
EQUAL RIGHTS REVIEW

Special Focus:
Equality in Employment

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EQUAL RIGHTS TRUST



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From Prohibiting Discrimination to Transformative Equality in Employment

The prohibition of discrimination in the workplace on grounds of sex and/or race is the historical cornerstone of equality law in most national jurisdictions. Sex and race discrimination in the area of employment continues to be a daily experience for many people in the world. However, for those living in one of the approximately 70% of UN member states that have any equality law to speak of, it would most likely be found in the labour code or similar legislation, and refer to several protected characteristics, almost always including race and/or sex.

In the most progressive jurisdictions, these initial protections from discrimination have been built upon in the last five decades so that the law now provides for equality in areas of life beyond employment, such as in the provision of goods and services, education, the administration of justice, public and government functions, etc. At the same time, the law has evolved to protect people from discrimination on the basis of further personal characteristics, such as religion or belief, disability, sexual orientation, age, etc.

Against the backdrop of this evolution, this issue of the *Equal Rights Review* is about equality and non-discrimination in the area of employment – thus going back home, as it were, to take a look at the oldest area of equality law. In doing so, it confirms that – unsurprisingly – this is where we find equality law to be at its most advanced, both in terms of national legislation, jurisprudence, and effective protection. Michael Rubenstein’s article manifests that employment discrimination law deserves this “most advanced” status, at least within the jurisdiction of the European Union, judging from the level of detail and sophistication of the legal questions being adjudicated in the region in the last 30 months, if not necessarily from the progressiveness of the court judgments themselves.

Let me provide a very rough sketch of the thematic map of employment equality. At its centre is the prohibition of employment discrimination on certain grounds, or protected characteristics. Given the history outlined above, it is unsurprising that sex and race are the most immediately recognised. Sex discrimination has generated the largest number of legal claims at all levels. One of the frontiers for policy makers and courts today concerns the achievement of gender-neutral parental rights, where fathers would be equal to mothers in the world of work in respect to parental leave and all related policies. At the Court of Justice of the European Union (CJEU), the key question, as Rubenstein points out, is how far the Court is willing to go in classifying different treatment of fathers as contrary

to EU law; but this is currently unclear as the decisions in recent similar cases have been difficult to reconcile.¹

Race (racial/ethnic origin) is the most “suspect” protected characteristic in the area of employment as well as elsewhere, meaning that it attracts perhaps the strongest protection from direct discrimination, with very few exceptions likely to be allowed if the jurisdiction makes use of a crucial concept which in EU law is termed “genuine and determining occupational requirements”. In other words, direct race discrimination in employment might only be justifiable if the race of a person is absolutely necessary for performing the job in question. How many such jobs can you think of?

Once sex and race discrimination began to be broadly outlawed in an increasing number of states, the time came, around the mid-1990s, for equality law to start to cautiously embrace further characteristics and emanate further strands of protection: sexual orientation, gender identity (gender re-assignment in the UK), disability, age, etc., each requiring ground-specific analysis. Coupled with this, the increasing diversity of workforces has led to an increasing number of discrimination claims being brought on grounds such as religion.

Some of the most controversial issues arise in relation to religious discrimination in the workplace, a matter much grappled with by courts in recent years.² We include in this issue a case note featuring a case from June 2015 in which the US Supreme Court³ held that an employer who had not employed a Muslim woman whose veil was not in accordance with their “Look Policy” had discriminated against her. This is one of a series of religious dress and religious symbols cases that have been reaching courts in a number of jurisdictions, giving judges a difficult job in striking the balance between accommodating religion in the workplace and other rights, interests and values. In a parallel slew of cases, employees have claimed religious discrimination, and/or demanded reasonable adjustment to accommodate their religion, when they have been required to perform certain job duties contrary to their religious beliefs – for example, to sell contraceptives, register same sex unions, or provide counselling to same sex partners. In such cases, in Europe at least, the employers have usually so far prevailed.

Disability discrimination also raises a number of ground-specific legal questions on which the courts are slowly building a body of case law. One such question is that of the comparator

1 Rubenstein, M., “Recent and Current Discrimination Cases in the Court of Justice of the European Union”, *Equal Rights Review*, Vol. 15. Rubenstein contrasts *Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, C-5/12, 19 September 2013 – deciding that in Spain, there was no gender discrimination when the father of a child whose mother was not an employee (as she was a self-employed lawyer and thus not eligible for state social security) was denied paternity leave, to *Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropon Dikaionaton*, C-222/14, 16 July 2015 – deciding that in Greece, there was gender discrimination in contravention of EU law when a male judge was refused paternity leave because his partner was not employed.

2 See, for example, *Equal Rights Review*, Vol. 14, 2015, which focuses on religion and equality.

3 *Equal Employment Opportunity Commission v Abercrombie & Fitch*, 575 U.S. 14-86 (2015).

in cases of denial of reasonable adjustment in the workplace, analysed concisely and lucidly by Sarah Fraser Butlin and Rachel Crasnow QC in an article on the approach of the UK courts in this issue. “Discrimination arising from disability”, as opposed to discrimination based on disability, is another example of a ground-specific definitional question with potentially serious consequences for employers and employees.

In EU law, age is the least protected characteristic as direct age discrimination is the only type of direct discrimination for which a general justification is allowed. But on many issues, EU law lags behind both national laws of EU member states and non-European states. For example, it permits mandatory retirement at a certain legally specified age, whilst in recent years, mandatory retirement age has been abolished in an increasing number of EU member states, having been illegal in the United States since 1986. In an interview in this issue, Chai Feldblum, Commissioner at the US Equal Employment Opportunity Commission, expresses her surprise at the slow progress made in this regard in the EU compared to her native US. The move towards the approach long since adopted in the US is a very positive trend that goes a long way towards preventing discrimination against older workers.

Other grounds on which employment discrimination is or should be prohibited include citizenship (with an exhaustive list of exceptions for certain jobs such as Head of National Security, perhaps), physical features including size and weight, migration status, caste, and others if they are attributes of vulnerable categories of persons in a specific country context. In this issue, we have included an interesting comparison between UK and US approaches to weightism and weight discrimination – particularly against obese persons – in employment. Certain categories of migrant workers continue to face significant abuses of their rights, including forced labour, trafficking and dangerous conditions of work. However, “migration status” is relatively absent from most lists of protected characteristics, while the judicial practice remains under-developed. Caste discrimination should definitely be also outlawed, and it is a shame that the UK executive continues to refuse to provide explicit protection from caste discrimination by not enforcing the relevant provision of the Equality Act 2010; this is despite the evidence documenting the existence of caste discrimination, particularly in respect of domestic workers.⁴

The personal scope of the right to non-discrimination in employment should not stop at those who possess a protected characteristic but should also include as right-holders persons who, while not having the protected characteristic themselves, are perceived as, or associated with someone having that protected characteristic.⁵

4 National Secular Society, *Calls for Government to outlaw caste discrimination after tribunal rules in favour of victim kept in “domestic servitude”*, 23 September 2015.

5 See, for example, *S. Coleman v Attridge Law and Steve Law*, C-303/06, 17 July 2008 – where the mother of a disabled child treated less favourably by her employer because of her child’s disability was herself recognised as a victim of disability discrimination.

Regarding the material scope of the right to non-discrimination in the area of employment, it covers access to employment, vocational training, conditions of work, pay, benefits, promotion, and dismissal.

Critically, the law providing protection from employment discrimination should define all forms of prohibited conduct in the jurisdiction. In most EU member states, these include: direct and indirect discrimination; harassment (including sexual harassment); denial of reasonable accommodation; and victimisation. The absence of legal definitions of the forms of discrimination constitutes one of the most widespread deficiencies affecting victims of discrimination across the world; only a minority of UN member states actually have meaningful legal definitions of discrimination in their statutes, including their labour laws.

This sketch of the relevant themes would be incomplete without a reference to the procedural aspects of anti-discrimination law in the area of employment. These aspects include: access to justice (including complaint procedures and legal aid); standing; evidence and proof; and remedies and sanctions, among others. For example, as shown in Shira Stanton's article in this issue through a case study on Tunisian garment workers, full access to justice is critical to the enjoyment of equal employment rights. Further, the effectiveness of the protection from discrimination often depends on the breadth of standing rules (i.e., who can file a legal claim) and the breadth of how the duty bearer is defined (i.e., who can be sued for discrimination). For example, in a Romanian sexual orientation discrimination case decided in 2013 by the CJEU,⁶ in which homophobic statements were made in public by the sponsor of a football club, the complaint was not brought by the allegedly homosexual footballer concerned but by a Romanian gay rights group. The CJEU held that the Equality Directives do not require an identifiable claimant. Further, the club as employer could be liable for statements made by someone who was only a shareholder and not the club's legal representative. This is because, in the Court's view, the employer could have refuted a *prima facie* case of sexual orientation discrimination by showing it had sufficiently distanced itself from the homophobic remarks.

The prohibition of employment discrimination, as I said above, is at the centre of employment equality – but, structurally, this is only a small part of the whole circle, and historically, it is only the first step toward employment equality. Indeed, only a small proportion of the inequality in employment can be put down to discrimination.

The late Bob Hepple, the Honorary President of the Equal Rights Trust who died on 21 August, reflected on gender inequality in employment, in a piece we published last year:

The most significant change in recent decades that influences the position of women at work is the transformation of state-managed capitalism into a globally marketised, privatised, deregulated system. This is accompanied by an ideological change from the post-war spirit of social solidarity, collective action, and partici-

6 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, C-81/12, 25 April 2013.

*patory democracy into a belief in individual choice, personal autonomy and meritocracy. Women are told that they will succeed through individual advancement and by being more career-oriented.*⁷

Gender inequality in employment, Hepple pointed out, is rooted in patriarchal social structures and cultures, where discrimination law alone could be of very limited help. For example, the fact that women in many cultures, complying with societal expectations, choose home and children over education and career, and thus are not equal to men in the job market, is a reality which discrimination claims can hardly challenge, even if the law allowed one to bring claims of indirect discrimination. Hepple continued:

*The roots of gender inequality lie in the socio-cultural traditions of countries, and also in the structures of employment and the way we measure economic value. What is needed is a more or less radical transformation that empowers women to the same degree as men and restores a spirit of social solidarity, collective action and participatory democracy.*⁸

I believe that, similarly, racial, religious, ethno-regional and other employment inequalities are rooted in socio-demographic structures, and in cultures defined by tradition and prejudice. And to achieve radical transformation, we aspire to a right to equality which is broader than non-discrimination and which includes an entitlement to equal participation in employment as well as in all areas of life regulated by law. Equal participation would only be possible if we go beyond simply eliminating discrimination, and address not only our bias (be it even in respect to currently unprotected characteristics such as place of education)⁹ but the very structures and traditions that recycle inequality.

Positive action and the placement of positive duties on public and private sector bodies to promote equality are among the key strategies through which the law can contribute to a more equal society. The law is called upon to integrate such strategies, in order to support what Bob Hepple, one of the greatest minds in both equality and employment law, often called “transformative equality”. While combating discrimination, we should hold in view this purpose.

Dimitrina Petrova

7 Hepple, B., “The Key to Greater Gender Equality”, *Equal Rights Review*, Vol. 12, 2014.

8 *Ibid.*

9 See the news of a university-blind recruitment policy introduced by Deloitte, Coughlan, S., “Firm ‘hides’ university when recruits apply”, *BBC News*, 29 September 2015.

ARTICLES

“When human rights are read today in different cultural contexts, it is through the uniqueness of the individual and her life narrative that human rights receive meaning and it is through narrating these rights in community with others that human rights receive their political weight.”

Rebecca Adami



Counter Narratives as Political Contestation: Universality, Particularity and Uniqueness

Rebecca Adami¹

Introduction

If human rights, as a Western concept bound to notions of individualism and secularism, are incompatible with particular values in non-Western cultural contexts, then this entails that Human Rights Education (HRE) is missionary in its attempts to bring people's particular beliefs into harmony with the presumed universalism of Western human rights. I aim to recast this presumed dichotomy of universality and particularity, towards a dialectic of a universality, as based on conflicting ideological values, with a notion of uniqueness found in life narratives. This paper aims at reclaiming the radical politics of human rights and the power of people to advocate for universal social justice through counter narratives that act as political contestation to dominant particular narratives legitimising patriarchal and colonial discriminatory practices. A presumed dichotomy between the universality of human rights, as an ideology, and the particularity of cultural and religious moral value systems, implies that HRE takes on an ideologically and politically missionary character, which is more accurately defined as persuasion than education. The actual drafting of the Universal Declaration of Human Rights (UDHR) challenges universalism of human rights as Eurocentric, opening up the possibility for competing historical narratives to be drawn upon in human rights learning as an open relational inquiry.

Earlier research on the drafting process leading up to the UDHR in 1948 has generally focused on the contributions and political subjects of the Western and male delegates who participated in that process.² The French delegate to the Commission on Human Rights, René Cassin – who was also in the drafting Committee – has long been viewed as the “father” of the UDHR. This view was questioned by Morsink who instead highlighted the contribution of Canadian delegate John Humphrey, who had collected earlier work on human rights (from the Botoga conference, the French Declaration, etc.).³ Supplementary to these descriptions,

1 Rebecca Adami is a Senior Lecturer at Södertörn University.

2 Ignatieff, M. and Gutmann, A., *Human Rights as Politics and Idolatry*, Princeton University Press, 2003; Lauren, P.G., *The Evolution of International Human Rights: Visions Seen*, University of Pennsylvania Press, 2011; and Morsink, J., *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, University of Pennsylvania Press, 1999.

3 Morsink, above note 2.

Mary Ann Glendon has illustrated a more complex understanding of the drafting process, focusing on Eleanor Roosevelt's influence in the Commission on Human Rights alongside male delegates Charles Malik from Lebanon and Peng Chang from China.⁴

In light of the minimal attention paid to the non-Western female contributors to the drafting of the UDHR in earlier research, there are insights to be gained from acknowledging these alternative narratives. Considering these perspectives entails questioning the static quality of rights in terms of both universality and particularity. From this inquiry into the drafting of the UDHR, where counter narratives contest the reification of a European, male subject, we can illuminate the broader point that notions of political subjectivity are able to morph through the availability of competing historical narratives.

The concept of "counter narratives" makes explicit the hegemony that silences some of the voices that counter conceptions of a universal subject. Reading the UDHR through narratives other than the Western narrative of the origin of human rights enriches human rights studies. The arguments for human rights put forth in 1948 by the women delegates from India, Pakistan and the Dominican Republic based on their different religious and cultural values contain important messages about both the legal and pedagogical aims of the document.

In this paper, I highlight three female delegates: Hansa Mehta (1897–1995) – an Indian delegate and legislator who was active in the movement towards India's independence, a delegate to the Commission on Human Rights; Shaista Begum Ikramullah (1915–2000) – a Pakistani author, founder of the Muslim Women Students Federation in Pakistan and delegate to the UN Third Committee of Social and Economic Affairs; and Minerva Bernardino (1907–1998) – a feminist politician, leader of women's movements in the Dominican Republic and delegate to both the UN Third Committee and the Committee on the Status of Women.

I claim that there are important, albeit neglected, philosophical conclusions to gain by closely examining the roles of the women delegates in these different bodies as their contributions and arguments were distinctive and often quite different from those of the male participants. In this paper I draw on Cavarero's notion, that we as individuals are singularly unique and that there cannot be total identification with a plural other, nor are all human beings alike.⁵ According to Cavarero what unites human beings is the sharing of stories, of narratives that relate in different ways to our personal life narrative. This reading also uncovers educational possibilities of shared and unique narratives of learners in global education within the constraints of politics of particularity.

4 Glendon, M.A., *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, 2001.

5 Cavarero, A., *Relating Narratives: Storytelling and Selfhood*, Routledge, 2000.

1. Counter Narratives as Political Contestation

Within feminist research, creating counter narratives is seen as a political act; using dominant stories to create counter narratives by unearthing alternative sequences, experiences and trajectories. Adams St Pierre and Richardson argue that the presence or absence of particular narratives influences the available degree of subjectivity.⁶ The presence of a master narrative on man encourages men to relate their experiences in these stories that not only represent masculinity but also replicate the master narrative of classical theory. Equally, as stories of women's political influence in history continue to be overshadowed by a continuous reification of maleness and whiteness, there is a dearth of narratives that women can relate their experiences to – especially non-Western women. Who is seen as a political subject, with an active voice of agency, becomes limited to the repertoire of historically represented subjectivities and the presence of disparate individuals who have collaborated to change society and the world.

Although women played a significant role in the movement toward independence in India and Pakistan in 1947,⁷ history has focused almost exclusively on Mahatma Gandhi (who opposed granting women the right to vote) as the leader of the Indian Independence movement as well as on Mohammed Ali Jinnah as the founder of Pakistan. Though there were women involved in the drafting of the first constitutions of India and Pakistan – two of whom were also part of drafting the UDHR (Hansa Mehta, India and Shaista Ikramullah, Pakistan) – their role has been subsequently overshadowed by male, nationalist and religious narratives in the re-telling of the historical founding of the nations.

In Europe, the political roles that women played during World War Two to combat the Nazi occupation in the post-war years were not recognised for their political significance. French women involved in the resistance movement against the Nazi occupation did not receive the same acknowledgement as their male counterparts.⁸ Only six women received recognition for their resistance through *Croix de la Libération* after World War Two – four out of the six being awarded posthumously – in contrast to over a thousand men who received the *Croix*.⁹

From a feminist perspective, the counter narratives of non-Western women who took part in the drafting of the UDHR are a valuable component in harmonising human rights with religious and cultural values. Such counter narratives of non-Western female politicians who

6 Adams St Pierre, E. and Richardson, L., "Writing: A Method of Inquiry", in Denzin, N.K and Lincoln, Y.S. (eds), *Collecting and Interpreting Qualitative Materials*, SAGE Publications, 2008, pp. 473–500.

7 Basu, A. and Ray, B., *Women's Struggle: A History of the All India Women's Conference 1927–1990*, Manohar Publications, 1990; Forbes, G., *The New Cambridge History of India. Women in Modern India*, Cambridge University Press, 1996; and Narain, V., *Reclaiming the Nation: Muslim Women and the Law in India*, University of Toronto Press, 2008.

8 Duchon, C., *Women's Rights and Women's Lives in France 1944–1968*, Routledge, 1994.

9 *Ibid.*, p. 12.

argued for human rights on religious grounds – the same religious beliefs that today are conflated on an international scale with a rejection of women’s human rights – may serve to give young girls educational alternatives. Girls and women can relate to such narratives as political subjects in their on-going process of subjectification.

Due to the marginalisation of the non-Western women’s voices through earlier recounting of the creation of human rights in the UN, recent scholars have argued that conceptions of human rights reflect the concerns and freedoms of a male, universal subject that neglects the lived realities and challenges of women. According to Butler, the definition of “human” and thus of human rights represent a universalisation of Man and of male subjectivity. Therefore, the basis of human rights rests on a notion of a human dignity that excludes women, children, “minorities” or “anyone other” than a white, male subject. Butler argues that there exists a dichotomy between the intended international legitimacy of human rights and the dominant local notion of human rights as Western and American. In Butler’s view, there is a need for cultural translation as a method of re-reading human rights through occasionally conflicting cultural and religious value systems in order to create a more inclusive notion of rights, or a limited list of rights and freedoms that would be acceptable in divergent moral value systems. Butler’s critique is solid if we presume that the dominant Western, male narrative on the creation of human rights is unquestionable.¹⁰ In my earlier writings, I have focused on what I referred to as an “intersectional dialogue” surrounding the UN debates on the universality of human rights, precisely in an effort to question this Eurocentric narrative that I argue is additionally reified through its postmodern and feminist critiques.¹¹

What I highlighted was the participation of delegates from different ideological backgrounds – from countries that held conflicting political and religious stands. Delegates from different nations argued for the universality of human rights based on Communist, Catholic, secular, Christian, Islamic, liberal, socialist and feminist beliefs on social justice. They did not agree on a “right” basis for human rights, but they agreed on a list of rights, to accommodate conflicting ideological grounds.¹² In order for this agreement to be reached, delegations from 56 countries held over 200 sessions, debates that led to an abstraction of the text, as all specific cultural and religious references had to be deleted from the document. This is precisely the reason why there is no mention in the UDHR of any conception of “God” as the basis for human dignity, nor to natural law, nor to specific discriminatory practices such as apartheid, the caste system or racial segregation.

10 Butler, J., “Competing Universalities”, in Butler, J., Laclau, E. and Zizek, S. (eds), *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, Verso, 2011, pp. 136–181.

11 Adami, R., “Intersectional Dialogue: A Cosmopolitan Dialogue of Ethics”, *Cosmopolitan Civil Societies: An Interdisciplinary Journal*, Vol 5., 2013, pp. 45–62.

12 *Ibid.*; and Adami, R., “Reconciling Universality and Particularity through a Cosmopolitan Outlook on Human Rights” *Cosmopolitan Civil Societies: An Interdisciplinary Journal*, Vol. 4, 2012, pp. 22–37.

Earlier accounts on the conceptualisation of human rights in the UDHR have focused mainly on the male delegates from the United Kingdom, Australia, Canada, France and the socialist Soviet Union. Rightfully, Butler raises a well-founded critique against the exclusion of women in the notion of “human” rights today and to the way that some women are excluded by this term. It is against a dominant notion of a universal, male subject that Butler raises the need to rearticulate what being “human” signifies if women are to be included within such notions.¹³ Within any dominant narrative that gives precedence to one description of what it means to be human over another, there are the untold, the silenced, the marginalised stories – counter narratives that disrupt the reified notions in the dominant narrative. One of these particular counter narratives is that of “women” that I explore in this paper, arguing that one must transcend the notions of particularity towards notions of uniqueness and life narratives in order to reconcile the universal notion of subjectivity with the uniqueness of lived experience, that transcends redundant particular narratives. Still, there is a political dimension of particular narratives that shouldn’t be ignored in favour of a totally relativistic position which emphasises the importance of identity politics to social categories. There lays political significance in particular narratives, as a means of highlighting violations of social justice from a shared perspective of oppression of marginalised peoples. However, too much faith in the particular to represent “all” marginalised within a specific group has been heavily criticised by recent feminist research. As Webster writes in her discussion on the subjectivity of women in the work of Benhabib:¹⁴

*In recent years, however, feminism has been criticised for its assumption of authority over the experience of women and for its general presumption that, simply on the basis of a shared gendered identity, women have immediate access to and knowledge of the lives of other women.*¹⁵

The critique that Webster raises by engaging Benhabib and Butler¹⁶ problematises “women” as a homogenous entity and is simultaneously a critique of white privilege blindness in feminist research that overlooks how different social structures other than gender create marginalisation and experiences of oppression that cannot be understood or shared by all women since specifics other than gender bind people together within common interests. Whenever people meet in a political context, not one but multiple categories of positional power relations are at play that can effectively silence communication. These include but are not limited to social status, such as race, class, gender, sexuality, language, nationality, ethnicity and age.

13 See above, note 10, pp.136–181.

14 Webster, F., “The Politics of Sex and Gender: Benhabib and Butler Debate Subjectivity.” *Hypatia: a Journal of Feminist Philosophy*, Vol.15, 2000, pp. 1–22, citing Benhabib, S., “Subjectivity, Historiography, and Politics”, in Nicholson, L. (ed), *Feminist Contestations: A Philosophical Exchange (Thinking Gender)*, Routledge, 1995, pp. 107–126.

15 *Ibid.*, Webster, p. 1.

16 Butler, J., “Contingent Foundations: Feminism and the Question of ‘Postmodernism’” in Nicholson, L. (ed), *Feminist Contestations: A Philosophical Exchange (Thinking Gender)*, Routledge, 1995, pp. 35–58.

When the individuals met for a conversation of human rights in the international arena in 1946 through 1948, they engaged not only in the sharing of particular narratives incorporating different religious, cultural and ideological values, but particular narratives which had been interrupted by the uniqueness of the lived experiences of the individual participants.

Thus, the female representatives, when narrating human rights through their own particularity, interrupted the male-centred notion of such religious and cultural values through their personal experiences. For example, Shaista Ikramullah – delegate in the Third Committee to the Economic and Social Council – was the first Muslim woman to obtain a doctorate from the University of London. Ikramullah describes in her book, *From Purdah to Parliament*,¹⁷ how she was in constant dissonance with her male colleagues in the first Constituent Assembly of Pakistan. Whereas Ikramullah argued for the importance of liberal education in Pakistan, the Pakistani Education Minister countered her by pushing for education to be religious and conservative. Shaista Ikramullah argued for women’s equal political and social rights based on her Islamic beliefs. When Ikramullah took part in the drafting the first constitution of Pakistan, she debated her male colleagues for Sharia laws to include equal rights of women to own property and to inherit property. The law she pushed for also guaranteed all citizens, including women, equal pay for equal work, equality of status and equal opportunities with male citizens. The law was opposed in the Constituent Assembly but was voted through after protests from the public.¹⁸ Shaista Ikramullah, in her contention that human rights were in harmony with the Islamic personal law, de-centred the male focused notion of Islamic law as un-inclusive of equal rights of women. Hence, her personal moral conviction was argued partly through a particular narrative of religious values and partly by interrupting dominant voices of static notions of particularity, from her position both as a woman and an advocate for women’s equal rights. Neither Ikramullah nor the other Muslim delegates (from Iran, Saudi Arabia and Syria) insisted on a reference to God or Allah in the UDHR. Rather, Ikramullah argued that:

*[i]t was imperative that the peoples of the world should recognize the existence of a code of civilised behaviour which would apply not only in international relations but also in domestic affairs.*¹⁹

Similarly, Hansa Mehta did not insist on a mention of caste in the non-discrimination list, as she thought it was out-dated and should not be referred to in the declaration. Instead, “social status” was used as a more inclusive term in the declaration (this was later amended to “other status”). The common goal of establishing a shared definition of human rights overruled potential differences of particularity. As a universal ethics, Benhabib conceives that:

17 Ikramullah, S.B., *From Purdah to Parliament*, Oxford University Press, 1998.

18 Shaista Begum Ikramullah describes challenges faced in the Pakistani Constituent Assembly in *From Purdah to Parliament*.

19 “Summary Record of the Ninetieth Meeting [of the Third Committee]” UN Doc., A/C.3/SR.90, 1 October 1948, p. 2045.

What a universalist ethics seeks to establish is that in the face of the needs and suffering of others, we have to engage in moral conversation and action; that we cannot abdicate the responsibility of responsiveness to the other with facile arguments about cultural relativism.²⁰

During the drafting of the UDHR and the debates in the different UN bodies through which the Declaration was approved, delegates representing different and even antagonistic ideologies were faced with the horrors of the Holocaust. In the wake of such immense human suffering they were preoccupied with seeking a common ground for affirming a sense of human dignity that had been in question both during war, Nazi occupation and Western colonisation. Through compromise, delegates were able to reach a common list of human rights and an agreement to disagree on the philosophical and ideological underpinnings for those rights.

2. Conflicting Voices in the Commission on Human Rights and in the Third Committee

I turn now to the contributions of the female delegate Hansa Mehta from India to the Commission on Human Rights. In the Commission, Mehta was the only female delegate apart from Eleanor Roosevelt. Mehta was at variance with Roosevelt on several crucial issues. Notable among these differences was the wording of “men” instead of “human beings” in the document.

Hansa Mehta fought for Indian independence alongside Mahatma Gandhi in peaceful resistance demonstrations. Like Gandhi, she was from an Indian ethnic group called Gujarati. Mehta was the third woman from her ethnic group to obtain a college degree in India, her sister having been the second before her. Mehta obtained an undergraduate degree in philosophy and then studied journalism in London. In India, she proposed a Charter of Women’s Rights 1946.²¹ When the Declaration of Human Rights was discussed in the Commission on Human Rights in 1947, Hansa Mehta said that she did not like the wording “all men” or “and should act towards one another like brothers”, sensing that they might be interpreted to exclude women, and were outdated.²² Eleanor Roosevelt, the acting chair, replied that the word “men” used in this sense was generally accepted to include all human beings.²³ The delegate from the United Kingdom, Lord Dukeston, proposed that in order to avoid further discussion on the subject, a note should be included at the beginning of both documents to the effect that the word “men”, as used therein, referred to all human beings.²⁴ Mehta stated that she didn’t object to the United Kingdom suggestion, though Article 1 was the only place in the Declaration where the expression “men” appeared. Mehta wished to have this overruled to “human

20 Benhabib, above note 14, p. 252.

21 Basu, above note 7.

22 ECOSOC, “Commission on Human Rights: Summary Record of the Thirty-Fourth Meeting”, UN Doc., E/CN.4/SR.34, 12 December 1947, p. 1255.

23 *Ibid.*

24 *Ibid.*

beings” or “persons”. This wording in Article 1 was voted on and Mehta’s suggestion was adopted at that stage of the process.²⁵

Mehta raised her voice in the Commission on Human Rights, both against the apartheid in Africa and against the United Kingdom’s colonial manner of neglecting and disrespecting the notion of human rights in the UN. In this way, she mobilised a strong rhetoric against colonialism and imperialism, representing the newly independent India in 1948:

*Hansa Mehta (India) declared that the Government and people of India attached the greatest importance to the Human Rights Commission and considered that its work would profoundly influence the future of the UN. She recalled that the Government of South Africa had maintained the position during recent discussions that there had been no violation of human rights in South Africa since there existed no written definition of human rights as such within the framework of the UN. The Government of the UK had taken a similar attitude by suggesting that the dispute between India and South Africa might be referred to the International Court of Justice. Mrs. Mehta considered it the justification of the Commission that pleas of this nature should not be allowed to be advanced within the forum of the UN in the future.*²⁶

The Commission on Human Rights sent the Declaration to the Third Committee of the Economic and Social Council before it was sent to the General Assembly. In all instances, the Committee on the Status of Women had three representatives when human rights were debated. Eleanor Roosevelt was initially opposed to the creation of a Committee on the Status of Women arguing that the Commission on Human Rights addressed women’s rights, but the female delegate from Dominican Republic, Minerva Bernardino, sustained the need for such a committee, and won the debate.

The discussion on the wording of “all men” versus “all human beings” was further debated in the next UN body through which the declaration was approved. Along with Roosevelt, several male delegates held that “man” was inclusive of women. The female delegates from non-Western countries including India (Hansa Mehta), Pakistan (Shaista Ikramullah) and Dominican Republic (Minerva Bernardino) stressed that in their national legal and political systems, “man” would not indicate that women were included under the auspices of human rights. Since women in many countries at that time were not seen as political subjects eligible to vote or take part in government, these non-Western female delegates spoke for more than just their own particular societies and cultures. Their critique of the wording “man” and “rights of Man” and the changes that followed – to the wording “human rights” in the title of the Declaration – indicates that “human rights” was considered as inclusive of women. In light

25 *Ibid.*

26 ECOSOC, Commission on Human Rights: Summary Record of the Second Meeting, UN Doc., E/CN.4/SR.2, 27 January 1947, p. 161.

of this contribution to the UDHR by these non-Western female delegates, Butler's critique of human rights as representing only male, white subjects can be challenged. Acknowledging such critiques raised during the drafting of the UDHR may help legitimise the universality of human rights today as cultural and religious translations were being made already in 1948.²⁷ Minerva Bernardino argued in the Third Committee to the Economic and Social Council that:

As one who had taken an active part in the international feminist movement, she thought it appropriate to remind the Committee that the question of equality between men and women had been raised at the San Francisco Conference, and that the delegations of Brazil, Mexico, the Dominican Republic and several other countries had submitted amendments the result of which had been the explicit recognition of that equality in the Charter of the UN. That had not been achieved without a certain amount of controversy; a group of delegations had held that women were included by implication in any reference to men. The fact that the Charter explicitly proclaimed the equality of the sexes was a triumph for the women of the world. It was not an empty triumph; legislators in various countries were proceeding to implement those provisions of the Charter. Nevertheless, some States still had constitutions, which granted rights, in particular suffrage, to men alone.²⁸

Bernardino lobbied for women's equal rights while representing Dominican Republic, which was under dictatorship for a long period of her career. DuBois and Derby, in an article entitled "The Strange Case of Minerva Bernardino", conclude that this context may explain her record in the international arena. DuBois and Derby believe that Bernardino's autobiography is a list of achievements, not portraying much self-reflection.²⁹ Notwithstanding their critique of Bernardino's loyalties to a corrupt regime in Dominican Republic, DuBois and Derby affirm that Bernardino took a progressive position relative to women's equal rights, especially in relation to social and economic rights, in conflict with the female representatives from the US (Roosevelt) and Britain (Margery Corbet). Bernardino mentioned this controversy, stating her view that these women who came from two of the countries where women had advanced their positions, were least supportive of the inclusion of women in the notion of human rights.³⁰ There were two articles in the UDHR regarding women's rights which were seen as particularly controversial in 1948: the article on equal rights of women and men in terms of marriage and its dissolution; and the article on equal pay for equal work. Again, the American female delegate Eleanor Roosevelt said that her delegation:

27 See above, note 10, pp. 136–181.

28 "Summary Record of the Ninety-Eighth Meeting [of the Third Committee]", UN Doc., A/C.3/SR.98, 9 October 1948, p. 2168.

29 DuBois, E. and Derby, L., "The Strange Case of Minerva Bernardino: Pan American and United Nations Women's Right Activist" *Women's Studies International Forum*, Vol. 32, 2009, pp. 43–50.

30 *Ibid.*, p. 48.

[w]as aware that the declarations might be improved upon; it did not think, for instance, that article 14, which dealt with marriage, should be included in the declaration at all.³¹

It was reported that, in response to the questioning of the article on equal rights in marriage (Article 14 UDHR), the Pakistani female delegate Shaista Ikramullah said that:

All civilised countries could accept article 14, which she thought was designed to prevent child marriage and marriages contracted without the consent of both parties, and also to ensure protection of women after divorce and the safeguarding of their property. Since the laws of Pakistan recognized all the rights referred to in article 14, her delegation was prepared to accept it. She would wish to make it clear, however, that “equal rights” must not mean “identical rights”. Identical rights for women as to marriage could in some cases be a liability to them rather than an asset. That point had been ably put by the representative of Saudi Arabia, and the Pakistan delegation would have been the more ready to support his amendment as the Mohammedan laws of marriage in all countries where they are applied gave adequate safeguards to women. Unfortunately however, she could not support the amendment, as she feared it would enable countries with laws discriminating against women to continue to apply them.³²

This was a highly diplomatic way of not offending the Saudi Arabian delegation while criticising the suggestion that there should be an insertion of “according to every national legislation” in terms of equal rights of women and men in marriage and at its dissolution. Further, this equally stressed that one could hold a feminist notion of Islamic personal law but that in some countries, this would be used to neglect the equal rights of women if non-discrimination due to sex and gender was not explicitly mentioned in the Declaration.

Arguing in this manner, Shaista Ikramullah was truthful to her own struggle toward equal rights and freedoms for Pakistani women – drawing on her own life’s narrative of moving from a life in strict purdah to a life in parliament – while simultaneously redefining how the particular narrative of “Islam” was understood from a feminist perspective. Ikramullah was born into a politically influential and wealthy family where she had the privilege of studying at college abroad and working in public politics and international diplomacy alongside male colleagues while being a mother of three.³³ The uniqueness of her life experiences, of being devoted to her faith and of being privileged with access to public power positions, helped her to challenge the dominant narrative of the cultural and religious values she worked to re-claim on what today we would call feminist grounds. By arguing for the universality of hu-

31 See above, note 28, p. 2038.

32 “Summary Record of the Hundred and Twenty-Fifth Meeting [of the Third Committee]”, UN Doc. A/C.3/SR.125, 8 November 1948, p. 2470.

33 See above, note 17.

man rights based on her Islamic beliefs, she challenged the notion of universality as conflated with a secular ideological ground and equally interrogated the patriarchal definition of the particular narrative with which her life was in constant negotiation.

