design of public health campaigns.

The second aspect is the use to which the linear aspect of age as a characteristic has been used as a proxy for length of service or length of enjoyment of a benefit and so on.

So in short the fact that we more readily accept that direct age discrimination may be justified is indeed a reflection of this aspect.

The American jurisprudence has certainly taken note of the linear basis of age and has imposed a lesser burden of proof not requiring strict scrutiny.28 There is some indication that our judges will take a similar approach,29 though I think that this would be regrettable. The Supreme Court of the Republic of Ireland has also considered this point.30 However this is less evident in the jurisprudence of the Court of Justice of the European Union (CJEU) where age equality is seen as a fundamental right.31 So there may be a looming debate about this among jurists.

Alexandre Kalache: The linear nature of age implies that every age is different and is affected by different issues and discriminations. Many of the issues that affect an individual in their 20s are certainly not the same as those that affect an individual in their 60s, or 80s. I believe that an awareness of this specificity is important. Of course, older people are not a homogeneous group. They are in fact more diverse than younger people as they have had more years to accumulate differences. They have also had more time to accumulate disadvantages alongside any advantages and this is a process that begins at the earliest stages of life. We do not suddenly arrive at old age. Nor do we become different people at the onset of older age. But, as older people, we are subject to specific cultural forces.

The Bismark Pension trap provides an example of discrimination based on the linear nature of age. The scheme was developed in the 19th Century in Germany and established retirement at the age of 65. It was a suitable response at a time when life expectancy, even in a rich country such as Germany, was not much higher than 40 years. Only a small number of people would reach the age of 65 due to prevailing poverty, lack of sanitation, poor education and ineffective medical care.
Some 130 years later, this retirement age is still being used as the default in most countries despite the dramatic and almost universal rise in life expectancy. For example a child born in Germany today can expect to live more than 80 years. To reach older age is no longer the exception but the norm. Not only are many more people now living considerably longer but they are also doing so in much better health and with much more sophisticated skills. Society however, has not yet come to terms with the change in paradigm. We are still locked into a 19th century mindset. Far too many healthy older people with precious professional skills throughout the world are simply discarded as the result of an outdated and entirely arbitrary chronological age. It is discrimination not based on talent or ability but on the number of years lived. To my mind, this is an absurdity.

ERT: What, in your view, is the best way to approach issues of age discrimination against children?

Robin Allen: I believe profoundly in the principle of equality before the law expounded in the Universal Declaration of Human Rights. On that basis I am very clearly of the view that children and young persons must benefit from the same laws in relation to protection from age discrimination as adults. Politicians that think otherwise diminish the potency of the laws that they enact by building into their enactments, not a paradox, but a confusion. A law against age discrimination should not operate on an age discriminatory basis. This is the fault with the American ADEA.

Consider how this works in our current laws: a person aged 19 may be refused entry to a club because he is under the 25 age limit applied by the owner and he or she has a claim, but their sibling aged 17.11, barred at the same time as them does not. They both suffer the same indignity and any justification for an age 25 rule ought to be established not merely for 18 – 24.11 year olds. What possible reason justifies this kind of distinction? The truth is that there was a lack of political will to confront such an absurd result and this demonstrates how far we have to go in order to address the problem of age discrimination profoundly.

Take another problem: child mental health. At present there is evidence that – in some parts of the United Kingdom at least – there is a disproportion in the allocation of resources to address the mental health problems of those under 18 as compared with over that age. An under 18 has no right to sue in relation to this under the existing age legislation. They may of course have a claim under the Human Rights Act 1998 but the fact of the exclusion of under 18s from our specific protective legislation creates either a false or deeply undesirable normative position. However, I also think that the work done by our Children’s Commissioners in highlighting the less favourable treatment of children and young persons is enormously important and has in many places begun to set the tone of public debate. I applaud what has been achieved by the Commissioners. I must also acknowledge how much the UN Convention on the Rights of the Child has contributed in this field as well. Moreover, the highest courts now recognise that the provisions of this Convention are essentially ius cogens.

I would not want to undermine the work done by these Commissioners for a moment, nor would I wish to downplay the importance of this UN Convention. My key concern is that it is ridiculous to create an artificial boundary at 18 between the different classes of rights. The need for special...
protection at certain ages does not for a minute justify a failure to create a harmonised age equality law.

**Alexandre Kalache:** I believe that the best way to approach this issue is to deal with it separately. Some values are universal and we have the general principles arising from the Universal Declaration of Human Rights that apply to everybody regardless of age. It should be noted that the Declaration was created in 1948, when the prevailing age structure in both developed and developing countries was composed of a large predominance of children.

However, I think that because of particular or unique features, some groups need special targeted protection. It was this focused attention that led to the creation of the UN Convention on the Rights of the Child which contains specific provisions designed to protect children from sexual and labour abuse amongst other things.

I think that it is vital to have a mix of strong general human rights principles and laws that apply to everybody that can be used in conjunction with a tailored rights framework designed to prevent discrimination against specific groups, age-groups included.

**ERT:** What are some of the age-related issues in relation to recruitment, pay and working conditions in your country?

**Robin Allen:** There are many and each day more emerge. What follows is therefore not offered as a definitive list but includes some of the problems that I consider to be particularly important if not necessarily particularly problematic!

First there is a really interesting problem concerning change. As employers and unions confront the need to avoid age discrimination they have had to revisit collective agreements and old established working practices. Many of these contain provisions which are *prima facie* discriminatory. Identifying this possibility is one thing but remediying it can be quite another: Is it enough to maintain a progressive direction of travel when trying to change these or must all discrimination be eradicated forthwith? This has been a particularly thorny problem in Germany where many collective agreements have contained detailed discriminatory provisions and where expectations and, in some cases, budgets and other forms of financial planning have been built around these. The extended period of six years that states were given for transposition of the Framework Directive was meant to allow for this to be addressed but it seems that it has not always been enough.

For what it is worth in my view the CJEU should be more intolerant of these difficulties. It is really important that its normative stance on age discrimination should not be watered down.

Secondly, I am generally opposed to length of service pay increments. I appeared for the Equality and Human Rights Commission in the gender equal pay case *Cadman v Health & Safety Executive* in which the CJEU considered that some such increments might be justified. However, I consider that they have bad economic consequences creating a mismatch between value to the firm or public undertaking and the worker’s enterprise. I do not deny that there is frequently a good correlation between expertise and length of service but I ask why use length of service as a proxy. Any properly run organisation ought to be able to know the worth of its staff and ought to be alive to an increase in skills that can come but will not necessarily come with increased service.
The next issue that I think is very interesting concerns those situations in which a really good argument can be made for justified age discrimination in order to address a very specific shortage of job opportunities. University posts provide a good example of this.

Finally I think that the dignity arguments – that it is more dignified to avoid confronting failures in job performance or capacity as a person advances to a possible retirement – need much deeper reflection. I acknowledge that provisions which force retirement can prevent the need to address performance issues, but personally I do not accept the dignity argument. Perhaps this is a long way around to saying that I think that my client Mr Seldon had a point.\(^{35}\)

Beyond these are a range of issues such as the use of age as a proxy for continued health where there is a specific health and safety issue such as in flying planes and driving trains, redundancy policy issues, life assurance provision and of course the general trend from final salary to career average pensions.

Alexandre Kalache: Until recently, there was no legal framework to prohibit discrimination in recruitment at all. It was commonplace to see job adverts which unashamedly stated “no over 40s” for example. An improvement in laws in many places has helped to ensure that this is no longer admissible. However, age discriminatory practices in hiring still persist. For example, it is still routine for recruiters to reject potential candidates on the basis of a photograph, date of birth or a “too lengthy” job history.

Therefore, whilst it is vital to ensure that legal protections are in place, it is also necessary to begin the slow process of changing the attitudes of society as a whole. Employers, recruitment and human resources personnel, along with the rest of us, need a much greater understanding of the realities and nature of contemporary ageing. This process must begin early. It requires school and university students to be exposed to positive images of older people. The vast majority of older people are not in the geriatric ward – and yet medical students are seldom exposed to older patients outside of that context. We should aim to expose younger people to the communities where older people actually live and are active. Intergenerational exchanges and other methods really can help to foster the necessary shift in attitudes.

ERT: Are there any issues within the employment context which raise concerns about discrimination against younger people or children?

Robin Allen: I have already mentioned that the exclusion of those under 18 from protection from age discrimination is a breach of the principle of equality before the law in the field of goods, facilities and services, is not justified and should be removed. I do not like the statutory exclusion of the national minimum wage legislation.\(^{36}\)

Alexandre Kalache: In terms of recruitment, the main problem faced by younger job applicants in Brazil is that they are often lacking in adequate training and skills. I am ashamed to say that the education and vocational system in my country continues to fail a very large proportion of young people. It is not youth that excludes younger people from job opportunities in Brazil, but rather a lack of preparedness that policy makers must urgently address.

It is hard to gauge the extent of discrimination against very young workers in Brazil as much of it happens within the context of informal or illegal employment and as such
is often below the radar of many measure-
ments. It is fair to say that recent govern-
ments have been more proactive in address-
ing many of the abuses relating to youth and
child exploitation.

ERT: What, in your view, is the impact of
the prohibition of age discrimination on
the regulation of retirement and pensions?