3. Learning Human Rights Beyond Dichotomies

There is a presumed dichotomy between the notion of universality as inherent in human rights and the particularity of the context in which human rights are interpreted and taught. Although particular narratives create links to universal principles, human rights learners in national settings are left with *dominant* narratives closely rooted in specific religious and cultural interpretations of rights and duties. When these dominant religious and cultural narratives are articulated through patriarchal structures, they may undermine countering feminist narratives on human rights within the same religion or culture. Hence, the language in the UDHR may not touch the unique experiences of individual lives that may transcend particular narratives of difference. There is no universal to counteract the constraint of narratives of particularity. Therefore, these have to be transcendent – through relationality – as shifting to uniqueness. Notions of particularity can contain suppressive elements which totalise power within a cultural religious group. The solution to this is a relational approach. A relational dynamic highlights the aspect of particularity that comprises of, and allows for, truly unique articulations. What would happen to this dichotomy between particularity and universality if we would instead approach learning about human rights as occurring within the narration of life experiences?³⁴ Narrating one’s life story in relation to human rights would not be limited to the socially held notions of what it means to be human in a certain culture or religious context, but instead, what it means to be human through the lived experiences of unique human beings.

The Italian philosopher Adriana Cavarero argues for an ethics of relationality, wherein she criticises a categorical subject and introduces a “narratable self” who is addressed by the singular other in the sharing of narratives.³⁵ The relationality that Cavarero conditions the subject with is borrowed in part from the work of Hannah Arendt. In Arendt, I read an opening towards change, where the subject acts in the world, in relationships, and these actions and words receive their meaning (according to Arendt, a political meaning) through the way in which they are interpreted by others.³⁶ What is interpreted is neither *you* nor *me*; what is interpreted are the narratives *through* which we expose ourselves:

34 Adami, R., “Re-Thinking Relations in Human Rights Education: The Politics of Narratives.” *Journal of Philosophy of Education*, Vol. 48, 2014; and Adami, R., *Human Rights Learning: The Significance of Narratives, Relationality and Uniqueness*, Doctoral Thesis from the Department of Education, Stockholm University Press, 2014.

35 See above, note 5.

36 Arendt, H., *Men in Dark Times*, Harcourt Publishers Ltd, 1968; Arendt, H., *The Promise of Politics*, Schocken Books, 2005; and Arendt, H., *Between Past and Future: Eight Exercises in Political Thought*, Penguin Books, 2006.

*The one who tells us our story speaks the language of the you. Within the shared narrative scene, the addressee of the tale and its presence wins out over the classic role, in the text, of the absent protagonist.*³⁷

In the work of Cavarero, there exists an ontological notion of an embodied other, who is a *you*, and who addresses us with a specific and unique narrative. The universality of such an ethics entails that what is universally shared between human beings is the notion that all individuals have a unique life story to tell. Such a universality is not based on sameness – that we are all the same – nor does the notion of a narratable self render it impossible to speak of the universality of human rights since the uniqueness of the life narrative is not to be conflated with a relativistic view of difference. The notion of a narratable self touches upon the particularity of cultural signifiers which impact upon the way in which the life narrative is negotiated and articulated. Relational life narration challenges the dominant narrative in national and cultural contexts. This means that the particular is not static but under constant re-articulation through people’s lived experience. There is not one way to articulate what it means to be woman, Muslim, Hindu, agnostic, but a multitude of ways; divergent narratives that may contradict and enrich the dominant narrative. As for the women in the Third Committee, the other is not an absent protagonist, but a real human being with a unique life narrative that contradicts static notions of particularity. Through a narrative articulation of the other and myself as in constant relationality and reciprocity, one finds an identification (though Cavarero does not use that specific term), which is beyond egocentrism (making the other myself) or exoticism (making the other everything else but me), towards a recognition of uniqueness beyond social labelling.

The historical counter narrative of the women’s voice in drafting the UDHR, is, I believe, of the utmost importance today when UN Women speaks of “women’s rights” instead of “women’s human rights”. This use of “women’s rights” implies that human rights of women need extra protection and must address issues specific to the lives of women but also problematically, (and this is where my critique comes in to the use of the concept “women’s rights”), the wording “women’s rights” suggests that these are not human rights. Through the use of “women’s rights” instead of “women’s human rights”, human rights are reified as the rights of *man*, and not as human rights for all. As with all declarations, the UDHR is open for reinterpretation when read both through particular contexts and in the light of competing historical narratives on the intent of the disparate and unique drafters. According to both Arendt and Cavarero, it is the relationality of narratives that creates the political dimension – this means that human beings are not political subjects in isolation from each other, rather that deeds and words gain their political significance when received and acted upon by another. Accordingly, counter narratives act as political contestation to dominant notions of power. When human rights are read today in different cultural contexts, it is through the uniqueness of the individual and her life narrative that human rights receive meaning and it is through narrating these rights in community with others that human rights receive their political weight.

37 See above, note 5, p. 92.

Securing Sexual Orientation and Gender Identity Rights within the United Nations Framework and System: Past, Present and Future

Gemma MacArthur¹

*You, at the United Nations, have a particular role to play. You have a responsibility. Lesbians, gays, bisexuals, transgender people are equal members of the human family whose rights you have sworn to uphold. Those who face hatred [and] violence look to you for protection (...) Do not fail them.*²

Desmond Tutu

Introduction

Since the very emergence of human rights, “the controversy over which should be considered human rights, and to whom they should extend has thrived”.³ Those of diverse sexual orientation and gender identity (SOGI) continue to fight amidst such controversy for recognition of their rights.⁴ In almost every region of the world, people face persistent human rights violations by reason of their actual or perceived SOGI.⁵ This ranges from targeted violence to discrimination in all aspects of society.⁶ The formal protection afforded to those of diverse

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- 1 Gemma MacArthur is a recent graduate from the Human Rights Law LLM programme at the University of Strathclyde.
 - 2 Tutu, D., “Video Message: Ending Violence and Criminal Sanctions based on Sexual Orientation and Gender Identity”, 17 September 2010, available at: <http://arc-international.net/global-advocacy/human-rights-council/hrc15/panel-tutu-en>.
 - 3 Persad, X.B.L., “An Expanding Human Rights Corpus: Sexual Minority Rights As International Human Rights”, *Cardozo Journal of Law and Gender*, Vol. 20, 2009, p. 337.
 - 4 The terms “sexual orientation” and “gender identity” are used throughout this article to mirror the language frequently proliferated within the UN. The extent to which sexual orientation and gender identity (SOGI) includes intersex persons has been subject to some debate and for the purposes of space will not be included in this article. For a useful discussion of the terms “sexual orientation” and “gender identity”, see Waites, M., “Critique of ‘Sexual Orientation’ and ‘Gender Identity’ in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles”, *Contemporary Politics*, Vol. 15, 2009.
 - 5 O’Flaherty, M., “Sexual Orientation and Gender Identity”, in Moeckli D., Shah S. and Sivakumaran S., (eds.) *International Human Rights Law*, Oxford University Press, 2010, p. 331.
 - 6 O’Flaherty, M. and Fisher, J., “Sexual Orientation and Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles”, *Human Rights Law Review*, Vol. 8, 2008, pp. 207–14.

SOGI varies widely throughout the world. Recent trends have been remarkably antagonistic; whilst steps towards same-sex marriage rights (often purported to be one of the last triumphs of equality) have been increasingly endorsed,⁷ the spread of “homosexual propaganda” bills has been nearly as swift.⁸

Thus the global rights movement for SOGI rights has been defined by “periods of advancement matched with regression”.⁹ This article reflects on whether international human rights law has made room for the development of SOGI rights, with a focus on the UN framework and system; given that the UN, as the foremost progenitor in the development and protection of international human rights, holds the most relative importance. In order to deduce what room has been made for the development of SOGI rights, this article will consider both the development of the law in this forum, and the extent of integration within the monitoring mechanisms.

Section 1 will briefly discuss the applicability of SOGI rights in the current UN framework. The aim of section 2 is to highlight the limited protection afforded by current international law, based on the most authoritative proclamations within treaty and political bodies. This will be followed, in section 3, by an assessment of the extent to which the UN system has made a concerted effort to continually and adequately address violations of SOGI rights. Analysis will draw on the most relevant monitoring bodies in this regard: the Human Rights Committee (HRC) in its concluding observations; the special procedures mechanisms; and the Universal Periodic Review (UPR). In concluding that international human rights law has made notable, though insufficient, room for SOGI rights within the UN framework and system, section 4 draws on this analysis in looking at future progression. This article first considers the merits of a specialised convention; however, it recommends advocacy towards a dedicated special procedure as a more constructive route to advancing and securing SOGI rights.

1. The Application of Sexual Orientation and Gender Identity to the United Nations Framework

Where international human rights law previously remained silent on issues relating to SOGI, increasing interaction within the last few decades has been met with contention. Before analysing current protection and integration, this section briefly engages with some of the distinct challenges faced, and demonstrates the valid application of SOGI rights within this framework.

7 Most recently, the landmark case which stated the right to marry in the US is guaranteed to same-sex couples. See *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al.* 576 US (2015).

8 For instance, Tanzania and Belarus: International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State Sponsored Homophobia*, 2014, p. 9.

9 Narayan, P., “Somewhere Over the Rainbow...International Human Rights Protections for Sexual Minorities in the New Millennium”, *Boston University International Law Journal*, Vol. 24, 2006, p. 316.

The foundational instruments of international human rights law consists of two binding foundational treaties, the International Covenant on Civil and Political Rights (ICCPR)¹⁰ and the International Covenant on Economic Social and Cultural Rights (ICESCR).¹¹ As well as these, the Universal Declaration of Human Rights (UDHR)¹² is a key document from which the treaties were derived, and the principles of which they seek to protect. These instruments provide the grounding on which international human rights law is principally based, referencing important principles of non-discrimination and equality,¹³ as well as universality, inalienability and indivisibility of rights.¹⁴

Most notably, the Article 26 non-discrimination provision in the ICCPR provides a demonstrative list of prohibited categories, such as “race, colour, sex”, whilst further providing for the inclusion of “other status”. Whilst SOGI “is on its face an obvious case of an ‘other status’ by which human beings are singled out for invidious discrimination”,¹⁵ in practice this incorporation has garnered much resistance.

Concerns have surfaced regarding the inherent compatibility of SOGI related issues within a “category”. This firstly involves the perception that SOGI cannot be adequately defined within the static nature required by a human rights framework. The inherent reliance on binary categories of “male” and “female” which appear “deeply embedded in human rights discourse” may present a number of issues.¹⁶ For instance, where terms such as lesbian, gay, bisexual or transgender (LGBT) have undoubtedly evolved from western language, such terms necessarily excludes those whom this category does not readily encompass. There are recognised instances “where sexuality and gender forms elude Western categories”, and where this occurs it necessarily results in “problematizing the Western gender/sexuality distinction itself”.¹⁷ Even the seemingly inclusive terms of “sexual orientation” and “gender identity” appear to ignore those whose behaviour does not necessarily succeed their identity, such as “men who have sex with men” but do not identify as “gay”.¹⁸

10 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 December 1966.

11 International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, 16 December 1966.

12 UN General Assembly, Universal Declaration of Human Rights (UDHR), UN Doc. A/810, 10 December 1948.

13 UDHR, Articles 1, 2 and 7; ICCPR, Articles 2 and 26; and ICESCR, Article 2.

14 UDHR, Preamble; ICCPR, Preamble; and ICESCR, Preamble.

15 Donnelly, J., “Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime”, in Baehr, P., Flinterman C. and Senders M., (eds), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*, Royal Netherlands Academy of Arts and Sciences, 1999, p. 20.

16 Correa, S., Petchesky, R. and Parker, R., *Sexuality, Health and Human Rights*, Cambridge University Press, 2008, p. 204.

17 See above, note 4, p. 139.

18 *Ibid.*

Those advocating for SOGI rights may find difficulties with tackling disputes over incompatibility with the human rights framework, with some proponents opting towards grounds based approaches, and seeking to combine SOGI with existing movements. One example is the inclusion of SOGI with reproductive rights, under a more expansive view of “sexual and gender rights”. Arguably, such an approach may ignore the historical traction to which identity politics are tied, as well as undesirably blur the boundaries between gender roles.¹⁹

However, to the extent that “SOGI” does not adequately fit its purpose, Waites remarks that this does not necessarily require abandonment of such concepts; but rather countering with political analysis “in the context of recognition of their dominant meanings” in order to regularly demarcate and address its limits.²⁰ Where a more fluid approach is taken, it helps to encompass the need for language that carries the capacity for change, whilst retaining a self-critical perspective.²¹ Such an approach is not an inherent obstacle to its codification, however, as this has been done elsewhere: “the problem of naming unstable categories is by no means unique to the area of sexuality (...) ‘race’ and ‘gender’ are also volatile social constructs rather than ‘fixed’ or ‘natural.’”²²

Thus, language encompassing SOGI as a category does not render it inherently incompatible to protection; as such diversity exists, the limited “mandate of human rights allows us to identify elements of unity, and to invoke these for the specific goal of promoting fundamental rights”.²³ Notwithstanding this, where such language is relied upon, it could valuably be coupled with the promotion of understanding cross-cultural distinctions, particularly where states attempt to limit this by protesting the existence of any such groups; as people of diverse SOGI, but equally diverse designation, are existent in every society throughout the world.²⁴ Indeed, such variations exist between national contexts for those other prohibited categories. It is true, however, that this “difficulty of naming sexual dissidents as subjects of international standards has reinforced indivisibility and lack of protection”.²⁵

There is no inherent reason for those of diverse SOGI to be excluded from protection under the “other” category, and to the extent that such explicit language is required for protection, this would signify an endemic failure of the international human rights system.

19 Kukara, E., “Sexual Orientation and Non-Discrimination” *Peace Review: A Journal of Social Justice*, Vol. 17, 2006, p. 186.

20 See above, note 4, p. 151.

21 Petchesky, R., “The Language of ‘Sexual Minorities’ and the Politics of Identity”, *Reproductive Health Matters*, Vol. 17, 2009, p. 109.

22 Saiz, I., “Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN”, *Sexuality Policy Watch*, 2005, p. 18.

23 Heinze, E., *Sexual Orientation: A Human Right*, Martinus Nijhoff, 1995, p. 29.

24 See above, note 19, p. 186.

25 See above, note 22, p. 18.

Indeed, it has been said that “if human rights doctrine cannot meet the needs of a minority persecuted on the basis of its status, the doctrine itself may well find claims to universality are undermined”.²⁶

SOGI issues are innately compatible with, and applicable within, existing international human rights protection. Whilst tactics have been used to delay the development of SOGI rights within the human rights framework, it is essential to remember that “[f]or all its shortcomings, international human rights law, today, is the best existing framework not only for attempting to implement, but also for understanding and debating.”²⁷

2. Development and Status of Sexual Orientation and Gender Identity Rights

Following the lack of explicit inclusion of SOGI rights in treaties, the development of relevant law that has ensued has been both patchy and slow. Limited progress has been made within relevant treaty bodies and political forums; and these are considered the foremost authoritative sources in determining the status of these rights.

a. HRC Jurisprudence and Authoritative Commentary

The HRC is the body that oversees the implementation of the ICCPR, and can receive individual complaints subject to ratification of an optional protocol.²⁸ The communications of the HRC can carry sufficient weight, and are often deemed to have a quasi-judicial nature. The ICCPR will be the main focus of the treaty bodies here as the most widely ratified treaty covering the broadest range of rights relevant to SOGI,²⁹ which has led to its collective jurisprudence being considered to provide the “strongest explicit protections against discrimination on the basis of sexual orientation”.³⁰

The first express consideration of sexual orientation rights dates to 1982, in *Hertzberg v Finland*,³¹ where the HRC dismissed an Article 19 claim for freedom of expression, admitting a wide benchmark by stating that as “public morals differ widely (...) a certain margin of discretion must be accorded to the responsible national authorities”.³² It wasn’t until 1994 that real progress regarding sexual orientation rights was made in this forum, in the landmark

26 See above, note 19, p. 186.

27 See above, note 23, p. 11.

28 First Optional Protocol to the ICCPR, 999 UNTS, 19 December 1966.

29 Some other treaty bodies, such as the Committee on the Elimination of Discrimination against Women that have addressed SOGI, will not be covered in this article.

30 See above, note 19, p. 183.

31 UN Human Rights Committee (HRC), *Hertzberg et al v Finland*, Communication No. 61/1979, UN Doc. CCPR/C/OP/1, 2 April 1982.

32 *Ibid.*, Para 10.

case of *Toonen v Australia*.³³ This challenged a Tasmanian sodomy law prohibiting consensual same-sex conduct, with the HRC ruling that the relevance of Article 17 privacy rights in this regard was “undisputed”, and rejecting the Tasmanian government’s morality claims. This was the first finding that states did not hold exclusive jurisdiction on such “moral issues”, and was hailed as the first “juridical recognition of gay rights on a universal level”.³⁴

However, basing the decision on privacy, the HRC merely affirmed the relevance of the Article 26 prohibition of discrimination – a seemingly missed opportunity. In addition, its conclusion that “sexual orientation” fell within the prohibited category of “sex” was considered an easy option in bypassing the issue of status,³⁵ and a matter of confusion.³⁶ Importantly, the decision resulted in unclear boundaries for exceptions to such rights. For instance, some consider that the decision bars morality arguments altogether for the criminalisation of homosexuality³⁷ or “expressly dismissed cultural relativism”,³⁸ whereas others believe a more homogenous moral and legal code could be a potentially objective justification.³⁹

The subsequent case of *Joslin v New Zealand*⁴⁰ demonstrated a clear limit that the Committee was willing to impose, in denoting the right to marry under Article 23 as “only the union between a man and a woman”.⁴¹ The decision itself was described as “difficult to square with prior precedent”,⁴² particularly in light of the HRC’s previous remarks on the evolving nature of the family unit.⁴³ Tahmindjis remarked:

[I]t gives no authority for this sweeping statement, attempts not even a modicum of interpretation, ignores any possibility of evolving social constructions of mar-

33 HRC, *Toonen v Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50D/488, 25 December 1992.

34 Joseph, S., “*Toonen v Australia: Gay Rights under the ICCPR*”, *University of Tasmania Law Review*, Vol. 13, 1994, p. 394.

35 Clavier, S., “Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination against Homosexual and Transgendered Individuals”, *Fordham international Journal*, Vol. 35, 2011, p. 394.

36 Gerber, P. and Gory, J., “The UN Human Rights Committee and LGBT Rights: What Is It Doing? What Could It Be Doing?”, *Human Rights Law Review*, Vol. 14, 2014, p. 429.

37 See above, note 9, p. 322

38 Garvey, T., “God v Gays? The Rights of Sexual Minorities in International Law as Seen Through the Doomed Existence of the Brazil Resolution”, *Denver Journal of International Law and Policy*, Vol. 38, 2010, p. 671.

39 Cowell, F. and Milon, A., “Decriminalisation of Sexual Orientation through the Universal Periodic Review”, *Human Rights Law Review*, Vol. 12, 2012, p. 344.

40 HRC, *Joslin v New Zealand*, Communication No. 902/1999, UN Doc CCPR/C/75/D/902/1999, 30 July, 2002.

41 *Ibid.*, Para 12.

42 See above, note 3, p. 369.

43 HRC, *General Comment No 19: Article 23 (Protection of the Family, the Right to Marriage and Equality of the Spouses)*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 1990.

*riage, and leaves the notion of fundamental meanings of concepts in the Covenant in the care of the States.*⁴⁴

A separate concurring opinion of two HRC members suggested an element of undefined flexibility by stating that a difference in treatment “may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination”.⁴⁵

Subsequent decisions of the HRC appear to depart from previous approaches. *Young v Australia*⁴⁶ concerned the denial of pension from Young’s deceased same-sex partner, and the HRC explicitly stated that sexual orientation was included within the “other status” category in Article 26. However, after confirming the applicability of sexual orientation to Article 26, the HRC failed to expand further on its limitations, stating only that it repeatedly observed, “that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria”.⁴⁷ *Young* was followed by the case of *X v Colombia*,⁴⁸ also involving denial of pension rights on the basis of sexual orientation, similarly finding that Article 26 was applicable under “other status”. The case generated a dissenting opinion from two members who instead stated that Article 26 should be read in light of Article 23, defining family as “the natural and fundamental group unit of society”.⁴⁹

Most recently, the case of *Fedotova v Russian Federation*⁵⁰ brought the first important affirmation of sexual orientation rights outside of Articles 17 or 26, signalling “a greater awareness of the entitlement of sexual minorities to enjoy the full spectrum of rights under the ICCPR”.⁵¹ The case concerned a ruling under the Article 19 protection of freedom of expression and opinion against a Russian ban on “homosexual propaganda”, and demonstrated evolutive reasoning in reversing the similar *Hertzberg*. Russia based their case on morality; however, while referencing principles of universality and non-discrimination, the HRC noted that arguments based on morals could not be derived merely from a *single* tradition, as public morals stemmed “from many social, philosophical and religious traditions”.⁵²

44 Tahmindjis, P., “Sexuality and International Human Rights” *Journal of Homosexuality*, Vol. 48, 2005, p. 18.

45 See above, note 40, Appendix.

46 HRC, *Young v Australia*, Communication No. 941/2000, 18 September 2003.

47 *Ibid.*, Para 10.4.

48 HRC, *X v Colombia*, Communication No. 1361/2005, 6 August 2003.

49 *Ibid.*, Annex.

50 HRC, *Fedotova v Russian Federation*, Communication, No. 1932/2010, 31 October 2012.

51 See above, note 36, p. 433.

52 See above, note 50, Para 22.

As the ICCPR is a broad instrument, “adjudication is required to work out the meanings and boundaries of rights but also the expanding duties to respect, protect and promote them”.⁵³ However, a wide discretion is provided to states when the scope of limitations to restrict SOGI rights is unsettled, and this further leaves unexplored the legal basis of “the legitimacy or veracity of potential political objections”.⁵⁴ The protection of rights appears to rest with the discretion of discordant committee members, and it is clear that the HRC “struggles with the interplay between human rights norms which affect the rights of LGBT persons and the restrictions placed on the norm by the state party”.⁵⁵

Whilst such jurisprudence is readily understood to similarly relate to gender identity claims, the HRC has not yet addressed gender identity in its decisions, leaving protection on the basis of gender identity even more ambiguous.⁵⁶ Gerber and Gory have highlighted a number of missed opportunities by the HRC to confirm the applicability of SOGI within General Comments,⁵⁷ a tool which has been utilised by other treaty bodies to clarify their stance in respect of SOGI rights.⁵⁸ However, both sexual orientation and gender identity have been included in a recent comment on liberty and security of person.⁵⁹ Whilst not a comprehensive affirmation of SOGI, this has importantly referenced gender identity, and could make way for a broader thematic comment.

Whilst the ability of the HRC to make “authoritative interpretations” is disputed,⁶⁰ and though most states do not generally hold them to be legally binding,⁶¹ communications undeniably generate significant legal effect. For instance, a number of states invoked *Toonen* as authoritative reference to challenge sodomy laws.⁶² Thus, the actions of the HRC could hold invaluable weight in the scheme of protecting SOGI rights. However, the HRC has yet to construct “a satisfactory overall approach”.⁶³ The decisions and commentary of the HRC offer

53 Alston, P. and Crawford, J., *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000, p. 26.

54 See above, note 39, p. 344.

55 See above, note 36, p. 433.

56 The HRC has recognised gender identity within its concluding observations.

57 See above, note 36, p. 422; see also, for example, HRC, *General Comment No 34: Freedoms of Opinion and Expression (Article 19)*, UN Doc. CCPR/C/GC/34, 2011.

58 For example, Committee on Economic Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4, 2000.

59 HRC, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 2014.

60 See above, note 15, p. 21.

61 See above, note 22, p. 17.

62 For example, *Texas (Lawrence v Texas)* 2003 123 Ct 2472.

63 See above, note 19, p. 187.

an incomplete perspective on the strength of SOGI claims, particularly in respect of other rights, claims based on gender identity, and in leaving a seemingly undetermined space for state restrictions.

b. Political Body Statements, Resolutions and Declarations

A wider and more inclusive process of norm creation can take place within the political bodies. Texts produced by the Human Rights Council (and its predecessor, the Commission on Human Rights) as well as the General Assembly have the potential to carry enormous significance for normative development, as well as setting and shaping the UN agenda. Thus, it is true that “any evaluation of the status of sexual minorities within the context of the United Nations must take more political bodies into account”.⁶⁴

The first landmark efforts towards affirming broad protection for sexual orientation within the political bodies began in the Commission for Human Rights, with the 2003 draft “Resolution on Sexual Orientation” (Brazil Resolution).⁶⁵ This attempted to merely affirm that the application of pre-existing rights in the foundational documents also applied regardless of sexual orientation. However, in failing to articulate specific rights, critics feared the creation of extra rights for SOGI. Indeed, the proposal sparked an immediate counter-statement supported by 55 states. This denounced sexual orientation as a human rights issue on numerous grounds: lack of explicit inclusion in instruments; failure to properly define its “category”; and as an issue that did not concern the southern states.⁶⁶ However this reaction was not limited to the south, with one western state responding that it would not support a resolution on sexual orientation requiring “some sort of universal application”.⁶⁷ After postponing for a year, Brazil dropped the resolution before a vote, stating that they “had not been able to arrive at the necessary consensus”.⁶⁸ However, significant implications followed. Some states argued that by not reaching a vote, the Commission did not intend to guarantee the rights in the Brazil Resolution, and considered that expressly refusing the language of sexual orientation may alleviate any obligations arising from further interpretations of the law.⁶⁹ However, in elevating discussion, this led to a joint statement supported by 54 states that that they

64 Heinze, E., “Sexual Orientation and International Law: A Study in the Manufacture of Cross-cultural Sensitivity”, *Michigan International Law Journal*, Vol. 22, 2001, p. 294.

65 Commission on Human Rights, *Human Rights and Sexual Orientation: Draft Resolution*, UN Doc. E/CN.4/2003/L.92, 2003.

66 See above, note 38, p. 671.

67 Lau, H., “Testing the Universality of International Human Rights Law”, *The University of Chicago Law Review*, Vol. 71, 2004, p. 1703.

68 Commission on Human Rights, *Summary Record of the 49th Meeting*, E/CN.4/2004/SR.49, 22 April 2004, Para 100.

69 See above, note 38, p. 671.

“cannot ignore” violations of human rights based on SOGI,⁷⁰ which despite having little value and strength in terms of declaring rights, importantly marked the first inclusion of gender identity in a UN statement.

It was not until 2008, that the first significant discussion of the concerns of SOGI were placed on the UN agenda, this time within the General Assembly. It was here that the Netherlands and France presented the “UN Declaration on Sexual Orientation and Gender Identity”, originally signed by 66 states, and later increasing to 85.⁷¹ It strongly affirmed the application of non-discrimination principles, and condemned a number of abuses such as the criminalisation of same-sex relations, and violence and torture. This provided the broadest protections detailed within the political bodies (despite no reference to positive rights). Yet, in failing to garner support, it merely remained a declaration of symbolic nature, and “offers no framework for assessing sexual and gender rights claims”.⁷² Interestingly, two states signing the declaration criminalised same-sex relations at that time, perhaps an apt demonstration of the lack of real value or force placed on the declaration. It is also significant that the counter-statement that followed drew near equal support in proclaiming a “misinterpretation” of the law, with “no legal foundation”, and furthermore the “right of member states to enact legislation meeting the just requirement of morality and public order”.⁷³

Furthermore, this increased attention produced an apparent backlash in 2010, when the previous success of the inclusion of sexual orientation in annual resolutions on extrajudicial summary executions was suddenly removed. Considering the text concerned both basic and fundamentally accepted rights, this marked clear regression for the movement.⁷⁴ Though restored the following year, this illustrates that “the subject area is highly controversial and in a state of political flux”.⁷⁵

However, in 2011, a significant milestone was reached for the SOGI rights movement, when the Human Rights Council adopted a Resolution (2011 Resolution) though only by 23 members to 19, and with three abstentions.⁷⁶ This expressed “grave concern” for global acts of discrimination and violence, but made little reference to rights otherwise, leading to criticism

70 See above, note 6, p. 230.

71 Human Rights Council, *Joint Statement from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly*, UN Doc. A/63/635, 18 December 2008.

72 Wolfe, C., “The United Nations Declaration on Sexual Orientation and Gender Identity 2008: Tracing the Evolution of LGBT Minority Rights Within the UN”, *Social and Policy Review*, Vol. 22, 2012, p. 57.

73 See above, note 3, p. 367.

74 Crawley, W., *Does the UN Now Support the Execution of Gays?*, *BBC News*, 19 November 2010.

75 See above, note 5, p. 343.

76 Human Rights Council, *Resolution 17/19, Human Rights, Sexual Orientation and Gender Identity*, UN Doc. A/HRC/RES/17/19, 14 July 2011.

that “despite the positive perception (...) [it] fails to clearly identify rights for LGBT people”.⁷⁷ In addition, the weak consensus leaves the strength of the 2011 Resolution dubious, notably as it split the Human Rights Council, a body exclusively dedicated to the protection of human rights, down the middle.⁷⁸ Nevertheless, the real legacy of the 2011 Resolution may have come from the mandated request that the Office of the High Commissioner for Human Rights (OHCHR) conduct a study documenting SOGI abuses – the first real, though limited, action towards a continued focus on SOGI.⁷⁹ In addition, it importantly allowed for a constructive 2012 Panel Discussion dedicated to SOGI, despite resulting in an unprecedented walkout by a number of states before its commencement.

The Human Rights Council importantly passed another resolution in 2014,⁸⁰ reaffirming its 2011 predecessor in condemning discrimination based on SOGI in all regions of the world, with a limited increase in support (25 in favour, with 14 against and 7 abstentions). Attempts to restrict its relevance to those only who had expressly supported SOGI rights in their country were rejected, and the resolution requested another 2015 follow up report documenting SOGI abuses, which demonstrates another important and dedicated focus on SOGI issues.⁸¹

However, the texts of the statements, declarations and resolutions themselves fail to clarify any real content of SOGI rights, and as such, “the contours of [SOGI] rights are unclear”.⁸² In 2007, 29 independent experts, drawing on the applicability of existing international framework and attempting to fill the gap left by the political bodies, produced the Yogyakarta Principles.⁸³ The principles have received some positive response. However, despite the fact that some drafters held current or former UN posts, their origination from outside the UN and a lack of UN support in wholly endorsing the principles has downplayed their significance and generated accusations that the instrument was produced by “individuals acting on their own accord”.⁸⁴

77 Braun, K., “Do Ask, Do Tell: Where is the Protection against Sexual Discrimination in International Human Rights Law?” *American University International Law Review*, Vol. 29, 2014, p. 888.

78 See above, note 3, p. 367.

79 Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity – Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/19/41, 17 November 2011.

80 Human Rights Council, *Human Rights Sexual Orientation and Gender Identity*, UN Doc. A/HRC/27/L.27/Rev.1, 24 September 2014.

81 International Gay and Lesbian Human Rights Commission (IGLHRC), “UN Human Rights Council Votes To Support LGBT Rights”, 26 September 2014, available at: <http://iglhrc.org/content/un-human-rights-council-votes-support-lgbt-rights>.

82 See above, note 67, p. 1698.

83 Yogyakarta Principles: Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity, 2007.

84 For example, Malta, see above, note 77, p. 886.

Ultimately, any discussion of enshrining sexual orientation as an explicit category within new declarations and resolutions “has consistently been met with unyielding opposition”.⁸⁵ Whilst having the potential to produce important legal consequences, agreement and repetition are important components of norm development; which have faced limited success in respect of SOGI. When confronted with such a high level of reproach, the legitimacy and strength of affirmations of basic SOGI rights within these forums is weakened.⁸⁶ It is necessary to aim particular criticism towards the Human Rights Council; a human rights focussed body that nonetheless sees the election of countries like China, Russia, Cuba and Saudi Arabia who themselves “systematically violate the human rights of their own citizens and they consistently vote the wrong way on the UN initiatives to protect the human rights of others”.⁸⁷ Tactical and bloc voting has created double standards and selectivity in key decisions, and such candidates “undermine the credibility and effectiveness of the UN human rights system”.⁸⁸ Often instead of advancing human rights issues, these political bodies have instead created a space for airing arguments from delegates engaging in empty rhetoric, lacking legitimate legal grounds, and essentially leaving the power of advancing SOGI rights in their unwilling hands. Compared to this, it seems a “vigorous defence of the universality of rights related to sexual orientation has generally been lacking at the UN”.⁸⁹ One contributing factor may be the mere handful of SOGI NGO’s granted UN consultative status, limiting their ability to take part in UN activities and counter opposition, and demonstrating a lack of integration.⁹⁰

In placing SOGI on the UN agenda, the political forums have managed somewhat to affirm the relevance of SOGI within international human rights. However, within SOGI related statements, resolution and declarations, it can be seen that even the most basic affirmations of SOGI rights have failed to achieve significant consensus, and contain little useful articulation. Thus, the status afforded to SOGI rights in their legal development remains of limited value. As the application of human right principles to SOGI “still remains a matter of broad interpretation”,⁹¹ it leaves open restrictions on rights, and limits the ability for advocates to challenge their state. Whilst delineating the content of rights is not incumbent on their existence, Donnelly notes that “without authoritative international standards (...) to what can states be held

85 See above, note 72, p. 55.

86 Roseman, M.J. and Miller, A.M., “Normalising Sex and its Discontents: Establishing Sexual Rights in International Law”, *Harvey Journal of Law and Gender*, Vol. 34, 2011, p. 366.

87 Human Rights Foundation, “The UN’s Human Rights Council Farce: U.S. Silent as Brutal Regimes Take Seats”, 15 November 2013, available at: <http://humanrightsfoundation.org/news/the-uns-human-rights-council-farce-us-silent-as-brutal-regimes-take-seats-00329>.

88 *Ibid.*

89 See above, note 64, p. 284.

90 See above, note 6, p. 229.

91 See above, note 72, p. 57.

accountable?”⁹² In order to successfully create change, norms must be further spelt out into obligations and rights, with clear components in identifying their path to national implementation. This is important not only in providing political pressure for reform, but to provide a clear avenue and base from which state laws may be successfully challenged.

The analysis in this section has demonstrated that whilst SOGI has been affirmed numerous times as applicable to international human rights law, mainly regarding non-discrimination, the strength and boundaries of such rights remain unclear. Thus, in concluding that “a certain degree of legal uncertainty persists”,⁹³ it must be concluded that the UN has not sufficiently developed and articulated the status of SOGI rights.

3. Addressing Violations of Sexual Orientation and Gender Identity Rights in Monitoring Mechanisms

Analysing the extent to which violations of SOGI rights are sufficiently addressed within broader state monitoring mechanisms provides a useful indication of their integration. In examining the concluding observations of the HRC and the extra-conventional mechanisms within the special procedures and the Universal Periodic Review, the truly ad-hoc and fluctuating attention placed on SOGI issues becomes evident.⁹⁴

a. HRC Concluding Observations

The HRC, in undertaking a mandatory state reporting procedure for those bound by the IC-CPR,⁹⁵ has been the most active in terms of its inclusion of SOGI within concluding observations.⁹⁶ The function of these recommendatory comments is both highlighting violations of human rights, and praising positive progression towards treaty obligations.

As concluding observations link human rights issues directly to a binding treaty counter-part, they encompass a somewhat more legalistic avenue for addressing SOGI rights violations; though its exact authority is unsettled. This is perhaps demonstrated by the fact that the HRC referenced sexual orientation in its concluding observations before the *Toonen* decision in 1994, and yet that decision is regarded as the first real recognition of sexual

92 Donnelly, J., “The Relative Universality of Human Rights”, *Human Rights Quarterly*, Vol. 29, 2007, p. 31.

93 See above, note 5, p. 341.

94 Whilst being unable to present a fully comprehensive examination, section 3 draws on significant examples and trends in analysing each mechanism’s inclusion of SOGI issues.

95 ICCPR, Article 4.

96 Other treaty bodies have included SOGI within state reports to a lesser extent. For a recent selection, see International Commission of Jurists (ICJ), *Sexual Orientation and Gender Identity in International Human Rights Law: The ICJ UN Compilation*, ICJ, 5th Edition, 2013.

orientation rights at the UN.⁹⁷ In this regard, some states have readily refused any such authoritative interpretations; for instance, following a recommendation to repeal its sodomy law, Trinidad and Tobago stated that due to the lack of any explicit mention of sexual orientation in the ICCPR they would continue criminalisation and follow a “conservative” approach.⁹⁸ Despite this contestation, the interpretative function of a monitoring body cannot be without its consequences and garners at least some special status. In this sense, the importance of including SOGI issues remains vital for both the purposes of highlighting abuses, and providing such interpretation.

A reasonable span of issues have been recognised by the HRC in its observations, though focus has mainly concerned the condemnation of violence, criminalisation of same-sex relations, and anti-discrimination provisions.⁹⁹ The HRC has, however, at times appeared to delve further into SOGI issues by importantly addressing issues such as the social stigma surrounding SOGI,¹⁰⁰ partnership benefits for same-sex couples,¹⁰¹ or other SOGI rights such as freedom of expression and assembly.¹⁰² This has been an important forum in bringing attention to gender identity issues, as little explicit mention has been made elsewhere in the HRC.¹⁰³ Nonetheless, gender identity has still received considerably less attention than sexual orientation. Moreover, although it has been an important forum, the language used by this expert body in its recommendations arguably suggests a “lack of a nuanced understanding on the part of the HR Committee”.¹⁰⁴ For instance, in its observations concerning transsexuals in Ecuador, reference was made to the placement of women in rehabilitation centres for undergoing “sexual re-orientation treatments”.¹⁰⁵

Furthermore, the language in the HRC’s concluding observations has been noted to facilitate a lack of urgency and importance, tending towards generalised comments on violations rather than express and affirmative language on SOGI rights.¹⁰⁶ For instance, Sudan’s criminalisation of same-sex relations on penalty of death was denounced by the HRC as incompatible with the ICCPR, but the HRC then merely asked for information on the patterns and

97 HRC, *Concluding observations, Norway*, UN Doc. CCPR/C/79/Add.27, 4 November 1993.

98 HRC, *Comments by the Government of Trinidad and Tobago on the concluding observations of the Human Rights Committee*, UN Doc CCPR/CO/70/TTO/Add.1/2001, 15 January 2001.

99 See above, note 36, p. 408.

100 HRC, *Concluding observations, Ethiopia*, UN Doc. CCPR/C/ETH/CO/1, 19 August 2011.

101 HRC, *Concluding observations, Armenia*, UN Doc. CCPR/C/ARM/CO/2, 31 August 2012.

102 HRC, *Concluding Observations, Georgia*, UN Doc. CCPR/C/GEO/CO/4, 23 July 2014.

103 HRC, *Concluding observations, Ireland*, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008.

104 See above, note 36, p. 414.

105 HRC, *Concluding observations, Ecuador*, Un Doc. CCPR/C/ECU/CO/5, 4 November 2009.

106 See above, note 9, p. 334.

use of sentences, rather than making any recommendation to de-criminalise (which request, notably, Sudan did not respond to).¹⁰⁷ Indeed, the HRC has regularly asked for “appropriate action” to be taken in response to SOGI issues¹⁰⁸ – a method which not only significantly fails to aid states in implementing measures to address violations, but makes it difficult to assess compliance. Thus, Narayan observed that the lack of strong language regarding SOGI rights abuses has meant that “states take limited, ineffective action to appease the Committee or do not respond altogether”.¹⁰⁹ When this approach is taken, it demonstrates a lack of real commitment to the issues, and in terms of its effectiveness, is arguably little more use than not being referenced at all.

Furthermore, this process faces difficulties which affect its ability to broadly identify and address violations, beyond merely only being able to issue such observations to ICCPR state signatories, effectively ignoring states like Qatar who have neither signed nor ratified the IC-CPR.¹¹⁰ Firstly, backlog in both consideration of state reports and their submission has meant that states like Ghana, which has criminalised same-sex relations, simply fail to be addressed by the HRC.¹¹¹ In addition, the process has proven itself highly dependent on shadow reports in order to pay attention to even the most obvious encroachments. For example, the HRC has failed to comment on even half of the states criminalising homosexuality, and for those which it has addressed its concern, there are strong links to identification in shadow reports.¹¹² This demonstrates both a lack of prioritisation of SOGI violations and a weakness in approach, as the work of civil society is “increasingly repressed”.¹¹³ There is further evidence that SOGI rights remain subject to discretionary rather than systematic inclusion; as Gerber and Gory noted, within the ten year period focussed on, SOGI issues were only frequently raised by five out of a possible 35 HRC members.¹¹⁴ Ultimately, inconsistent practice continues to saturate the work of the HRC, leading to discrepancies in results. For instance, 2013 saw the HRC condemn the continued sodomy laws in Belize,¹¹⁵ but fail to address comparable laws in its concluding observation to Angola.¹¹⁶

107 HRC, *Concluding observations, Sudan*, UN Doc. CCPR/C/79/Add.85/1997, 19 November 1997.

108 For example, HRC, *Concluding observations, Cameroon*, UN Doc. CCPR/C/CMR/CO/4, 4 August 2010.

109 See above, note 9, p. 334.

110 Accurate as of 14 September 2015.

111 Seventy-seven states are currently over 10 years late with their reports: see Office of the High Commissioner for Human Rights, “Late and non-reporting states”, available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx.

112 See above, note 36, p. 415.

113 See above, note 96, p. 7.

114 See above, note 36, p. 410.

115 HRC, *Concluding observations, Belize*, UN Doc. CCPR/C/BLZ/CO/1, 26 March 2013.

116 HRC, *Concluding observations, Angola*, UN Doc CCPR/C/AG/CO/1, 29 April 2013.

Overall inclusion of SOGI references has been described by O’Flaherty as “frequent”, despite citing a fairly low engagement of 13 recommendations out of a total of 84 recommendations within a six year period.¹¹⁷ However, a recent study by Gerber and Gory found 54 out of a total of 139 recommendations related to SOGI within the ten year period studied, and concluded that there was “considerable room for improvement”.¹¹⁸ It must be determined in this regard that engagement with only around a third of recommendations, when SOGI violations are thought to exist in every state, does not demonstrate widespread and sufficient attention to SOGI violations, especially considering that not all recommendations are necessarily criticisms.

Thus, whilst the HRC state reporting mechanism should arguably demonstrate the greatest potential for addressing SOGI issues, in building on treaty jurisprudence and utilising its interpretative function, it must be concluded that “the effectiveness of this scheme has not yet been maximised”.¹¹⁹ Though it has usefully interpreted some broader associated obligations, and whilst SOGI inclusion appears to be increasing, it is nonetheless required to be significantly more consistent and expansive in its recommendations.

b. Special Procedures

The special procedures system comprises groups of independent experts (as individuals or part of a working group) mandated by the Human Rights Council to investigate and report human rights issues within the ambit of country specific or thematic mandates (though no mandate is strictly dedicated to SOGI issues).¹²⁰

This mechanism has been referred to as “a response to palliate shortages, gaps and lack of effective procedures of the conventional system”.¹²¹ It has realised some of these intentions in regards to SOGI, particularly ground-based investigations of violations which may go unreported by civil society, and even more likely by states. For example, the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran undertook investigations into SOGI violence based on individual interviews, and noted that many were “beaten by family members at home, but could not report these assaults to the authorities out of fear that they would themselves be charged with a criminal act”.¹²² In addition, the Working Group on Arbitrary Detention has consistently investigated and commented on patterns of violence related to cruel punishments and criminalisation of same-sex relations, as well as the gap between

117 See above, note 5, p. 337.

118 See above, note 36, p. 407.

119 See above, note 9, p. 331.

120 There are currently 41 thematic and 14 country mandates (as of 12 September 2015).

121 Isa, F.G. and de Feyter, K., *International Human Rights Law in Global Context*, Deusto, 2009, p. 621.

122 Human Rights Council, *Report of the 22nd session Agenda item 4*, UN Doc. A/HRC/22/56, 28 February 2013.

legislative and practical protection.¹²³ They have also frequently cited *Toonen* and Article 26 of the ICCPR, and so the special procedures have been useful in re-affirming and complimenting the existing system for protection.¹²⁴

Inclusion of SOGI within special procedures has meant not necessarily having to wait for a state's report or periodic review in undertaking urgent responses to violations. This occurred in respect of Nigeria's proposed regressive legislation on same-sex relations, whereby a joint report not only urged Nigeria to "reconsider the Bill and to ensure that any law that is adopted conforms to international human rights norms and to Nigeria's obligations under international law", but importantly commented that cultural practices "do not absolve governments from their duty to promote and protect all human rights and fundamental freedoms".¹²⁵

Further, outside of mapping violations, some mandate-holders have undergone important exploration into the content of SOGI rights and underlying causes for violations. For instance, the Special Rapporteur on the human right to safe drinking water and sanitation has dealt with SOGI discrimination in access to safe water and sanitation, and noted that combating stigma "requires raising awareness of stigmatizing practices that are pursued under the umbrella of culture, religion and tradition".¹²⁶ Mandate-holders have also increasingly referenced issues outside of discrimination and violence, though this remains a principal focus, to more positive rights of sexual autonomy.¹²⁷ However, these interpretations have resulted in somewhat piecemeal and divergent understandings of SOGI issues, as they are also only considered to the extent that they overlap with the issues of a particular mandate.

The inclusion of SOGI issues has also faced a significant hurdle in relation to the scope of mandates. One of the most controversial examples has been the elaboration of the Special Rapporteur on the right to education in noting comprehensive education requires special attention to sexual diversity, as "everyone has the right to deal with his or her own sexuality without being discriminated against" and "sexual education is a basic tool for ending discrimination against persons of diverse sexual orientations".¹²⁸ This interpretation was followed by enormous hostility, and numerous states condemned the "expanded interpretation by the mandate holder

123 Human Rights Council, *Report of the Working Group on Arbitrary Detention. Addendum: Mission to Colombia*, UN Doc. A/HRC/10/21/Add.3, 16 February 2009.

124 Human Rights Council, *Opinions adopted by the Working Group on Arbitrary Detention (Cameroon)*, UN Doc A/HRC/4/40/Add.1, 2 February 2007.

125 "Independent UN Experts Express Serious Concern over Draft Nigerian Bill Outlawing Same-Sex Relationships", cited in ICJ, *Sexual Orientation and Gender Identity in International Human Rights Law: The ICJ UN Compilation*, ICJ, 5th Edition, 2013, p. 122.

126 General Assembly, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Stigma and the realization of the human rights to water and sanitation*, UN Doc. A/HRC/21/42, 2 July 2012.

127 Economic and Social Council, *Report of the Special Rapporteur on Violence Against Women*, UN Doc. E.CN.4/1999/88.Add, 1999.

128 General Assembly, *Report of the United Nations Special Rapporteur on the Right to Education*, UN Doc. A/65/162, 23 July 2010.

of his mandate” without the authority of the Human Rights Council, on issues with “no universal agreement”.¹²⁹ This concern has been reiterated further by mandate holders who have admitted that they have failed to address such issues, stating that, as the question of sexual orientation was not debated within the Human Rights Council on the creation of the mandate, they believed more express authority was required in order for them to consider sexual orientation.¹³⁰ The mere reference to sexual orientation or gender identity within reports can lead to accusations of “over-stepping mandates”, an accusation used by states as an excuse to undermine any work undertaken by mandate holders, and to limit the overall value of that work.¹³¹

Whilst it is inherently more difficult to assess the extent to which SOGI issues are adequately addressed, it should be noted that in absence of a SOGI themed mandate, any inclusion of SOGI issues, particularly the type of in-depth discussion highlighted above, is significant in addressing gaps left open throughout the UN system. It is notable that some reference to SOGI has been made in at least 26 separate mandates since 2007, which does suggest a reasonably wide regard for SOGI issues, and a regard not only confined to violence or torture.¹³² This is important as it exhibits the opinions of a multitude of experts and their interpretation of SOGI as a relevant rights concern, and importantly discusses how SOGI relates to a number of other rights. However, considering the wide discretion for mandate holders, many have remarked there is greater room for attention, and noted that the current practice is “inconsistent”.¹³³ It is also worth considering that whilst some inclusion has provided a thorough focus on SOGI issues, many mandate holders merely make token, minimal reference within a list of discriminated categories¹³⁴ – though of course even highlighting vulnerability and the need for protection deserves some merit. Even these marginal actions that make some reference to those of particular sexual orientations as vulnerable or discriminated against often exclude any reference to gender identity.¹³⁵ A particularly notable missed opportunity also concerns the failure of the UN Sub-Commission on the Promotion and Protection of Human Rights (or its replacement Advisory Committee) to take up SOGI rights within its ambit, despite its role in developing emerging rights, and it having received numerous calls to do so from NGOs.¹³⁶

129 UN News, “General Assembly, Human Rights Council Texts Declaring Water, Sanitation Human Right ‘breakthrough’; Challenge Now to Turn Right into Reality, Third Committee Told”, UN News, 25 October 2010, available at: <http://www.un.org/News/Press/docs/2010/gashc3987.doc.htm>.

130 Human Rights Council, “Statement of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Interactive Dialogue”, 8 September 2006.

131 See above, note 86, p. 363.

132 The ICJ has documented 26 inclusions alone in the 2007-2013 period focussed on. See above, note 96, p. 5.

133 See above, note 6, p. 231.

134 Human Rights Council, *Report of the independent expert on minority issues*, UN Doc. A/HRC/13/23, 7 January 2010.

135 Human Rights Council, *Recommendations of the Forum on Minority Issues at its Third Session*, UN Doc. A/HRC/16/46, 31 January 2011.

136 See above, note 22, p. 11.

Overall, there has been some significant in-depth inclusion of SOGI issues within the special procedures, especially bearing in mind the lack of a dedicated mandate, and thus any requirement for such mention. However, fundamentally, SOGI is neither consistently nor comprehensively referenced, and “there are some violations of rights that are not addressed at all by the existing system”.¹³⁷ There is an unquestionable “need for special procedures mandate-holders to be able to integrate these human rights issues in their work without being attacked for doing so”.¹³⁸ However, to the extent that a lack of explicit permission to address SOGI concerns is hindering individual mandates, this need will likely remain unfulfilled.

c. *Universal Periodic Review*

The UPR arose from the recalibration of the Human Rights Commission, and allows individual states to make recommendations on the human rights record of any other state. With no restraint due to treaty membership or theme, the UPR indeed provides a uniquely inclusionary forum for controversial SOGI issues, as well as civil society participation.¹³⁹ The review categorises the strength of a recommendation from one to five and state responses fall either into the “accepted” category or are otherwise considered “noted”.¹⁴⁰

Whilst the scope of issues has largely concerned decriminalisation of same-sex relations and anti-discrimination, the UPR has further made significant reference to some other issues, such as state duties of public awareness and sensitisation for both sexual orientation and gender identity.¹⁴¹ The flexibility of this process has also allowed for the inclusion of more positive rights not affirmatively acknowledged in any other state monitoring mechanism, such as reference to same-sex marriage¹⁴² and same-sex adoption rights.¹⁴³

137 See above, note 96, p. 6.

138 Human Rights Council, *Human Rights Council Panel on Ending Violence and Discrimination Against Individuals Based on their Sexual Orientation and Gender Identity, Summary of discussion*, UN Doc. A/HRC/19/4, 1, 7 March 2012, Para 25.

139 References are largely made to the first round as has been completed; however, where appropriate reference to the second uncompleted round is made.

140 Recommendations range from 1 (minimal action) to 5 (specific action), available at: http://www.upr-info.org/database/files/Database_Action_Category.pdf; and http://www.upr-info.org/database/files/Database_Methodology_Responses_to_recommendations.pdf.

141 For example, Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Antigua and Barbuda*, UN Doc. A/HRC/19/5, 14 December 2011.

142 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Austria*, UN Doc. A/HRC/17/8, 18 March 2011.

143 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Australia*, UN Doc. A/HRC/17/10, 24 March 2011.

In undertaking an overall analysis on the first round of review, it was found that SOGI¹⁴⁴ issues attracted 503 recommendations.¹⁴⁵ This number does, however, form part of a total of 21,356 recommendations, translating to around 2.3% engagement; leading Schulanbusch to designate SOGI as “a marginal issue”.¹⁴⁶ Nonetheless, it should also be borne in mind that within a UN database-compiled list of issues, SOGI ranked 24th out of 55 broad categories in the first round.¹⁴⁷ These statistics show that SOGI issues have been integrated as a genuine concern, though not a main priority.

One important point to note, however, is that the 503 recommendations do not necessarily translate into 503 distinct issues. For example, evidence of overlap can be seen in the five recommendations for decriminalisation of same-sex relations that Brunei Darassulam received.¹⁴⁸ However, issuing comparable recommendations should not be readily considered superfluous, as the strength of five parallel recommendations in comparison to one creates the kind of significant pressure often incumbent to change. For instance Cameroon, famous for its vicious human rights record in regards to SOGI, accepted a recommendation in the second round of reviews to investigate police conduct regarding violence based on sexual orientation after receiving (and rejecting) seven recommendations in the first round.¹⁴⁹

In addition, the category of recommendations suggests a targeted and weighty regard for SOGI concerns when recommending change, as most fell into the two strongest categories; 279 of these attracting category five, with 158 attracting category four, and with only one recommendation receiving a category one recommendation.¹⁵⁰ However, one reference from Bangladesh suggested that Tonga continue criminalising same-sex relations, as it fell “outside the purview of human rights norms”; an instance described as both “novel” and “omi-

144 For the purposes of this section references to SOGI are references to sexual orientation, reference to gender identity, or references to both. The UPR info system processes these categories together in its data.

145 Results generated from highlighting “sexual orientation and gender identity”, “1st round review” and “recommendations only” within the UPR Info Database, available at: <http://www.upr-info.org/database>.

146 Schulanbusch, M.D., “Sexual Orientation and Gender Identity Rights in the Universal Periodic Review” Dissertation for Masters in Human Rights Practice, University of Gothenburg School of Business and Social Sciences, 2013, p. 35.

147 UPR Info, “Statistics of Recommendations”, available at: <http://www.upr-info.org/database/statistics/index.php?cycle=1>.

148 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Brunei Darassalum*, UN Doc. A/HRC/13/14, 4 January 2010.

149 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Cameroon*, UN Doc. A/HRC/24/15, 5 July 2013.

150 Results generated from highlighting “sexual orientation and gender identity”, “round 1”, “recommendations only” and “action category”, within the UPR Info Database, available at: <http://www.upr-info.org/database>.

nous”.¹⁵¹ This demonstrates utilisation of the UPR in facilitating denunciation of SOGI rights, beyond merely refusing recommendations.

It also important to note that the span of recommendations in this first round came from only 39 states, the majority of which are from “the West”.¹⁵² This demonstrates that SOGI issues remain a low priority amongst most states, whilst arguably serving to facilitate arguments that such issues stem from western values. This may be a contributing factor to SOGI issues having been generally rejected more than the overall rate of recommendations.¹⁵³ This has further meant that, with the crux of the concentration on other regions, only 57 recommendations were given to western states.¹⁵⁴ While this may indicate a priority towards those violations perceived as most grave, it allows for weaker scrutiny of other violations.

The extent to which gaps exist in addressing SOGI rights can be demonstrated further with the reliance on civil society information. For instance, the Philippines escaped SOGI-related recommendations in the first round following a lack of inclusion within civil society submissions. However, a submission in the second round highlighting widespread discrimination generated a recommendation for comprehensive discrimination legislation.¹⁵⁵ Once again, this can be problematic as although national level submissions from civil society offer the best source of information, the existence of civil society and the extent to which it may face danger in contributing to international scrutiny necessarily limits its abilities.¹⁵⁶

Despite these shortfalls, the heightened focus on decriminalisation has achieved some significant results, with acceptance from five countries within the first round of recommendations to de-criminalise sexual orientation.¹⁵⁷ An important example here is the Seychelles, which, escaping criticism for this legislation under the treaty review process, not only accepted decriminalisation but agreed to take measures to prohibit discrimination based on both sexual orientation and gender identity.¹⁵⁸ Cowell and Milon have acknowledged in this regard that:

151 Caroll, A., “A Voice for Sexual Orientation and Gender Identity in the Universal Periodic Review”, *Centre for Criminal Justice and Human Rights*, 4 December 2014.

152 See above, note 146, p. 35.

153 Seventy-three percent of recommendations in the first round were accepted overall compared to only 36% of SOGI recommendations, *Ibid.*, p. 35.

154 See above, note 151.

155 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Philippines*, UN Doc. A/HRC/21/1, 29 July 2012.

156 See above, note 8, p. 13.

157 *Ibid.*, p. 12.

158 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Seychelles*, UN Doc. A/HRC/18/7, 11 July 2011. See also: UPR Info, “Responses to Recommendations, Seychelles”, 5 January 2012, available at: http://www.upr-info.org/sites/default/files/document/seychelles/session_11_-_may_2011/recommendationstoseychelles2011.pdf.

[A] full or active commitment to repeal in response to recommendations is generally given in a country where the penal provisions remain largely or totally un-enforced and are more a matter of historical legacy than a reflection of current government policy.¹⁵⁹

Nonetheless, this indicates the importance of monitoring to initiate discussion, where otherwise a lack of attention may affect no commitment to change.

Overall, it is considered that “[t]he UPR has been a very effective process in advancing LGBT human rights at the UN”.¹⁶⁰ It has demonstrated itself as valuable in tackling some of the gaps left elsewhere, and whilst not necessarily as a high overall priority, seems to include SOGI issues more readily than other mechanisms. In this regard, the political element hindering development within the political bodies has proven to allow some states to push for issues here. Despite this, disparity and inconsistency remains, and as inclusion is limited largely to the priorities of states, this will likely remain in a state of flux.

Analysis has shown some demonstrable efforts to address SOGI issues within the aforementioned monitoring mechanisms, perhaps surprisingly so considering the extent of development and lack of consensus in section 2. It is precisely because of the disregard shown in authoritatively developing the law that attention in the monitoring mechanisms has been so vitally important; it has proven to keep SOGI issues alive within the UN system, and helped to solidify SOGI issues as a human rights concern. In particular, the work undergone within these monitoring systems in highlighting key issues such as the importance of positive obligations, including anti-discrimination legislation and public awareness, is a significant contribution. In this sense, the monitoring mechanisms are facilitating “the global elaboration of how human rights relate to SOGI”.¹⁶¹ However, it should also be noted that where such progress has occurred, this provides the groundwork for, and is not an alternative to, a more authoritative articulation of SOGI rights.¹⁶²

Multiple problems persist with current monitoring, and a lack of consistent focus on the scope of SOGI issues within the full range of states demonstrates that addressing SOGI rests on discretionary priorities over comprehensive integration. Importantly, gaps remain which ignore even the most flagrant denials of rights, and an over-reliance on information and advocacy from civil society is a demonstrable concern. While UN monitoring mechanisms are often considered ineffective or impotent,¹⁶³ where advocates are unable to challenge laws

159 See above, note 39, p. 348.

160 See above, note 96, p. 7.

161 See above, note 8, p. 11.

162 See above, note 86, p. 366.

163 Mutua, M., “Standard Setting in Human Rights: Critique and Prognosis”, *Human Rights Quarterly*, Vol. 29, 2007, p. 547.

domestically or effectively lobby in politics, these mechanisms may nonetheless remain the best avenue to highlight abuses and effect change, and therefore it remains vital that they mainstream SOGI issues more significantly.

Thus, what section 2 and section 3 have collectively shown is that whilst SOGI rights appear an emerging concern, overall protection afforded in both the development of rights and the extent to which they are monitored for violations does not demonstrate that the necessary room has been made in the international human rights framework. There is a clear need to move towards a broader mainstreaming of SOGI issues throughout the UN, in order to combat the ad-hoc and piecemeal approach to the law and monitoring thus far.

4. Determining a Strategy for the Future of Sexual Orientation and Gender Identity Rights

One principal feature that the SOGI rights movement appears to lack at present is reference to a long term strategy for facilitating progression of SOGI issues within the UN.¹⁶⁴ In order to contribute to this debate, and drawing on the analysis in the preceding sections, this article considers two different options to advance SOGI rights.

a. A Specialised Convention

The creation of a specialised treaty has produced the most active discussion amongst academics,¹⁶⁵ likely as proliferation of similar instruments has generated such palpable precedent. Indeed, Heinze has even suggested that failure to generate one may depict SOGI rights as un-worthy, “[t]he longer sexual minorities fail to get one, the greater the suspicion that there must be some good reason”.¹⁶⁶

The most patent benefit of a treaty is the binding legal status which would be afforded to SOGI rights; though only incumbent on consenting states. In addition, and significantly, elevating SOGI rights offers retort to those opposing their existence merely on the basis of lacking explicit mention within *any* treaty.¹⁶⁷ The legal effects may therefore extend beyond signatories in allowing their steady rise; as Hathaway has noted, “once norms favouring human rights are entrenched, they can be difficult to dislodge”.¹⁶⁸ However, it is also true that

164 Persad, above note 3, p. 362. Persad notes advocates have focussed on encouraging and facilitating the jurisprudential percolation of SOGI rights within states.

165 See above, note 163, p. 628.

166 See above, note 64, p. 297.

167 See above, note 77, p. 890.

168 Hathaway, O.A., “Do Human Rights Treaties Make a Difference?” *The Yale Law Journal*, Vol. 111, 2002, p. 2004.

such a process in itself “may take decades to lead to tangible change”,¹⁶⁹ and provide more shortcomings to SOGI rights protection for non-signatories than benefits. For instance, it may feed opponent states with a sense of choice towards SOGI rights, asserting that failure to accept such binding obligations exonerates them from any respective duties. This argument goes hand in hand with the assertion by Alston and Crawford that treaty bodies stand in increasing isolation from the rest of the UN system,¹⁷⁰ which could then result in SOGI rights being effectively “boxed away”. On the other hand, the provision of a framework articulating SOGI rights, notably absent at present, could be an invaluable gain. This would bear legitimacy from originating strictly within the UN, and prove a constructive tool for advocacy in even non-signatory states.

The collaborative efforts of states in drafting such documents arguably substantiates that “treaties codify cultural standards from the different cultural traditions that make up the UN community”.¹⁷¹ In this regard, it may provide a valuable repository against cultural arguments. However, such a state of agreement would need to be met, and a frequent pattern in treaty drafting is the use of delays in order to block consensus, creating obstacles to its conclusion. This can be seen from previous state actions, including following the draft Brazil Resolution, where hundreds of amendments were threatened to the text in order to paralyse it.¹⁷²

One option for reducing this possibility is to settle for minimalist scope. For instance, Narayan argues for a fundamental focus on violence and state-persecution.¹⁷³ However, to the extent that this might establish a difficult barrier to the achievement of other important SOGI rights, it may represent a thorny compromise for consensus. Indeed, following the reactions within the political bodies to texts concerning basic rights, it is often considered unlikely that a comprehensive treaty may meet success if proposed in the near future.¹⁷⁴ If an all-inclusive articulation did indeed pass the drafting stage, in suffering comparable contention to women’s rights, it may be similarly subject to a high number of reservations, as occurred with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁷⁵ Indeed, this is often regarded to have left the Convention somewhat defunct, and Mutua argues “[the] reservations against CEDAW are the clearest sign yet of

169 *Ibid.*, p. 2022.

170 Alston, P. and Crawford, J., *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000, p. 175.

171 Addo, M.K., “Practice of the United Nations Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights”, *Human Rights Quarterly*, Vol. 32, 2010, p. 620.

172 See above, note 6, p. 230.

173 See above, note 9, p. 344.

174 See above, note 3, p. 368.

175 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS, 18 December 1979.

the need to rethink the view that treaties ought to be the preferred method for standard setting in human rights”.¹⁷⁶

In addition, hard legal effect may have limited consequences in practice, as “fundamental to the project of international law is the assumption that legal commitments meaningfully condition the exercise of state power”.¹⁷⁷ This assumption may not always hold true as is shown through instances demonstrating the ineffectiveness of treaty monitoring, such as following the aforementioned decision of *Fedotova*, when Russia responded to a finding that its “homosexual propaganda” laws violated Article 19 by strengthening the laws and providing fines for information sharing to minors of “homosexual propaganda”.¹⁷⁸

Indeed, as usually only a limited number of states sign up for individual communications, this task would be left to state reports, often considered an ineffective means of monitoring and enforcement. In this regard, treaties may be utilised as “a substitute for, rather than a spur to, real improvement in human rights practices”.¹⁷⁹ Such usage could have negative consequences for SOGI, and it has been suggested that declaring rights without securing remedies for those violations “may actually be counterproductive”.¹⁸⁰ To the extent that a treaty may provide any effective monitoring, this would also be limited to signatory states.

It follows from this that even “mooting the idea of a specialised treaty as a means of clarifying and advancing sexual minority rights in the international human rights order, warrants an analysis of this proposal’s prospect for success”.¹⁸¹ Invoking the “naming and shaming” methodology that arguably drives treaty membership¹⁸² may not generate altogether different results than those demonstrated in the political bodies when it comes to endorsing texts. Another perspective is to consider that states are generally unwilling to undertake obligations for which they would be privy to significant attack; and the extent of SOGI violations across the world may provide some useful guidance on the limited potential signatories. Moreover, there appears little to suggest from the analysis in this study that any reasonable consensus would likely be achieved. In light of this uncertainty, Braun notes that failing to reach a majority consensus after the failed attempt of the Brazil Resolution to broadly affirm SOGI rights “could send a negative message to the international community and potentially worsen the treatment of LGBT people around the globe”.¹⁸³

176 See above, note 163, p. 572.

177 Goodman, R. and Jinks, D., “Measuring the Effects of Human Rights Treaties”, *European Journal of International Law*, Vol. 14, 2003, p. 177.

178 See above, note 36, p. 433.

179 See above, note 168, p. 2010.

180 *Ibid.*, p. 2024.

181 See above, note 3, p. 366.

182 See above, note 168, p. 2006.

183 See above, note 77, p. 894.

Thus it must be considered that while a specialised convention holds potential for elevating the status and monitoring of SOGI rights, it does present considerable risks; and importantly, without the promise of an effective result. It is necessary to ensure that any move towards clarification is based on considerable and deliberate research in order to provide the full understanding of rights lacking at present, and to further learn from the Brazil Resolution by undertaking a realistic deliberation of the likelihood of success at the given point in time. Accordingly, it is imperative that any step taken must build on, and not regress, the headway made thus far.

b. A Dedicated Special Procedures Mandate

Within the recent SOGI panel discussion in the Human Rights Council, Helfer highlighted two main obstacles as “a lack of information about the full scope of human rights violations against LGBT persons”, and “persistence of prejudice and stereotypes, leading to misunderstandings about human sexuality”.¹⁸⁴ A dedicated thematic SOGI mandate within the special procedures holds the ability to significantly impact on these concerns and on some of the limitations highlighted previously.

First, it should be noted that the reports generated by such special procedure would continue to have only a persuasive effect, and would not emulate the binding effect of a convention, and in this regard may not be considered as valuable. A dedicated mandate, however, is not without its important symbolic effect. It would undoubtedly elevate SOGI rights by, for the first time, creating a distinct and focussed space within the UN. This indeed holds true to the extent that mandate holders are regarded as “the public face of the UN human rights system”.¹⁸⁵ By providing a concentrated focus on SOGI issues, this will continue to solidify the SOGI norms. As Goodman and Jinks have noted in this regard, “improved human rights documentation and reporting are themselves part of the process of incorporation”.¹⁸⁶ Further, as express inclusion of SOGI can counter claims of over-stepping experienced by other mandates, alongside the fact its creation would stem from agreement in the Human Rights Council, it could significantly heighten the mandate’s persuasive legal effect. In addition to this, reporting directly to the Human Rights Council may effectively accelerate SOGI concerns within the broader UN system, as “the exposure that a particular issue receives may make it a priority within UN circles”.¹⁸⁷

One potential restriction, however, rests on the fact that the most effective monitoring requires the co-operation of states. Although that is not to say that it is incumbent entirely

184 See above, note 138, Para 25.

185 Subedi, S.P., “Protection of Human Rights through the Mechanism of UN Special Rapporteurs”, *Human Rights Quarterly*, Vol. 33, 2011, p. 209.

186 See above, note 177, p. 177.

187 See above, note 163, p. 609.

on this, and even when states are unreceptive, the appointment of mandate holders has proved to put a spotlight on practices, and helped “nudge the government towards adopting a policy more closely in keeping with international human rights norms.”¹⁸⁸ Furthermore, a lack of co-operation would not have the significance of the rejection of a treaty on SOGI rights.

Arguably, the greatest importance stems from garnering the support of more neutral states, as mandate holders exist not only for criticism, but “to offer help to receptive governments”.¹⁸⁹ Saiz has noted in particular that the best response to claims of “western ideals” is the support of southern states, which may be a consequence of this strategy facilitating wider agreement. This approach considers that with contention hampering the development of rights, the power of international law falls not within threatening, but nurturing and amassing consensus towards that protection; and a soft approach through dialogue can be effective towards this in addressing sensitive or controversial issues.¹⁹⁰ When new norms, and particularly those affecting cultural notions, become entrenched, the most imperative task is the development of conversations between local and global worlds.¹⁹¹

Thus, Navi Pillay has remarked that “the first step in overcoming divisions among States is dialogue. But to have an effect, dialogue must be sustained (...) and, equally important, it must be informed”.¹⁹² This is a notion that holds merit for *all* participants in a conversation, as “until those debates are enriched, in a cosmopolitan way, with an awareness of what is to be said about them and around them and against them, from all the variety of cultural and religious and ethical perspectives that there are in the world, they remain parochial”.¹⁹³ This builds on the concept of de-centring rights, and instead attempting to approach them from domestic angles. Flynn has noted in this regard that issues such as uncovering colonial contexts “cannot be fully addressed at theoretical level, but require changes in dominant perceptions and practice”.¹⁹⁴ This could be particularly valuable given the reliance on arguments of culture in warranting disregard for SOGI rights.

188 See above, note 185, p. 209.

189 *Ibid.*, p. 225.

190 See above, note 39, p. 211.

191 Cowan, J.K., Denbour, M. and Wilson, R.A., *Culture and Human Rights: Anthropological Perspectives*, Cambridge University Press, 2001, p. 8.

192 UN High Commissioner for Human Rights Navi Pillay, “Video Message: Oslo Conference on Human Rights Sexual Orientation and Gender Identity”, Oslo, 15–16 April 2013, available at: <http://geneva.usmission.gov/wp-content/uploads/2013/06/SOGI-conference-summary-and-toolkit.pdf>.

193 Waldron, J., “How to Argue for a Universal Claim”, *Columbia Human Rights Law Review*, Vol. 30, 1999, p. 313.

194 Flynn, J., *Reframing the Intercultural Dialogue on Human Rights: A Philosophical Approach*, Routledge, 2014, p. 10.

Some might argue in this sense that such an approach runs risk to a process of chipping away at the concept of universality. However, this need not be the case. Through a better understanding of the obstacles in the advancement of SOGI rights, mandate holders can utilise their efforts towards promoting, and engaging in, a more informed conversation. For instance, Braun has highlighted campaigns towards reducing female genital mutilation, where “receiving information about the violations of human rights through dialogue has led to a major change in attitudes about the practice”.¹⁹⁵ This approach could therefore be used to promote a different understanding of dominant perceptions regarding SOGI. Indeed, this is not only a necessity for state engagement, but the strength of public perception demonstrates an obstacle as equally strong as political will. The case of Malawi, which in 2011 attempted to repeal its sodomy laws but found that public consensus would not allow it, demonstrates that affecting legal reform can prove difficult without undertaking sufficient measures towards mobilising domestic attitudes.¹⁹⁶

Notwithstanding this, the appointment of a mandate holder for SOGI does not necessarily solve the problem of providing a framed articulation of rights. However, research from mandate holders can garner important consequences in understanding rights. The value that such a mechanism can bring can be demonstrated by recent praise towards the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for effectively “addressing the nexus” left in the respective treaty and by its monitoring body.¹⁹⁷ The approach to SOGI rights thus far has been both piecemeal and ad-hoc, and it is partly this inconsistency that has compounded uncertainty.¹⁹⁸ A lack of understanding of the scope of rights, as well as how they play out domestically, warrants uniform in-depth research. This may further provide the groundwork for action towards a UN endorsed framework, in which consistent and articulated delineations can be produced, originating strictly within the UN process and under the auspices of the Human Rights Council or General Assembly, even if it is non-binding.