Robin Allen: This is a very big question
which in part I have already answered. The
abolition of the default retirement age pro-
visions has been enormously important. Now
employers have to have specific job related
justifications and what is more, because of
the litigation in Seldon and the judgment of
the Supreme Court in that case, we know
that all justifications for direct discrimina-
tion have to be rooted in the social policy
aims of the state. However, as Lady Hale
pointed out in Seldon, these may conflict.37
Moreover, the social policy of the state in
relation to retirement and pensions is un-
doubtedly somewhat fluid. The state wants
employers to have a high degree of freedom
to run their businesses as they want but on
the other hand it wants employees to save
as much as possible so that for as long as
possible they will be able to finance them-

selves in retirement.

To a large extent it seems that the state
wishes to will the end without legislating
significantly to secure the means to achieve
that end.

What does this mean in the longer run? In my
view it means that it ought to be harder to
justify a forced retirement policy as the need
to earn to secure a retired future increases.
The only way to offset this argument is by
better pension provision. Here the move to
pensions policies based on creating an em-
ployment opportunity linked not to the crea-
tion of a defined benefit but a defined fund
may become increasingly important. Obvi-
ously final salary schemes will disappear
sooner or later from the private sector and I
suspect also from the public.

Alexandre Kalache: There is a huge impact
and this can be seen in countries that have
already abolished the mandatory retirement
age. It is important to respect an individual’s
right to continue to work as well as their
right to stop working. The right to stop is a
very important part of this conversation. For
many people working in boring, demean-
ing, physically arduous or repetitive jobs, an
increase in the mandatory retirement age
would be harmful and unfair; although, nei-
ther should this right to stop working arise
unsustainably early. Sustainability is, in fact,
the operative word. The responses to the
longevity revolution, such as the considera-
tion of the raising of pension ages, need to be
carefully calibrated and implemented in con-
junction with much more imaginative and
graduated retirement options.

In respecting the right to work, a priority
must also be given to the right to continuing
education as it provides an opportunity for
retraining or reinvigoration to face another
5 to 10 more years in the workforce. There
are people below the age of 65 that, despite
being competent enough to continue work-
ing, have not been offered the opportunities
that open new doors, allowing them to pur-
sue new interests and to learn new skills and
therefore they have no desire to continue
working. All people, including older peo-
ple, have greater job satisfaction and higher
productivity if they feel a sense of relevance
in their work and this comes with on-going
training. Continuing education must be seen
as a very important response to the longevity
revolution that will result in both enormous
individual and societal gain.
ERT: What are the key issues surrounding age discrimination in health/social care?

Robin Allen: There are two key issues. The first concerns the fair distribution of resources between different age groups; this is an issue of intergenerational fairness. The second is the issue of appropriate generalisations as a basis for the formation of policy. They are of course interconnected but it is better to consider them separately first to see how they work.

Health and social care needs must be met and in most cases the state is not merely the provider of last resort but essentially the guardian of proper provision. Accordingly, a budget has to be fixed for this, whether on a yearly programme or rolling basis. Equality in the use of this budget is essential and this is a very difficult issue. Age is not the only relevant protected characteristic; gender and disability and race are also often highly relevant. That is why the public sector Equality Duty is so important in this area. However, from my perspective, public administration has not begun to take age equality seriously in this area and much more work will have to be done.

I have not specifically mentioned the debate about policies on non-resuscitation, which are often a particular application of specific views on intergenerational fairness. I think that a new approach to intergenerational issues will illuminate this kind of thinking. Indeed in my view it will become increasingly clear that the first and last seven to ten or so years of life have a special importance which cannot be easily valued against other years. Those years at the start of life are well known to provide a foundation for many of our subsequent life chances. The years at the end of life, though obviously they cannot be identified so rigidly, form the period when our life chances diminish to nothing.

That said, I don’t want to suggest that it is never appropriate to use age as the basis for some, indeed many, programmes at other times of life. The health and social care needs of children or of mothers, or Asians at risk of diabetes in their 50s, for instance, are very well known. This means that it is appropriate to use thought through generalisations to frame health care programmes. The key, however, is to avoid rigidity and to ensure that, where appropriate, others not falling into the specifically targeted age group can also benefit.

Alexandre Kalache: There are seemingly contradictory attitudes on this issue. On the one hand, there is a reluctance to provide high quality care to people who are considered too old concurrent with the view that it is too costly and the resources are better spent elsewhere. On the other hand, there is a common attitude that we should prolong life at whatever cost even when there is no longer any prospect of quality of life. I strongly believe in the right of access to appropriate modern health care for people of all ages. I also strongly believe in an individual’s right to determine when medical intervention is no longer appropriate. I recently witnessed an example of the negative result of the obsession to prolong life at whatever cost. This was the case of a 91 year old woman who, after a vibrant life, was forced to spend her last months in an intensive care unit. She was entitled to have family around her for only one hour per day. The situation in which she found herself was completely contrary to her wishes. She expressed the view that she had experienced a wonderful life and that all she now wanted was to die in a reassuring environment with her family. She was prevented from doing this and was deprived of
the right to define the manner of the second most significant event of her life. My view is that the right to a dignified death is as intrinsic to humanity as the right to a dignified life. In countries where the health care system is more market driven such as the United States (where 17% of the total GDP is up for grabs), the wide-ranging opportunities for colossal profit in prolonging “life” produces a failure to respect the limits of life.

All people must have both the right to a dignified life and the right to a dignified death but, in the normal course of things, death is an older age event (in Brazil, for example, 75% of deaths now occur at the age of 70 and above). It is for this reason that older people in particular are leading the struggle for empowerment over this issue.

ERT: If age plays a part when professionals make decisions about the care or treatment patients receive, when should this be deemed unlawful?

Robin Allen: I have already outlined my answer to this. Well-researched and justified health and social care programmes which target particularly vulnerable age groups will continue to be necessary and must be lawful until we move to the only imagined world of entirely personal health care!

I do not consider that age is ever relevant to decisions that diminish life chances.

Alexandre Kalache: Age alone should never form the basis of the decisions of medical professionals. Decisions should be based on the quality of life experienced. I would worry about the outcome for people like my mother if such decisions were made on the basis of age discrimination instead of quality of life. My mother is now 95. Until five years ago she was very independent, was living alone and had full use of her mental faculties. She has recently deteriorated in some health aspects and now requires a carer to assist her but she is still socially active, responsive and continues to enjoy her pets and plays the piano. She still has quality of life and for as long as she does, I will fight to provide her with proper care and protection. Of course there will come a day when she no longer has quality of life and we will have to face that day when it comes.

ERT: How should the prohibition of age discrimination be applied in relation to the regulation of reproductive rights?

Robin Allen: This question engages again with the issue of intergenerational fairness. Many would argue that after a particular age a person has no continuing right to want to become a biological parent. They may well be able to become a non-biological parent but here too there are often policies in place which make this really difficult.

Let’s consider an exaggerated example: should a 90 year old person be able to adopt a two year old? That is a question easily posed in the abstract but which has to be answered in the specific context.

A 90 year old who is bed-ridden and a stroke victim would be functionally incompetent and it would be wrong for them to be a parent for those reasons – not because of their age. Should the 90 year old be denied that opportunity on the basis that they are expected to become functionally incompetent in a few years and so be unable to give enough care and attention to the child? This is a much more difficult question. For a start there are a number of records of men of 90 becoming fathers. What modern science will enable women to do in order to overcome the menopause is only just beginning to be discovered.
I think that all one can say is that rigid policies about threshold or maximum ages are wrong in principle, though more flexible policies that require much more careful assessment of the merits of assisted reproduction or of adoption are entirely appropriate.

**Alexandre Kalache:** I don’t have a problem with restricted access to reproductive services on the basis of respect for the biological restraints of the process. Technology may tinker with the biological clock but I do not expect to see 80 year olds giving birth anytime soon. Nor do I feel that this is ever going to assume the most important area of discrimination against older people. Biological limitations in old age do exist and common sense must also apply within the law. The more important issue should be to increase access to reproductive and sex-related advice for people of all ages.

**Interviewer on behalf of ERT:** Joanna Whiteman

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6. At the time there was a different test for indirect discrimination to that which is now used.


8. The challenge to its legality was brought in the so called *Heyday* litigation: Case C-388/07 *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] 3 CMLR 4; and later *Age UK, R (on the application of) v Secretary of State for Business, Innovation & Skills & Ors* [2009] EWHC 2336 (Admin).

9. In the latter judgment the judge Blake J. specifically held at Para 128 that he did not consider that the exclusion in the regulations would have been lawful if introduced in 2009.


12. With Dee Masters of Cloisters Chambers.

14 Ecclestone, J., "Majority of employers will allow workers to choose retirement age", Personnel Today, 31 May 2011.


17 Intergenerational Foundation (IF), www.if.org.uk.


22 Both federal and provincial laws give this protection.

23 See Loi du 10 mai 2007 tenant à lutter contre certaines formes de discrimination (BS 30 V 07), Articles 3 and 5.


28 See Massachusetts Board of Retirement v Murgia 427 US 307.


31 Case C-144/04 Werner Mangold v Rüdiger Helm 2005 E.C.R. I-09981.


33 See, for instance, H (H) v Deputy Prosecutor of the Italian Republic, Genoa and others [2012] WLR 90 and in particular Lord Mance’s judgment at Para 98.

34 Case C-17/05 2006 Cadman v Health & Safety Executive E.C.R. I-09583.


36 Equality Act 2010, Schedule 9, Part 2, Para 11-120.

37 See above, note 35, Para 28.

38 Guinness World Records states: “The oldest ever man to father a child was reportedly Les Colley (1898-1998, Australia), who had his ninth child, a son named Oswald to his third wife at the age of 92 years 10 months. Colley met Oswald’s Fijian mother in 1991 through a dating agency at the age of 90.” More recent newspaper reports talk of an Indian man of 96 losing his three year old. Other stories of more modern Methuselahs abound, for instance there is a Thomas Parr buried in Westminster Abbey who was reputedly 152 at his death and who is alleged to have fathered children in his 100s. He was painted by van Dyck and Rubens. However, his longevity is held suspect by many!
ACTIVITIES

- The Equal Rights Trust Advocacy
- Update on Current ERT Projects
- ERT Work Itinerary: January-June 2013
The Equal Rights Trust Advocacy

In the period since the publication of ERR Volume 10 (March 2013), ERT has continued with its work to expose patterns of discrimination globally and to combat inequalities and discrimination both nationally and internationally. ERT advocacy is based on the Declaration of Principles on Equality which is an instrument of best practice reflecting the modern consensus on the major substantive and procedural elements of laws and policies related to equality. Below is a brief summary of some of the most important ERT advocacy actions since March 2013.

Australia

In April 2013, ERT made a submission to the Australian Senate Committee on Legal and Constitutional Affairs on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013. ERT expressed its disappointment that the government was no longer pursuing the enactment of comprehensive anti-discrimination legislation, but nevertheless welcomed the Bill as an attempt to introduce prohibition of discrimination on grounds of sexual orientation, gender identity and intersex status. ERT made a number of specific recommendations to the Committee to achieve conformity with international law and best practice. In particular, ERT called for: the inclusion of discrimination by association as a form of discrimination; the inclusion of a stand-alone prohibition of harassment in addition to the existing prohibition of sexual harassment; and for exceptions in relation to religious organisations and marriage law to be removed.

The Senate Committee’s report, issued on 14 June 2013, referred frequently to the evidence and recommendations provided in ERT’s submission, but the Committee ultimately concluded that it could not consider broader changes to the Sex Discrimination Act than those contained in the Bill, given the need to ensure its adoption before the dissolution of Parliament on 27 June 2013. In so doing however, the Committee endorsed ERT’s central recommendation that Australian anti-discrimination law should be harmonised and strengthened.

Bosnia and Herzegovina

At its 55th session (8 to 26 July 2013), the Committee on the Elimination of Discrimination against Women considered the combined fourth and fifth periodic reports of Bosnia and Herzegovina. ERT had submitted a parallel report to the Committee, focused on the country’s obligations to respect, protect and fulfil the right to non-discrimination under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.

The parallel report made recommendations in a number of areas, based on analysis of Bosnian legislation conducted by ERT as part of its project “Developing Civil Society Capacity to Combat Discrimination and Inequality in Bosnia and Herzegovina”. The re-
port examined deficiencies and gaps within the existing legislative framework in Bosnia and Herzegovina and highlighted a number of areas where, despite the existence of legislation, there has been a failure to implement effectively certain provisions so as to ensure that the rights to equality and non-discrimination are realised in practice.

Disappointingly, the Committee failed to make any recommendations specifically addressing the weaknesses in existing legislation and the failure of Bosnia and Herzegovina fully to implement certain provisions. However, the Committee did call for greater awareness-raising and training for lawyers, judges and prosecutors on the legislation, as well as for increased efforts to raise awareness amongst women of their rights and the available remedies to enable them to seek redress in cases of gender-based discrimination.

**Indonesia**

At its 108th session (8 to 26 July 2013), the Human Rights Committee considered the first periodic reports of Indonesia. ERT had submitted a parallel report focused on the country's performance under two articles of the Covenant: Article 2(1), which requires that states parties respect and ensure the enjoyment of the rights provided in the Covenant without distinction on a number of grounds, and Article 26, which, as the Committee has stated, provides an “autonomous right” to non-discrimination.

ERT’s parallel report was based on research conducted by ERT in the context of its project “Empowering Civil Society to Combat Religious Discrimination and Promote Religious Freedom”. The report had three parts, the first of which focused on the protection of the rights to equality and non-discrimination in the Constitutional and national law of Indonesia. The second part examined constitutional and legislative provisions which discriminate directly or indirectly on the basis of religion or belief, against religious minorities and heterodox communities within mainstream religions. The final part examined a number of cases of discrimination and discriminatory violence against religious minorities, highlighting serious problems with the ability of Indonesia to meet its obligations to protect these groups from discrimination and associated violence.

In its concluding observations, the Committee raised a number of concerns relating to the failure on the part of State authorities to protect victims of violent attacks motivated by religious hatred and the lenient penalties imposed on the perpetrators of such violent attacks, echoing concerns raised by ERT. The Committee also stated its regret that Law No. 1 of 1965 on Defamation of Religion, which prohibits the divergent interpretation of religious doctrines of the six protected and state-recognised religions, together with a number of other laws and regulations, unduly restricts the freedom of religion and expression of religious minorities such as the Ahmadiyya. The Committee expressed further concern at the persecution of other religious minorities such as Shia Muslims and Christians who are subjected to violence by other religious groups and by law enforcement personnel. The Committee’s recommendations on these issues reflected the suggestions of ERT, notably that Indonesia take all measures to protect victims of religiously-motivated attacks, repeal Law No. 1 of 1965 on Defamation of Religion, and provide adequate protection against violence perpetrated against members of religious minorities.
Malaysia

In March 2013, ERT made a stakeholder submission to the Universal Periodic Review of Malaysia, based on the findings and recommendations of the report *Washing the Tigers: Addressing Discrimination and Inequality in Malaysia*. It urged states participating in the review of Malaysia to endorse and adopt the recommendations in the report. Given the particular focus of the second round of the UPR process on the implementation of recommendations from round one, the submission focused on how the adoption of these recommendations would ensure compliance with international instruments to which Malaysia is party, and increasing the country’s participation in international human rights instruments. The review of Malaysia will take place in October and November 2013, at the 17th session of the Universal Periodic Review.

Russia

On 31 May, ERT submitted a legal opinion to the State Duma of Russia on Bill № 44554-6 which would have created an administrative offence of promoting homosexuality among minors. In the legal opinion, ERT demonstrated that the Bill violates a number of human rights provisions in treaties to which Russia is party, including the right to freedom of expression and the rights to equality and non-discrimination, as set out in the International Covenant on Civil and Political Rights and the European Convention on Human Rights. ERT also expressed its concern that the Law would cause significant harm to members of the lesbian, gay and bisexual (LGB) community in Russia, to those who work with and support them, and to children as well. The legal opinion was also sent to President Van Rompuy and Commissioner Füle of the European Union ahead of the EU-Russia Summit in June. Commissioner Füle thanked ERT for providing the legal opinion and stressed that the European Union was discussing the Bill with the Russian authorities.

Unfortunately, the State Duma voted to adopt a slightly amended version of the Bill, which President Putin signed into law on 30 June.

Ukraine

In May 2013, ERT participated in a Conference hosted by the UN Office of the High Commissioner on Human Rights in Kiev, on the implementation and enforcement of the country’s new anti-discrimination law. ERT was asked to provide the keynote presentation in the conference, and to provide training for staff from the office of the Ukrainian Parliamentary Commissioner for Human Rights and other governmental bodies. ERT used this opportunity to advocate improvement of the legal and policy frameworks related to equality and the Declaration of Principles on Equality in a country in which official denial of discrimination is endemic, equality law is in its infancy, and politicisation of some issues, notably homosexuality, has impeded progress.

At its 108th session (8 to 26 July 2013), the Human Rights Committee considered the seventh periodic reports of Ukraine. ERT had submitted a parallel report focused on the country’s performance under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights. The first part of ERT’s report examined the protection of the rights to equality and non-discrimination in the Constitution and national law of Ukraine. The second part highlighted a number of weaknesses in the Law “On the principles of preventing and combating discrimination”, the principal legislation providing protection from discrimination in Ukraine. The third
part assessed a specific draft piece of legislation, Draft Law 0945 (formerly Draft Law 8711) which would prohibit “propaganda of homosexuality”, for its compatibility with the Covenant. The fourth part highlighted other pieces of legislation in Ukraine which are incompatible with the right to equality.

In its concluding observations, the Committee repeated recommendations made by ERT on all above issues. The Committee raised concerns over certain weaknesses in Ukraine’s anti-discrimination legislation and recommended that the legislation be amended to ensure adequate protection against discrimination in line with the Covenant and other international human rights standards. The Committee also made a detailed and wide-ranging recommendation in respect of LGBT rights in Ukraine, in which it called on the state to provide effective protection to LGBT persons and ensure the investigation, prosecution and punishment of any act of violence motivated by the victim’s sexual orientation or gender identity, to take all necessary measures to guarantee the exercise in practice of the rights to freedom of expression and assembly of LGBT persons and defenders of their rights, to not to permit the Draft Law 0945 on “propaganda of homosexuality” to become law, and to amend and repeal other pieces of legislation which discriminate on grounds of sexual orientation or gender identity.