However, whilst the work of mandate-holders is largely independent of political divides, the creation itself rests on a Human Rights Council vote. Nonetheless, the groundwork for such a mechanism has already been demonstrated, as the OHCHR 2011 report expressly notes that there is a “protection gap”, and that “a pattern of human rights violations emerges that demands a response”.¹⁹⁹ The commission of a follow up 2015 report demonstrates a recog-

195 See above, note 77, p. 901.

196 IGLHRC, “Malawi Suspends Sodomy Laws”, 11 June 2012, available at: <https://iglhrc.org/content/malawi-suspends-sodomy-laws>.

197 International Justice Resource Centre, “UN Special Rapporteur Addresses Possible Torture in Healthcare”, 11 March 2013, available at: <http://www.ijrcenter.org/2013/03/11/un-special-rapporteur-addresses-possible-torture-in-healthcare>.

198 See above, note 5, p. 341.

199 Human Rights Council, *Discriminatory Laws and Practices*, Paras 28 and 82.

nised need for further enquiry into SOGI issues and a further need to alleviate the monitoring gap not yet filled. These findings provide an extremely effective foundation for a movement advocating for such a mechanism, as its creation can be considered somewhat mandated by the previous actions of the Human Rights Council itself.

Whilst such a process may not garner immediate effects, notwithstanding that a treaty offers no guarantees either, it must be agreed that the “progressive recognition of ever more specialized interests must surely promote an overall climate of tolerance and broad-mindedness that will benefit sexual minorities in the long run”.²⁰⁰

Analysis of two options in advancing SOGI rights within the UN has demonstrated that limitations existent within both approaches, and neither may comprehensively tackle all the problems highlighted in sections 2 and 3. However, as SOGI issues currently appear at an impasse regarding their attention and development, it is necessary to look towards more effective mainstreaming of SOGI issues. Where it has been demonstrated that a convention may garner unwarrantable risks to the progress made thus far, advocacy towards a dedicated mechanism may provide a more careful and considered approach to engaging with current hurdles.

Conclusion

This article has demonstrated the inadequacy of the current place afforded to SOGI rights within the UN framework and system. Whilst the very purpose of human rights avowals basic and fundamental rights “for all”, the project of international human rights law remains imperfect; and the deficient protection of SOGI rights may attest to that.

SOGI rights are largely left open to interpretation and do not yet appear authoritatively fully formed, and in turn lack a consistent and comprehensive focus towards such violations. Whilst the authoritative development of the law appears to be stifled by the extent of contention and lack of consensus, the SOGI rights movement has arguably found some real allies in softer monitoring systems of the UN, and particularly the extra-conventional systems. However, focussing on any one area will not achieve the results required, and a more systemic approach is needed.

Where new norms require acknowledgement, and significant obstacles are faced, it requires a re-thinking of the current modes of international rights making and adherence. Facilitating a broader understanding of context and the promotion of different perceptions of SOGI may present a more constructive approach than the risk of polarising the issue further. Notwithstanding this, “[c]are and caution, however, must not be confused with inattention or inaction”,²⁰¹ and it is vital to ensure that SOGI issues are kept alive within the UN forum. One appropriate strategy could be in the form of a dedicated thematic mandate. Increased scru-

200 See above, note 64, p. 298.

201 See above, note 92, p. 29.

tiny and investigation, coupled with consistent research and dialogue, may provide the next crucial step towards a stronger foundation for SOGI rights in the UN.

To the extent that the UN system has failed to make adequate room for SOGI thus far, it has led some to contend that “[w]e can no more than observe that with regard to the plight of members of sexual minorities, the universal enjoyment of human rights remains an elusive and distant goal”.²⁰² However, this notion fails to acknowledge the extent of progress that can be made given the proper approach. Several decades ago the idea of rights for indigenous peoples may have appeared a preposterous ambition but the gradual development of that forum within the UN demonstrates hope for SOGI rights.²⁰³ The recognition of SOGI rights presents a test in itself to the capacity of international human rights but one which justifies only one acceptable outcome.

202 See above, note 5, p. 331.

203 Sanders, D., “Getting Lesbian and Gay Issues on the International Human Rights Agenda”, *Human Rights Quarterly*, Vol. 18, 1996, p. 105.

“Neither the US nor the UK recognise obesity as a separate protected characteristic. However, some progress has been made in providing protection to obese employees.”

Sam Middlemiss and
Margaret Downie



Recent and Current Employment Discrimination Cases in the Court of Justice of the European Union

Michael Rubenstein¹

Introduction

This article reviews important recent discrimination decisions issued by the Court of Justice of the European Union (CJEU) within the area of employment. I am taking as “recent” only judgments issued since the beginning of 2013. I will also be reviewing some interesting references currently before the CJEU but yet to be decided as this article went to press.

In this comparatively short time frame there have been historic decisions which have reshaped our understanding of parental rights, disability discrimination and race discrimination. There have been significant decisions on age discrimination, sex discrimination, equal pay, and sexual orientation discrimination. There have been no decisions yet on religion or belief discrimination, but there are two potentially explosive references currently pending before the Court.

1. Parental Rights

The CJEU has been in the vanguard of establishing equal rights for new fathers in decisions such as *Land Brandenburg v Sass*² and *Roca Álvarez v Sesa Start España ETT SA*.³ The key question, however, is how far the CJEU is willing to go in classifying different treatment of fathers as contrary to European Union (EU) law. The underlying principle was set out in 2010 in *Roca Álvarez*. This case had the somewhat unusual facts of a man seeking time off to feed expressed breast milk to his unweaned child. Spanish law provided that if a female employee does not claim the time off work for breastfeeding herself, the child’s father may take the time off instead. The father was refused leave, however, because his child’s mother was not

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2 *Land Brandenburg v Ursula Sass*, C-284/02, 18 November 2004.

3 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, C-104/09, 30 September 2010.

an employee but was self-employed. The CJEU said that this was discrimination against men contrary to EU law as it was:

[L]iable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.⁴

When faced, however, with the more central issue of whether EU law requires that there must be no discrimination between men and women as regards leave following childbirth, the CJEU backtracked. Spanish law also allows mothers to transfer their maternity leave, once a compulsory period has been taken, to an employed father. The issue in *Betriu Montull v INSS*⁵ was whether in order for the father to have rights, the mother had to be an employee within the meaning of the Spanish legislation. Mr Betriu Montull was an employee but his wife was a self-employed lawyer, outside the social security system. He sought maternity benefit for the time after the period of compulsory leave required under Spanish law had expired. The Advocate General thought that the case was indistinguishable from *Roca Álvarez* and that it was sex discrimination to give only employed mothers a primary right.⁶ The CJEU, however, took a different view. It said that:

[T]he mother of a child who is a self-employed person not covered by a state social security scheme does not enjoy any primary right to maternity leave. Consequently, the mother of the child does not have a right to such leave which she could grant to the father of that child.⁷

It followed that the Spanish legislation did not contravene the Equal Treatment Directive.⁸

Unfortunately, no real attempt was made by the CJEU in *Montull* to distinguish *Roca Álvarez*. Then again, in the next case in the line, there is no mention at all of *Montull* by the Court, though *Roca Alvarez* is referred to twice. Greek law gives nine months parental leave to female civil servants, whereas fathers who are civil servants are entitled to leave only if the mother of their child works or exercises a profession. This was challenged in *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropon Dikaiomaton*⁹ as being contrary to the Pa-

4 *Ibid.*, Para 36.

5 *Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, C-5/12, 19 September 2013.

6 *Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, C-5/12, 11 April 2013, decision of the Advocate General.

7 See above, note 5, Para 66.

8 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

9 *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropon Dikaiomaton*, C-222/14, 16 July 2015.

rental Leave Directive and the Framework Agreement on parental leave,¹⁰ and also to the recast Equal Treatment Directive.¹¹ The case involved a magistrate. He applied for parental leave in respect of his young daughter but this was turned down because his wife was not employed. The reference to the CJEU asked whether it is contrary to the Framework Agreement on parental leave and the recast Equal Treatment Directive for legislation to provide that if an employee's wife does not work or exercise any profession, the male spouse is not entitled to parental leave. The Advocate General assigned to the case was Juliane Kokott, the German Advocate General, who has set out a series of pioneering opinions for the Court on family-friendly rights (including in *Roca Alvarez*, but she was not the Advocate General in *Montull*). Her Opinion in *Maistrellis* was not available in English at the time this article went to press, but she recommended that the Court rule that legislation providing that a male judge is not entitled to parental leave where his wife does not work or exercise a profession is contrary to both the Parental Leave Directive and the Equal Treatment Directive. She said that rules such as those at issue strengthen a traditional division of roles in the family and complicates a woman's return to the labour force.¹² This was then echoed by the CJEU, stating that the legislation:

*[F]ar from ensuring full equality in practice between men and women in working life, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.*¹³

The Court concluded that the Greek rules not only contravened the Parental Leave Directive, but also contravened the Equal Treatment Directive.

It is certainly difficult to reconcile *Montull* and *Maistrellis*, and it is particularly bizarre that the cases were both decided by the same (Fourth) Chamber of the CJEU, with almost entirely the same judges. The finding that Greek legislation is contrary to both Directives is important in countries such as the UK that allow the minimum three months' leave provided for under the Parental Leave Directive on an entirely equal basis as between men and women, but make a father's right to share the additional much longer period of leave available to new mothers (shared parental leave in the UK) parasitic on the entitlement of the mother (strictly

10 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by Union of European Employer Confederations (UNICE), the European Central Association of Public Sector Employers (CEEP) and the European Trade Union Conference (ETUC) as amended by Council Directive 97/75/EC of 15 December 1997.

11 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

12 *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthroponon Dikaiomaton*, C-222/14, 16 April 2015, decision of the Advocate General.

13 See above, note 9, Para 50.

speaking, a mother whose partner does not work will not be entitled to shared parental leave either, but she will be entitled to maternity leave of an equivalent length).

The modern trend has been for more employees to be given more rights to take longer leave for family-related reasons: maternity leave, paternity leave, and parental leave. One consequence is that it will become more common for it to be necessary to make comparisons between an employee who is on statutory leave and employees who have remained at work. This may arise where there is a promotion competition or, as in the Latvian reference to the CJEU, *Riežniece v Zemkopības ministrija*,¹⁴ where there is a redundancy selection exercise. Ms Riežniece was on extended parental leave from her post as a legal adviser in the Latvian Ministry of Agriculture when a redundancy situation arose in 2009. She was one of four in the redundancy pool. Her last performance appraisal had been in 2006 before she went on parental leave. Subsequent to that, the performance appraisal system itself changed. Some of the criteria from 2006 were no longer used and others had been introduced. Two employees who had not taken leave were assessed against the new criteria, whereas Ms Riežniece and another employee on leave were assessed against their last appraisal, covering a different time period. This resulted in Ms Riežniece being selected for redundancy. She claimed that this was contrary to the Equal Treatment Directive and the Parental Leave Directive. The CJEU ruled that EU law requires any such assessment must not place the worker on leave in a less favourable position than workers who did not take leave. It then went on to set out three specific criteria for a national court to apply where workers on leave are being assessed. The national court must:

*[E]nsure that the assessment encompasses all workers liable to be concerned by the abolishment of the post, that it is based on criteria which are absolutely identical to those applying to workers in active service and that the implementation of those criteria does not involve the physical presence of workers on parental leave.*¹⁵

The second criterion is problematic. Where there has been a change in the appraisal system, it is difficult to see how a requirement to apply identical criteria can operate in practice. It would mean an employer using different criteria for redundancy selection according to whether or not any employees in the pool were on leave, and might pose the risk of being unfair to employees who have not been on leave.

When the Pregnant Workers Directive was adopted in 1992,¹⁶ commercial surrogacy arrangements, whereby a woman carries and delivers a child for another woman or a couple,

14 *Riežniece v Zemkopības ministrija and Lauku atbalsta dienests*, C-7/12, 20 June 2013.

15 *Ibid.*, Para 56.

16 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

were virtually unknown. Developments in medical science have made this much more feasible and in March 2014 the CJEU handed down its decisions in two cases concerning the rights of mothers who have a child through a surrogacy arrangement: such women are called “commissioning” or “intended” mothers as opposed to “birth” mothers. *C-D v S-T*¹⁷ was a case from the United Kingdom and *Z v A Government Department*¹⁸ was from the Irish Republic. Both cases considered whether a female worker whose baby is carried by a surrogate is entitled to maternity leave under the Pregnant Workers Directive, or to the equivalent of such leave under the recast Equal Treatment Directive. Advocate General Kokott, in the UK case, took the view that the intended mother did have the right to maternity leave because maternity leave is “intended to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth”.¹⁹ The Advocate General expressed the view that in the case of a baby born through surrogacy, the intended mother “is faced with the challenge of bonding with that child, integrating it into the family and adjusting to her role as a mother.”²⁰ However, she could not take the Court itself with her on this occasion. The Grand Chamber ruled that the grant of maternity leave presupposes that the worker entitled to such leave has been pregnant and given birth to a child. Therefore, EU law does not require that a mother who has had a baby through a surrogacy agreement should be entitled to maternity leave or its equivalent, although member states are free to apply more favourable rules to commissioning mothers (as Great Britain has now done in the Children and Families Act 2014). The CJEU also ruled the refusal to grant paid leave to an intended mother equivalent to maternity leave did not constitute direct or indirect sex discrimination. There was no direct discrimination because mothers who have a child through a surrogacy arrangement are treated in the same way as fathers. So far as indirect discrimination was concerned, the Court said there was no evidence that the refusal of paid leave put female workers at a particular disadvantage compared with male workers.²¹ This was surprising as, on the face of it, one would expect a considerably higher proportion of intended mothers of babies born through surrogacy to seek extended paid leave from work than fathers.

The Irish case raised an additional issue of interest. The claimant in that case was fertile but had no uterus and therefore could not support a pregnancy. She claimed that the refusal to grant her paid leave equivalent to maternity or adoption leave amounted to discrimination against her on the ground of disability. The Framework Employment Equality Directive²² has no definition of “disability”, but, as we discuss in more detail below, the CJEU has applied the

17 *C-D v S-T*, C-167/12, 18 March 2014.

18 *Z. v A Government department and The Board of management of a community school*, C-363/12, 18 March 2014.

19 *C-D v S-T*, C-167/12, 26 September 2013, decision of the Advocate General, Para 45.

20 *Ibid.*, Para 46.

21 See above, note 17, Para 49.

22 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

definition of disability contained in Article 1 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). This focuses on whether the limitation from which the person suffers, in interaction with various barriers, hinders the person's full and effective participation in professional life on an equal basis with other workers. In *Z*, the CJEU concluded that the claimant's impairment did not disable her at work:

*[T]he inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. In the present case, it is not apparent from the order for reference that Ms Z's condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity.*²³

2. Sex Discrimination

In addition to the parental rights cases which raise sex discrimination issues, there is one other recent sex discrimination case of note: the 2014 decision in *X*.²⁴ This was a Finnish reference which casts doubt on whether legislation which relies on sex-based actuarial factors is compatible with EU law. The case concerned the Finnish statutory insurance scheme for workplace accidents, which is carried out by private insurance companies. The Finnish legislation governing the calculation of payment for long-term disability uses separate actuarial tables for men and women. The claimant, a man, was given compensation for an accident at work that was €279 less than that which would have been payable to a woman of the same age and in a comparable situation. He brought a discrimination claim before the CJEU. The Finnish Government attempted to justify the use of sex-based actuarial factors on grounds that the life expectancies of men and women are different. However, the CJEU said that the calculation of compensation "cannot be made on the basis of a generalisation as regards the average life expectancy of men and women"²⁵ since "there is a lack of certainty that a female insured person always has a greater life expectancy than a male insured person of the same age placed in a comparable situation."²⁶ The CJEU ruled that EU law precludes:

*[N]ational legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable due to an accident at work, when, by applying this factor, the lump sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation.*²⁷

23 See above, note 18, Para 81.

24 *X*, C-318/13, 3 September 2014.

25 *Ibid.*, Para 37.

26 *Ibid.*, Para 38.

27 *Ibid.*, Para 40.

Article 18 of the recast Equal Treatment Directive provides that compensation for discrimination must be real, effective and “dissuasive and proportionate to the damage suffered”. *Arjona Camacho v Securitas Seguridad España* is a new Spanish reference before the Court at the time of writing which asks whether this enables the national court “to award the victim reasonable punitive damages that are truly additional”.²⁸ Can the national court award damages that go “beyond the full reparation of the actual loss and damage suffered by the victim” and serve “as an example to others”?²⁹ In those countries, where damages are limited to economic loss, or to economic loss from discrimination plus proof of emotional distress suffered, this case could add to the sanctions available in respect of unlawful discrimination.

3. Equal Pay

In contrast to earlier years, there have been very few recent equal pay references to the CJEU. The 2013 decision in *Kenny v Minister for Justice, Equality and Law Reform*,³⁰ however, is noteworthy. The case arose out of the “civilianisation” of the Gardai in Ireland, by which civil servants have taken over some administrative work from the police. However, some police officers (mainly male) remained in designated posts doing administrative work alongside the civil servants (mainly female), and the men were paid considerably more. The women claimed a violation of their entitlement to equal pay. The Irish High Court reference pre-supposed that there was prima facie indirect discrimination in pay, but the CJEU went out of its way to question this on the basis that the two groups – the civil servants and the police officers - had different qualifications. It said that:

*[W]here seemingly identical tasks are performed by different groups of persons who do not have the same training or professional qualifications for the practice of their profession, it is necessary to ascertain whether, taking into account the nature of the tasks that may be assigned to each group respectively, the training requirements for performance of those tasks and the working conditions under which they are performed, the different groups in fact do the same work within the meaning of Article 141 EC (...) Professional training is not merely one of the factors that may be an objective justification for giving different pay for doing the same work; it is also one of the possible criteria for determining whether or not the same work is being performed.*³¹

This is a problematic test. Differences between claimants and their comparators in training or qualifications should not be treated as sufficient in themselves to mean that the work done

28 *María Auxiliadora Arjona Camacho v Securitas Seguridad España, S.A*, C-407/14, lodged on 27 August 2014.

29 *Ibid.*

30 *Margaret Kenny and Others v Minister for Justice, Equality and Law Reform, Minister for Finance and Commissioner of An Garda Síochána*, C-427/11, 28 February 2013.

31 *Ibid.*, Paras 28 and 29.

is not the same if those differences are not relevant to how the job is done. Most jobs will be done in the same way no matter what qualifications are brought to them. Factors which influence the “personal equation” are legitimate to take into account at the justification stage, but the more coherent approach is that they should only be taken into account at the equal work stage where they so influence how the job is done that one can say that the work itself is truly not the same. Be that as it may, the key question posed by the Irish court was whether “the interests of good industrial relations” can be taken into account as an objective justification for the difference in pay?³² This is a vital point because where work has been job evaluated, much of the remaining pay differential is the product of negotiated settlements which protect men’s pay. The CJEU ruled that the interests of good industrial relations cannot “of itself, constitute the only basis justifying (...) discrimination”,³³ but it qualified this by adding that:

*[T]he interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality.*³⁴

This begs the question of how much weight can be given to the interests of good industrial relations.

4. Disability Discrimination

The Framework Employment Equality Directive, as noted above, prohibits discrimination by employers on grounds of “disability” but contains no definition of what “disability” is covered or who is a disabled person entitled to rely on the protection offered by the Directive. In one of its most important recent decisions, the Danish case, *HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab*,³⁵ the CJEU has filled in the gap and done so in an expansive way. The CRPD is notable for incorporating the “social model” of disability. A recital to the Convention says that:

*[D]isability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.*³⁶

32 *Ibid.*, Para 35.

33 *Ibid.*, Para 48.

34 *Ibid.*, Para 50.

35 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S*, C-335/11 and C-337/11, 11 April 2013.

36 Preamble to the Convention on the Rights of Persons with Disabilities, Para (e).

Accordingly, Article 1 of the Convention provides that:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The European Union is a signatory to the CRPD and in *Ring*, the CJEU held that the Convention is now an integral part of the European legal order and takes precedence over EU legislation itself.³⁷ As a result, it ruled that the Framework Employment Equality Directive “must, as far as possible, be interpreted in a manner consistent with that Convention.”³⁸ Whereas, in the only other reference to deal with disability, *Chacon Navas v Eurest Colectividades SA*,³⁹ the Court drew a distinction between disability and sickness, and said that “sickness” is not covered by the Framework Employment Equality Directive, in *Ring*, the Court, applying the Convention, held that the concept of “disability” for the purposes of the Directive:

*[M]ust be understood as referring to a limitation which results in particular from a physical, mental or psychological impairment which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.*⁴⁰

The Court also called into question employer absence control policies which treat days of absence on grounds of illness linked to disability the same as absence through illness not linked to disability. The Court pointed out that such a policy will indirectly discriminate against disabled workers in that a worker with a disability “has the additional risk of an illness connected with his disability. He thus runs a greater risk of accumulating days of absence on grounds of illness”⁴¹ and consequently of reaching the limit provided for under the absence control policy. In such circumstances, the CJEU ruled, the policy would have to be objectively justified, not by deciding whether or not counting disability-related absences would be a reasonable accommodation, but by deciding whether it was justified according to the stricter test of showing that the policy was a proportionate means of achieving a legitimate aim.

The CJEU built on *Ring* in its much-publicised decision in *Fag og Arbejde, acting on behalf of Kaltoft v Kommunernes Landsforening, acting on behalf of the Municipality of Bullund*,⁴² which concerned the claim by a Danish childminder that it was contrary to EU law to dismiss him

37 See above, note 35, Paras 28–32.

38 *Ibid.*, Para 32.

39 *Sonia Chacón Navas v Eurest Colectividades SA*, C-13/05, 11 July 2006.

40 See above, note 35, Para 38.

41 *Ibid.*, Para 76.

42 *Fag og Arbejde, acting on behalf of Kaltoft v Kommunernes Landsforening, acting on behalf of the Municipality of Bullund*, C-354/13, 18 December 2014.

because he was obese (he weighed some 160 kgs or 350 lbs). Mr Kaltoft's claim was put on two bases. First, it was argued on his behalf that discrimination on grounds of obesity is contrary to EU law as such. In effect, this would have entailed either treating the grounds for unlawful discrimination under EU law as open-ended, similarly to the open-ended grounds under Article 14 of the European Convention on Human Rights, or declaring that obesity is a new protected characteristic. The CJEU was clear that only the EU legislator can adopt new grounds for unlawful discrimination. The second basis of argument was that obesity should be regarded as a disability for the purposes of the Framework Employment Equality Directive. On this question, the CJEU concluded that obesity is not a disability as such, but that it can amount to a disability if, applying the words of the CRPD, it entails:

*[A] limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.*⁴³

Thus, it is the effects of the obesity that decide whether a claimant falls within the scope of the statutory protection. Importantly, the CJEU lays down the general principle that the cause of a person's disability is irrelevant:

*The concept of 'disability' within the meaning of Directive 2000/78 does not depend on the extent to which the person may or may not have contributed to the onset of his disability.*⁴⁴

Accordingly, whether Mr Kaltoft was obese because he has a glandular disorder or because of poor eating habits is not a consideration. The question is whether the worker's obesity:

*[H]indered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.*⁴⁵

The CJEU emphasised that it is sufficient if the disability acts as "a hindrance" to exercising a professional activity; it does not have to render it impossible for the person to work. Moreover, the fact that Mr Kaltoft was able to do his job for 15 years even though he was obese for that entire period did not negate his claim to be disabled if he satisfied the requirements of the definition in the CRPD.⁴⁶ Accordingly, on the one hand, after *Ring*, it

43 *Ibid.*, Para 64.

44 *Ibid.*, Para 56.

45 *Ibid.*, Para 60.

46 *Ibid.*, Paras 61–62.

would seem that a person may be treated as disabled – and entitled to a reasonable accommodation – for some jobs but not for others. On the other hand, after *Kaltoft*, it would seem that a person may be treated as disabled if they would be hindered generally in professional life as a result of their impairment even if they are not so hindered in their particular job at the moment.

5. Sexual Orientation Discrimination

The Romanian reference to the CJEU, *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*⁴⁷ concerned some outrageously homophobic remarks by Gigi Becali, the financial patron of the football club, FC Steaua. Mr Becali told an interviewer:

*Not even if I had to close FC Steaua down would I accept a homosexual on the team (...) Perhaps he's not a homosexual (...) but what if he is? (...) There's no room for gays in my family and Steaua is my family (...) Rather than having a homosexual on the team, it would be better to play a junior. That's not discrimination. No one can force me to work with anyone.*⁴⁸

The reference to the CJEU asked whether this and similar statements amounted to a prima facie case of sexual orientation discrimination. This is obvious, but there were complications. First, the complaint was not brought by the footballer concerned but by a Romanian gay rights group against the statutory enforcement agency (for not levying a penalty that was severe enough). The CJEU held that the Equality Directives do not require an identifiable claimant. Secondly, could the club as employer be saddled with legal liability for statements made by Mr Becali, who was only a shareholder and not the club's legal representative or a person having the legal capacity to represent it in recruitment matters? The CJEU ruled that “the mere fact that statements such as those at issue in the main proceedings might not emanate directly from a given defendant is not necessarily a bar”⁴⁹ to establishing a prima facie case against the employer. Instead, the employer could refute a prima facie case of discrimination with “a body of consistent evidence”, which might include:

*[A] reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78.*⁵⁰

47 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, C-81/12, 25 April 2013.

48 *Ibid.*, Para 35.

49 *Ibid.*, Para 48.

50 *Ibid.*, Para 58.

6. Age Discrimination

Whereas in parental rights and disability discrimination the CJEU can be said to be ahead of the curve, the same is not the case with age discrimination. The recent jurisprudence of the CJEU on age discrimination has been less progressive than many of the Court's decisions as regards discrimination on the basis of other characteristics. In part, this may be because the Community legislator itself treated age differently in the Framework Employment Equality Directive by allowing direct age discrimination to be justified.⁵¹ In part, this may be because the members of the CJEU have yet to fully take on board that employment discrimination based on an arbitrary age criterion can be no less offensive than other forms of prohibited discrimination.

We can see this difference in approach even in a recent age discrimination case where the claimant succeeded. *Vital Pérez v Ayuntamiento de Oviedo*⁵² is a reference to the CJEU from Spain which asked if it is prohibited age discrimination for a municipality to fix a maximum age of 30 for recruitment to the post of local police officer. In 2010, in *Wolf v Stadt Frankfurt am Main*,⁵³ the CJEU upheld a maximum recruitment age of 30 for a post involving frontline fire-fighting duties. It did so not on the basis that imposing a recruitment age limit was justified as a proportionate means of achieving a legitimate aim. Instead, the CJEU controversially held that physical fitness was a "genuine and determining occupational requirement"⁵⁴ for the job within the meaning of Article 4(1) of the Framework Employment Equality Directive. In *Vital Pérez*, the Court continued to accept that possession of particular physical capabilities may be regarded as a "genuine and determining occupational requirement", in this case for the purposes of employment as a local police officer; and that the possession of particular physical capacities is a characteristic relating to age.⁵⁵ Thus, it continues to accept that there are circumstances in which stereotypes directly linked to chronological age may be valid (in marked contrast to its approach to gender stereotypes in *X*).⁵⁶ In this case, however, the CJEU concluded that the age limit was disproportionate. It distinguished *Wolf* on the basis that whereas "scientific data" before the Court in that case established that front-line fire fighters requires "exceptionally high" physical capacities and that very few individuals over the age of 45 have those capacities, this is not the case with all of the capacities which a police officer requires.⁵⁷ Moreover, other Spanish municipalities operate different, or no, maximum recruitment ages for police officers and the maximum age for recruitment to the Spanish national

51 See above, note 22, Article 6.

52 *Mario Vital Pérez v Ayuntamiento de Oviedo*, C-416/13, 13 November 2014.

53 *Colin Wolf v Stadt Frankfurt am Main*, C-229/08, 12 January 2010.

54 *Ibid.*, Para 40.

55 See above, note 52, Para 41.

56 See above, Section 2.

57 See above, note 52, Paras 53–54.

police force has been abolished. Furthermore, the advertised job qualifications stipulated that candidates would have to pass stringent physical tests, which would make it possible to ensure that local police officers possess the particular level of physical fitness required. Nor could the age limit be objectively justified under Article 6(1)(c) of the Framework Employment Equality Directive in that it was based on the training requirements of the post and the need for a reasonable period of employment before retirement. The retirement age for police officers was 65 and there was no evidence linking the age limit to training requirements.⁵⁸

If the CJEU wishes to revisit this issue, it will have the opportunity in *Salaberria Sorondo v Academia Vasca de Policia y Emergencias*,⁵⁹ which asks whether a maximum age of 35 years for participation in the selection process for recruitment as a police officer in the Basque Country is compatible with the Framework Employment Equality Directive.

*Specht and Ors v Land Berlin and Ors*⁶⁰ followed on from the 2011 decision in *Hennigs v Eisenbahn Bundesamt*⁶¹ and relates to the former German practice of linking public sector pay to the age of the employee at the time of recruitment. The CJEU ruled that this is age discrimination contrary to Framework Employment Equality Directive, but the more interesting dimension to the case is that the Court went on to hold that transitional measures which perpetuated the age discrimination by providing that pay increments would continue to be determined in accordance with basic pay under the old system did not contravene the Directive. This was said to be justified on the basis of budgetary considerations and the difficulties that would be entailed in reclassifying each individual civil servant. The Court acknowledged that: “as a rule, justifications based on an increase in financial burdens and possible administrative difficulties cannot justify failure to comply with the obligations arising out of the prohibition of discrimination”⁶² but it held that in this case:

*[T]he preservation of previous remuneration and, as a consequence, the preservation of a scheme establishing a difference in treatment based on age made it possible to prevent loss of remuneration and (...) were a crucial factor in enabling the domestic legislature to arrange the transition.*⁶³

These are much the same arguments, of course, that are used to justify continuing unequal pay between men and women.

58 *Ibid.*, Paras 55–58.

59 *Gorka Salaberria Sorondo v Academia Vasca de Policia y Emergencias*, C-258/15, lodged on 1 June 2015.

60 *Specht and Ors v Land Berlin and Ors*, C-501/12, 19 June 2014.

61 *Sabine Hennigs (C-297/10) v Eisenbahn-Bundesamt and Land Berlin (C-298/10) v Alexander Mai*, C-297/10, 8 September 2011.

62 See above, note 60, Para 77.

63 *Ibid.*, Para 67.

The next case in the line is *Schmitzer v Bundesministerin für Inneres*.⁶⁴ Austrian legislation for pay in the public sector provided that payments based on length of service did not take into account periods of service prior to age 18. In the 2009 case of *Hütter v Technische Universität Graz*,⁶⁵ the CJEU held that this was unjustified age discrimination. The Austrian Government then made various changes purportedly to comply with the ruling and introduce a non-discriminatory system. These included transitional arrangements, but it was argued that the transitional arrangements continued to disadvantage those who had been disadvantaged by the previous system. This led to a further age discrimination claim, which ended up before the CJEU in the form of *Schmitzer*. Once again, the Austrian Government defended the discriminatory transitional arrangements on grounds that it was “motivated by budgetary considerations”.⁶⁶ So *Schmitzer* gave the CJEU the opportunity to give a more authoritative pronouncement on whether an employer is able to justify discrimination by arguing that it would be too expensive not to discriminate, and the case was referred to the Grand Chamber. It ruled that budgetary constraints are not a defence in themselves. An employer cannot simply say that it cannot spend any more money to achieve equal treatment. The Court said:

*With regard to the objective of budgetary equilibrium pursued by the national legislation at issue in the main proceedings, it must be borne in mind that EU law does not preclude Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination. In that regard, while budgetary considerations may underpin the chosen social policy of a Member State and influence the nature or extent of the measures that that Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.*⁶⁷

Prior to age discrimination legislation, it was common for severance payment or redundancy payment schemes to exclude employees who were eligible for a retirement pension. In *Andersen v Region Syddanmark*⁶⁸ in 2010, the CJEU held that a Danish law which excluded workers from receiving a severance allowance if they are eligible to receive a retirement pension amounted to unjustifiable direct discrimination on grounds of age, where no distinction was drawn between those who actually take their pension and those who wish to continue to work. This has been revisited by the CJEU in another Danish reference, *Ingeniørforeningen i*

64 *Leopold Schmitzer v Bundesministerin für Inneres*, C-530/13, 11 November 2014.

65 *David Hütter v Technische Universität Graz*, C-88/08, 18 June 2009.

66 See above, note 64, Para 40.

67 *Ibid.*, Para 41.

68 *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark*, C-499/08, 12 October 2010.

*Danmark, acting on behalf of Poul Landin v Tekniq, acting on behalf of ENCO A/S – VVS.*⁶⁹ In this case, Mr Landin was given notice of dismissal when he was age 67. He was not paid a severance allowance because he was entitled to the State pension, even though he had postponed taking the pension and was actively seeking alternative employment. The CJEU this time held that the provision “does not appear unduly to prejudice the legitimate interests of workers who have reached the ordinary age of retirement.”⁷⁰ The Court purported to distinguish this case from *Andersen* on the grounds that the pension at issue in that case was paid from age 60 and an employee would risk a reduction in pension entitlement if he or she took early retirement. Not surprisingly, perhaps, these two decisions have resulted in a third reference from Denmark, *DI [Dansk Industri], acting on behalf of Ajos A/S v Estate of Rasmussen*, which also asks whether the prohibition on age discrimination applies to a scheme under which employees are not entitled to severance allowance if they are entitled to an occupational old age pension, “irrespective of whether they choose to remain on the employment market or retire.”⁷¹ What is somewhat surprising is that the Danish court goes on to ask if it is found that it is contrary to EU age discrimination law for an employer not to pay the severance allowance in such a case, then can the Danish court “undertake a weighing up” of the principle of non-discrimination:

*[W]ith the principle of legal certainty and the related principle of the protection of legitimate expectations and, following that weighing-up, reach the conclusion that the principle of legal certainty must prevail over the principle prohibiting discrimination on grounds of age.*⁷²

This is certainly a novel and disturbing argument, which would have huge consequences if it was upheld by the CJEU.

7. Race Discrimination

The Race Discrimination Directive and the Charter of Fundamental Rights prohibit discrimination because of “racial or ethnic origin.”⁷³ The Directive covers both employment and access to goods and services and there is a single definition of “direct” and “indirect” discrimination for any discrimination falling within the Directive’s scope. This definition, found in Article 2 of the Directive, uses parallel wording to that found in the other two European

69 *Ingeniørforeningen i Danmark, acting on behalf of Poul Landin v Tekniq, acting on behalf of ENCO A/S – VVS*, C-515/13, 26 February 2015.

70 *Ibid.*, Para 44.

71 *DI [Dansk Industri], acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, C-441/14, lodged on 24 September 2014.