**United Kingdom**

In April 2013, ERT made a submission to the House of Lords in the United Kingdom in relation to provisions in the Enterprise and Regulatory Reform Bill which would have removed the general duty of the Equality and Human Rights Commission in section 3 of the Equality Act 2006. ERT’s submission called on members of the House of Lords to insist on amendments to the Bill, in order to retain the “general duty” of the Equality and Human Rights Commission. ERT also called on the House of Lords to back amendments introducing protection from caste-based discrimination.

Section 3 of the Equality Act 2006 implemented a key recommendation of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation, co-chaired by ERT Chair Professor Sir Bob Hepple, namely that equality legislation should contain a “purposes” clause. ERT advocated the retention of section 3 for three reasons:

- **Section 3 has a very precise legal function which is to assist those interpreting and enforcing the 2006 Act. Without section 3, the Commission would have no clear direction and would be left rudderless, risking increasing inconsistencies in the way in which the Act is applied.**

- **Section 3 allows the Commission to look more broadly at issues involving human rights than was the case before it came into force.**

- **Section 3 fulfils the obligations of the United Kingdom under the Paris Principles relating to the status of national institutions to ensure that national human rights institutions are "given as broad a mandate as possible". ERT argued that removal of section 3 would put the UK’s ability to meet this criterion at risk, and thereby threaten the current ”Status A” designation awarded to the Commission by the International Coordinating Committee of National Human Rights Institutions.**

ERT’s letter also urged the House of Lords to insist on amendments which would prohibit caste-based discrimination, relying...
inter alia on the interpretation of the International Convention on the Elimination of All Forms of Racial Discrimination by the relevant United Nations committee. ERT's letter argued that the introduction of protection from discrimination on grounds of caste would ensure both that the United Kingdom met its obligations under international human rights law and that the law provides the necessary protection for victims of caste discrimination. On 24 April 2013, the House of Lords voted to insist on its amendments in relation both to section 3 of the Equality Act 2006 and the introduction of protection from caste-based discrimination. The government then announced that it would no longer oppose these amendments. As a consequence, the Equalities and Human Rights Commission will remain guided by the general duty in section 3 and in July 2013 the government published its timetable for the introduction of provisions which will prohibit discrimination on grounds of caste.

At its 55th session (8 to 26 July 2013), the Committee on the Elimination of Discrimination against Women considered the seventh periodic report of the United Kingdom. ERT had submitted a parallel report focused on the country's obligations to respect, protect and fulfil the right to non-discrimination under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. The parallel report examined the principal means by which the right to non-discrimination is enforced in the United Kingdom: the Equality Act 2010. In particular, it examined three provisions of the Act which ERT argued are crucial to ensuring the effectiveness of the United Kingdom's legislation to protect and fulfil the right of non-discrimination for women, but which the government has announced will not be brought into force. These provisions are: a new public sector duty regarding socio-economic inequalities (sections 1 to 3); provisions recognising multiple discrimination (section 14); and provisions on publicising information on gender pay gaps (section 78).

In its concluding observations, the Committee included a number of recommendations which replicated those made by ERT, expressing concern that the highlighted provisions of the Equality Act 2010 have not been brought into force, and urging the United Kingdom to enforce them.
Update on Current ERT Projects

I. Thematic Projects

*Applying Equality and Non-discrimination Law to Advance Socio-Economic Rights*

This thematic project started on 1 July 2011 and is aimed at building strategies of better enforcement of economic and social rights through drawing and communicating lessons from a global review of jurisprudence which has used equality and non-discrimination law to advance the realisation of social and economic rights.

On 6 June 2013, ERT convened an expert roundtable in London in conjunction with University College London Institute for Human Rights. The roundtable was attended by...
24 international experts in equality and socio-economic rights. The experts discussed and commented on ERT’s draft project report, completed in May 2013. On the evening of 6 June 2013, ERT then hosted a public panel discussion to raise awareness of the topic. It was entitled “Poverty and Rights: Can and Should the Law Promote Socio-economic Equality?” and was moderated by ERT’s Chair, Bob Hepple. The discussion was attended by roughly 150 people and was made widely available as a podcast online. Since June 2013, ERT has updated the draft report and continues to work towards its finalisation and publication.

**Developing Resources and Civil Society Capacities for Preventing Torture and Cruel, Inhuman and Degrading Treatment of Persons with Disabilities: India and Nigeria**

This project commenced in November 2010 with partner organisations in India (Human Rights Law Network – HRLN) and Nigeria (Legal Defence and Assistance Project – LEDAP). Its objectives include the development of legal and policy guidelines on the prevention and remedy of torture and ill-treatment of persons with disabilities, based on documentation of abuses and test litigation, as well as capacity building related to the intersection of disability rights and non-torture rights.

Since March 2013, ERT’s key activities under this project have been twofold. Firstly, it has continued to finalise the *Resource Packs on Disability and Torture* for both India and Nigeria, based on the outcome of its consultations with key stakeholders in conjunction with HRLN and LEDAP. These Resource Packs describe patterns of torture and ill-treatment of persons with disabilities identified in the course of field research in the two countries; present legal research and analysis, bringing together
relevant international, regional and domestic law and jurisprudence on disability and torture; and make recommendations for change.

Secondly, the strategic litigation component of the project continues to progress. The project is supporting 10 legal cases which are currently before the courts in India. It also supports 13 cases which, with ERT’s assistance, have been filed before the Nigerian courts. Amongst other positive developments, the New Delhi High Court has ordered in one case that guidelines provided to mental health institutions for the care of patients be amended in accordance with our client’s suggestions so as to help prevent future cases of ill-treatment of patients.

**Empowering Human Rights Defenders in Central Asia to Combat Discrimination on the Basis of Ethnicity and Religion**

This project started in January 2013, in partnership with two NGOs based in Central Asia, and the participation of further local activists and experts. Its purpose is to address ethnic and religious discrimination in some Central Asian countries, and publish studies on the subject.

Following ERT’s visit to the region in February 2013, work has been undertaken to research the main patterns of discrimination, the legislative and policy framework related to equality and non-discrimination, and the capacity of civil society in each of the project’s target countries. In addition, ERT established an Advisory Committee of experts working on the region to inform and guide work on this project. The Committee held a strategic consultation on 30 August 2013.

**Greater Human Rights Protection for Stateless Persons in Detention**

The project has the following objectives: strengthening human rights protection standards for stateless persons, with a focus on detention; strengthening capacity and awareness on statelessness at an international level; developing networks on statelessness and encouraging greater civil society activity on statelessness; and carrying out advocacy on statelessness at international and regional levels.

In the period March–September 2013, ERT carried out advocacy in cooperation with other organisations, including as a member of the Asia Pacific Refugee Rights Network (APRRN) and of its Working Group on Statelessness, the International Detention Coalition (IDC), and the European Network on Statelessness (ENS). ERT’s Guidelines to Protect Stateless Persons from Arbitrary Detention, published in July 2012, continued to be used as a resource by civil society organisations around the world. The Guidelines have been used for training purposes in Bangkok, Belgrade, Budapest, Geneva, Kuala Lumpur, and London. ERT has also been able to utilise its Guidelines to influence the development of other standards related to detention. For example, the Bingham Centre for the Rule of Law of the British Institute of International and Comparative Law is in the process of drafting and publishing its Safeguarding Principles on Immigration Detention. ERT was involved in the process as an expert reviewer, and as a result of ERT’s input, the Bingham Centre has added a Principle on Equality. ERT was also able to positively influence the content and drafting of many of the other Principles.

At the annual UNHCR NGO Consultations in June 2013 in Geneva, ERT’s Guidelines were
promoted at the immigration detention session as well as at meetings with UNHCR, OHCHR, NGOs and other key actors. As NGO Focal Point on statelessness at the Consultations, ERT co-organised and presented at the statelessness session. The session was well attended and there was a visible increase in momentum and engagement on the issue. ERT also attended a retreat organised by UNHCR for organisations working on statelessness related issues prior to the Consultations.

In April 2013, ERT delivered training on statelessness and human rights to ENS associate members in the Western Balkans region. In June, ERT organised and contributed to the ENS side meeting at the UNHCR NGO Consultations in Geneva, and also attended ENS meetings with UNHCR, OHCHR, permanent missions in Geneva and NGOs.

**Strengthening Human Rights Protection of the Rohingya**

This project started in March 2011. It aims to strengthen human rights protection for stateless Rohingya through targeted research and advocacy activities. The project envisages research in six countries (Bangladesh, Indonesia, Malaysia, Myanmar, Saudi Arabia and Thailand) followed by advocacy at national level (Bangladesh, Malaysia and Thailand), regional level (ASEAN and OIC) and the international level.

The project has five objectives. (1) To increase understanding of the scope of discrimination, vulnerability and abuse suffered by stateless Rohingya in Bangladesh, Malaysia, Myanmar, Saudi Arabia, as well as additional countries including China, India, Indonesia, Pakistan and Thailand; and to increase awareness on international, regional and national norms pertaining to the rights of the stateless in order to lobby for and afford greater protection for the stateless Rohingya; (2) To encourage NGOs, civil society organisations, lawyers’ forums and other such groups to prioritise the Rohingya issue in their work; (3) To improve the quality of life of all stateless Rohingya in the region including Rohingya women, children and the disabled through strategic activities aimed at addressing the human rights concerns faced by stateless Rohingya; (4) To pursue change at a structural level to strengthen protection for Rohingya in the ASEAN region and also in specific target countries; (5) To increase visibility of the Rohingya issue internationally, through engaging with the UNHCR, UN Treaty Bodies, Special rapporteurs, and the international community.

During the period since March 2013, field research in six countries was completed. Following discussion of draft reports at a workshop held at Mahidol University Thailand on 16-17 February 2013, second drafts of reports were prepared by July-August 2013 and the ERT team is currently working on finalising them.

ERT was instrumental in establishing the Rohingya Advocacy group in the UK – a loose network of organisations including Refugees International, Human Rights Watch, Christian Solidarity Worldwide, Burma Campaign UK and Amnesty International which share information and advocacy opportunities with each other. In June 2013, ERT spoke at events on the Rohingya issue including at the University of Essex, and at a televised panel discussion aired on the Islam Channel.

In June 2013, ERT attended the UNHCR NGO Consultations in Geneva, and used this opportunity to carry out awareness raising and advocacy activities on the Rohingya issue. For
this purpose, ERT worked in close partnership with Refugees International, The Arakan Project and Burmese Rohingya Organisation UK. Highlights included the successful hosting of a side-meeting on the Rohingya attended by over 80 persons; a briefing of Permanent Missions attended by representatives of the Canadian, German, Japanese, New Zealand, Swedish, UK, and USA embassies; meetings with the OHCHR and the UNHCR.

In June 2013, ERT drafted a joint civil society statement on the Rohingya issue that was endorsed by 76 organisations. The statement was publicly issued and sent to the Myanmar president as well as Myanmar ambassadors in more than 15 countries. It was also sent to relevant UN Agencies and bodies including UNHCR, OHCHR, OCHA, special mandate holders and treaty bodies. Additionally, the statement was submitted to key governments and regional bodies including the EU and OIC. The statement was translated into Burmese, French, and Bosnian by endorsing organisations.

In July 2013, ERT attended a High Level Roundtable Discussion on peace building in Myanmar. The Roundtable, organised by the Overseas Development Institute (ODI) brought together high level participants from London, Geneva, Myanmar; Thailand and India. Participants included representatives of the UK and Turkish governments, senior UNHCR, OHCHR, UNDP and OCHA personnel, representatives of key human rights and humanitarian NGOs and academics.

II. Country Projects

Azerbaijan: Developing Civil Society Capacity for Preventing Discriminatory Torture and Ill-treatment

This project began in November 2011 in partnership with Women’s Organisation Tomris based in Ganja, Azerbaijan’s second city. It sought to increase the capacity of civil society organisations (CSOs) and other professionals to understand and apply anti-discrimination and human rights law in challenging discriminatory torture and ill-treatment; create an institutional framework for civil society dialogue and advocacy on issues relating to discriminatory torture and ill-treatment through establishing CSO Forums; and increase awareness and understanding among CSOs and other key stakeholders of the link between discrimination and the occurrence of torture and ill-treatment in Azerbaijan. The project featured training workshops in three major cities in Azerbaijan (Baku, Ganja and Kurdemir), the publication of a report on discriminatory torture and ill-treatment in Azerbaijan, the establishment of a CSO Forum, and an advocacy campaign.

This project secured the participation of a large number of CSOs representing a range of groups exposed to discrimination in three regional CSO Forums focused on discriminatory torture and ill-treatment – in Baku, Ganja and Guba, representing the Eastern, Western and Northern/Central regions respectively. Throughout May 2013, the final round of Forum meetings took place in the regional hubs, with a focus on advocacy and awareness-raising in each of the local communities. To this end, alongside each Forum meeting, members hosted an “open door” event where members of the public were able to share their experiences of discrimination and seek advice from social and legal experts. These events proved popular with the local communities and a successful form of outreach.

On 27 May 2013, following the completion of the series of regional Forums, delegates from each region attended a National Forum event in Baku, tying together the work
undertaken by the regional forums over the life of the project, and identifying priorities for future national advocacy. ERT participated in the National Forum, presenting on the unified perspective on equality, the nexus between discrimination and torture and ill-treatment, and relevant international standards on discriminatory torture and ill-treatment. The event was well attended by both civil society stakeholders and governmental representatives.

**Belarus 1: Empowering Civil Society in Belarus to Combat Discrimination and Promote Equality**

This project started in December 2010. Its objectives are to improve knowledge of anti-discrimination law among NGOs in Belarus to enable them to monitor and report on discrimination and to bring discrimination cases to courts; and to create a coalition of NGOs with a joint advocacy platform on issues of discrimination. ERT worked with a partner based in Minsk, the Belarusian Helsinki Committee (BHC). The results of the project included: increased knowledge of anti-discrimination law concepts among NGOs in Belarus, expressed in high quality monitoring and reporting on discrimination; better familiarity with anti-discrimination law among lawyers in Belarus, applied in pilot strategic litigation on discrimination issues; development of an agreed joint advocacy strategy to address deficiencies in Belarusian equality legislation and policies; raised awareness of equality and non-discrimination issues among Belarusian civil society and sections of the public.

The final activity of the project, a comprehensive report on discrimination and inequality in Belarus, was completed in August 2013. A translation of the Russian draft into English is currently underway, with publication expected later in 2013.

**Belarus 2: Empowering Civil Society to Advocate Collaboratively the Adoption of Anti-discrimination Legislation**

This project began in April 2012, in informal partnership with the Belarusian Helsinki Committee. The project aims to build on the achievements of Belarus 1 by providing training on the development of advocacy campaigns and engaging in international advocacy on equality issues for CSOs; establishing a National Equality Forum; developing and implementing a strategic paper and action plan for the National Equality Forum; creating an online equality forum; supporting international advocacy actions by Forum members; and generating new evidence of discrimination through documentation and research.

On 13 March 2013, a meeting of the core group of the National Equality Forum (NEF), established under this project in November 2012, was held in Minsk. This meeting focused on coordination of documentation and research, including identifying areas for targeted research and refining the methodology to be adopted. This meeting also featured sessions for the development and structure of the online equality forum, and discussion of opportunities for collaboration with other organisations and initiatives.

Monitoring of incidents and patterns of discrimination has been ongoing since early 2013 and continues to date. Researchers trained and supported by ERT are in the process of documenting discrimination on grounds of religion, disability, gender, sexual orientation and gender identity, nationality and ethnicity, and age, in areas such as education, the media and the provi-
sion of goods and services in the public and private sectors.

**Bosnia and Herzegovina: Developing Civil Society Capacity to Combat Discrimination and Inequality in Bosnia and Herzegovina**

This project began in December 2011 with two partner NGOs, the Helsinki Committee for Human Rights (HCHR) based in Sarajevo and the Centre for Informative and Legal Aid (CIPP) based in Zvornik. The project seeks to increase the capacity of CSOs and other professionals to understand and apply anti-discrimination and human rights law in challenging discrimination and inequality; create an institutional framework for civil society dialogue and advocacy on issues relating to discrimination and inequality through establishing an Equality Forum; enhance and strengthen the implementation of the new anti-discrimination law in Bosnia and Herzegovina (BiH) through training, advocacy and strategic litigation; and positively influence social attitudes towards minority groups and those vulnerable to discrimination including ethnic and religious minorities, women, LGBT persons, persons with disabilities and returnees.

Following two training workshops for civil society organisations in August 2012, a third workshop, aimed at members of the judiciary and public prosecutors, took place in early April 2013. It was attended by 22 members of the judiciary and government ministries, together with several independent lawyers. Over the course of two days, the workshop focused on the procedural aspects of equality law, in particular evidence and proof in discrimination proceedings. It also covered substantive aspects of equality law: definitions, scope, rights-holders and obligations. The workshop was positively evaluated both by the participants and an observer from the European Union Delegation to Bosnia and Herzegovina.

CIPP and HCHR, together with members of the Equality Forum, held the second of two stakeholder roundtable events in April 2013 in Sarajevo. The meeting was attended by 23 people from 20 government departments and agencies, including the Ministry of Justice. Also in April, following sustained advocacy by the project partners and the Equality Forum, the Government of Bosnia and Herzegovina adopted a Regulation concerning methods for data collection on cases of discrimination in Bosnia and Herzegovina. The Government was required to introduce such a regulation by the Law on Prevention of Discrimination which came into force in 2009, but had failed to take any action for over four years.

Also in April ERT conducted a training workshop in Sarajevo on advanced equality law for approximately 20 members of the judiciary and certain law enforcement agencies.

On 10 July 2013, the Equality Forum of Bosnia and Herzegovina held its seventh and final meeting under the project. The Forum, which was launched in May 2012, now has a membership of over 50 organisations, including members from both the Federation of Bosnia and Herzegovina and Republika Srpska. The seventh meeting discussed and agreed a plan for the continuation of the Forum after the end of the project and future advocacy priorities, including on the implementation of the *Sejdić and Finci v Bosnia and Herzegovina* decision.

ERT has also made good progress towards completion of a country report on Bosnia and Herzegovina. At the end of June 2013, ERT and its two local partners launched a consultation on the draft country report on Bosnia
and Herzegovina, which had been completed in May 2013. The report was distributed to more than 50 civil society organisations, the Ministry of Human Rights, the Ministry of Justice, the Human Rights Ombudsmen and the National Legal Institute, with a request for comments and feedback. Recipients of the report were then invited to participate in a consultation meeting as part of the Equality Forum meeting on 10 July 2013. The meeting was well-attended by both civil society and government representatives, and a number of additions and modifications were proposed to improve the report.