72 *Ibid.*

73 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Charter of Fundamental Rights of the European Union, Article 21.

directives covering employment discrimination – the recast Equal Treatment Directive and the Framework Employment Equality Directive. This is what makes the decision of the Grand Chamber of the CJEU in the Bulgarian reference, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsias*,⁷⁴ so momentous for employment discrimination law, even though the facts of the case are about access to services. The Race Directive defines indirect discrimination as occurring “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons”. *CHEZ* establishes the principle that indirect discrimination applies to a person who shares a disadvantage, even if they do not share the characteristic of the group that leads to such disadvantage. Accordingly, where a neutral practice causes a particular disadvantage to members of an ethnic group, anyone who is similarly disadvantaged may bring an indirect discrimination claim even if they are not themselves a member of the group that is particularly disadvantaged.

The case concerned Anelia Nikolova, who runs a shop in a predominantly Roma district of a Bulgarian town, but is not Roma herself. The electricity company put meters in Roma districts considerably higher than in other districts, ostensibly so as to avoid tampering, making them less visible to consumers. Ms Nikolova brought a complaint that she was unable to check her electricity meter and that this amounted to discrimination. Could she complain about discrimination based on ethnic origin in those circumstances, even though she was not Roma herself? The Grand Chamber of the CJEU has held unequivocally that she can: the principle of equal treatment applies not to a particular category of person but by reference to the grounds of discrimination.

*[The] principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds.*⁷⁵

This appears to extend to indirect discrimination the principle of associative discrimination set out by the CJEU in *Coleman v Attridge Law*,⁷⁶ where a mother of a disabled child was found to have been directly discriminated against because of her child’s disability. Moreover, as Advocate General Kokott put it in her Opinion in *CHEZ*, the principle of discrimination by association is not restricted to cases where there is a close personal link or association as in *Coleman*, but also covers a case of “collateral damage” as here.⁷⁷ If Ms Nikolova had been living in an area that was not mainly Roma, she would have been given a more accessible electricity meter.

74 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, 16 July 2015.

75 *Ibid.*, Para 56.

76 *S. Coleman v Attridge Law and Steve Law*, C-303/06, 17 July 2008.

77 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsias*, C-83/14, 12 March 2015, decision of the Advocate General, Para 58.

8. Religion or Belief Discrimination

Unlike the European Court of Human Rights, the CJEU has not been called upon to adjudicate in cases of alleged discrimination because of religion or belief. This is now going to change. Two similar references were made to the CJEU at the end of March 2015 and the beginning of April, one from France and one from Belgium. Both references concern Islamic headscarves.

The French case, *Bouagnaoui v Micropole Univers SA*⁷⁸ concerns a design engineer who was sent by her employer to clients. A customer complained that the veil she wore “embarrassed” a number of its employees, and demanded that this should not recur. The employer discussed this with Mrs Bouagnaoui and asked her to observe a principle of “neutrality” as regards her dress when dealing with clients. When she refused, she was dismissed. The reference to the CJEU asks, must Article 4(1) of the Framework Employment Equality Directive:

*[B]e interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?*⁷⁹

The Belgian reference, *Achbita v G4S Secure Solutions NV*⁸⁰ concerned a receptionist who was contracted out to another company, Atlas Copco. Sometime after her employment began, she decided to wear an Islamic veil. G4S is part of an international company and this was regarded as infringing a “strict neutrality” rule in the workplace. The reference to the CJEU asks if Article 2(2)(a) of the Framework Employment Equality Directive should:

*[B]e interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer’s rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?*⁸¹

The two references raise some issues that go to the heart of discrimination law. In both cases what is at issue appears to be a hijab rather than a full-face covering such as a burqa or

78 *Asma Bouagnaoui, Association de défense des droits de l’homme (ADDH) v Micropole Univers SA*, C-188/15, lodged on 24 April 2015.

79 *Ibid.*

80 *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15, lodged on 3 April 2015.

81 *Ibid.*

niqab, as was considered by the European Court of Human Rights case of *SAS v France*.⁸² The hijab does not give the appearance of cutting its wearer off from the rest of society, the main ground on which the Strasbourg Court upheld the right of the French government to prohibit face covering in public places. Moreover, whereas in the author's view the burqa is plainly an instrument of men's oppression of women and cannot sensibly be reconciled with feminism, there is a stronger case for regarding the Islamic veil as being an expression of modesty and an affirmation of faith by a significant number of the women concerned. It has to be acknowledged, however, that this is not the way the Islamic veil is regarded in more secular societies than Great Britain, such as France and Belgium. Thus, the cases will require the CJEU to adjudicate on key issues such as the right of an employer to dictate dress codes to its employees, an employer's right to impose a "neutral" workplace, whether EU law obliges an employer to accommodate manifestation of an employee's religious beliefs as suggested by the European Court of Human Rights in *Eweida v United Kingdom*,⁸³ and the extent to which an employer is entitled to limit an employee's religious expression in order to comply with the preferences of a customer.

Conclusion

The CJEU has been responsible for significant developments in the interpretation of EU protections from discrimination in the employment sphere since 2013. These developments have affected protection from discrimination on a variety of grounds including sex, race and disability. How it will treat the highly contentious issue of accommodation of religious practices in the workplace remains to be seen.

82 *SAS v France*, Application No. 43835/11, 1 July 2014.

83 *Eweida v The United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

Disabled Compared to Whom? An Analysis of the Current Jurisprudence on the Appropriate Comparator Under the UK Equality Act's Reasonable Adjustments Duty

Rachel Crasnow and Sarah Fraser Butlin¹

Introduction

A hot topic in disability discrimination in employment in the UK is the question of comparators. It is unlawful for employers to discriminate against employees, understood in a very broad sense, who are disabled.² Disability discrimination is unlawful in a variety of forms: direct discrimination where a person is treated less favourably because of their disability (Section 13 of the Equality Act 2010 (Equality Act)), discrimination arising from disability where a person is treated less favourably because of something arising from their disability (Section 15),³ and indirect discrimination where a seemingly neutral provision, criterion or practice (PCP) is applied to everyone but puts a disabled person at a substantial disadvantage (Section 19). There are further potential claims for harassment and victimisation.⁴ The focus of this article is, however, on the final strand of protection from discrimination, which arises out of the duty on an employer to make reasonable adjustments (Section 20). Reasonable adjustments can require an employer to do what is reasonable to remove a disadvantage faced by a disabled employee, perhaps because of particular physical features in the building, because of the way a particular policy impacts them or because they need some aid or equipment to enable them to work. Where an employer fails in that duty, that employer discriminates against the individual.

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 - 2 For the definition of employee see Section 83(2) of the Equality Act 2010. Contract workers are also protected (Section 41) as are applicants for employment (Sections 39 and 40).
 - 3 An example would be where a person is disciplined for not doing their job because they cannot lift heavy boxes. If the reason they cannot lift heavy boxes is because of their disability, the disciplinary action would be for something arising from their disability.
 - 4 See Equality Act 2010, Sections 26 and 27.

A key issue when the duty to make reasonable adjustments arises is the question of comparators. When a claim is made that an employer should have made a reasonable adjustment, the first question that has to be determined is whether the disabled person was put at a substantial disadvantage by something as compared to a non-disabled person. Thus a comparative exercise must be undertaken to consider whether this is the case. This comparative exercise may be made by comparing the disabled person with a real employee who is not disabled, i.e. an actual comparator, or by a hypothetical individual. The issue of the characteristics that should apply to the comparator and what makes someone a “proper” comparator has proved particularly controversial in the UK. While comparators come into play in several strands of the Equality Act, this article is limited to exploring the issue as it applies to the question of reasonable adjustments. The duty to make reasonable adjustments is jurisprudentially distinct from the other forms of discrimination because it requires proactivity. Thus there are different considerations that come into play when considering the relevant legal tests. Moreover, the limited focus on comparators in reasonable adjustments claims enables proper consideration of a particular problem and provides an entry point to consider the duty to make reasonable adjustments generally. The relevant legislative provision in relation to the duty to make reasonable adjustments is Section 20 of the Equality Act, which provides:

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) The duty comprises the following three requirements.*
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

Thus it can be seen that there are various ways in which the duty to make reasonable adjustments arises but, in each, there is a requirement for the claimant to show that they have been put “at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled”. The question in many cases is who is the appropriate comparator? What characteristics should the “persons who are not disabled” have?

Before one can determine who the appropriate comparator is, the PCP must be considered (Section 20(3)). As can be seen from Section 20 above, the question of whether there is substantial disadvantage in relation to the impact of a PCP in Section 20(3), or a physical feature or the need for an auxiliary aid in Section 20(4) and Section 20(5). The majority of cases

centre around particular PCPs and the precise definition of them will determine the scope of the comparison to be undertaken. This is contentious in and of itself. However, until the PCP is defined, self-evidently the comparative exercise cannot take place.

A further linkage that must be explored when looking at the comparative exercise relates to the definition of disability. The claimant's substantial disadvantage relative to a non-disabled person will depend on the scope and nature of their disability. Significant shifts are taking place in how disability is defined; however, this warrants a separate article so we will make only brief reference to these issues.⁵

Thus in the article, we will seek to explore these issues and highlight some key points that practitioners, whether lawyers or those working in the third sector, should be aware of. It is logically necessary to consider the PCP first, followed by the definition of disability, before returning to the crux of the article relating to comparators.

1. What Does a PCP Look Like?

The term PCP is not defined in the Equality Act. The best definition is that contained in the Code of Practice: PCP should be defined widely so as to:

*Include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A [PCP] may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a “one-off” or discretionary decision.*⁶

*Archibald v Fife*⁷ is the paradigm case explaining what amounts to a PCP. Mrs Archibald was employed by the council as a road sweeper. It was an implied “condition” or an “arrangement” of her employment that she should be physically fit. She became disabled as a result of surgery on her foot and was no longer able to do her job. She unsuccessfully applied for a number of alternative posts, including administrative posts that would have meant a modest promotion, and was eventually dismissed.

The House of Lords held that the circumstances where a duty to make reasonable adjustments arises include an employee becoming incapable of fulfilling their job description so as to become liable to be dismissed. Lady Hale observed:

5 On this see further recent blog posts by the authors on Michael Rubenstein's blog, for example, Crasnow, R. and Butlin, S. F., “Obesity and Disability Following Kaltoft”, Rubenstein Publishing, 19 December 2014, available at: <http://blog.rubensteinpublishing.com/obesity-and-disability-following-kaltoft-by-rachel-crasnow-and-sarah-fraser-butlin>.

6 Equality and Human Rights Commission, *Equality Act 2010 Code of Practice: Employment Statutory Code of Practice*, Para 4.5.

7 *Archibald v Fife* [2004] I.C.R. 954.

An employer's arrangements for dividing up the work he needs to have done into different jobs are just as capable of being "arrangements" as are an employer's arrangements for deciding who gets what job or how much each is paid. Some employers might combine cooking and bottle-washing in one job while others might treat them quite differently. The job descriptions for all their posts are "arrangements" which they make in relation to the terms, conditions and arrangements on which they offer employment. Also included in those arrangements is the liability of anyone who becomes incapable of fulfilling the job description to be dismissed.⁸

Another difficult issue relates to whether the PCP was in fact applied to the claimant. In *Roberts v NW Ambulance Service*,⁹ the Employment Appeal Tribunal (EAT) held that it is generally unhelpful for tribunals to enquire whether the PCP was actually applied to the disabled employee. The enquiry should focus on the statutory wording, namely, did the employer apply a PCP which put the disabled employee at a substantial disadvantage? In *Roberts* itself, Mr Roberts had a social anxiety disorder recognised as a psychiatric condition. He worked as an emergency medical dispatcher (EMD) in a control room with other EMDs. The EMDs "hot-desked" meaning they took any available desk when they started their shift. This was stressful for Mr Roberts who was permitted to use a designated workstation without the need to hot-desk. However on a number of occasions he arrived for work and found other persons in his seat. Eventually he resigned.

The Employment Tribunal (ET) found that the PCP of hot-desking was not applied to Mr Roberts because he had been allowed, in principle if not always in practice, to sit at a preferred workstation. The EAT reversed this, holding:

*The key question for the Tribunal was whether this PCP placed the claimant, a disabled person, at a substantial disadvantage in comparison with persons who are not disabled. If so, the Respondent would then be under a duty to take such steps as it was reasonable for it to have to take in order to prevent the PCP having that effect. In *Environmental Agency v Rowan* (paragraph 27) the Appeal Tribunal emphasised the importance of following the statutory language and addressing the issues raised by the statutory language.*

Neither section 4A nor section 18B required the Tribunal to ask or answer the question whether the PCP applied to the claimant. In our judgment asking or answering this question is not necessary and will tend to obscure the real issues the Tribunal has to decide – whether the PCP placed the claimant at a substantial disadvantage in comparison with persons who are not disabled.

8 *Ibid.*, Para 62.

9 *Roberts v NW Ambulance Service* [2012] Eq. L.R. 196; [2012] I.C.R. D14.

The Tribunal's reasoning was that the PCP was not applied to the claimant because he was not required to sit in any place other than his preferred seat. However, he continued to be affected by "hot desking" because other people who were required to hot desk were still sitting in and intending to use his preferred seat when he arrived for work. The Tribunal ought to have assessed whether this placed the claimant at a substantial disadvantage in accordance with section 4A(1) and if so whether there were further steps which it was reasonable for the Respondent to have to take in accordance with that section read with section 18B.

We think it will generally be unhelpful for a Tribunal to ask whether a PCP was applied to the disabled person. There will, we think, sometimes be cases where PCPs which are applied to others at work place the disabled person at a substantial disadvantage even if they are not applied directly to the disabled person.¹⁰

The definition of the PCP is key to determining who the appropriate comparator is. Therefore great care must be taken to ensure that the PCP encapsulates the issue that is putting the disabled person at a disadvantage. Put simply, what is the "thing" that is causing the disabled person a problem? The answer to that question will be foundational when asking whether the same "thing" would cause a problem for the comparator or not.

2. Relevance of the Nature of Disability

Once the PCP has been identified, it is vital to determine what the substantial disadvantage actually is. We recall that reasonable adjustments are not generic measures which make things easier for the disabled person, they are specific, targeted measures to deal with a particular substantial disadvantage.

Thus it is necessary to go back to the question of disability: what is it about the person's disability that gives rise to the substantial disadvantage because of the specified PCP or physical feature? The best way to consider this is to explore carefully and precisely why the PCP or physical feature causes a problem and exactly how that interrelates with the disability. Again, this goes to the core question of whether the comparator would be similarly disadvantaged or not.

The definition of disability is to be given a broad understanding.¹¹ Moreover, there is no requirement for an impairment to have a cause. The Statutory Guidance at paragraph A7 provides that "[i]t is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded".¹² Instead, it is important to con-

¹⁰ *Ibid.*, Paras 31–34.

¹¹ *Aderemi v London & SE Railway Ltd* [2013] ICR 591, Para 24.

¹² Office for Disability Issues, *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*, 2011.

sider the effect of an impairment. This has recently been reaffirmed in both the UK¹³ and by the Court of Justice of the European Union (CJEU) whose focus was on the nature and extent of the impairment.¹⁴

3. Impact of the UN Convention on the Rights of Persons with Disabilities

In the background of these cases is a critical piece of legislation: the UN Convention on Rights of Persons with Disabilities (CRPD). The UK Government ratified it in 2009 and the European Union is also signatory to it. Importantly, in *HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab*,¹⁵ the CJEU confirmed that the CRPD is now an integral part of the European legal order and takes precedence over EU legislation itself. The CJEU said that this means that the Framework Employment Equality Directive 2000/78¹⁶ (Framework Directive) (the basis for the Equality Act) “must, as far as possible, be interpreted in a manner consistent with that Convention.”¹⁷

Article 1 of the CRPD provides that:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Importantly, recital (e) of the CRPD provides that “disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.

This is a very different definition of disability to that in the Equality Act. Notably, it is a social model rather than a medical model, that is, one which focuses on the barriers in society rather than the medical impairments the individual suffers from.

Thus in the case of *Ring*, the CJEU emphasised that the concept of “disability” for the purposes of the Directive:

[M]ust be understood as referring to a limitation which results in particular from a physical, mental or psychological impairment which in interaction with various

13 See *Walker v SITA Information Networking Computing Ltd* [2013] Eq. L.R. 476.

14 See *FOA, acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, C-354/13, [2015] I.C.R. 32.

15 *HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab* [2013] IRLR 571.

16 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

17 See above, note 15, Para. 29.

*barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.*¹⁸

The emphasis on professional life is the novel point and expands the definition by taking account of barriers that may exist in only one aspect of a person's life, that is their professional life.

In the recent CJEU case of *Kaltoft*, it was the Convention which, together with the reliance on the Framework Directive, enabled the Advocate General to reach the opinion that obesity was a disability; a key factor was the inability to participate fully in professional life. The Advocate General said this:

*I am also of the opinion that, in cases where the condition of obesity has reached a degree that it, in interaction with attitudinal and environmental barriers, as mentioned in the UN Convention, plainly hinders full participation in professional life on an equal footing with other employees due to the physical and/or psychological limitations that it entails, then it can be considered to be a disability.*¹⁹

When the case reached the CJEU, the Court similarly referred to the CRPD, underlining its relevance to the interpretation of the Framework Directive.²⁰

In our opinion, the CRPD could be used to a far greater extent especially when considering cases under the Equality Act. Tribunals generally take a medicalised approach, exploring the diagnosis, symptomatology, treatment and prognosis when determining whether someone is disabled. The CRPD turns that question on its head and focuses instead on the societal barriers, rather than the individual's medical position. The focus on professional life in *Ring* has similarly not had a significant impact on domestic case law.

Why are we discussing the broad definition of disability that is now in play in an article on comparators? Put simply, the broader the definition of disability then the broader the types of "substantial disadvantage" which will be relevant to the comparative exercise. A broad view ought to be taken and the focus should be on the barrier caused by the PCP.

4. Who is the Appropriate Comparator?

As stated above, the PCP must place the claimant at a substantial disadvantage, "in comparison with persons who are not disabled".²¹ For a duty to make reasonable adjustments to

¹⁸ *Ibid.*, Para 38.

¹⁹ *FOA, acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, C-354/13, Opinion of the Advocate General, 17 July 2014.

²⁰ See above, note 14, Para 53.

²¹ See above, note 4, Section 20.

arise, a non-disabled person must not be at the same disadvantage. Having identified the substantial disadvantage, it should be easier to identify an appropriate comparator. However, the proper approach is contentious. The case of *Griffiths v Secretary of State for Work and Pensions*²² provides a helpful example of the different approaches that may be taken.

In *Griffiths*, the claimant was absent and had been given a written warning under the attendance policy. Ms Griffiths relied upon “the operation of the attendance management policy” (as opposed to the terms of the policy itself, which would constitute an indirect discrimination claim) and that this “was a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal”.²³ She sought two reasonable adjustments, firstly to disregard the disability absence and therefore have the warning withdrawn; and secondly for the number of days’ absence that triggered the policy to be increased.

The EAT in *Griffiths* emphasised that the proper comparator is:

*A non-disabled person absent for sickness reasons for the same amount of time but not for disability-related sickness. If a claimant is treated at least as well as such comparators s/he cannot be at a disadvantage let alone a ‘substantial’ disadvantage.*²⁴

People who are not disabled would similarly be affected by the attendance management policy if they took a similarly long period of time off work sick. Therefore, there was no duty to make reasonable adjustments. Ms Griffiths’ contention was that but for her disability, she would not have been off for the long periods of time and therefore this had everything to do with her disability. When the comparator was constructed, the disability had to be removed as did all the disability related absence.

The decision in *Griffiths* is being appealed to the Court of Appeal but, for now, it represents the current state of the law. In our view there is a major problem with the approach in the decision and to understand this, one must briefly consider the background to the Equality Act.

Prior to the Equality Act, disability discrimination was dealt with in the Disability Discrimination Act 1995. Section 3A(1) provided that it was unlawful for a person, for a reason which relates to the disabled person’s disability, to treat him less favourably than he treats or would treat others to whom that reason does not or would not apply, unless he can show that the treatment was justified. The issue of how you defined the relevant comparator, that is, the “others to whom that reason does not apply”, was raised in numerous cases. It was ultimately determined by the House of Lords in 2008 in the case of *Malcolm v Lewisham London Borough Council*.²⁵

22 *Griffiths v Secretary of State for Work and Pensions* EAT/0372/13 [2014] Eq. L.R. 545.

23 *Ibid.*, Para 15.

24 *Ibid.*, Para 33.

25 *Malcolm v Lewisham London Borough Council* [2008] 1 A.C. 1399.

In that case it was held that the comparator is someone without the disability but with all the same characteristics as those of the disabled person. By way of example, Lord Scott said that where a cafe owner refused to have any dogs in his cafe, including guide dogs for the blind, then the disabled person was refused entry “not because he is blind but because he is accompanied by a dog (...) anyone, whether sighted or blind, who was accompanied by a dog would have been treated in the same way”.²⁶ Therefore, there would be no discrimination. The decision in *Malcolm* was heavily criticised and the Lords themselves expressed their considerable unease about the case. When the Equality Act was drafted, there was great care to ensure that the new provisions of discrimination arising from disability did not give the same result.

Yet, the analysis in *Griffiths* is that which was applied in *Malcolm*, pre-Equality Act. The characteristics of the disabled person (the lengthy absence) were added to the comparator, despite them being fundamental to the disability. The resulting comparison was meaningless: the disability caused the lengthy absence and it makes little sense to say that a non-disabled person would have been treated in the same way when it was the disability that caused the absence. This is plainly circular and the *Griffiths* decision represents a serious and unwarranted regression in the law.

On reading the Equality Act itself, one can draw the conclusion that the EAT’s decision in *Griffiths* was simply wrong. *Griffiths* relies on the idea that there must be no material difference between the circumstances of the comparator and that of the claimant. This comes from Section 23(1) which provides:

On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

However, Section 23 is only expressly applied to direct, dual and indirect discrimination. It does not refer to reasonable adjustments. Therefore the applicable comparator is *not* one that must have “no material difference” as per Section 23. Section 23 does not apply and an analysis of a comparator that requires them to have no material difference to the claimant is erroneous. Rather, the comparator should be someone who is not disabled. Accordingly, Ms Griffiths’ comparator should not have been someone who had been long term absent as this was because of her disability.

Thus it appears that the EAT has imported a direct discrimination approach to comparators (a requirement for the claimant and the comparator to be in not materially different circumstances) to the reasonable adjustments context where this is not the appropriate approach.

When one looks more broadly, the Framework Directive also indicates that the interpretation in *Griffiths* is plainly wrong. Article 5 of the Directive concerns reasonable accommodation for disabled persons and provides:

²⁶ *Ibid.*, Para 35.

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

The reference to “appropriate measures” is clearly broader than a direct discrimination context. In *Foster v Cardiff University*, it was argued that that because the CRPD does not require there to be a comparison between disabled and non-disabled people, then no comparison should be applied under domestic law.²⁷ This argument failed for a number of reasons but this does not mean that it could not and should not be argued that a direct discrimination type comparison is wrong. The language of the Framework Directive provides a further opportunity to challenge the EAT’s approach in *Griffiths* of applying this limited comparison, albeit that the court held in *Foster* that some form of comparison was permissible.

In summary, it is our view that at a domestic level, with reference to the Framework Directive, the proper comparator is someone who is not disabled and where the characteristics arising from that disability are also discounted. Thus where an individual is off sick because of their disability, the proper comparator is someone who is not disabled and who has not been off sick. Where some of the sickness is disability related and some is not, then the comparator would be “given” the non-disability sickness absence but not the disability related absence. Such a comparison is then meaningful and useful to the judge in determining whether there is a substantial disadvantage or not.

5. Broader Thinking on Comparators

When one considers the CRPD, it is clear that a narrow approach to a comparator is wrong. There are several facets to the issue.

Firstly, as we have noted above, the CRPD emphasises a social model of disability. The focus is on barriers in society to those who are disabled, be they physical, environmental or attitudinal, and not on the person’s disability. The medical aspects of disability are very clearly subordinate to the social model. Importantly, this also requires pro-activity: the focus on barriers in society shifts the emphasis from an individual to society itself. “Acculturation” is not enough, rather the social model requires pro-activity in resolving and removing the barriers.²⁸

27 *Foster v Cardiff University* [2013] Eq. L.R. 718.

28 See Quinn, G. “Resisting the “Temptation of Elegance””, in Arnardottir, O.M and Quinn, G. (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Nijhoff, 2009, pp. 224–9, 245–6.

Secondly, the whole Convention is premised upon the idea of accessibility. Article 9(1) provides:

To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.

Accordingly, it is quite clear that an effective means of enforcing the protection laid down in the Directive must be provided for under UK law.

Thirdly, and most importantly, Article 2 of the CRPD provides:

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Arguably the *Griffiths* line of reasoning fails to ensure such outcomes.

In relation to the workplace, Article 27(1)(i) provides:

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(...)

Ensure that reasonable accommodation is provided to persons with disabilities in the workplace.

There is no requirement under the CRPD for substantial disadvantage to be established before persons with disabilities must be provided with “reasonable accommodation”. Instead Article 27(1)(i) requires that reasonable accommodation is provided to persons with disabilities. It is perhaps arguable that the reference in Article 2 of the CRPD to “an equal basis with others” does import the comparative perspective. However, this must be understood against the background of the social model and accessibility requirements. We would suggest that although a comparison may be valid – to understand what the barrier is, if nothing else – the threshold is low. Ensuring “an equal basis with others” is very different to having to prove substantial disadvantage and then making an adjustment to remove that particular disadvantage. The requirements of the CRPD, we would suggest, go much further than that.

Conclusion

The comparator question is fundamental to establishing that a breach of the duty to make reasonable adjustments has occurred. While *Griffiths* is being challenged in the Court of Appeal and so the situation may change, the position of comparators provides a clear indicator of how serious the courts are about challenging disability discrimination. By importing a narrow comparator, the courts are not taking the opportunities available to them to challenge discrimination in the way that they might. Further, little real progress will be made while they adopt this approach. In our view, there needs to be a greater focus on the CRPD and the very different perspective that it brings. In particular, the focus should be on accessibility and the removal of societal barriers. Given this expansive interpretation, the application of the CRPD holds great potential to bring true equality.

Anglo-American Comparison of Employers' Liability for Discrimination in Employment based on Weightism

Sam Middlemiss and Margaret Downie¹

Abstract

This article analyses and compares research into discrimination based on weight (weightism) and the legal rules that cover it in the United Kingdom and the United States. Weightism is discrimination that is often based on stereotypical views of people who have weight issues, especially people who are obese or very thin. This article will restrict its attention to discrimination against obese employees; however, what is said applies to both categories of employees because extremely thin employees will experience similar discriminatory treatment at the hands of their employers and are entitled to the same legal protection. There has been a general lack of precedent in both jurisdictions which makes determining entitlement to legal rights difficult and uncertain. It is therefore particularly apt to review employers' liability in this area given the recent European Court of Justice decision in FOA, Kaltoft v Billund Kommune.²

Introduction

This article will consider the liability of employers for obesity discrimination. It is not intended to consider the broader implications of people being obese, such as the health costs,³ the impact of obesity on social relations⁴ and the general significance of obesity in employment.⁵ Common stereotypes of obese persons are that they are lacking in self-con-

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2 *FOA, Kaltoft v Billund Kommune* (2014) WLR (D) 554.

3 In 2006 it was estimated that the National Health Service (NHS) spent at least £1 billion treating obesity-related conditions and also according to estimates in the same year, obesity was the cause of at least 18 million days of sick leave lost every year in the UK, which costs the economy £2.6 billion.

4 Rothblum, E.D., "The Stigma of Women's Weight: Social and Economic Realities", *Feminism Psychology*, Vol. 2, 1992, pp. 61-73.

5 Puhl, R. and Brownell K.D., "Obesity Research", *Bias, Discrimination, and Obesity*, Vol. 9, 2001, pp. 788-805.

fidence and discipline, lazy, unattractive, unintelligent or of poor character.⁶ Whilst there is no legal definition of the term, in the United States, someone is considered medically obese if they have an excessive amount of body fat and have a Body Mass Index⁷ of over 30.0.⁸ In the United Kingdom, a similar measurement is used by Government Departments⁹ and the British Medical Institute (based on the World Health Organisation's classification). There is no doubt that the number of people that are obese in the populations of the UK¹⁰ and the US¹¹ has increased dramatically over the last twenty years.¹² Over the same period, the types and levels of discriminatory behaviour experienced by obese employees has also increased. The empirical research into weightism is considered in the first part of this article. The legal solutions reached in the UK and the US will then be analysed and contrasted with a view to identifying the most effective approach to eliminating such discrimination.

1. Research into Weightism

a. Research in the UK

Considerable research has been carried out into the impact of obesity on employment matters. Researchers who carried out a study into the experience of obese employees¹³ asked participants to look at a series of job applications that had a small photo of the job applicant attached and were asked to make ratings of the applicants' suitability, starting salary and employability. The researchers found that high levels of obesity discrimination were displayed across all aspects of employment. They also considered whether individual employee's insecurity with their own bodies (poor body image) and employers having "conservative per-

6 The stereotypical views of extremely thin persons are similarly negative, namely that they are anorexic, unattractive, unhealthy and excessive in their dieting or exercise regimes.

7 The Body Mass Index (BMI) is the common tool used to determine an individual's level of weight, be that underweight, normal, overweight, or obese. BMI is defined by the National Institute of Health in the US (2002) as a measure of body weight relative to height.

8 Center for Disease Control, 2004.

9 For example, the Department of Work and Pensions.

10 The Health Survey for England produces yearly statistics which are published by the NHS Information Centre. In 1993, 13.2% of men were obese whereas in 2010 it was 26.2%. The number of obese women increased from 16.4% in 1994 to 26.1% in 2010.

11 According to a study in *The Journal of the American Medical Association*, in 2008 the obesity rate among adult Americans was estimated at 32.2% for men and 35.5% for women; these rates were roughly confirmed by the Centers for Disease Control and Prevention for 2009–2010. The figure in 1997 was around 19% of the population.

12 In the United States in 1991, four states were reporting obesity prevalence rates of 15%–19% and no states reported rates at or above 20%. In 2002, 18 states had obesity prevalence rates of 15%–19%; 29 states have rates of 20–24%; and three states have rates over 25%. (Obesity Trends, 2004).

13 O'Brien, K.S., Latner, J.D., Ebnetter, D. and Hunter, J.A., "Obesity Discrimination: The Role of Physical Appearance, Personal Ideology and Anti-Fat Prejudice", *International Journal of Obesity*, 2012.

sonalities"¹⁴ were factors leading to obesity discrimination. They found that when employers (particularly conservative ones) selected an obese candidate for a job, there was a high likelihood that employee would be placed on a low starting salary and their leadership potential would be discounted.¹⁵ Other researchers in the UK have reached similar conclusions. The pollsters company YouGov carried out a survey of more than 2,000 British adults over the age of 18 in a study conducted on behalf of *Slimming World* magazine.¹⁶ They found that employees who were obese were:

*[T]wice as likely to earn a low salary, four times more likely to suffer bullying about their weight and six times more likely to feel their appearance has caused them to miss out on a promotion.*¹⁷

They also discovered that an element of sexism was involved. The findings showed that male employers were particularly prejudicial in their attitudes. One in four of the male bosses surveyed said they would turn down a potential candidate because of his or her weight and one in 10 admitted they had already done so. In an earlier survey in 2005 carried out by Personnel Today,¹⁸ more than 2,000 UK based human resource professionals were contacted. The survey results revealed that almost half the respondents believed that obesity negatively affected employees' output, with more than a quarter believing that obesity was becoming a problem in their industry. Around a third of the human resources professionals surveyed considered obesity was a valid medical reason for not employing a person, while 11% thought that firms could fairly dismiss people because they are obese. The discrimination was not restricted to recruitment and selection decisions. Fifteen percent of respondents admitted that their organisation would be less likely to promote an obese employee and 12% suggested that obese employees were not suitable for client-facing roles. Research has shown that female employees who are obese are more likely to experience discrimination in employment than their male equivalents and are much more likely to experience discrimination than colleagues who are not obese. Women who are obese are more likely to be discriminated against when applying for jobs and receive lower starting salaries than their non-obese colleagues.¹⁹

14 I.e. those displaying authoritarianism and social dominance.

15 The higher a participant's score on the measure of anti-fat prejudice, the more likely they were to discriminate against obese candidates. Those employers with a more authoritarian personality also displayed discrimination.

16 Of these, 227 were employers. Clare, A., "'Lazy' obese workers face office discrimination", *Reuters*, 15 Jan 2010.

17 *Ibid.*

18 Personnel Today, "Obesity research: Fattism is the Last Bastion of Employee Discrimination", 25 October 2005, available at: <http://www.personneltoday.com/hr/obesity-research-fattism-is-the-last-bastion-of-employee-discrimination>.

19 The study was reported in 2011. It was led by the University of Manchester, UK, and Monash University, Melbourne. It examined whether a recently developed measure of anti-fat prejudice, the Universal Measure of Bias, predicted actual job discrimination on the ground of obesity.

These statistics clearly suggest that UK management is generally unsupportive of obese job applicants and employees. The research shows that employers are less likely to employ obese employees and even if they do, the pay levels will be affected and the majority of them will make sure that obese employees never rise up through the ranks of the organisation. Female employees are particularly badly affected as compared with men.

b. Research in the US

In the US, research into different aspects of weightism in employment has also shown that mistreatment of obese employees is a widespread activity. Researchers at Yale University had originally studied data collected from 3,437 adults as part of a national survey conducted in 1995 and 1996.²⁰ Their work was updated in 2006 with data from a survey of nearly 2,300 Americans.²¹ The latter survey results showed that since the earlier research was undertaken, weightism continued to remain a problem. Discrimination on this basis was spiralling upward and becoming as common as other forms of discrimination. Rebecca Puhl, lead author of the study, said in a telephone interview regarding weight discrimination that it:

*[O]ccurs in employment settings and in daily interpersonal relationships virtually as often as race discrimination, and in some cases even more frequently than age or gender discrimination.*²²

Most controversially, the researchers found that weightism was as common in the US as race discrimination:

*Our findings indicate that the prevalence of weight/height discrimination is high in the US, and is comparable to rates of racial discrimination. If this form of prejudice continues without sanction or interventions to shift societal attitudes, weight bias will likely remain socially acceptable and will harm future generations of overweight children and adults. Organized efforts to reduce weight bias are needed.*²³

As in the UK research, obese women were twice as vulnerable as obese men, and discrimination happened much earlier in their lives. Also, the study found that women seemed to be vulnerable to weight discrimination even if they were only moderately overweight (as opposed to obese), whereas only severely obese men reported discrimination at a comparable rate.

20 Puhl, R.M., Andreyeva, T. and Brownell K.D., "Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America", *International Journal of Obesity*, Vol. 32, 2008, pp. 992–1000.

21 *Ibid.*

22 Dye, L., "Study: Weight-ism More Widespread Than Racism", *ABC News*, 2 April 2008, available at: <http://abcnews.go.com/Technology/BeautySecrets/story?id=4568813>.

23 See above, note 20, p. 998.

The importance of race and the extent of its impact on female workers is highlighted in a study undertaken at Cornell University²⁴ where it was found that white obese women had worse labour market outcomes than any other obese workers and that “[t]he obesity penalty for wages was much greater for white than black females”.²⁵ Cawley, the author of the research study, also found in his research that obesity tended to lower the self-esteem of white women much more than black women: “[o]besity has a more adverse impact on the self-esteem of white females than on that of black and Hispanic females”.²⁶

Another study undertaken by economists at Tennessee State University found that obese men and women can expect to earn on average anywhere from 1% to 6% less than non-obese employees, with obese women being the most affected.²⁷ This finding is similar to that in equivalent studies in the UK.

The research clearly demonstrates that there is a considerable amount of discrimination against obese employees in both jurisdictions and highlights particular issues, namely recruitment, equal pay, bullying and harassment, and dismissal. It also identifies an overlap with other forms of discrimination such as sex and race.