In respect of the project’s strategic litigation activity, three of four planned cases were developed and filed in June and July 2013.

**Croatia: Empowering Civil Society through Training and Establishing a Croatian Equality Forum**

This project is implemented with two partners, the Croatian Law Centre (CLC) and the Association for Protection of Human Rights and Citizens’ Freedoms (HOMO). The project’s objectives are to increase the capacity of stakeholders to improve the implementation and application of anti-discrimination law and policy; create an institutional framework for civil society debate on equality and diversity issues through establishing the Croatian Equality Forum (CEF); and increase the communication and coordination of work agendas between CSOs working on different equality issues and key Croatian decision-makers in the field of anti-discrimination.

The CEF established under the project held its first three public meetings in the first half of 2013. All three meetings focused on supporting CSOs to participate in the Regulatory Impact Assessment (RIA) process established by the Croatian Government, and to use this process as a means to ensure that equality considerations were taken into account when new or revised legislation is reviewed. On 9 May 2013, ERT’s partners held the first CEF meeting, in the form of training workshop, organised in collaboration with the Legislative Office of the Government of
the Republic of Croatia. The goal of the training was to inform CSOs on how to engage in legislative reform through the RIA process, and to ensure that CSOs were informed on how to comply with the formal requirements of the RIA process. The second CEF public meeting was held on 28 May 2013, and focused on proposed revisions to the Family Act under the RIA process. Over 40 civil society organisations used the meeting to make representations to the Minister of Social Policy and Youth, the Office of the Ombudsman, various specialist Ombudspersons and representatives of the judiciary who participated in the meeting. A third meeting was held on 8 July 2013, and focused on the introduction of an equality impact assessment into the RIA process. At the meeting, ERT made a presentation on best practices in equality impact assessment to a group of CSOs and government officials involved in the RIA process.

Also at the meeting on 8 July 2013, ERT and its two partners launched a Toolkit on Anti-discrimination Law which had been produced through the project, for use by Croatian lawyers wishing to bring cases under the Croatian Equality Act and by civil society actors wishing to advocate for improvements to laws and policies. The Toolkit contains information about international and European standards on anti-discrimination law; the Croatian legal and policy framework on discrimination and equality; litigation techniques and procedures; influencing decision-makers to reform laws and policies on discrimination; and advocacy for progressive change in anti-discrimination standards in Croatia.

**Guyana 1: Empowering Civil Society to Challenge Homophobic Laws and Discrimination against LGBTI Persons**

This project, which started in 2010, is implemented in partnership with the Society Against Sexual Orientation Discrimination (SASOD), an LGBTI-rights organisation based in Georgetown, Guyana. The project’s objectives are to build the capacity of civil society to challenge discrimination against LG-
BTI persons, by both increasing the technical skills and capacity of LGBTI organisations and by fostering improved cooperation between LGBTI organisations and other human rights NGOs. The project involves a number of activities, including training for civil society organisations, the establishment of a Guyana Equality Forum and the development of a comprehensive report on discrimination and inequality in Guyana.

Since March 2013, ERT has continued to work to develop the draft report on addressing discrimination and inequality in Guyana, undertaking additional research and taking account of feedback received during the consultation process and recent developments in law and policy in the country.

**Guyana 2: Empowering Civil Society to Address Societal Prejudice and Undertake Advocacy on Discrimination against LGBTI Persons**

This second project on Guyana started in October 2011 in partnership with SASOD, building on the Guyana 1 project. The two projects were closely interconnected: the second, focusing on media, political and international advocacy, grew out from the first, which focused on the development of basic capacities and tools for advocacy. The two principal aims of this project were to increase awareness of discrimination and inequality in Guyana, with a particular focus on tackling stigma and prejudice against LGBTI persons; and to strengthen government commitment to legal reform on equality and non-discrimination. ERT and SASOD were highly successful in both respects, strengthening the position of the LGBTI movement in the process.

Throughout 2013, SASOD continued to implement the advocacy strategy developed in the latter half of 2012, which included a particular focus on intersectional discrimination and the presentation of discrimination against LGBTI persons in the context of other patterns of discrimination prevailing in Guyana. In January and February, SASOD focused its work on discrimination affecting women, with a particular focus on lesbian, bi-sexual and transgender women. In order to strengthen its advocacy in this area, SASOD partnered with leading women’s rights organisations Red Thread and Help and Shelter in their advocacy around the “1 Billion Rising” day of action on 14 February 2013 and International Women’s Day on 8 March 2013. On 26 March 2013, SASOD met with the Women and Gender Equality Commission in order to raise its concerns about the treatment of LBT women in Guyana, receiving a favourable response to its proposals. On 4 April 2013, SASOD convened a public forum in Georgetown, entitled “Gender Equality and Sexual Rights in Guyana”. Four other organisations, all members of the Guyana Equality Forum established under the first ERT-SASOD project, co-convened the event with SASOD. The forum was a success, attracting significant media attention and a good public attendance.

Alongside these activities, SASOD also continued its direct political and stakeholder advocacy activities focused on discrimination against LGBTI persons, targeting various government ministers and officials, and religious leaders. In this respect, SASOD met with representatives of the government and opposition parties, and engaged key Christian and Hindu leaders. ERT supported SASOD to develop a public advertising campaign. SASOD developed a series of public radio advertisements highlighting issues of discrimination to air on national radio stations. Developed in partnership with a Guyanese NGO specialising in public communication,
the advertisements aimed to address stigma and prejudice based on traditional perceptions of gender roles in Guyanese society.

**Guyana 3: Combating Discrimination through Advocacy and Strategic Litigation in Guyana**

This third project on Guyana formally commenced in January 2013, overlapping with the final phase of ERT’s second Guyana project. It is being implemented in partnership with SASOD and the Justice Institute of Guyana. The project aims to address two major problems identified through ERT’s research in Guyana: the failure of implementation and enforcement of laws which provide protections from discrimination; and the stark difference between the legal rights of LGBTI persons and all other persons.

Since April 2013, SASOD has completed a number of advocacy and awareness-raising activities. On 18 May 2013, the Guyana Equality Forum, established in 2011 under the first project undertaken by ERT and SASOD, marked International Day Against Homophobia and Transphobia (IDAHO) by painting a mural on the seafront. On 24 June 2013, SASOD held a press conference and public event to mark the 10th anniversary of its foundation. In addition to public and media advocacy, SASOD has continued to engage with the consultation on the repeal of laws criminalising same-sex intimacy between men. Following pressure from SASOD and other Forum members, the Government of Guyana has now established a select committee to consult on these laws, honouring a commitment made at the last Universal Periodic Review, and SASOD has sought to cooperate with the committee.

In July 2013, ERT met with SASOD in London to discuss the development of an advocacy strategy which sets out a detailed plan of action for a year-long advocacy campaign, building on that undertaken under the previous project. The plan combines public-awareness-raising activities with direct engagement with decision-makers to build support for legislative reform to decriminalise same-sex sexual activity and prohibit discrimination on grounds of sexual orientation and gender identity.

In the first quarter of 2013, ERT undertook discussions with the Justice Institute of Guyana on the planning for a judicial colloquium which will be held in 2014.

**Indonesia: Empowering Civil Society to Use Non-discrimination Law to Combat Religious Discrimination and Promote Religious Freedom**

This project, which aims to build the capacity of Indonesian civil society to use the right to non-discrimination to combat religious discrimination and promote religious freedom, started in November 2010, in partnership with two of Indonesia’s leading human rights organisations, the Indonesian Legal Aid Foundation (YLBHI) and the Institute for Policy Research and Advocacy (ELSAM). It involved a range of activities including training, documentation, production of a report on discrimination and inequality in Indonesia with a focus on religion-based discrimination, and the development of advocacy strategies.

Since March 2013, ERT has continued to work to develop a report on religious discrimination in Indonesia, in particular expanding the report’s focus to examine issues of multiple discrimination and the role of religion in perpetuating discrimination against women, disabled people and other groups. All other project activities were completed by April 2013.
Jordan: Addressing Discrimination and Violence against Women in Jordan

The objective of this project, which started in January 2011 and was completed in June 2013, was to contribute to the protection of women from all forms of discrimination in Jordan at the societal and legal level. ERT implemented this project in Jordan as a partner to Mizan, an Amman-based organisation which is one of the most prominent and active human rights and legal defence NGOs in the Middle East.

In early 2013, Mizan published a report on discrimination in Jordan to which ERT contributed, mainly through providing detailed feedback to drafts and by contributing two papers to be incorporated in the report. The first, “Guidelines for the Development of Comprehensive Anti-discrimination Law”, sought to provide a best practice guide, based on the Declaration of Principles on Equality, to the content of anti-discrimination legislation. The paper contained sections on the treatment of grounds; the different forms of prohibited conduct; material scope; exceptions; enforcement; access to justice; remedies and sanctions; positive action; and positive duties. On each of these issues, the paper set out and explained the relevant principle from the Declaration of Principles on Equality and the relevant international obligations and standards, together with draft provisions which might act as a starting point for the development of legislation.

The second paper, “Global Overview of Equality Laws”, provided an introduction to the right to non-discrimination in international law, and the status of the obligation to enact equality legislation. The paper defined and elaborated six different categories of state compliance with the obligation to enact comprehensive equality law, and provided selected examples of states which fall within each category.

Kenya 4: Improving Access to Justice for Victims of Gender Discrimination

This 4.5 year-long project is implemented in partnership with the Federation of Women Lawyers – Kenya (FIDA), having started in April 2011. It aims to increase access to justice for women and girls in Kenya who experience discrimination which contributes to or creates poverty. The project’s central activity involves the establishment of community-based legal advice services (referred to as Legal Assistance Scheme Partnerships), situated within existing Community Based Organisations (CBOs). This is to be achieved through a combination of training, production of a handbook, ongoing support and advice and financial support to the CBOs and the lawyers with whom they work on the project.

ERT and FIDA completed a five-day training workshop for 59 CBOs in April 2013. The workshop was designed to both strengthen CBOs’ knowledge of relevant concepts in anti-discrimination law and of Kenyan anti-discrimination laws, and to increase their understanding of how the legal assistance scheme should operate. As a result of lessons learned from the previous year, the workshop programme focused on practical application and role-play exercises designed to replicate real-life cases which the CBOs could expect to deal with under the project. The manual which had been developed for CBOs to use in implementing the project was well-received, with participants commenting positively on its relevance and usability. After the completion of the workshops, the manual was revised in line with CBO’s feedback, to ensure its usability.
Following completion of the training workshops, CBOs established and advertised the legal services which they are being supported to provide, and began receiving cases from women and girls who have been victims of gender-based violence, discrimination in respect of property, land or employment, and education. FIDA is reviewing these reports, providing feedback and support to the CBOs and considering further modifications to the manual, reporting forms and intake and referral process.

In August 2013, ERT visited Kenya to participate in the first round of start-up and monitoring visits with CBOs participating in the project. ERT and FIDA visited a total of eight CBOs across a number of counties in Kenya to ensure that they are working effectively and have the necessary resources and support in order to provide the legal services. ERT and FIDA also discussed the best way to deal with the first round of cases collected by CBOs. FIDA will continue the start-up visits throughout September 2013, visiting all participating CBOs before implementing any changes to the programme, the training manual or the support provided to CBOs which are necessary to ensure the scheme’s successful operation.

**Kenya 5: Promoting Equality Inclusive of Sexual Orientation and Gender Identity**

This project, which commenced in April 2012, built on some of the work carried out under a previous project with similar objectives. The project has two objectives: to support civil society campaigning for the introduction of comprehensive substantive equality legislation and policies inclusive of sexual orientation and gender identity; and to establish a pilot legal service for LGBTI persons who complain of discrimination.

In the first months of 2013, ERT revived the consensus on the need for – and content of – comprehensive equality legislation inclusive of sexual orientation and gender identity, and facilitated the formation of a new coalition of civil society and state actors committed to the achievement of this objective in the current parliament. ERT also supported the establishment of a new LGBTI-rights organisation, the National Gay and Lesbian Human Rights Commission (NGLHRC) and helped it launch a legal assistance service for LGBTI victims of discrimination. As a consequence of this project’s success in these two areas, civil society in Kenya is once again well situated to challenge discrimination against LGBTI persons, after a period in which a lack of focus at the political level and obstacles to effective civil society operations limited progress substantially.

In the final week of March 2013, ERT convened a one-day conference entitled “Legal Reform on Equality and Non-discrimination”, in Nairobi, marking the culmination of the advocacy activities under the project. The conference was convened in partnership with the Kenyan Section of the International Commission of Jurists (ICJ) and the National Gender and Equality Commission (NGEC). The conference was a forum for discussion of the main recommendations in the ERT country report, *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*, which had been published a year earlier. The objective was to secure consensus among key stakeholders, including the NGEC itself and four other constitutional commissions with mandates concerning human rights and equality, on the need for legal reform on equality to be a major priority for the new parliament. The conference focused in particular on the need for comprehensive equality law, and the key principles which such
legislation must adhere to, if Kenyan law is to be brought into line with the country’s international obligations.

The conference was a great success. Five highly influential constitutional commissions – the NGEC, the Kenya National Human Rights Commission, the National Cohesion and Integration Commission, the Law Reform Commission and the Commission for the Implementation of the Constitution – all agreed to endorse the enactment of equality legislation in the current parliament. In addition to the five commissions, this objective was endorsed by a wide range of civil society organisations, including those working with and on behalf of LGBTI persons and other groups exposed to discrimination.

In the first quarter of 2013, ERT agreed a partnership with a new Kenyan NGO, the National Gay and Lesbian Human Rights Commission (NGLHRC). Under this partnership, the NGLHRC is establishing a legal defence service for LGBTI victims of discrimination, thus meeting the second objective of this project. ERT’s decision to form a partnership with NGLHRC was taken in response to serious problems affecting its original partner, the Gay and Lesbian Coalition of Kenya (GALCK), which forced it to cease operations in the second half of 2012. It is hoped that the partnership will enable the NGLHRC to become a key actor on LGBTI rights in Kenya, and to support an approach which unites the LGBTI community after the recent re-instalment of GALCK.

Solomon Islands 2: Empowering Civil Society to Promote Gender Equality and Reduce the Incidence of Gender Discrimination

In this project, which began in April 2012, ERT works in partnership with the Secretariat of the Pacific Community Solomon Islands Country Office (SPC-SI) and the Secretariat
of the Pacific Community Regional Rights Resource Team (RRRT). ERT is responsible for training and report writing activities under this project.

At the beginning of 2013, ERT began researching and drafting a country report on discrimination and inequality in the Solomon Islands. In March, ERT completed a draft section on the legal and policy framework which provides an assessment of national laws relevant to the rights to equality and non-discrimination. The draft section has been distributed to legal experts identified by SPC-SI, in order to ensure that the text provides a comprehensive review of relevant laws. At the same time, ERT provided SPC-SI with guidance for documenting discrimination through interviews with victims and focus groups with affected communities, in order to expand the field research available for the part of the report on patterns of discrimination and inequality. ERT received feedback on both of these components of the report in August 2013 and is currently in the process of compiling the information into a single draft report.

**Sudan 1: Empowering Civil Society in Sudan to Combat Discrimination**

This project, implemented in partnership with the Sudanese Organisation for Research and Development (SORD), aims to build the capacity of Sudanese civil society organisations to advocate for improved protection from discrimination and for the promotion of equality, through training, support with documentation, publication of a country report and support with the development of an advocacy strategy.

While a report on discrimination and inequality in Sudan was produced within the project, ERT and SORD agreed that the potential existed to produce a report of greater depth and breadth, and thus agreed to continue work towards this end. Work to produce this report has continued throughout 2013. In March 2013, ERT representatives travelled to Sudan, met with SORD and interviewed a wide range of stakeholders in order to verify the findings in the report and expand its focus. A revised and expanded version of the country report is currently in production.

**Sudan 2: Equality and Freedom of Opinion, Expression and Association**

This project was implemented in an informal partnership with the Journalists for Human Rights (JHR) network operating both inside Sudan and in third countries. The project aimed to support this highly vulnerable group of human rights defenders, and at the same time develop their understanding of the importance of the rights to equality and non-discrimination in responsible journalism, particularly in a conflict country like Sudan. The project came to an end in April 2013.

In late March 2013, ERT and the JHR held a fourth and final strategy development roundtable, with 25 leading members of the JHR in attendance. Over the course of four days this group discussed a long-term organisational strategy and advocacy strategy for the JHR. As a result, the JHR has now agreed its organisational strategy for the coming two years.

**Sudan 3: Equality and Freedom of Expression in Sudan and South Sudan**

This project began in November 2012, in informal partnership with Journalists for Human Rights (JHR). The project aims to build on the ERT’s previous collaboration with the JHR, expanding the work to involve journal-
ists and human rights defenders from South Sudan as well. In addition to providing ongoing support to journalists working in the challenging media environment in both countries, and providing training on human rights and equality, the project aims to increase collaboration between those working in Sudan and South Sudan. In so doing, the project aims to make a contribution to tackling one of the most important human rights and security concerns between the two countries: the perpetuation of hate speech by the political leadership and media in Sudan and South Sudan.

Work in the first phase of the project was pursued in two strands. In Sudan, the JHR project team worked with the membership to finalise and start implementing the JHR’s organisational and advocacy strategy agreed at a roundtable in March 2013 (see Sudan 2 above). In April 2013, JHR representatives travelled to Banjul, Gambia to participate in a meeting of the African Commission on Human and People’s Rights. They also took part in the NGO Forum, met with other organisations and consulted with a delegation from the National Human Rights Council. In May 2013, the JHR published a report on freedom of expression and human rights protection in Sudan during the past year. Throughout the period, the JHR continued to document and publicise abuses of freedom of expression, discrimination and other human rights violations.

In South Sudan, the JHR project team worked to establish networks with South Sudanese journalists and human rights defenders, and to develop consensus on the establishment of a South Sudan Journalists for Human Rights network. From February onwards, the JHR team consulted with key figures in the South Sudanese media and civil society, including owners, editors and managing directors of various newspapers, the Association for Media Development in South Sudan and the South Sudan Journalists’ Union. These consultations led to the identification of a group of journalists and human rights defenders interested in participating in project activities. There was a strong interest in the establishment of a South Sudan Journalists for Human Rights (SSJHR) network. The Sudanese JHR also agreed that establishment of a partner network in South Sudan should be a key priority in its organisational strategy, given the need for coordinated action to protect journalists, particularly in conflict zones, and to challenge hate speech by politicians in both countries.