2. Legal Protection for Victims of Weightism

What follows is a consideration of the legal position of victims of weightism in the UK and the US with an emphasis on the issues highlighted by the research. The law relating to obesity will be examined under four broad headings, namely: discrimination law; equal pay law; liability for bullying and harassment; and the law relating to dismissal.

a. Discrimination Law

Both the UK and the US have laws designed to protect employees from discriminatory treatment on certain grounds.

i. UK Law

UK anti-discrimination law derives from European Union law. In particular, Article 19 of the Treaty on the Functioning of the European Union and Directive 2000/78.²⁸ Neither of

24 Cawley, J., “The Impact of Obesity on Wages”, *Journal of Human Resources*, Vol. 39 (2), 2004, pp. 451–474.

25 *Ibid.*, p. 468.

26 *Ibid.*

27 Baum II, C.L. and Ford, W.F., “The wage effects of obesity: a longitudinal study”, *Health Economics*, Vol. 13, Issue 9, 2004, pp. 885–899.

28 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

these list obesity as an unlawful ground for less favourable treatment. In the UK, protection against unlawful discrimination is provided by the Equality Act 2010 (Equality Act). There is no explicit protection for employees suffering from weight discrimination under that Act. The Equality Act lists nine protected characteristics which must not be the reason for less favourable treatment by an employer. These reflect the EU legislation and include sex, race, disability, gender reassignment, sexual orientation, religious or philosophical belief, pregnancy and maternity, and age. The Equality Act prevents direct discrimination (less favourable treatment on the basis of a protected characteristic)²⁹ and indirect discrimination.³⁰ Indirect discrimination occurs where the employer applies (or would apply) to the employee a “provision, criterion or practice” (PCP) and the PCP is applied (or would apply) to the employee with a protected characteristic and to others who do not share the protected characteristic but it puts, or would put, persons with whom the employee shares the characteristic at a particular disadvantage when compared with those who do not. The affected employee must actually be put at a disadvantage in order to bring a claim. An example would be requiring all applicants to be able to run a mile. Obese applicants would be at a disadvantage. The application of the PCP by the employer will be unlawful if it is not a proportionate means of achieving a legitimate aim.³¹ The Equality Act also imposes liability on the employer for harassment of an employee because of his/her protected characteristic,³² and prohibits employers from victimising an employee who has made or is threatening to make a claim under the Act.³³ The Act is not designed to combat obesity discrimination and weight is not a protected characteristic under the Act. However, under the legislation, there is the possibility of bringing a discrimination claim at the moment when the victim of weightism can identify discrimination because of one of the nine protected characteristics. The legal rules which are most appropriate and helpful to victims of weightism are those dealing with disability discrimination and sex and race discrimination.

Weight and Disability Discrimination in the UK

The medical link between obesity and disability is well established: “[t]he prevalence of both obesity and disability is increasing globally and there is now growing evidence to suggest that these two health priorities may be linked.”³⁴

Obesity (...) is listed under the World Health Organization’s International Classification of Diseases (ICD) (...) and this recognition of obesity as a disease and a

29 Equality Act 2010, Section 13.

30 *Ibid.*, Section 19.

31 *Ibid.*, Section 26.

32 *Ibid.*

33 *Ibid.*, Section 27.

34 Ells, L.J., Lang, R., Shield, J.P., Wilkinson, J.R., Lidstone, J.S., Coulton, S. and Summerbell, C.D., “Obesity and Disability – A Short Review”, *Obesity Review*, Vol. 7(4), 2006, pp. 341–345.

*medical condition has implications for the way in which obese people are treated in the workplace. Attention needs to be given to the consequences of obesity in causing disability.*³⁵

The legal link between obesity and disability is less clear and has been the subject of recent debate. Under Section 6 of the Equality Act:

- (1) *A person (P) has a disability if –*
- (a) *P has a physical or mental impairment, and*
 - (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

Long term means expected to last more than 12 months or until the person dies, if sooner. The protection is extended to a person who has had a disability in the past.³⁶

An employer must not discriminate against a disabled person directly or indirectly.³⁷ In addition, in the case of disability discrimination, there is additional protection from disability related discrimination under Section 15 of the Equality Act (which will be discussed below) and the employer is under a positive duty to make reasonable adjustments to ensure that the employee is not disadvantaged.³⁸

Tribunals and courts have been divided as to whether obesity fits within this definition and can be regarded as a disability in its own right. A decision by the UK Employment Appeal Tribunal (EAT) in *Walker v Sita Information Networking Computing Ltd*³⁹ concluded that obesity was not a disability under the Act. Despite this, the EAT accepted that other conditions associated with obesity such as diabetes may fall within the statutory definition. Walker weighed over 21 stone and suffered from a range of health problems such as diabetes, chronic fatigue syndrome, knee pain, bowel and stomach problems, anxiety and depression. At first instance, the Employment Tribunal considered that some of his conditions were associated with or compounded by his obesity. It was accepted by both parties that these conditions had a substantial and long-term adverse effect on his ability to carry out day to day activities, in accordance with the definition of disability under Section 6(1) of the Equality Act. However, as his complaints could not be attributed to a recognisable pathological cause,⁴⁰ the Tribunal concluded that Mr Walker was not disabled. On appeal, the EAT overturned this decision on

35 Williams, N., *Managing Obesity in the Workplace*, Radcliffe Publishing, 2008, pp. 93–97.

36 In considering this definition regard must be had to the guidance which accompanies the Equality Act 2010, Code of Practice and the regulations issued under the Act.

37 See above discussion, page 5.

38 See above, note 29, Section 20.

39 *Walker v Sita Information Networking Computing Ltd*, EAT/0097/12.

40 The tribunal concluded that there was no physical or mental cause of the symptoms other than obesity.

the basis that it was not the cause of Mr Walker's symptoms that should be focussed on, but rather the effect. In this case, Mr Walker's health problems amounted to a disability, even though they had seemingly been caused by obesity which is not, in itself, a disability.

This decision not to recognise obesity as a disability in its own right meant that employers were not liable for making reasonable adjustments for obese persons and were not liable for bullying and harassment based purely on the employee's weight.

The Court of Justice of the European Union (CJEU) decision in the case of *Kaltoft v The Ministry of Billund* confirmed this approach but seemed to go further.⁴¹ The case involved a child-minder who was dismissed because he was obese. There were no facts to suggest that his obesity affected his ability to perform his duties. The Danish court referred several questions to the CJEU including whether obesity could be regarded as a protected characteristic in its own right, and whether and in what circumstances it could be regarded as a disability.

The CJEU ruled that, "obesity does not in itself constitute a disability within the meaning of Directive 2000/78 on the ground that, by its nature, it does not necessarily entail the existence of a limitation."⁴² However:

*[U]nder given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78.*⁴³

The CJEU also considered the policy issue of whether self-inflicted conditions can be considered a disability. The CJEU decided that the origin of the disability and the extent to which the employee had contributed to it were irrelevant.⁴⁴

In light of this decision, obesity does not qualify automatically as a disability but equally it is not excluded. Obesity is a form of physical impairment which may, depending upon its effects, amount to a disability. It is for national courts to decide on a case by case basis whether the obesity amounts to a disability. In the UK, in terms of the Equality Act, that would require demonstrating a substantial and long term adverse effect upon the ability to carry out normal day to day activities. So, workers could be protected under the Act if their obesity directly or indirectly had a serious detrimental impact on their day to day activities. There would be

41 See above, note 2.

42 *Ibid.*, Para 58.

43 *Ibid.*, Para 59.

44 *Ibid.*, Para 55–57.

no need to prove a separate disability related condition such as diabetes. For example, if a person's obesity resulted in him experiencing serious depression, back problems or mobility issues, then his employer would need to be sensitive to this. Once a disability is established, if a person is frequently off sick because of treatment that they are receiving for their weight or because of weight related illness, then where an employee is reprimanded or dismissed because of his absences, as with any other condition, the employer risks being found to have discriminated on grounds of disability.

Obesity resulting in disability will give rise to various legal obligations, in particular the requirement to make reasonable adjustments to working practices and/or premises. This could take the form of making available work equipment or work spaces designed to accommodate larger people, or ensuring that the jobs they advertise for are suitable. Other adjustments might include offering parking spaces nearer to the entrance of the premises, altering work duties or reducing working hours. Failing to do this for applicants/employees could be a form of disability discrimination against obese employees for which the employer will be liable.

An employee must not be harassed because of their disability and if a person is subjected to jokes or comments about his weight, or physically or mentally tormented or abused then this could amount to harassment on the ground of disability under Section 26 of the Equality Act (which is considered further below).

Under Section 15 of the Equality Act, discrimination arising from a disability is prohibited where the employer treats the employee unfavourably because of something arising in consequence of the employee's disability, and cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if the employer did not know, and could not reasonably have been expected to know, that the employee had a disability.⁴⁵ With respect to discrimination arising from a disability, if, for example, a school teacher suffered from severe depression that substantially adversely affected his ability to carry out his day to day activities, then he is treated as a disabled person for the purposes of the Act. If over-eating and obesity are a direct consequence of his depression, then a failure to promote him because he is obese would be discrimination arising from his disability (i.e. the depression). The difficulty with this is the need to establish that an obese employee is disabled before claiming that the behaviour complained of arose from the disability.

Whilst not protecting employees from disability discrimination on grounds of obesity *per se*, the *Kaltoft* decision is therefore an important clarification of the law in this area.

Sex and Race Discrimination in the UK

As identified earlier, research has indicated that female employees suffer more from weightism in the workplace than male employees and that race also is a factor. Section 11 of the

45 Lack of knowledge of a disability is a general defence for an employer under the provisions.

Equality Act prohibits direct or indirect discrimination on the grounds of a person's gender and protects both men and women. An obese female employee could therefore potentially bring a direct or indirect sex discrimination claim if she is able to prove that she has experienced less favourable treatment by her employer compared to an obese man (or non-obese man) in the same employment. Direct discrimination in this context could be refusing to employ or promote her because of her sex (and additionally influenced by her size). It is also important to note that the claimant's sex need not be the sole, or even principal, reason for the treatment, as long as it has significantly influenced the reason for the treatment.⁴⁶ This is not necessarily an easy case to make when there is no evidence of a sexist reason for the discrimination and no comparator available. Sometimes it is not possible for the claimant to find a real person who is in the same or similar enough situation to them to use as a comparator. If this is the case then they can use a hypothetical comparator.⁴⁷ In *O'Reilly v BBC & Anor*,⁴⁸ the difficulties encountered in bringing a combined discrimination claim⁴⁹ (in that case for age and sex discrimination) were highlighted. A female TV presenter claimed the decision to discontinue her involvement in the programme country file was based on her age and sex. Only the former claim was upheld. The claimant had brought her claim on the basis that she had been discriminated against on the grounds of a combination of age and sex. The BBC ran an interesting argument in response, stating that the "old law" that applied to pre-Equality Act 2010 cases did not afford any protection against discrimination on combined grounds. The EAT unsurprisingly rejected this argument and confirmed its view that protection from discrimination on the grounds of "combined characteristics" was available under the "old law" because it is not necessary for any one protected characteristic to be the sole, or even the principal, reason for dismissal. The provision in the Equality Act 2010 dealing with combined discrimination claims has been repealed. However, it is arguable on the basis outlined by the tribunal in the *O'Reilly* case that dual or combined claims are still a possibility.

Indirect discrimination occurs when a PCP is applied to both sexes but the practical reality is that it puts one sex at a particular disadvantage. However, in indirect discrimination claims an employer will not be liable if the discrimination is justifiable by the employer because it is a proportionate means of achieving a legitimate aim. An example of a situation where this might apply is where a high degree of physical fitness is a prerequisite for employment, for example, air traffic controllers. The employer could argue that not selecting obese employees for the role is justifiable. Case law has shown that there are few jobs where someone's obesity will totally disqualify them from employment. There is a dearth of cases where claims

46 *Nagarajan v London Regional Transport* [1999] IRLR 572.

47 Although not directly relevant to obesity the following case does usefully illustrate the use of hypothetical comparators. In *The Home Office v Saunders* (2006) ICR 318, the EAT endorsed the employment tribunal's decision that the correct comparator of a female prison officer conducting a search of a male prisoner was a male prison officer conducting a search of a female prisoner despite the fact that male officers were not permitted to carry out such searches.

48 *O'Reilly v BBC & Anor* 2200423/2010 (ET).

49 Initially made unlawful under the Equality Act 2010, but this section was subsequently repealed.

have been brought by obese employees on the basis of sex discrimination. This is surprising given that the research studies in both the UK and the US have shown that obese women are generally treated less favourably than obese men in the workplace. There is some evidence they will be treated less favourably than non-obese women in the workplace but there is no remedy under the Equality Act for this.

Almost identical provisions will apply in the case of race discrimination.

ii. US Law

The US federal law affords standard levels of protection against discrimination which apply across the US. The individual states also have anti-discrimination legislation which varies from state to state. These provisions sometimes offer greater protection than the federal legislation but cannot derogate from the minimum standard assured by federal law. As is the position in the UK, it is illegal to discriminate against someone because of his or her race or gender, etc.⁵⁰ However, in the US, federal law largely fails to protect people who are obese from bias or discrimination.⁵¹

Federal Law Dealing with Weightism

Title VII of the Civil Rights Act 1964⁵² (Civil Rights Act), as amended, prohibits employment discrimination on the grounds of race, religion, sex and national origin. Discrimination on the basis of weight alone is not protected under the language of Title VII. It will be up to the plaintiff to show that the inequality of treatment he has experienced because of his weight can be brought under a ground of discrimination covered by existing legislation.⁵³

Weightism is often combined with other discriminatory behaviour which could form the basis of a legal action for discrimination, as Theran has highlighted:

*Overweight people are at a high risk of discrimination due to disempowerment because of their weight or more specifically because of their weight combined with race, gender, and socioeconomic factors which operate synergistically to disadvantage them further.*⁵⁴

50 Title VII of the Civil Rights Act 1964.

51 In the US groups such as the National Association to Advance Fat Acceptance and the American Obesity Association lobby the US Government for legal rights for their members.

52 See above, note 50.

53 Valenti. C., "Victims of Lookism Face Uphill Battle", *ABC News* 13 May 2002.

54 Theran, E.E., "Free to be Arbitrary and Capricious: Weight Based Discrimination and the Logic of American Antidiscrimination Law", *Cornell Journal of Law and Public Policy*, Vol. 11, 2001, pp. 124–125.

While weightism is not included in the list of protected classifications, employers violate Title VII when they apply weight requirements in a discriminatory manner. An employer would violate Title VII if he or she enforced a weight requirement in a disparate fashion, e.g. making exceptions for men but not for women.

Weight and Disability Discrimination in the US

Under federal law in the US, the Rehabilitation Act 1973⁵⁵ protects the rights of persons with disabilities in programs, facilities, or employment that receive federal funds, and the Americans with Disabilities Act (ADA)⁵⁶ extends this protection to employees in the private sector. In the employment area, both statutes prohibit discrimination against an otherwise qualified individual with a disability solely on the basis of their disability. The ADA governs the process of recruitment, hiring, training, promotion, pay, job assignment, leaves of absence, benefits, and social programs.⁵⁷ The Act defines “persons with disabilities” as including those who are regarded or perceived as having a disability which could include employees that are obese. As defined in the ADA, the term “disability” applies to the following:

1. people who have a physical or mental impairment that substantially limits one or more major life activities;
2. people who have a record of an impairment which substantially limits major life activities; and
3. people who may be regarded by others as having such impairment.

The definition is similar to the one used in the UK,⁵⁸ although it could be argued that these classifications are more general and hence easier to establish as a ground for action than the narrowly defined “day to day activities”⁵⁹ looked for under UK disability discrimination law. In *Cook v Rhode Island*,⁶⁰ a plaintiff who was “morbidly obese” was denied re-employment at a state home for the mentally impaired because the state claimed her obesity compromised her ability to evacuate patients in the case of an emergency. The state also claimed she was at a greater risk of developing ailments and that would increase the likelihood of absenteeism and claims for worker’s compensation. The First Circuit Court of Appeals found that concern over absenteeism and increased costs is not a valid basis for denying employment. The Court upheld a jury finding that the state denied Ms. Cook employment solely on the basis of her obesity, rather than on her ability to do the job, and it upheld a damages award of \$100,000.

55 Rehabilitation Act of 1973, 29 U.S.C. § 701.

56 Americans with Disabilities Act 1990, 42 U.S.C. § 12101 et seq.

57 For employers with 25 or more employees, the requirements became effective on 26 July 1992. For employers with 15 to 24 employees, the requirements became effective on 26 July 1994.

58 Both jurisdictions include discrimination by perception in their definition.

59 See above, note 29.

60 *Cook v Rhode Island* 10 F.3d 17 (1st Cir. 1993).

The case law tends to support the idea that if obesity has a physiological reason behind it then it could be covered by the definition of disability in the legislation. In *Equal Employment Opportunity Commission v Resources for Human Development, Inc.*,⁶¹ the Equal Employment Opportunity Commission (EEOC) filed its first lawsuit asserting that severe obesity was a protectable disability under the ADA. Although the case was unhelpful in defining when obesity is severe enough to constitute an ADA protected disability, it is now clear that the EEOC considers morbid obesity⁶² to be a protectable disability under the ADA. The court also concluded that severe obesity may qualify as a disability regardless of whether it is caused by a physiological disorder.⁶³ This is similar to the approach taken by the EAT in the *Walker* case (considered above when they held that the cause of the obesity was not relevant in deciding if someone should be protected).⁶⁴ The American Medical Association has recently upgraded obesity from a condition to a disease which suggests that in their view obesity is not a minor impairment. In 2011, Congress amended the ADA to extend workplace disability protection automatically to morbidly obese people, who were defined as those 100% or more above the healthy weight range for their height. Earlier in 2011 (in April and July), the EEOC had gained settlements in its first two major cases brought against employers for weight-related workplace discrimination.⁶⁵

State Law and Disability Discrimination based on Weightism

The approach taken to weightism differs amongst the US states. A research study undertaken by researchers from Yale University in 2008 found that only one state prohibited discrimination on the basis of weight and that was Michigan.⁶⁶ In Michigan, the Elliott Larsen Civil Rights Act 1976⁶⁷ states that persons have the opportunity to obtain employment without discrimination because of religion, race, colour, national origin, age, sex, height, weight, or marital status. So, in Michigan, weightism is a prohibited ground of discrimination in its own right. There are other pockets of legal protection provided by other states. In San Francisco, under City law it is unlawful to discriminate on the grounds of height or weight. Also, under the state law of the District of Columbia, it is unlawful to discriminate on the ground of

61 *Equal Employment Opportunity Commission v Resources for Human Development, Inc* F. Supp. 2d, 2011 WL 6091560 (E.D. La. Dec. 2011).

62 Morbid obesity occurs when a person is 50% - 100% above their ideal body weight, 100 pounds above their ideal weight or has a BMI of 39 or more.

63 The Equal Employment Opportunity Commission's (EEOC) position is supported by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The ADAAA significantly expanded the definition of "substantially limits" and "major life activities", thereby increasing the likelihood that obesity in all its forms constitutes a federally protected disability.

64 See above, note 39.

65 See above, note 61; and *Kratz v BAE Systems, Inc* (Civil Action No. 4:11-cv-03497).

66 See above, note 20, pp. 992-1000.

67 Elliott Larsen Civil Rights Act of 1976 Mich. Comp. Laws Ann. § 37.2101 (West 1994).

physical appearance.⁶⁸ Through legislative enactments or court decisions, several states have moved to outlaw discrimination based on size or weight. In various states, the equality law has been broadly interpreted to include discrimination on the ground of weight (or obesity) in the absence of specific protection.

In 2002, McDonald's restaurants were sued for breach of the ADA and the Connecticut Fair Employment Practices Act⁶⁹ when they refused to engage an employee on the basis that he was overweight. In New York, in the case of *State Division of Human Rights v Xerox Corp*⁷⁰ and in New Jersey, in the case of *Gimello v Agency Rent-a-Car Systems, Inc.*,⁷¹ the courts found that obesity falls within the definition of disability or handicap under each state's human rights laws. In *Cassista v Community Foods, Inc.*, the Supreme Court of California found that obesity could be the basis of a violation of the state's fair employment law where there is a physiological systemic basis for the condition.⁷² Also obesity may be regarded as a handicap under the state of Oregon's Fair Employment Practices Act, if the obesity substantially limits one or more of the person's major life activities, such as caring for oneself, working, walking, etc.⁷³

The State Supreme Court in *BNSF Railway Company v Feit*⁷⁴ was asked to deliberate on whether obesity discrimination was unlawful under the state law of Montana which used the same terms as the ADA. The facts were that the railway company offered Eric Feit an offer of employment as a trainee conductor. The employment was conditional upon successful completion of a physical examination, drug screening, background investigation, proof of employment eligibility, and the company's medical history questionnaire. The company then informed Feit he was not qualified for this position because of the significant health and safety risks associated with his extreme obesity. He was told he would not be considered for the job unless he either lost 10% of his body weight or successfully completed additional physical examinations at his own expense. Regardless of the test results, the company did not guarantee Feit a job. With the exception of a sleep study test, he successfully completed the additional physical exams requested. The sleep test cost at least \$1,800 and he could not afford it. Because the company informed him that it would not consider him for the trainee conductor position unless he completed the sleep study, Feit set out to lose 10% of his weight and claimed he was successful. However, a genuine dispute arose regarding whether the company received documentation of his weight loss. Feit filed a complaint with the Montana

68 The District of Columbia prohibits discrimination based on "personal appearance", which refers to "bodily condition or characteristics". The D. C. Human Rights Act of 1977, D.C. Code Ann. § 1-2501 (1981).

69 *Connecticut Fair Employment Practices Act* (FEPA) CONN. GEN. STAT. § 46a-51.

70 *State Division of Human Rights v Xerox Corp* 480 N.E.2d 695 (NY 1985).

71 *Gimello v Agency Rent-a-Car Systems, Inc* 594 A.2d 264 (N.J. Spur Ct. App. Div 1991).

72 *Cassista v Community Foods, Inc.*, 856 P.2d 1143 (Cal. 1993).

73 *Oregon Correctional Institution v Bureau of Labor and Industries*, 780 P.2d 743 (Or.App.1989).

74 *BNSF Railway Company v Feit* 2012 MT 47 also cited as No. OP 11-0463.

Department of Labour that the company had discriminated against him based on his physical or mental disability. The Montana Supreme Court in its analysis of Montana's state discrimination law looked to the EEOC's regulations and guidance on the ADA and relied upon it to reach the conclusion that obesity, even with no underlying medical condition, may constitute a disability. This is similar to the UK position after the *Kaltoft* decision.⁷⁵

It is clear that many state laws hold employers liable for discrimination on grounds of obesity without requiring proof of further disability and still more when the obesity results in impairment of activities.

Sex and Race Discrimination in the US

Federal law provides the minimum standard which applies across the US. However, there are some City laws which provide additional protection against sex discrimination and weightism.⁷⁶ Under federal statutes it is possible that an overweight or obese woman would be able to establish a prima facie case of disparate treatment against an employer who failed to hire her despite her qualifications⁷⁷ provided she pursued her case on the basis of her gender and not her weight. If a plaintiff is able to establish a prima facie case, then the burden would shift to the employer to put forward some legitimate non-discriminatory reason for rejecting the plaintiff. Although, unless it amounts to a disability, weightism is unprotected under federal law, an employer could simply defend his claim by showing that he does not want to employ obese people of either gender.

Although employers may appear to have a gender neutral policy for recruiting or promoting staff, if an obese woman can show that the policy has a disparate impact on obese women as a class and that there is statistical evidence of this, then a disparate impact case could be successful.⁷⁸ However, in a case involving flight attendants who claimed that an airline's maximum weight requirement for staff disparately impacted upon women, the Court of Appeals of New York ruled that the petitioners had failed to meet the requirements for a sex discrimination (disparate impact) claim. This was because there was no record of inequality of recruitment between men and women and no record that weight standards were used as an excuse to discriminate against women.⁷⁹ Similar provisions apply in relation to race discrimination.

75 See above, note 2.

76 Santa Cruz and San Francisco.

77 Under the McDonnell-Douglas framework a test is established and is now used by the courts to establish if a prima facie case exists. *McDonnell-Douglas Corp. v Green*, 411 U.S. 792 (1973).

78 The courts would allow societal statistics to be produced but would equally be persuaded by employer-specific statistics.

79 *Delta v NY State Div of Human Rights*, 91 N.Y.2d 65 (1997). The court relied heavily on the fact that 90% of Delta Airline's flight attendants were women.

b. Equal Pay Law

i. Equal Pay in the UK

Female employees who are obese often receive lower pay than others in the workplace. This was shown by a study undertaken in 2000 by the Guildhall University.⁸⁰ The researchers found that obese women receive less pay than other women, and men who are obese were shown not to suffer pay discrimination in the same way.⁸¹ Given that all the statistical evidence in the surveys above points to pay inequality being a practical reality for the majority of obese female employees, an equal pay claim is likely to be a relevant cause of action. However, to claim equal pay, such an employee would need to find a male comparator (real or hypothetical) in the same employment who is paid more than her and who is doing equal work to her. Equal work is defined under Section 65 of the Equality Act 2010 as: like work; work rated as equivalent; or work of equal value. When this is the case and she can prove it, a female employee will be successful in an equal pay claim. However, there is a defence available to employers in this situation, namely, that there is a material difference between the situation of the comparator and the claimant.⁸² Examples would be if he was paid more because: he had more seniority (provided this was material to the difference in pay); more responsibility; or the market forces defence applied.⁸³ The second of these defences is most applicable because, as has been shown, obese employees are unlikely to be promoted once appointed and so unlikely to be placed in a supervisory role.

ii. Equal Pay in the US

The Equal Pay Act 1963 protects women and men who perform substantially equal work in the same establishment from sex-based wage discrimination. Unfortunately there is no record of how many legal claims for equal pay have been taken by obese employees against their employers. However, there is statistical evidence that shows that inequality of pay is a problem for obese employees in the US. An article published in 2000⁸⁴ revealed interesting findings from a study funded by the National Association to Advance Fat Acceptance. Namely, it found that on average only 9% of top male executives at the time were obese. It also found that upper-level managers, male or female, that were 20% overweight, typically earned ap-

80 Barry Harper of the department of economics at London Guildhall University undertook the first large-scale investigation of the issue of obesity in employment in the UK when he surveyed a sample of over 11,000 people aged 33, examining the effects of looks, height and obesity on hourly pay, employment, etc. (Harper, B., "Beauty, Statute and the Labour Market: A British Cohort Study", *Oxford Bulletin of Economics and Statistics*, Vol. 62, 2000, pp. 773-802).

81 *Ibid.*

82 See above, note 29, Section 69.

83 An employer may need to pay one group of workers more than another, even though their work is of equal value, because the going rate for the job is higher.

84 Voros, S., "Weight Discrimination Runs Rampant in Hiring", *Career Journal Europe*, 2000.

proximately \$4,000 less than their thinner co-workers. Overall, the study showed that obese people normally were paid 10% to 20% less than their thinner colleagues.⁸⁵

This lack of legal protection against weightism in relation to pay under federal and state law is disappointing given the fact that the problem of weightism in employment is on the increase according to the Yale study.⁸⁶

c. *Bullying and Harassment*

i. Liability for Bullying and Harassment in the UK

In the UK, if individuals are bullied or harassed at work by colleagues or a supervisor because of their weight they can raise a grievance against their employer if the employer has failed to take reasonable steps to protect them from such behaviour.⁸⁷ When following a grievance procedure is inappropriate⁸⁸ or fails to achieve a satisfactory result for an employee, the employee can potentially claim harassment under Section 26 of the Equality Act 2010. In order to do this, the employee will need to show that the behaviour was undertaken on the basis of one of the protected grounds. In cases where harassment or bullying is prompted by someone's weight, the relevant ground of inequality will most likely be because of their sex or disability.⁸⁹

With respect to disability, a Belfast employment tribunal in *Bickerstaff v Butcher*⁹⁰ found obese workers in Northern Ireland are entitled to the same protection as disabled persons if they are subjected to humiliating or degrading treatment, or treatment which violates the employee's dignity. The decision followed the ruling in the *Kaltoft* case in respect of the definition of disability, allowing obesity to be a protected trait. The tribunal in this case applied these principles and found that harassment on grounds related to obesity was unlawful and actionable.

Where no link can be found to a protected characteristic or the obesity is not severe enough to amount to a disability, the employer may still be vicariously liable under the Protection

85 Another study by the Harvard School of Public Health explained that the households of obese women earn \$6,710 less than the average household.

86 See above, note 20.

87 There is no statutory protection against bullying in the UK although it could be treated as harassment under the Equality Act 2010 or form the basis of an action in tort when it leads to the victim experiencing illness, or unfair dismissal if the victim is forced to resign because the failure of the employer to protect them from such behaviour amounts to a breach of contract.

88 For example, when bullying or harassment is being perpetrated by the victim's supervisor and there is no independent person in the employer's organisation who could deal with the grievance, it is unlikely employment tribunals will expect employees to follow a grievance procedure which is likely to be biased.

89 Other possibilities are a common law action under the law of tort or contract.

90 *Bickerstaff v Butcher* NIIT/92/14.

from Harassment Act 1997 (Harassment Act) (sections 1 to 7 of which only apply to England and Wales) for harassment suffered by obese workers by employees in the course of their employment.⁹¹ Section 1 states that:

(1) A person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other. (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

As a consequence of the House of Lords decision in *Majrowski v Guys and St Thomas Trust*,⁹² it was established that an individual could bring a claim under the Harassment Act if he can establish that he has been subjected to a course of conduct (more than one incident) which amounts to harassment and which the harasser knew or ought to have known amounted to harassment of him. It would amount to harassment if a reasonable person in possession of the same information would think the course of conduct amounted to harassment. This would certainly apply to obese employees who suffer harassment or bullying because of their size. The benefit of bringing in a claim under the Harassment Act is that there is no need for the plaintiff to tie in the behaviour they have suffered with a protected characteristic. However, a limitation in a civil claim is that it is only available as a remedy for conduct which amounts to a breach of Section 1 of the Act and is behaviour that is sufficiently serious as to constitute a criminal offence under Section 2 of the Act.⁹³

Section 2 of the Harassment Act sets out when someone commits an offence of harassment as follows:

*(1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence.
(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.*

This requirement limits the applicability of the Act to the most serious kinds of harassment or bullying.⁹⁴ In *Marinello v City of Edinburgh Council*, it was held by the Inner House of the Court of Session in Scotland, that in order to succeed in a claim under the Act, a claimant

91 Middlemiss, S., "Liability of Employers under the Protection from Harassment Act", *Edinburgh Law Review*, Vol. 10, 2006, pp. 307–309.

92 *Majrowski v Guys and St Thomas Trust* (2006) IRLR 695.

93 Although a similar standard applies in Scotland, different sections of the Act apply.

94 *Conn v The Council of the City of Sunderland* [2007] EWCA Civ 1492; and *Veakins v Keir Islington Ltd* [2009] EWCA Civ 1288.

must demonstrate that the behaviour complained of amounts to at least two instances of oppressive and unacceptable conduct that is targeted at him and calculated to cause him alarm or distress.⁹⁵ Unlike the Equality Act, there is no protection offered for victimisation of the employee because he has brought a claim under the Harassment Act. The Harassment Act includes a remedy of an injunction or damages (for anxiety caused by the harassment and financial loss resulting from the harassment). Regarding the latter claim, an employee will not have to prove he has suffered any psychiatric or physical injury in order to claim compensation.

Obese employees are therefore afforded protection only from serious incidents of bullying and harassment in the workplace and there is no protection from victimisation from the employer for bringing a claim under this Act.

ii. Liability for Bullying and Harassment in the United States

Title VII of the Civil Rights Act imposes employer liability for discriminatory workplace bullying or harassment. This is very similar to the liability for harassment offered in the UK under the Equality Act. In order for the protection to apply the harassment must be for a discriminatory reason. As mentioned above, obesity is not included in the protection offered by the Civil Rights Act unless it is linked with another discriminatory reason such as sex or race.

As in the UK, there is a two part test – the first part is objective and the second part is subjective. Both parts of the test must be satisfied in order for a claim to succeed.⁹⁶ The conduct is considered actionable if it creates an environment that a reasonable person would find hostile or abusive and the victim perceives the environment to be hostile and abusive. Factors to be taken into account when considering the first part of the test include whether the conduct was physically humiliating or a single comment and whether the behaviour has unreasonably interfered with the performance of the victim’s work. Unlike UK law, US federal law provides protection against third party harassment. The employer has a defence to an action if he has taken reasonable steps to prevent the conduct or to remedy it promptly. However, this defence does not apply if the harassment has resulted in an adverse employment decision.⁹⁷

During the last 15 years, there has been a greater understanding of workplace bullying in the US and the model Healthy Workplace Bill developed by Professor David C. Yamada⁹⁸ has been adopted by just over half of all states. This legislation provides an effective remedy for workplace bullying and harassment without the need to prove a discriminatory reason for the conduct complained of. It makes it unlawful for an employer to subject an employee to an “abusive

95 *Marinello v City of Edinburgh Council* (2011) IRLR 668.

96 *Harris v Forklift Systems Inc*, 510 US 17 (1993).

97 *Burlington Industries Inc v Ellerth* 524 US 742 (1998); *Faragher v City of Boca Raton* 524 US 775 (1998).

98 Yamada, D.C., “Emerging Responses to Workplace Bullying”, *Politics & Civil Rights Legal Review*, Vol. 329, 2012–2013.

work environment". The victim can raise a private action for damages or an injunction in the state courts. An abusive work environment is defined as the situation where an employer or one or more employees, acting with intent to cause pain or distress to an employee, subjects that employee to abusive conduct that causes physical harm, psychological harm or both. Abusive conduct may be physical or verbal and a single act can be considered sufficient if it is serious enough. Again the employer has a defence where he exercised reasonable care to prevent and promptly correct any actionable behaviour and the complainant unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. The employer is not prevented from taking action against the victim for poor performance, misconduct or economic necessity. Damages will be awarded but there is usually a limit placed on the amount which may be awarded unless the harassment has resulted in an adverse employment decision. Only where the conduct complained of has been extreme will the claimant be able to recover damages for emotional distress. There is protection from retaliation which is the equivalent of the protection from victimisation provided in the Equality Act in the UK.

In most states in the US, there is therefore protection from harassment for obese employees without the need for the harassment to be severe. However, the damages for emotional distress are limited.

d. The Law Relating to Dismissal

Personnel Today has found that obese people are more likely to be made redundant than non-obese people.⁹⁹ Of greater concern is the fact that 10% of the respondents thought they could dismiss an employee because of their size. At first sight, the law relating to dismissal in the UK appears radically different from that in the US, with the former adopting a dismissal only for just cause model and the latter the employment at will model.

i. Dismissal in the UK

The UK system of unfair dismissal proceeds from the standpoint that an employee should not be dismissed unless for just cause. The Employment Rights Act 1996 (ERA) contains the basic right for employees with two years of service¹⁰⁰ not to be unfairly dismissed. Sections 98 (1) and (2) of the ERA list five potentially fair reasons for dismissal. If the principal reason for dismissal is a person's size, the dismissal would be unfair unless the employer shows that the dismissal was fair because the person's weight fell within one of the potentially fair reasons, such as capability, conduct or some other substantial reason for dismissal. There are therefore limited situations where an employer could defend a decision to dismiss an employee who is obese and was dismissed purely because of his/her size. The reason of capability is the most obvious to apply in the limited circumstances where obesity may affect a person's

99 See above, note 18.

100 One year for people employed before 6 April 2012 as per Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012/989.

ability to do his work, for example a flight attendant who is too large to walk along the aisle of an aeroplane may be incapable of performing his or her job.¹⁰¹ In addition, the ERA specifies that the employer must act reasonably in treating the reason as sufficient reason for dismissal in the specific case. The employer must also follow fair procedures in order for the dismissal to be regarded as fair.