In late July, a group of 50 journalists (25 each from Sudan and South Sudan) participated in a five-day training workshop held in a third country for security reasons. The training programme covered monitoring and reporting on discrimination and other human rights abuses, journalistic ethics, techniques and best practice in conflict situations. The workshop was effective in equipping participants with the tools to ensure effective reporting on discrimination and other human rights abuses, to promote equality and non-discrimination and to recognise and challenge ethnic and religious hate speech. The workshop also provided an important opportunity to bring leading journalists from the two countries together, the first step towards improving cooperation between the media in these two states.

Sudan 4: Strengthening Civil Society Capacity to Combat Discrimination in Sudan

This project began in July 2013, and aims to create the foundations for sustained civil society and media advocacy on issues of discrimination in Sudan. Over the course of the project, ERT aims to: produce the first ever...
comprehensive report on discrimination and inequality in Sudan, containing analysis of all major patterns of discrimination and inequality, combined with an assessment of the legal and policy framework on equality and non-discrimination; engage key government departments and agencies, the National Human Rights Commission and civil society stakeholders on the report’s findings and recommendations, in order to maximise the impact on government policy; publicise this report in the national, regional and international media; and complete advocacy actions at the international, regional and national levels.

Throughout August and September, ERT continued to research and draft the comprehensive report on equality and non-discrimination in Sudan, building on the work completed during the Sudan 1 project. In addition, ERT commenced the international and regional advocacy activities, by preparing and submitting a List of Issues for consideration by the UN Human Rights Committee, examining Sudan’s compliance with its obligations under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights.

Turkey: Empowering Civil Society to Challenge Discrimination against LGBTI Persons in the Aegean and Marmara Regions of Turkey

This project began in January 2012 and is implemented in partnership with a Turkish LGBTI rights organisation based in Izmir, the Black Pink Triangle (SPU). It seeks to address the lack of capacity among CSOs in two of Turkey’s regions to challenge discrimination against LGBTI persons and to advocate for improved legal protection from discrimination, including on grounds of sexual orientation and gender identity, through improving documentation of all types of discrimination, increasing knowledge of anti-discrimination law and concepts among CSOs; creating CSO expertise in documenting cases of discrimination in the target regions; and cooperation between CSOs in the target regions through the creation of a Regional Equality Forum.

Earlier in the project, a Regional Equality Forum was established as a body bringing together civil society groups from across the two project regions to collectively advocate for improved protection from discrimination on all grounds, inclusive of sexual orientation and gender identity. The final Forum meeting took place in late July 2013. The Forum had a significant impact in improving communication, coordination and cooperation between regional CSOs on the issue of discrimination and inequality.

Throughout 2013, field research on discrimination in the project region has continued. ERT provided written guidance on research methodology, outcomes and documentation of cases. Participating organisations were tasked with undertaking interviews and focus groups with a number of victims of discrimination on different grounds, but maintaining the project’s focus on discrimination against LGBTI persons within the project region.

Ukraine: Empowering Civil Society to Challenge Discrimination against LGBTI Persons in Ukraine

This project, which commenced in November 2012, is implemented in partnership with an LGBTI organisation, Nash Mir, based in Kiev. The project involves the delivery of training to civil society organisations, support to the Coalition on Combating Discrimination, and the development of a report on discrimination and inequality in Ukraine.
In April 2013, a Baseline Study for the project was completed, providing an overview of the main patterns of discrimination and inequality in Ukraine, and the legislative and policy framework on equality. Also in April 2013, ERT and Nash Mir co-convened a roundtable on combating discrimination in Ukraine, with the Coalition on Combating Discrimination. The event was attended by over 50 representatives of civil society organisations, the European Commission, the United Nations Development Programme, and embassies of a number of EU Member States, including the Netherlands and Finland. The roundtable was preceded by a media briefing to raise public awareness of the project and its activities.

In July and August 2013, ERT and Nash Mir began preparations for a series of training workshops for civil society organisations and lawyers on equality and anti-discrimination law and concepts which will take place in Kiev, Odessa, Kharkov and Dnipropetrovsk in September and October 2013.

**United Kingdom: Greater Protection for Stateless Persons**

ERT’s key accomplishments under this project are twofold. First, ERT’s advocacy on the issue of statelessness has contributed to the UK adopting a statelessness determination procedure in its immigration rules. The new procedure was introduced on 6 April 2013. ERT, in collaboration with Asylum Aid and Garden Court Chambers, has since successfully approached UNHCR for funding to conduct training on the new procedure once published. The training will target lawyers and civil society organisations throughout the UK. ERT continues to play a key role in raising the profile of the statelessness issue in the UK.
ERT Work Itinerary: January - June 2013

January 18, 2013: Conducted a focus group with Ukrainian civil society organisations involved in work on discrimination, inequality and other human rights concerns, in order to assess the capacity-building needs of this group, Kiev.


February 12, 2013: Convened a strategic consultation meeting on combating ethnic and religious discrimination in Central Asia, Bishkek.

February 16-17, 2013: Conducted a research workshop for the Rohingya Project research team, Mahidol University, Bangkok.


February 25, 2013: Convened a roundtable of key governmental and non-governmental stakeholders of India to discuss recommendations for the prevention of the torture and ill-treatment of people with disabilities, New Delhi.

February 27-28, 2013: Delivered training to civil society organisations and lawyers on discriminatory torture and ill-treatment of people with disabilities, Lagos.

March 1, 2013: Convened a roundtable of key governmental and non-governmental stakeholders of Nigeria to discuss recommendations for the prevention of the torture and ill-treatment of people with disabilities, Lagos.

March 8-21: Conducted field research in Sudan on patterns of discrimination, toward a country report on inequality in Sudan.

March 26, 2013: Convened a conference “Legal Reform on Equality and Non-discrimination”, bringing together key governmental and non-governmental stakeholders in Kenya to discuss recommendations from ERT’s report In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya, Nairobi.

March 27-31, 2013: Convened a roundtable for members of the Journalists for Human Rights Network of Sudan to discuss the network’s organizational and advocacy strategy.

April 4, 2013: Participated in a stakeholder roundtable on the use of strategic litigation to improve the application and implementation of anti-discrimination legislation, Sarajevo.
April 4-5, 2013: Provided training for members of the judiciary and public prosecutors in Bosnia and Herzegovina on the application of international law and best practice on the right to equality, Sarajevo.

April 15-19, 2013: Provided training for staff from 57 community-based organisations as part of an initiative to develop community-based legal services for victims of gender discrimination, Nairobi.

April 22, 2013: Delivered training on statelessness and human rights to European Network on Statelessness associate members in the Western Balkans Region, Belgrade.

April 25, 2013: Convened a roundtable for governmental and non-governmental stakeholders, with Ukrainian LGBTI-rights organisation Nash Mir and the Coalition for Combating Discrimination, Kiev.

May 1, 2013: Participated in Expert Roundtable Discussion on Immigration Detention, organised by the Bingham Centre for the Rule of Law, British Institute of International and Comparative Law, London.

May 20-21, 2013: Delivered a keynote presentation and provided training for staff from the Office of the Ukrainian Parliament Commissioner for Human Rights as part of a Seminar on Equality and Non-discrimination, Kiev.

May 27, 2013: Delivered a presentation on "International Standards on Discriminatory Torture and Ill-treatment" at a meeting of the National Equality Forum of Azerbaijan, Baku.


June 6, 2013: Convened and participated in an international expert roundtable on socio-economic rights and equality in conjunction with University College London’s (UCL) Institute for Human Rights, London.


June 11-13, 2013: Attended Annual UNHCR NGO Consultations, served as NGO Focal Point, organised and presented at the Statelessness Session at the Consultations; moderated a side meeting to the Consultations on the Rohingya issue, Geneva.

June 12, 2013: Conducted meetings with UNHCR and OHCHR; organised and attended the European Network on Statelessness Side Meeting at the UNHCR NGO Consultations, Geneva.

June 14, 2013: Attended the International Detention Coalition Advisory Committee Meeting, Geneva.

June 24, 2013: Drafted, coordinated and published a joint civil society statement on the Rohingya issue that was endorsed by 76 organisations.

June 26, 2013: Conducted a seminar on “The Role of Strategic Litigation for the Advancement of Roma Rights”, University of Leeds, UK.
Note to Contributors

The Equal Rights Trust invites original unpublished articles for future issues of The Equal Rights Review. We welcome contributions on all aspects of equality law, policy or practice. We encourage articles that examine equality in respect to cross-cutting issues. We also encourage articles that examine equality law policy or practice from international, regional and national perspectives. Authors are particularly welcome to submit articles on the basis of their original current or past research in any discipline related to equality.

Peer Review Process
Each article will be peer reviewed prior to being accepted for publication. We aim to carry out the peer review process and return comments to authors as quickly as possible.

Further Information and Where to Submit
Articles must be submitted by email attachment in a Microsoft Word file to: info@equalrightstrust.org

For further information regarding submissions, please email: Joanna.whiteman@equalrightstrust.org

Submission Guidelines
- Articles should be original, unpublished work.
- Articles must be written in United Kingdom English.
- Articles must contain footnote or endnote referencing.
- Articles should be between 5,000 and 10,000 words in length.
- Articles must adhere to the ERT style guide, which is available at: http://www.equalrightstrust.org/ertdocumentbank/ERR%20STYLE%20GUIDE.pdf
The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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