In a Scottish case¹⁰² Ronald Agnew, aged 42, was a 25 stone postman who was taken off delivery duties and ended up losing his job on health grounds when his managers at the Royal Mail claimed they could not find another job for him. Mr Agnew claimed he was treated unfairly as other workers in a similar position had been given the chance to undertake lighter duties to avoid dismissal. He claimed he could have carried out a driving job, but management argued that his bulk made it difficult for him to fit into a van. Mr Agnew pointed out he could drive his Ford Escort car without difficulty. A Glasgow employment tribunal held that Mr Agnew had been unfairly dismissed, recommended he should be reinstated and awarded him £24,278 compensation.

Where an employee suffers harassment or other forms of abuse or bullying because of his or her size, the employee could be entitled to leave his or her job and claim constructive dismissal. This is because the behaviour of the harasser could be a breach of the implied term of trust and confidence in a contract of employment that imposes a duty on an employer to have general respect for his staff within the workplace and treat them accordingly.

The law relating to unfair dismissal therefore offers a reasonable amount of protection to obese employees.

ii. Dismissal in the United States

In contrast to the UK, the US system of dismissal proceeds on the basis that in most cases, private sector employment in the US is “at will” which refers to the right of an employer to dismiss an employee at any time and for any reason (good or bad) provided the dismissal does not fall within one of the five exceptions. The first exception is the federal anti-discrimination legislation described above. It is therefore unlawful for employers to dismiss workers based on their gender, race, disability, pregnancy or other characteristics. The other exceptions are all state provisions, namely: state anti-discrimination legislation described above, public policy, implied contract and good faith.¹⁰³ Some states adopt all of these exceptions, others only some and a minority recognise none.

101 Other examples may include employment in the armed forces, emergency services, or working for an airline as an air traffic controller or on board a plane.

102 Unreported in 2001.

103 Montana and Arizona have enacted unjust termination laws which require employers to dismiss only on just cause and allow employees to seek relief by filing complaints with government agencies, bring private law suits, or both.

The public policy exception applies where an employee is dismissed for enforcing their rights under state law or refusing to violate public policy in some way, e.g. by refusing to commit an illegal act. This exception is likely to apply to obesity dismissals in limited circumstances, for example, employers cannot legally dismiss workers for reporting sexual harassment, discrimination and other unlawful practices which could be directed at obese employees.

The implied contract exception applies where it can be said that the contract impliedly promises job security. There is no requirement under the law of the US for employers to have written employment contracts but such contracts are commonly provided for senior management or key employees. Further, if a contract is for a fixed term it will often provide that employers can only dismiss workers for good or just cause unless the contract itself provides alternate grounds for termination. Obese employees who do not have a written contract of employment may be able to bring a wrongful termination action based on rights provided by employee handbooks or manuals. For example, when a company handbook or manual provides a disciplinary process that must be followed before termination then a failure to follow the process and dismiss an employee may support a wrongful termination action by them. In certain states, the courts will enforce verbal contracts and any terms within them dealing with termination of employment. So if an employee was told by his employer he had a job for life or would only be dismissed for just cause then provided he can prove the term exists he may be successful in claiming wrongful termination.

The good faith exception has been adopted by a minority of states and is broadly equivalent to the UK unfair dismissal legislation, implying a term into the contract that the parties will act in good faith. This could be construed to mean either that the employer must have just cause for the dismissal or, if given a narrower interpretation, that the employer will not dismiss in bad faith or maliciously. In states which recognise this exception to employment at will, employees who are dismissed for obesity will have legal redress, unless the obesity amounts to a disability.

It can therefore be seen that the level of protection against dismissal for being obese varies tremendously from state to state and the only protection available to all obese employees is the federal anti-discrimination legislation which offers protection only when the employee can be said to be discriminated against on grounds of another protected characteristic such as sex, race or disability.

Federal, state and local government workers on the other hand are protected by the Fifth and Fourteenth Amendments, which prohibit the government from depriving any person of "life, liberty or property" without due process of law. These employees are considered to have a property interest in their jobs, and the right to due process places significant restrictions on arbitrary dismissals unrelated to job performance. Some additional protection is provided by federal, state and local civil service laws. The US equal employment oppor-

tunity laws¹⁰⁴ prohibit discrimination in the workplace and this includes discriminatory dismissals of employees. Therefore public sector workers who are obese in the US have a level of protection against dismissal but again the main thrust of this protection is through the discrimination laws.

Because the impact of the employment at will doctrine is so strong in the US¹⁰⁵ it can make it difficult for employees to prove wrongful termination.

In 2011, the UK government contemplated introducing the equivalent of employment “at will”,¹⁰⁶ whereby employees could be sacked without cause and at the whim of an employer.¹⁰⁷ The proposed change in the law did not happen but may well be reconsidered in the future.¹⁰⁸ It can be seen from the research that any forms of lookism¹⁰⁹ (including weightism) would undoubtedly be a common reason for dismissal under a legal system where employment at will was allowed. It can also be seen that the US system of employment results in a situation where employers have little liability for dismissing an employee for weight related reasons. Ironically, while the UK shows signs of moving away from a just cause system of unfair dismissal, over the last 15 years approximately 10 states in the US have introduced bills to impose dismissal only for just cause.¹¹⁰ These systems would protect obese employees in the same way that the UK unfair dismissal does. It is clear that a “just cause” system offers more protection for such employees.

Conclusion

The numerous studies undertaken in both jurisdictions have shown that employees will face various consequences in the workplace for being obese including: discrimination in recruitment practices; inequality in entitlement to wages and benefits; limited access to promotion; and bullying and harassment.¹¹¹ While most forms of discrimination in the workplace in both

104 Civil Rights Act 1964, Americans with Disabilities Act 1990 etc.

105 States may also adopt the 1991 Model Employment Termination Act, which requires employers to show good cause for discharging employees under the Doctrine but, no state to date has adopted it.

106 The Beecroft report was commissioned in 2011 by the Prime Minister’s Office and it recommended a “Compensated No Fault Dismissal System”, Beecroft, *A Report on Employment Law*, 2012, available at www.bis.gov.uk.

107 At least for employers with 10 or less employees.

108 Morris, N., “Cable forces U-turn on ‘fire at will’ job reform”, *The Independent*, 22 May 2012.

109 Middlemiss, S., “Beauty’s Only Skin Deep? Legal Liability of Employers for Discrimination on the Ground of Physical Appearance: A Comparative Analysis”, *Contemporary Issues in Law*, Vol. 8, 2006/2007, pp. 18–46.

110 Kreuger, A.B., “The Evolution of Unjust-Dismissal Legislation in the United States”, *ILR Review*, Vol. 44, 1991, pp. 644–660.

111 Kristen, E., “Addressing the Problem of Weight Discrimination in Employment”, *California Law Review*, 2002, Vol. 90, pp. 57–109.

jurisdictions are unacceptable and legislated against, there are other types of discrimination that are still legally acceptable and weightism is amongst them. There are various social, legal¹¹² and political reasons for this¹¹³ which, due to the need for brevity, have not been fully explored in this article.¹¹⁴ However, the fact is that for most employers in both jurisdictions, obese people do not conform to the physical model that they expect of their employees:¹¹⁵ “[t]he further you are from the societal ideal of beauty, the discrimination you face is exponentially harder.”¹¹⁶ Calls have been made through the lobbying body the Size Acceptance Movement¹¹⁷ and various other individuals or organisations for specific legal protection against discrimination relating to an individual’s weight in the UK.

Neither the US nor the UK recognise obesity as a separate protected characteristic. However, some progress has been made in providing protection to obese employees. As a result of Federal case law and legislative amendments in the US and the application of the *Kaltoft* case in the UK, obesity related disabilities will not be considered outside of the scope of disability discrimination simply because they may to some extent be considered to be self-inflicted. Obesity may be considered a disability when it gets to the stage that the employee’s professional life and daily activities become limited. The US recognises severe obesity as a disability once it reaches 100% of normal weight and some US states have gone so far as to recognise it as a disability in its own right. The failure to recognise obesity as a disability in its own right or indeed to recognise it as a separate protected characteristic means that prejudice against obese persons is not tackled at an earlier stage. Until the obesity is severe, the employer need not make reasonable adjustments and the employee does not receive the protection against bullying and harassment offered to other types of discrimination, but is obliged to rely on other less favourable legislation, namely the Harassment Act in the UK and the healthy workplace laws in the US. The overlap with race and sex discrimination provides some protection in the event that the employee can show combined discrimination, but this applies only to some obesity cases and is difficult to prove. This is particularly restrictive since research shows that pay is a particular issue and the equal pay legislation in both jurisdictions is restricted to sex discrimination.

Although 22% of the working age population are defined as obese in the UK (and around a third in the US), with the exception of disability discrimination cases, there have hardly been

112 There is a genuine concern amongst the judiciary that any successful weightism case will lead to a torrent of claims.

113 Library Index, “Legal Political and Social Issues of Overweight and Obesity – Weight-based Discrimination”, available at <http://www.libraryindex.com/pages/1224/Political-Legal-Social-Issues-Overweight-Obesity-WEIGHT-BASED-DISCRIMINATION.html>.

114 See above, note 5.

115 Hospitals in Texas banned the hiring of obese workers.

116 Solovay, S., *Tipping the Scales of Justice: Fighting Weight-Based Discrimination*, Prometheus Books, 2000.

117 See above, note 25. They have suggested that employers should take some responsibility for promoting healthy lifestyles amongst its workforce and offer incentives to ensure that employees remain fit, active and healthy.

any reported discrimination cases relating to a worker's obesity. It is clear that overweight and obese job applicants and workers will often be subjected to weight-based discrimination in employment. Increasingly employers are being encouraged to promote and support the health of their workers.¹¹⁸ It has largely been left up to tribunals and courts to develop the law in this area and the UK government in particular has no plans to legislate.

Why then has no specific legal protection against weightism been introduced as yet in either the UK or US? A common viewpoint adopted in respect of weightism is that it is not a form of discrimination that should be protected against because the individuals concerned can ultimately regulate their own weight, whereas the individuals who have legal protection under the Equality Act have no control over the protected characteristics that apply to them; “[o]ne of the reasons that weightism is not given the same legal and social awareness as other forms of prejudice is because weight is often thought to be controllable.”¹¹⁹

There currently appears to be no willingness amongst legislators in both jurisdictions to amend this and extend comprehensive legal protection to victims of weightism. Managers therefore currently have the prerogative of excluding from employment or restricting the opportunities within the workplace of those persons that are in their view less attractive, including those that are obese. The decision of the CJEU in *Kaltoft*¹²⁰ makes it clear that the cause of obesity is not important, only the effect, and this may require the legislators in the UK to think again. If so, the impact could prove significant for UK employers, given that this jurisdiction has the highest percentage of obesity in Europe. It is hoped that this article will help to highlight this problem and put pressure on the legal establishment to take action.

118 The National Institute of Clinical Excellence (NICE) provides guidelines for employers to adopt in promoting a healthier working environment, with proposals such as healthier food in office canteens, encouragement of staff to exercise during lunch breaks and more workplace showers. Larger employers will be expected to install bike sheds and all employers should discourage staff from using the lifts in favour of using the stairs. NICE *Obesity, The prevention, identification, assessment and management of overweight and obesity in adults and children – Clinical Guidelines*, 2006, CG43.

119 Nourishing the Soul, “Weightism is a Human Rights Issue”, 5 January 2011. Obesity expert Boyd Swinburn, director of the World Health Organisation’s Collaborative Centre for Obesity Prevention at Deakin University, said: “There are a lot of studies to show obese people are prejudged in social situations and employment and so on.” “‘Weightism’ denies fat people human rights”, *News.com.au*, 12 July 2012, available at: <http://www.news.com.au/national/weightism-denies-fat-people-human-rights/story-fncynjr2-1226423926047>.

120 See above, note 2.

Equality and Justice in Employment: A Case Study from Post-Revolution Tunisia

Shira Stanton¹

Abstract

In 2013, women working in textile factories in Tunisia discovered that their employer had declared bankruptcy and left the country, owing them three months salary and social security payments. While they won their case against their former employer in court, these women remain in a precarious situation. Based on this case study, this article argues that efforts to support marginalised stakeholders to become proactive in seeking justice to ensure their enjoyment of employment and other basic human rights, requires challenging the entrenched structural causes at the root of their marginalisation and vulnerability. The article outlines how Avocats Sans Frontières works in fragile contexts to support people in vulnerable situations to become proactive justice seekers, and then analyses and explains the importance of the multiple vulnerabilities relevant to the case study. Finally, the article offers some ideas for supporting marginalised stakeholders to become proactive justice seekers.

Introduction

In post-conflict and fragile settings, laws, rules and standards may be partially or wholly ineffective in the face of the power dynamics that influence justice processes. Laws are regularly instrumentalised to the benefit of more powerful actors, and unenforceable official standards lead to power struggles and fear. When these unequal power relations are not counteracted by, or within, the justice system, that is, when laws are largely unenforced in practice, accessing justice by depending purely on a legal strategy will not address the inequalities that led to the problem. This is true even when a legal victory is achieved in an isolated case. Incorporating an understanding of the structural inequalities at the root of the problem into strategies to access justice can produce an effect that addresses the variety of problems stemming from structural inequality.

This article argues that efforts to support marginalised stakeholders to become proactive in seeking justice to ensure their enjoyment of employment and other basic human rights

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require challenging the entrenched structural causes at the root of their marginalisation and vulnerability. Section 1 defines access to justice and explains how *Avocats Sans Frontières* (ASF), an international non-governmental organisation, works in fragile settings to support traditionally marginalised people to become proactive justice seekers. This is illustrated in section 2 by the case of Tunisian women employed in textile factories who sought justice for labour rights violations. They won their case in court, but the root causes of their increased vulnerability have not been solved. Section 3 discusses the fluid nature of vulnerability and its association with specific contexts, in this case primarily to do with geographic and gender disparities in post-revolution Tunisia. Section 4 offers some ideas, based on current work within the Tunisian justice and labour sectors, for supporting marginalised stakeholders to become proactive justice seekers. The article ends by drawing some conclusions from the case illustration for improving access to justice.

1. Access to Justice Is the Right to Realise All Other Human Rights

Access to justice is a basic human right, comprising both the processes and the mechanisms that provide for a legal-based response to a problem.² Access to justice is required for the realisation of all other human rights. The normative framework for access to justice provides possibilities for the law to protect people who have few social, customary, political or financial means at their disposal. This is based on the Universal Declaration of Human Rights, Article 8, which states, “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law,” and on the International Covenant on Civil and Political Rights and regional human rights treaties, such as the African Charter on Human and People’s Rights. Without access to justice, other basic human rights, such as the rights to work, to fair working conditions, and to an adequate standard of living, are rights without meaningful guarantees.

In transitional contexts, there are often serious failings in the effectiveness of the rule of law and consequently, in the guarantees for human rights. This can be due to a lack of state willingness and/or capacity to guarantee the provision of basic public services, including justice. In this environment, social tensions can run high and economic development can be challenging. Justice institutions are regularly used by powerful actors to advance their own interests at the expense of the general public (although this is not unique to countries in transition). This abuse perpetuates a culture of impunity, as the justice system is used as, and seen to be, a tool to exacerbate the oppression and marginalisation of people in vulnerable situations, increasing the social, political and economic inequalities in the country. In such situations, marginalised people are unlikely to seek justice to solve their problems or protect their rights. When laws, rules and standards are ineffective, overpowered by the social dynamics that guide the justice processes, justice is arbitrary and the power relations that rule the street are pervasive in the courtroom.

2 Stanton, S. and Paras, J., *The Obstacles People Living in Extreme Poverty Face in Accessing Justice*, ASF, 2012.

Transforming power dynamics requires transforming rules, standards and laws into a regulatory system that influences people regardless of their positions in society. Working to improve access to justice in a situation of extreme imbalances of power requires addressing the structural causes leading to these inequalities. This transformation can only happen if the people seeking justice see themselves as active stakeholders in this process. The key to the transformation is in their actions, both in the message those actions sends to others, and in the way they enable them to see themselves and their capacity to make and act on their decisions. If a justice seeker sees that she can meaningfully participate in the processes and systems that affect how she lives her life, she is more likely to trust these processes and systems, and more likely to make use of them in the future.

ASF has been working in post-conflict and fragile settings for over 20 years, developing an approach across all its activities, regardless of project objectives, to support people to become legally empowered to claim and realise their human rights. ASF's condition for implementing projects is that the people engaging with these initiatives become active stakeholders in the activities. There are two different ways to be stakeholders: reactive stakeholders depend on the will of others, doing what others ask or suggest; proactive stakeholders shape the actions, and see themselves as being in control of the process, anticipating and making their own requests. ASF's goal is to develop a situation in which people in vulnerable situations demand and participate, without discrimination, in justice mechanisms consistent with human rights standards:

Through meaningful and effective participation, people can exercise their agency, autonomy and self-determination (...) Conceived as a right, participation (...) gives people living in poverty power over the decisions that affect their lives, transforming power structures in society and creating a greater and more widely shared enjoyment of human rights.³

To achieve this, ASF works in partnership with national and international stakeholders, such as bar associations, civil society organisations and justice ministries, so that they can develop the justice mechanisms needed to challenge the structural causes of marginalisation and vulnerability of different groups and people in society.

2. The Case of Women Textile Factory Workers in Tunisia

In 2012, ASF started working with the *Forum Tunisien pour les Droits Économiques et Sociaux*⁴ on a project to apply a human rights framework to their work, including in Monastir with textile factory workers. With picturesque souks and hotel restaurants dotting the shoreline, Monastir is better known as the textile industry capital of Tunisia. The textile industry is one-third of Tunisia's industry sector and accounts for around one-quarter of exports. Twenty-six

3 Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona*, March 2013, UN Doc. A/HRC/23/36, Para 16.

4 In English: Tunisian Forum for Economic and Social Rights.

percent of all textile factories in Tunisia are found in Monastir, making up over three-fourths of factories in the region. These textile factories employ 27% of all people working in the Tunisian textile industry, and 84% of all factory workers in Monastir. Most of these factories are subcontractors manufacturing clothing for export.⁵ Subcontractors are near the bottom of the supply chain, perched precariously on the backs of their employees.

The textile industry has had numerous adverse effects on the region's people, including pollution from untreated chemicals draining into the water supply and coastal waters, impacting their health and living environment.⁶ With few opportunities for work outside the textile factories, people dependent on work from the textile industry are faced with the constant fear of losing their jobs, and feel unable to challenge their deplorable working conditions. The end of the Multi-Fibre Arrangement in 2005⁷ led to a decline in employment in the sector, from approximately 250,000 workers to around 179,000 in the period between 2007 and 2012.⁸ In addition to pushing so many people into unemployment, the loss of jobs pushed the remaining workers into an increasingly insecure position.

One day in early 2013, approximately 300 women who showed up for work at five factories owned by a Belgian textile group found the factory gates closed. They had not received salaries for more than three months, but kept coming to work with the hope that they would eventually be paid. They felt they had little choice, as many of them were the sole gainfully employed person in their families. Many were young women from the interior of the country where unemployment can reach up to 26%;⁹ they came to Monastir alone, lodging in dormitories provided by their employer, and sending money home to their families. Older women, who were worried that their child-rearing responsibilities and illnesses caused by years of factory work made them unappealing candidates for employment, did what they could to keep the jobs they had. They quickly learned that their employer had filed for bankruptcy, effectively and unlawfully terminating their employment, and had then left the country.

In June 2014, the lower court of Monastir¹⁰ convicted five Tunisian member companies of the Belgian textile group Jacques Bruynooghe Global (JBG) of fraudulent bankruptcy and

5 Hassine, M., "Violations des droits économiques et sociaux des femmes travailleuses dans le secteur du textile, étude de cas : la région de Monastir", FTDES, 2013, pp. 5–9.

6 FTDES, *Le désastre écologique de la Baie de Monastir*, May 2013, p. 11.

7 An international trade agreement under which smaller and poorer countries were guaranteed access to the world clothing market through a quota system, enabling them to develop textile industries.

8 See above, note 5, p. 5 ; and Agence de Promotion de l'Industrie et de l'Innovation, *Les Industries du Textile et d'Habillement en Tunisie, Année 2014*, 2014, p. 4.

9 Compared to 17.6% nationally, according to latest reliable data from 2012. Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) with the Office de Développement du Centre-Ouest (Kasserine), *Plan régional de développement durable (PREDD) du Gouvernorat de Kasserine, document synthétique*, February 2015, p. 14.

10 *Tribunal de première instance de Monastir*. This was not a collective action, and there are over 300 individual cases, and thus no single case reference.

non-compliance with social legislation. Three hundred and eleven former employees of this association won their cases¹¹ and were awarded almost all of the indemnities they had sought: back pay, bonuses, and compensation for unfair dismissal, for a total of four million Tunisian dinars (approximately US\$2.032 million). This was the first time in Tunisia that a foreign company had been found guilty of fraudulent bankruptcy or had even lost a court case, resulting in widespread coverage in the national press.¹²

Now, over a year after the judgment was rendered, the affected workers have yet to see one dinar of the payment awarded them. JBG left Tunisia, and the justice seekers must go through further legal processes in an attempt to claim what the company owes them. For the former employees of JBG, access to the legal processes that provide a response to the problem has not meant that they have accessed an effective remedy. While the court provided a legal ruling saying that they were to be awarded back pay and damages, the limitations in administering justice mean the former employees have no effective remedy for the injustice they have faced. Effective remedy includes not only the necessary access to justice processes and mechanisms, but also ensuring that remedies are effective and legal with just and equitable outcomes. The end goal of access to justice is a positive change in the lives of the marginalised justice seekers via a reduction in the inequalities that caused their marginalisation, not a favourable court decision, and there is still work to be done. Continued efforts on the part of the justice seekers must be supported; but this support will only be effective if the support strategies recognise and address the root causes of their marginalisation and vulnerability.

3. Equal Access to Justice for Various Forms of Vulnerability

Not everyone is vulnerable at all times and in all situations. Vulnerability is tied to the context and there is no one-size-fits-all strategy for supporting marginalised people to access justice. The post-revolution Tunisian context in which these former employees are acting should be taken into account when working to effectively support proactive justice seekers.

Tunisians changed the course of their history when they told their corrupt leader to “*degage*” in 2010–2011. They did this by leveraging what they had: sheer numbers and the possibility to galvanise public opinion through their mass protests across the country. Their actions overpowered the ruling clique, who became unable to draw on their traditional sources of

11 Their lawyer was mandated by ASF, in the framework of a project funded by the European Union and in partnership with the FTDES.

12 For example, see: “After being arbitrarily dismissed, the latest development in the case of textile workers in Monastir”, *Almindhar* (in Arabic), available at: <http://almindhar.tn/%D8%A8%D8%B9%D8%AF-%D8%B7%D8%B1%D8%AF%D9%87%D9%85-%D8%A7%D9%84%D8%AA%D8%B9%D8%B3%D9%81%D9%8A-%D8%A3%D8%AE%D8%B1-%D8%AA%D8%B7%D9%88%D8%B1%D8%A7-%D8%AA-%D9%82%D8%B6%D9%8A%D8%A9-%D8%B9%D8%A7%D9%85%D9%84>. The court’s decision would not have been possible without the support of the members and employees of the Monastir section of the FTDES, who transcribed each of the 311 judgments so that they would be valid for enforcement proceedings. It took two FTDES members working full-time for three months in close cooperation with the court and the plaintiffs’ lawyer to complete the task.

power. Opaque, corrupt and undemocratic ways of running the institutions that rule society can be useful for asserting power over daily interactions, but may be less effective in dealing with mass unplanned demonstrations. But increased agency, or capacity to act, is not always sufficient to change power dynamics, especially abusive ones, when one side has more access to economic, social or political resources than the other. The sources of power Tunisians drew upon to get rid of a dictator are not necessarily those they need to reconstruct their country and build institutions capable of guaranteeing the rule of law. Mass protests can be effective in tearing down an institution, but less so in constructing one.

Since Tunisia's 2010–2011 revolution, the transition to democracy has been marked by democratic elections and a new Constitution, as well as by terrorist attacks, political assassinations of human rights and democracy advocates that have yet to be adequately investigated and prosecuted, and socio-economic living standards that have not improved and are widely perceived to have worsened.¹³ Post-revolution Tunisia finds itself in a situation in which institutions, justice and others, are experiencing cognitive dissonance. For example, Tunisia's previous government had ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) with reservations. Soon after the revolution, the transitional government lifted reservations to Articles 9, 15, 16 and 29 of CEDAW. The changes entered into force in 2014, after the UN was formally notified.¹⁴ These changes relate to guaranteeing women's rights to nationality, and women's rights in marriage and family relations, including property ownership. However, this unprecedented step in the Middle East and North Africa region was diluted by the government's declaration that Chapter I of its new Constitution (Tunisia's official religion is Islam) takes precedence over CEDAW, a problematic declaration under international human rights law. Lifting the reservations is only a first step toward ensuring that the law protects everyone, including women, in Tunisia, as proactive participation can only happen if women know their rights, know how to claim them, and feel confident in doing so.

Further, although official rules have gone through changes, many individuals in positions of power, even and maybe especially at the local levels, have not. For example, law-decree n° 2011–120 from November 2011¹⁵ was meant to fight public and private sector corruption by creating a national commission to fight corruption, and guaranteeing improved administrative procedures, as well as codes of conduct and precise instructions and conditions for public servants, among other initiatives. But corruption remains a part of daily life in Tunisia, as justice institutions and actors have not prioritised fighting impunity for corruption. The

13 Verdier, M., "Les ouvrières de Ksar Hellal, en pleine désillusion après la révolution tunisienne", *La Croix*, 23 October 2014, available at: <http://www.la-croix.com/Actualite/Monde/Les-ouvrieres-de-Ksar-Hellal-en-pleine-desillusion-apres-la-revolution-tunisienne-2014-10-23-1225977>.

14 United Nations Depository Notification, *Tunisia: Withdrawal of the Declaration with Regard to Article 15(4) and of the Reservations to Articles 9(12), 16(C), (D), (F), (G), (H) and 29(1) made upon ratification*, April 2014, available at: <https://treaties.un.org/doc/Publication/CN/2014/CN.220.2014-Eng.pdf>.

15 Interim President of the Republic, *Décret-loi cadre n° 2011–120 du 14 novembre, relatif à la lutte contre la corruption*, available at: www.legislation-securite.tn.

penal code regarding private sector corruption has yet to be changed. Even if the justice institutions officially support those who are trying to prevent fraudulent bankruptcy resulting in unpaid wages and social security contributions, these crimes can continue, and are generally perceived to have worsened,¹⁶ so long as other political-economic actors overrule the decisions *de facto*,¹⁷ if not *de jure*. This problem can also be examined in terms of issues of inequality; people who are illiterate or have just a primary formal education are more than twice as likely as those with a secondary or higher level of formal education to have experienced an act of corruption in the past year. Those who earn less than 800 dinar per month (approximately US\$405 per month) are around two and a half times more likely than those earning more than 800 dinar per month to have experienced an act of corruption (the former employees of JBG earned an average of 400 dinar per month).¹⁸

There is also political-economic confusion, with direct tension between so-called economic development and labour rights protection. High unemployment in post-revolution Tunisia has also led to a situation in which people working in textile factories feel unable to stand up for their labour rights. Since 2007, eight out of ten women working in the textile industry in Monastir have become unemployed.¹⁹ The end of the Multi-Fibre Arrangement is only one reason factories are leaving; since the revolution, companies have left Tunisia citing a lack of security. In some cases, the employees were not given any warning about these closures.²⁰ On other occasions, strikes and sit-ins by workers in factories were used as reasons to close factory doors, although labour representatives dispute this as a reason for closing, arguing that the decision to close had already been taken for other reasons and that the strikes were a useful excuse. Instead of addressing the reasons that compelled the workers to demand their rights, the local and national authorities have urged the workers to stop striking for the sake of the national economy.²¹

16 Association Tunisienne des Contrôleurs Publics, *La petite corruption: le danger banalisé. Etude exploratoire sur la perception de la petite corruption en Tunisie*, 2015, p. 13.

17 *Ibid.*, pp. 92–94. Sixty-seven percent of people surveyed felt that the judicial powers did not do enough to combat corruption, although 74% felt that the justice system has an important role to play in fighting corruption. Ninety-eight percent of respondents believe that strictly enforcing the law is necessary to fight corruption.

18 *Ibid.*, pp. 62–63. Forty-one percent of those who earn less than 400 dinar per month experienced an act of corruption in the past year, compared with 38% of those earning between 401–800, 16% earning 801–1200, 3% earning 1201–1600, and 2% earning over 1600.

19 Losson, C., “Ouvrières du textile en Tunisie : ‘la seule façon d’améliorer leur sort, c’est d’informer’”, *Liberation*, 28 March 2015.

20 For example, Tuniscope, “DRÄXLMAIER ferme son usine à Siliana, 3800 ouvriers se retrouvent au chômage”, 9 December 2014, available at: <http://www.tuniscope.com/article/58481/actualites/tunisie/draxlmaier-siliana-240416>.

21 Le Monde with AFP, “En Tunisie, une grande usine ferme en raison de ‘sit-in anarchiques’”, *Le Monde*, 10 February 2012.

While the workers are in the most vulnerable situation in this context, the state is also at a disadvantage when dealing with investors, who increasingly threaten to take their factories to Morocco or Asia, where they are able to pay workers even less. There are many laws that support investors in Tunisia, especially international investors, including no taxes for the first 10 years of activity in Tunisia.²² While laws to encourage investment are implemented consistently, the laws protecting workers and residents near the factories are not so carefully enforced. Textile factories dump water containing untreated chemicals into the water supply and into the sea, even though there is a clear legal framework that requires textile factories to treat their used water.²³ Within the factories, the workers are not provided with gloves or face masks when handling hazardous chemicals.²⁴ Challenging the structural causes leading to workers' marginalisation should take the legal framework and political-economic factors into account.

The employees who worked for the JBG factories were not just at a disadvantage in relation to their employer because of international political economic factors and the decisions taken on the national level, but also because of historical injustices that put people from the interior regions of Tunisia at a disadvantage in relation to Tunis and the coastal areas. This is especially the case for Monastir, birthplace of Habib Bourghiba, Tunisia's first president, and Sousse, birthplace of Zine El Abidine Ben Ali, Tunisia's second president and dictator who was ousted in the revolution. It is not by chance that more than half of the textile factory workers in Monastir come from the interior of the country, from the central-west, south-west and south-east regions of Tunisia.²⁵

The inequalities among Tunisia's regions are so entrenched that the 2013 law guiding the country's transitional justice process expands the definition of a "victim" to regions that have suffered systematic marginalisation or exclusion.²⁶ The need for this definition and the recognition it affords, to be included in transitional justice processes, stems from political-economic policies over the decades in Tunisia that favoured the coastal regions, even as official acknowledgements,²⁷ both before and after the revolution, were made that these inequalities should be addressed. Basic infrastructure, such as access to water, health and educational services that are provided in the coastal regions are largely insufficient in the interior and

22 Invest in Tunisia, "Législation incitative", available at: www.investintunisia.tn/Fr/legislation-incitative_11_24.

23 See above, note 6, p. 11.

24 See above, note 5, p. 29.

25 *Ibid.*, p. 22.

26 *Loi organique* n° 2013-53 from 24 December 2013, which mandated the Truth and Dignity Commission of Tunisia to establish the truth about the human rights violations committed between 1955 and 2013, contribute to national reconciliation, provide guarantees of non-recurrence and contribute to building the rule of law in Tunisia.

27 For example, Ministry of Regional Development and Planning, "Measuring Poverty, Inequalities and Polarization in Tunisia (2000-2010)", 2010.

west of the country.²⁸ In this case, concepts of marginalised or excluded regions are strongly related to social and economic development.²⁹ This marginalisation was not necessarily caused by formal discrimination, but rather was:

[E]mbedded in social, economic and political processes that restrict life chances for some groups and individuals. Marginalisation is not random. It is the product of institutionalised disadvantage – and of policies and processes that perpetuate such disadvantage.³⁰

The situation in the governorate of Kasserine illustrates the consequences of structurally excluding Tunisia's interior regions;³¹ its regional development index is 0.16 compared to 0.76 in the capital, Tunis;³² and in 2012, its unemployment rate was 26.2% compared with the national average of 17.6%.³³ The infrastructure distribution rate for potable water and connections to improved sanitation facilities in the houses and schools of Kasserine stands at 50%, compared to 90% in Tunis.³⁴ There are similar disparities for health services, education, and internet access.³⁵ This is strongly correlated with the rates of people living in poverty, which is 27% in Kasserine compared with 4.6% in Monastir and 7.6% for Tunisia as a whole.³⁶ These inequalities have been exacerbated over the years. In 2010, the regions in the centre-west (interior) had a rate of people living in extreme poverty that was 13 times higher than the rate in Greater Tunis, up from six times higher in 2000.³⁷

The extreme centralisation of power in Tunisia prior to the revolution, compounded by systemic corruption, contributed to the exacerbation of these inequalities among regions.³⁸ Decisions were taken exclusively in Tunis, and regional development plans were imposed without adaptation to the realities of the regions. The people and institutions responsible for decisions could

28 Ministry of Regional Development and Planning, *Indicateur de développement régional: Étude comparative en terme de développement régional de la Tunisie*, Institut Tunisien de la Compétitivité et des Études Quantitatives, 2012, p. 17.

29 FTDES, *Demande Relative à l'établissement du Statut de 'région-victime'*, with technical assistance from ASF, 2015, Para 15.

30 UNESCO, *Reaching the Marginalized*, 2010, p. 135.

31 See above, note 29, Para 15.

32 See above, note 28, p. 4.

33 See above, note 9, p. 14.

34 See above, note 28, p. 36.

35 See above, note 29, Paras 70–76.

36 See above, note 9, p. 14.

37 *Ibid.*

38 See above, note 29, Paras 109–113.

not be held to account by the people most affected by those decisions.³⁹ The effects of these policies were not unintended; the development plans promoted internal migration from the interior regions to benefit businesses on the coast. Rather than being modernised along with the coastal regions, the interior regions' main function was to provide cheap labour for low-status and low-paid occupations. Purposefully marginalising people within their regions of origin led to an influx of internal migrants to the coastal areas, and created new types of exclusion in the form of separated neighbourhoods, in which residents from the interior were unable to fully benefit from the services and infrastructure the coastal regions offered to others.⁴⁰

In addition to the horizontal inequalities across regions, the interior regions are also marked by a marginalisation of women that is more common than in other areas, largely excluding women from the formal labour market and leading to a higher rate of unemployment than men. While the average unemployment rate for women nationally was 25.6% in 2012, it reached 50% in the south and east interior regions.⁴¹ In the centre-east region, in which Monastir is located, the unemployment rate among labour force participants for women was 16%, compared to 11% for men; in the south-west interior, the rate of women's unemployment reached 44%, compared to 20% for men.⁴² The interior regions represent the worst of an already difficult situation, as only 26% of women actively participated in the labour force in 2012, compared to 70% of men.⁴³ This rate does not include unremunerated domestic workloads, which are 40% greater for women than men, accounting for an estimated 47% of GDP in 2006.⁴⁴ The high rate of women's unemployment and exclusion from remunerated work correlates with the marginalisation of the interior regions on the whole, as "women's ability to take advantage of labour market opportunities may be enhanced to a greater extent than that of men by expansion of public infrastructure in rural locations."⁴⁵ The multiple forms of marginalisation that adversely affected women from the interior regions meant that they were at a disadvantage in society and in the economy, and especially in relation to their employer, even before they arrived in Monastir. Any strategy for challenging structural issues should therefore address the geographic and gender inequalities that put many textile factory workers in a vulnerable situation.

It was not by chance that the factory jobs at JBG were largely occupied by women, the most geographically, socially and economically marginalised segment of the workforce. In this

39 *Ibid.*, Paras 100–102.

40 Ministry of Regional Development and Planning, *Livre blanc pour le développement régional*, 2001, pp. 42–43.

41 Triki, S. and Touiti, H., *Réglementation du travail et participation des femmes au marché du travail en Tunisie*, 2013, GIZ, p. 6.

42 *Ibid.*

43 *Ibid.*

44 Gribaa, B. and Depaoli, G., *Profil Genre de la Tunisie*, European Union and Tunisian Government, 2014.

45 Kabeer, N., *Women's economic empowerment and inclusive growth: labour markets and enterprise development*, SIG Working Paper 2012/1, 2012, p. 45.

sense, the former employees of JBG are emblematic of over half of the women in the world who work for their incomes in vulnerable employment.⁴⁶ “Gender segregation of the labour market reflects a variety of gender-related inequalities in women’s capacity for choice and agency”, including the constraints they face domestically, socially, professionally and legally.⁴⁷ This reflects, for example, women’s lower levels of literacy and formal education, as well as lower levels of professional training, compared to men. In industries where women are the majority of workers, the average monthly salary is half that of men in the sector.⁴⁸ The structure of the labour market helped to create a situation that allowed the management of JBG to think they could act abusively with impunity, and caused the workers in the factories to feel that they could not speak out or defend their rights.

Although the former employees of JBG were technically not informal or temporary workers, common practices in the industry are to dismiss workers just before they reach four years in the same position, or to eliminate their positions; the ones who are considered lucky get rehired by a sister company for a similar job.⁴⁹ This is done to avoid having to provide the benefits associated with permanent contracts.⁵⁰ Because these workers are not considered to have permanent employment status under Tunisian law, they have less access to state-sponsored safety nets such as unemployment benefits.

A person’s situational vulnerability depends on political-economic contexts, geographic origin and/or gender, and should be taken into account when working to support marginalised people seeking justice. They are not vulnerable in all places or all the time, nor is every issue a priority. Their willingness and ability to act on the issues that most concern them is what will make the difference in achieving justice that affects the entirety of the problem.

4. From Theory to Practice: Actively Seeking Justice

Post-revolution Tunisia provides various examples of how its vibrant civil society is taking action to transform power dynamics, informing ASF’s work, and creating possibilities for a more responsive justice system that provides equal access to justice. This section identifies and analyses some activities relevant to the case of the JBG workers that may be undertaken in an attempt to transform rules, standards and laws into a regulatory system by taking into account inequalities and structural causes of marginalisation. The section also draws some conclusions about how to use such a regulatory system to transform power dynamics.

46 Desai, R., *Women’s Work Counts: Feminist Arguments for Human Rights at Work*, Programme on Women’s Economic, Social and Cultural Rights, 2015, p. 5.

47 See above, note 45, pp. 51–52.

48 See above, note 41, p. 8.

49 See above, note 5, p. 13.

50 These practices are not unique to Tunisia.

Transitional justice activities carry lessons for the justice system as a whole. Women were underrepresented in the transitional justice national consultations and there were complaints of an overrepresentation of participants who supported the political party in power.⁵¹ The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence:

*[L]earned that consultations had been unable to bridge the gap between the urban coast and the interior of the country. As such, they seem to have tracked the status quo ante that the very transitional justice process is intended to address.*⁵²

These shortcomings were recognised, and during the technical committee's regional dialogue with victim representatives, these representatives recommended that the approach adopted should be participative, including representatives from all segments of civil society, and prioritising equality between men and women throughout all process stages. The same recommendations were made by representatives from civil and political society, professional associations, and political parties.⁵³ This process seems encouraging, as both participants and organisers actively and formally recognise the importance of carrying out transitional justice activities using a human rights-based approach, and have noted precisely where and how improvements can be made. The proactive participation of marginalised rights-holders in shaping these transitional justice processes can inform other types of justice processes.

One way would be to provide spaces for the former employees to explain how they got into a position in which they felt it necessary to work for unpaid wages; this can contribute to understanding how the formal equality provided for in Tunisian law does not translate into substantive equality for many, enabling abuse. Substantive equality is about ensuring that laws, policies and practices alleviate the disadvantages of certain groups,⁵⁴ and can be used as a guideline for formulating legal and other advocacy strategies, as it "requires decision-makers to hear and respond to the voice of women, rather than imposing top-down decisions."⁵⁵

One such space could be within Tunisia's largest labour union, the Union generale des travailleurs tunisiens (UGTT). Only in 2000 did the UGTT's commission on women workers become a formal body. Even in the last central congress in 2011, women union representatives made

51 Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, UN Doc. A/HRC/24/42/Add.1, July 2013, Paras 30–33.

52 *Ibid.*, Para 33.

53 Ministry of Human Rights and Transitional Justice, Republic of Tunisia, *Le dialogue national sur la justice transitionnelle en Tunisie*, October 2013, pp. 15 and 21.

54 Committee on Economic, Social and Cultural Rights, *General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights*, UN Doc. E/C.12/2005/3, 2005, Para 7.

55 Fredman, S., "Engendering Socio-Economic Rights", Legal Research Paper Series, Paper No. 54/2010, University of Oxford, 2010, p. 16.

up only 4% of the over 500 *congressistes*,⁵⁶ even though women comprise approximately 40% of labour union members.⁵⁷ The biggest voice representing the rights of workers in Tunisia does not currently provide sufficient space or means for its members in extremely vulnerable situations to advocate for their specific needs. Part of substantive equality is about pushing social institutions to change, “rather than expecting the individual to conform”.⁵⁸ If the power relationships that led to this situation are to be changed through better access to justice, there is also work to be done within and with the structure of one of Tunisia’s largest and most central labour rights advocate.

Scholars have found that progressive social policies on violence against women were primarily driven by autonomous feminist movements “because they articulate social group perspectives, disseminate new ideas and frames to the broader public, and demand institutional changes that recognise these meanings.”⁵⁹ Improving the former JBG employees’ opportunities to realise their full range of human rights through improved access to justice can take inspiration from this analysis on how feminist mobilisation helped bring about social change (in this case, in relation to violence against women). The scholars pointed to the movement’s ability to raise public awareness about the position and experience in society of women as a group. Unlike issues such as maternity leave or childcare, ending violence against women requires challenging gender roles rather than accepting them. In addition, autonomous women’s groups do not need to fight within broader institutions (labour unions and political parties, for example) to get their concerns recognised as a priority.

There are also alliances to be made among civil society actors, with women’s organisations well placed to work with the UGTT’s women’s commission to push women’s employment rights to the fore. These alliances can help ensure that the priorities of the women’s commission are not pushed aside by other UGTT priorities, so that the UGTT can advocate effectively for progressive social policies that address the specific and different needs of women, including women from marginalised regions, working in the textile factories. A recent analysis of court cases related to sex discrimination across nine countries found that workers were likely to win their cases if they could afford the time, money and stress that the lengthy legal proceedings entailed.⁶⁰ While the contexts analysed in that study present different sorts of challenges to those in transitional Tunisia,⁶¹ improving access to justice for former JBG employees requires more than just a good legal strategy; it also requires the accompanying

56 See above, note 44, p. 9.

57 See above, note 41, p. 8.

58 See above, note 55, p. 13.

59 Htun, M. and Weldon, S.L., “The Civic Origins of Progressive Policy Change: Combating Violence against Women in Global Perspective, 1975–2005”, *American Political Science Review*, Vol. 106, 2012, p. 552.

60 Hodges, J., “Eliminating Sex Discrimination at Work: Recent Court Decisions since Beijing+20”, *UNRISD Think Piece*, 26 May 2015, available at: <http://www.unrisd.org/beijing+20-hodges>.

61 The countries considered were Australia, Canada, Finland, France, Japan, Kenya, Spain, the UK and the US.

psychosocial and economic support. While donors consider the direct costs related to taking a case to court to be acceptable, it is rare that complementary psychosocial and economic support services for justice seekers are funded as an integral part of supporting access to justice. It is also infrequent that funding for legal aid providers covers expenses of the execution phase. The trend of favourable decisions in sex discrimination cases “raises the need to develop new measures or make better use of existing procedures that empower third parties to bring suit for justice against workplace discrimination.”⁶²

As the justice sector is being reformed, Tunisian civil society is in a unique position to contribute to the decisions that are being taken. For example, the *Reseau d’Observation de la Justice* (ROJ, or Justice Observation Network) is working to promote and ensure constructive, inclusive and proactive engagement with key stakeholders in the justice sector throughout the reform process.⁶³ Because this network provides an independent and apolitical space within which to examine issues and exchange ideas among multiple actors, the resulting recommendations garner support from diverse sectors of the justice system. The ROJ is an excellent example of how civil society can address multiple and complicated dysfunctions, and draw attention to disparities among those using justice mechanisms. It could be useful to implement a similar mechanism to closely examine how laws are enforced differently in the industrial sector, and the impact this has on workers’ rights and the environment.

Conclusion

The argument has been made here that efforts to support marginalised people to become proactive stakeholders seeking justice, in order to ensure their enjoyment of employment and other basic human rights, requires challenging the entrenched structural conditions at the root of their marginalisation and vulnerability. Ensuring that justice seekers are proactive stakeholders in efforts to improve access to justice requires a focus on meaningful participation that takes into account an understanding of the situation that put the justice seekers in a vulnerable position. The case of the JBG workers is a useful illustrative example, as more than a year after the former JBG employees won their case, they are still living in poverty, many without new jobs or social safety net benefits on which they can rely. Some have become labour rights activists and have not given up on pursuing avenues for compensation.⁶⁴ This is an encouraging sign for the transformation of laws into a regulatory system, as this transformation can only happen if the justice seekers become active stakeholders in the justice process, feeling comfortable making appropriate demands, and taking action. One social

62 See above, note 60.

63 This network is made up of the National Order of Tunisian Lawyers (*ONAT* in its French acronym, the national bar association), the Tunisian Human Rights League and ASF. The network’s activities are funded by the Open Society Foundations.

64 For example, see Merminod, I. and Baster, T., “The women fighting for Justice and Against Violence in Tunisia”, *Equal Times*, 8 March 2015, available at: <http://www.equaltimes.org/the-women-fighting-for-justice-and?lang=en#.VfBOy5caPiI>.

media video shows some of the former employees demanding local authority intervention to ensure that they get back the salaries and indemnities they are owed.⁶⁵ These justice seekers may be in a situation of vulnerability, but they send a strong message that they are working to change the existing unequal power relations.

The ability to challenge the inequalities they face as women, many of whom are from the interior of the country and dependent on the textile industry for their livelihoods, is sometimes called “legal empowerment”, although there is no universal agreement as to its definition or what it entails.⁶⁶ Legal empowerment can refer to the results of the legal process, but its relevance to ASF is how these results are achieved. ASF understands legal empowerment to be the process of supporting justice seekers to acquire the ability to make choices by using the law, and legal mechanisms and services. ASF’s goal is to challenge abusive power relationships so that people can realise the full range of their human rights. This is based on a useful definition of empowerment by Naila Kabeer. Kabeer’s definition of empowerment:

[R]efers to the processes by which those who have been denied the ability to make choices acquire such an ability. In other words, empowerment entails a process of change. People who exercise a great deal of choice in their lives may be very powerful, but they are not empowered in the sense in which I am using the word, because they were never disempowered in the first place.⁶⁷

While there are many different approaches to facilitating the active participation of justice seekers, ASF bases its actions on a human rights approach, both in terms of formulating goals and in terms of how to reach those goals. Through its experience, ASF has found that any effective approach must be based in human rights principles, and any support given should be done with the understanding that access to justice is meant to enable people to have control over their lives, rather than deciding for them how their lives should be improved. Instead of approaching a problem with a toolkit,⁶⁸ a more empowering approach is to ask the justice seeker what the problem is and what her ideal solution would be. Strategies, both legal and otherwise, are based on the goals of the justice seeker. Providing both legal and other types of support enables her to understand the possibilities and advantages of one strategy over another, and decide which strategy she will apply, if any. This approach is especially important for legal NGOs, as a positive legal response may not actually achieve the justice seeker’s goal. Confusing a positive legal decision with achievement of the justice seeker’s goal may be

65 “The national front in Monastir follows and supports the movement of workers in JB, 4 July 2013, (video in Arabic), available at: <https://www.facebook.com/video.php?v=10200619258782345>.

66 See the *International Journal of Human Rights*, Vol.19, No. 3, 2015, for various discussions on legal empowerment in transitional settings.

67 Kabeer, N., “Resources, Agency, Achievements: Reflections on the Measurement of Women’s Empowerment”, *Development and Change*, Vol. 30, 1999, p. 381.

68 See, for example, Sépulveda Carmona, M. and Donald, K., “Beyond legal empowerment: improving access to justice from the human rights perspective”, *The International Journal of Human Rights*, Vol. 19, 2015, p. 244.

well-intended, but it is problematic, both in terms of human rights and in terms of a lawyer's obligations to her client.

The process for the workers in JBG factories to become legally empowered, using the law and legal mechanisms and services to acquire the ability to make choices, is the process needed to address the power imbalances between them and their former employer. The ideas put forward in this article share the potential to create a situation in which the ability of traditionally marginalised rights-holders to make choices is strengthened, deriving from their active participation in the process.

“No Jobs for Roma”: Situation Report on Discrimination against the Roma in Moldova

Equal Rights Trust¹

Introduction

Since 2014, the Equal Rights Trust has been working with a Moldovan human rights organisation, Promo-LEX, with financial support from the European Union, to increase protection from all forms of discrimination in Moldova. As part of this effort, researchers have been documenting patterns of discrimination and inequality in Moldova, with a focus on discrimination against particularly disadvantaged groups. One of these groups is the Roma, who face discrimination in all aspects of their lives in Moldova, including in relation to employment. This situation report highlights this discrimination through discussion of some of the research findings to date.

1. Overview: Discrimination against Roma in Europe

The Roma people are Europe’s largest ethnic minority,² yet despite legal prohibitions of discrimination and policy measures such as the European Union’s (EU) 2011 Framework for National Roma Integration,³ Roma communities remain highly vulnerable to prejudice and social exclusion. The EU Fundamental Rights Agency’s Minority Discrimination Survey in 2009⁴ found that “[t]he Roma emerged as the most discriminated against group surveyed”.⁵ In several EU Member States, unfavourable views of Roma are held by a majority of the population (Italy: 85%, France: 66%, UK: 50%).⁶ Hate speech and crime directed towards Roma are on the rise.⁷

1 The Trust would like to thank Ben Smith for his research and drafting of this situation report and its partner Promo-LEX for conducting the interviews with Roma contained herein.

2 European Commission, “EU and Roma”, 23 September 2015, available at: http://ec.europa.eu/justice/discrimination/roma/index_en.htm.

3 European Commission, *An EU Framework for National Roma Integration: Strategies up to 2020*, 2011.

4 EU Fundamental Rights Agency, *European Union Minorities and Discrimination Survey (EU-MIDIS), Main Results Report*, 2009.

5 *Ibid.*, p. 155.

6 European Commission, *Report on the implementation of the EU Framework for National Roma Integration Strategies*, 2015, p. 9.

7 *Ibid.*

This stigma and prejudice affects Roma people in all aspects of their lives. Across Europe, among other disadvantages, Roma people are more likely to live in poverty, be unemployed, undereducated and have limited access to healthcare and adequate housing than non-Roma. Figures from the World Bank show that employment rates in the Roma community generally fall well behind rates for the non-Roma population, with women particularly badly affected.⁸ Roma communities tend to have much lower educational achievement than the non-Roma population, with data suggesting that only limited numbers of Roma children complete primary school.⁹ The segregation of Roma children in schools is well-documented, and has been the subject of several cases before the European Court of Human Rights.¹⁰ This problem persists, with the European Commission noting in its 2015 report on the implementation of the EU's National Roma Integration Framework that over 20% of Roma children up to the age of 15 in Slovakia and the Czech Republic attend social schools and classes for children with mental disabilities.¹¹ The failure to ensure that Roma communities have access to education acts to perpetuate the cycle of poverty and exclusion. Poverty, poor housing and lack of access to healthcare mean that Roma life expectancy is estimated to be as much as ten years less than the EU average,¹² and the infant mortality rate in Roma communities is estimated to be between two and six times higher than the average, depending on the country.¹³

2. Background: Roma in Moldova

The number of Roma living in Moldova is unclear, but the population is sizeable. The 2004 Moldova census showed 12,271 Roma living in the country, around 0.4% of the country's population.¹⁴ However, the UN Development Programme (UNDP) notes that censuses tend to underestimate the true size of the Roma population,¹⁵ and indeed Roma leaders estimate that there could be as many as 250,000 Roma in Moldova.¹⁶ Any difference between official

8 World Bank, *Roma Inclusion: An Economic Opportunity for Bulgaria, the Czech Republic, Romania and Serbia*, 2010, p. 8.

9 See above, note 3, p. 5, citing Open Society Institute, *International Comparative Data Set on Roma Education*, 2008.

10 See *DH v Czech Republic*, App. No. 57325/00, 13 November 2007; and *Oršuš v Croatia*, App. No. 15766/03, 16 March 2010.

11 See above, note 6, p. 10.

12 See above, note 3, p. 6.

13 UN Development Programme (UNDP), *The Roma in Central and Eastern Europe, Avoiding the Dependency Trap*, 2003; Cemlyn, S., Greenfields, M., Burnett, S., Matthews, Z. and Whitwell, C., *Inequalities Experienced by Gypsy and Traveller Communities: A review*, Equality and Human Rights Commission Paper Series, 2009.

14 Cace, S., Cantarji, V., Sali, N. and Alla, M., *Roma in the Republic of Moldova*, UNDP, 2007, p. 32.

15 *Ibid.*, p. 9.

16 *Ibid.*, p. 41.

figures and the actual Roma population is likely explained by reluctance to self-identity as Roma, given the stigma attached to Roma identity in Moldovan society.

The story for the Roma in Moldova is not a happy one. They remain among the most vulnerable to discrimination and exclusion in the country. Anti-Roma sentiment is reportedly very high, with a 2012 survey finding that 49% of Moldovans would not accept a Roma neighbour.¹⁷ Roma are more than twice as likely to live in poverty than non-Roma, with research by the UNDP finding that, in 2005,¹⁸ 59% of Roma lived in absolute poverty¹⁹ and 50% lived in extreme poverty,²⁰ compared to 24% and 19%, respectively, of non-Roma. Roma also face serious problems in accessing education and in educational attainment. Roma adults are more likely than non-Roma adults to be illiterate, for instance, and in general have reached a lower stage of education than non-Roma. The same UNDP research found that a particularly low number – only 4% – of Roma have a higher education.²¹

Roma in Moldova live “predominantly in rural area (sic) and in small towns”²² which can exacerbate poor access to education, employment, and healthcare. Their housing conditions are generally worse than for non-Roma: in 2005, 42% of Roma dwellings did not have a kitchen, compared to 17% of non-Roma; 81% of Roma dwellings did not have a bathroom available, while 51% of non-Roma did.²³ In recent years, poor access to clean water supplies, public transport²⁴ and emergency healthcare services²⁵ have been identified as common problems in these rural areas, further contributing to the vulnerable position of Roma in Moldova.

17 Mihalache, I. and Rusanovschi, S., *Study on the situation of Romani Women and Girls in the Republic of Moldova*, UN Women, 2014, p. 19.

18 See above, note 14, pp. 48–49.

19 This definition of poverty “recognises the need of essential non-food items, like dwelling, clothing, etc. and adds respective expenditures to the food poverty line. This line is also calculated based on the general Household Budget Survey. For 2005, this line was established at the level of 354 lei [\$17.7USD] per person per month”. See above, note 14, p. 48.

20 Extreme poverty is defined by the UNDP as “equivalent to food only consumption basket, necessary for mere survival, i.e. 2282 kcal per person per day. This line is calculated on the basis of the general Household Budget Survey. In 2005 this constituted 279 lei [\$13.95 USD] per person per month”. See above, note 14, p. 48.

21 See above, note 14, p. 61.

22 *Ibid.*, p. 51.

23 *Ibid.*, p. 92.

24 Office for the UN High Commissioner for Human Rights, “Bringing inclusion to Roma communities in Moldova’s rural areas”, 8 April 2013, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/RomaInMoldova.aspx>.

25 European Roma Rights Centre, “Moldovan Romani Organisation Complains About Discrimination by Local Doctor”, 12 June 2007, available at: <http://www.errc.org/article/moldovan-romani-organisation-complains-about-discrimination-by-local-doctor/2828>.

Further, the general problems that Roma people face in Moldova are experienced particularly potently by Roma women, who experience discrimination at the intersection of multiple characteristics, including race, gender, and class. They have lower levels of education, higher rates of unemployment, poorer health, and significantly lower incomes than the wider population, both Roma and non-Roma. In 2011, 45% of Roma women had no formal education (which includes primary education), compared to 33% of Roma men and only 2% of non-Roma women.²⁶ These factors, combined with cultural expectations of the role women should play in the home,²⁷ mean that Roma women and girls can all too easily become trapped in a cycle of poverty and exclusion. Roma women are almost entirely excluded from public life, with virtually no Roma women in elected positions of responsibility anywhere in Moldova.²⁸ In 2015, two Roma women were elected to town councils in Moldova and they were among the first Roma women to stand for election since Moldovan independence in 1991.²⁹ Though 31 of Moldova's 101 MPs are women,³⁰ none of them are Roma. This lack of political representation renders invisible the experiences and needs of Roma women and acts as a barrier to integration of the Roma community.

There are numerous protections against discrimination in Moldovan law which should operate to protect Roma communities. Discrimination on grounds of race and ethnic origin is prohibited by Article 16(2) of the Constitution.³¹ Article 4(1) of the Law on the Rights of Persons Belonging to National Minorities and the Legal Status of their Organisations³² guarantees to national minorities the right to equality before, and equal protection, of the law, while Article 4(2) specifically prohibits all discrimination for reasons of belonging to a national minority. In 2011, the Moldovan government announced the 2011-2015 Action Plan on Roma Inclusion, which sets out several key social inclusion factors, such as education, employment, and access to healthcare, with the view to improving the position of Roma in Moldovan society. However, these legal protections seem to have had little tangible effect on the lives of Roma people so far, as the exploration of employment opportunities for Roma in the next section indicates.

26 See above, note 17, p. 30.

27 *Ibid.*, pp. 58–60.

28 *Ibid.*, p. 15.

29 UN Women, "Blazing trails, first Roma women elected to local council in Moldova", 1 September 2015, available at: <http://www.unwomen.org/en/news/stories/2015/9/roma-women-elected-in-moldova>.

30 UNDP, "Women MPs determined to change the face of politics in Moldova", 30 April 2015, available at <http://www.eurasia.undp.org/content/rbec/en/home/presscenter/articles/2015/04/30/women-mps-determined-to-change-the-face-of-politics-in-moldova.html>.

31 Constitution of the Republic of Moldova.

32 Law No. 382-XV.

3. Employment for Roma in Moldova

For Roma in Moldova, discrimination continues to be a significant barrier to employment. In 2005, 29% of Roma were unemployed, compared to only 12% of the non-Roma population.³³ Statistics released by the UNDP in 2013 (collected in 2011) show that this gap in the unemployment rate remains, alongside a general rise in unemployment, with unemployment in the Roma population at 37%, compared to 20% in the non-Roma population.³⁴ The Roma population also has a much lower “activity rate”³⁵ than the non-Roma population – 27% compared to 43% – meaning that each “active” individual in the Roma population has to support 2.7 “inactive” individuals compared to 1.2 for non-Roma “active” individuals, further contributing to the risk of poverty.³⁶ Low levels of employment for Roma people are linked with several factors, including low educational attainment, poor housing which is often in remote areas, and pervasive discriminatory attitudes towards Roma people.

In August 2015, Equal Rights Trust partner Promo-LEX spoke to four Roma about their experiences of discrimination in accessing employment in Moldova. These testimonies are illustrative of common complaints Promo-LEX hears from Roma about discrimination they face in the employment sphere.

Experiences of overt and serious direct discrimination as a barrier to accessing employment emerged as a common theme in the testimonies. Liudmila Raiu lived in Hîncești with her three children. She is unemployed, and since her husband passed away, she has been facing difficulties in providing for her children. Ms Raiu recalled:

Two months ago I registered with the National Employment Agency, so I could get a job and somehow feed my children. The Agency sent me to one company which did sewing and tailoring, but there were no interviews and the boss of the company said immediately as soon as he saw me that they did not take Roma to work there. This happens very often to Roma. We are told to our faces that “We don’t give jobs to Roma”. The companies take others – Moldovans, Russians – but not Roma. This is very hard for us. How should we raise our children? Become burglars? Or what? It feels very bad to be rejected so often – it is offensive.³⁷

33 See above, note 14, p. 70.

34 Cantarji, V., Vremsî, M., Toartă, T. and Vladicescu, N., *Roma in the Republic of Moldova*, UNDP, 2013, p. 45 (in Romanian).

35 The active population, as defined by the UNDP includes working people, the unemployed who are seeking work, and students. See above, note 14, p. 70

36 See above, note 14, p. 70.

37 Promo-LEX interview with Liudmila Raiu, Hîncești, Moldova, August 2015.

Grigore Zapescu is a young lawyer from Sireți village, Strășeni district. He recounted his experiences of discrimination when trying to get a job to cover his expenses during his studies:

Towards the end of 2012 when I was a second year student, I was trying to find a job, not in my area of expertise, but a simple job to cover my expenses. I found a job on the internet – a restaurant was looking for waiters. The restaurant asked simply for young people willing to work. They did not require any experience in the field and they were offering training. I called the restaurant and I was invited in for the interview. My friend, who is not Roma, was also invited for an interview.

As we got there, we were immediately led to the HR office, the lady had a strange look on her face. I had the impression she was wondering who I was and what was I doing there. I introduced myself and explained that I was there to interview for the advertised job. She asked me to fill in a form which I did and she asked me a few questions. However, while I was answering, she did not listen to me and instead she was taking a phone call. I asked some questions about the job including the working hours, but although she was looking at me it was clear she was not paying attention to me. She told me I would be contacted within a week whilst hurrying me out of the door, explaining she was busy. After I left the office, my friend went in for his interview. He told me that he was accepted on the spot and was asked to attend the training the next day at 11.00 am.

My friend is not Roma, he is blond, whereas my appearance is Roma. We talked about it and concluded that it was discrimination. At that moment I realised how bad and offended one feels when one is treated differently. There was no requirement for experience in the field, and I was simply chased away.

The main barrier to Roma people being employed, as far as I have seen and as far as I know, is the general way that people perceive the Roma. People have a negative opinion about Roma from the very beginning due to their preconceived ideas and stereotypes. Uninformed people are judgmental and act in a discriminatory manner.³⁸

Mr Zapescu decided to challenge his treatment under Moldova's anti-discrimination law and is currently awaiting a decision from the Supreme Court. If it is successful, his case could provide an important precedent.

Victoria lives in Hîncești with her husband and baby.

Last year, we were given a paper at the unemployment office and we went to a walnut company, to pick the kernel out. When we went there, they said they cannot

38 Promo-LEX interview with Grigore Zapescu, Hîncești, Moldova, August 2015.

hire us. My husband was supposed to work as a freight handler and I was supposed to pick the walnut kernel out. The head of the company turned me down and told me and my husband to our faces that he was not going to hire us because we were Roma. I asked them whether Roma aren't humans as well. And they said that they won't hire us. They did hire Moldovans, though. Then I returned to the unemployment office. They told me to look for a job elsewhere. I asked where else can I look for one? I told them there was no other place I could go to. And that was it.³⁹

Vladimir lives in Hîncești with his family.

I went to another place in the neighbourhood, and I was told again that there were no vacancies, although there were. I think they did not hire me because I am of Roma ethnicity. Aren't we humans as well? Were we brought up in the wild? What if one is a Gypsy, and another is a Jew, aren't we all humans? Something must be done. They turned me down wherever I went. Everybody told me they would call when there are vacancies available, but nobody ever called.⁴⁰

Insufficient education is identified as a major barrier to Roma access to employment by the UNDP⁴¹ and by the EU.⁴² Statistics shows that, in 2005, 21% of adult Roma in Moldova were illiterate, compared to only 2% of the non-Roma population.⁴³ Further, 34% of adult Roma had only a primary-level education, 35% had only a secondary education (including vocational or incomplete education), and only 3% of Roma had a higher education. By contrast, the majority (83%) of the non-Roma population had a secondary education, and 38% have a higher education.⁴⁴ There are also significant gaps between current school enrolment rates for Roma and non-Roma children. Though primary and secondary education (up to age 15) are compulsory in Moldova, only 69% of Roma children were enrolled in primary education and 45% in secondary education, compared to a 94% enrolment rate in both primary and secondary education in the non-Roma population.⁴⁵ This failure to ensure that Roma children are educated is a major barrier to breaking the cycle of poverty and disadvantage that perpetuates the vulnerable position of the Roma people in Moldova.

I have no education because we were never told we should have one where I came from. The studying and the reading make it difficult. There are Roma who can read and Roma who can't. How can the unemployment office find them a job if they can't

39 Promo-LEX interview with Victoria, Hîncești, Moldova, August 2015.

40 Promo-LEX interview with Vladimir, Hîncești, Moldova, August 2015.

41 See above, note 14, p. 59.

42 See above, note 3.

43 See above, note 14, p. 60.

44 *Ibid.*, p. 61.

45 *Ibid.*

read? You must do something, read, and submit that document. (...) I don't know what to do about it. I went to a music school, hoping to work as a watchman or something, but I got turned down. I went to a car service centre and asked them to give me a job because I am going through hard times and have nothing to feed my three children with. They said they were sorry, and that I was illiterate and a Roma.⁴⁶

It is difficult for some Roma to get their children into schools. I know of a family who find it very difficult. They are fined by the police. They don't have clothes to dress their children in. I hope in the future that we will be able to find jobs, so that we can get our children into school.⁴⁷

The low education levels prevalent in the Roma community result in a lack of professional qualifications and skills, which in turn restricts many Roma to low-skilled, low-salary jobs. Roma who are excluded from the formal labour market are often reliant on low-paid, precarious daily or temporary work. The insecurity of this work acts to perpetuate the cycle of poverty that many Roma live in: they are unable to develop a career, or even transferable job skills, and therefore cannot access higher-paid and formal employment.

I would go for one-day jobs, but I was never legally hired. I would go and ask people if there was any work for me to do. I would work a day, bringing my own food, for 150 lei (\$7.5 USD). If you find a one-day job, then you can earn something, and if you don't find one then you don't earn. If a company happens to have work to do you go and do it, and if it doesn't then you don't go. When we go to sell at the market, the police chase us away. They do not let anyone sell.⁴⁸

Several of the interviewees expressed frustration at the lack of adequate assistance from state authorities. Legal prohibitions of discrimination and policy which should ensure the rights of Roma to equal participation in Moldovan society have yet to create positive change for many Roma in Moldova.

Roma should be helped to gain skills and to get work, but this does not happen. We want to be useful so that we can get a job and have something for our children and be like everyone else, but if people won't help, what should we do? Our children grow and need different things. But we are Roma and no one will employ us. They hate us and call us names. I would like to work to be a tailor, something that our children could do as well, but when I have tried to get a job I am simply told that I am Roma and the company doesn't employ Roma.⁴⁹

46 Promo-LEX interview with Vladimir, Hîncești, Moldova, August 2015.

47 Promo-LEX interview with Victoria, Hîncești, Moldova, August 2015.

48 *Ibid.*

49 Promo-LEX interview with Liudmila Raiu, Hîncești, Moldova, August 2015.

None of my friends and acquaintances work legally. Nobody hires Roma. My friends, acquaintances and relatives face the same problems. Sometimes they go for one-day jobs, but they stay at home the rest of the time. What should we feed our children with? Grass? Leaves? Should we steal? What should I do? Should I steal and then go to jail and eat the prison walls?

People must be put to work and not allowed to do stupid things and end up in jail, leaving their children orphans. And now, these girls have been turned down by the unemployment office during the past few days, turned down for the next three or four months. How can they find clothes for their children? The girls have no clothes to put on. How can they go to school? Should they go to school with the hoe on their backs? They have nothing else to do but stay at home with the children. They are not allowed to sell anything at the Market, but sometimes they find one-day jobs. This is how they keep going.

The State does not care about the Roma people. Instead of supporting them, the State breaks them down. The mayor of Hîncești doesn't do anything, he only makes the police chase us away. The Mayor must take some measures, increase the monthly social assistance payment. 200–300 lei (US\$10–15) is not money. Jobs must be created.⁵⁰

Conclusion

The testimonies gathered by Promo-LEX expose the serious difficulties that Roma in Moldova face when accessing employment. Statistics from the UN, the EU and other bodies, show that this is not an isolated problem affecting only a limited section of the Roma population, but a deeply embedded, systemic problem that affects Roma across the country. Legal and policy protections have led to limited positive change in the everyday lives of Roma people. Concerted efforts must be made to ensure enforcement of anti-discrimination protections, and a more rigorous approach to combatting the social problem of discrimination against Roma is needed. Any such approach needs to address all aspects of life for Roma to adequately address discrimination in accessing employment – many Roma are trapped in a cycle where poor access to education and training limits potential to participate in the labour market, embedding poverty in families and communities. Committed action is necessary to break this cycle.

50 Promo-LEX interview with Vladimir, Hîncești, Moldova, August 2015.

INTERVIEW

“Discrimination won’t stop unless every single manager that permits discrimination to happen is called to account. If people knew they would be fired if they engaged in or participated in unlawful discrimination that would be a great motivator to stopping discrimination. And that could happen tomorrow.”

Chai Feldblum



Equality in Employment

Despite the growth of laws and policies prohibiting discrimination in employment, equal access to, and equality within, employment remains out of reach for many, with experiences of discrimination continuing to be all too common. The gender pay gap persists, for example, with women earning on average 16.4% less than men in the EU in 2014,¹ and 15.2% less than men across the Organisation for Economic Co-operation and Development (OECD) in 2013.² Instances of discrimination on religious grounds seem to be increasing. Persons with disabilities and lesbian, gay, bisexual and transgender (LGBT) persons remain at considerable risk of unemployment and segregation into low-paid work.³

The consequences of the financial crisis of 2008 and the rise of austerity measures have had a considerable negative impact on equality in employment.⁴ Precarious forms of work, which have become more common post-crisis, are disproportionately undertaken by women, especially migrant women, thus exacerbating the existing gender pay gap. The high unemployment rates which have followed the crisis allow for discriminatory practices to become tolerated, as discrimination becomes less of a government priority and people are perceived to be grateful just to have a job.

The Equal Rights Trust spoke with equality experts from Serbia and the United States for their views on the continuing challenges faced in combating discrimination in employment. Brankica Janković was elected by the Serbian Parliament in May 2015 to the role of Commissioner for Protection of Equality, having previously been State Secretary at the The Ministry of Labor, Employment, and Social Policy. Chai Feldblum was appointed to the Equal Employment Opportunity Commission (EEOC) as a Commissioner by President Obama in 2010, and was previously a Professor of Law at Georgetown University.

1 Eurostat, “Gender pay gap statistics”, February 2015, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics#Gender_pay_gap_levels.

2 Organisation for Economic Co-operation and Development, “Gender wage gap”, available at: <http://www.oecd.org/gender/data/genderwagegap.htm>.

3 International Labour Organisation, *Equality at work: The continuing challenge*, 2011, Paras 184 and 205.

4 *Ibid.*

Equal Rights Trust: You are widely recognised for your experience in advocating for equality in employment. How did you become involved in this area of work? What life experiences and influences played a role in getting you to your present position?

Brankica Janković: My professional career has always been focused on the care of people and those social groups that are in the greatest need of help from society, no matter who they are – the elderly, children, the disabled, women, or members of some marginal social groups. The “small” man and the problems that he cannot solve has always been the centre of my attention and my interest has been both in finding legal mechanisms and institutional solutions to solve these problems and in creating legal standards where they do not already exist.



Brankica Janković

It hasn't been easy to find the path in a, very often, “hypernormative” world, but every achievement (for example, if one person has overcome their problem and is now going on with their life) has made me happy and motivated me to continue working even harder. At one point in my career, I was given a chance to create a legal framework. I can say now that for some citizens, both male and female, the framework was beneficial but in some cases it transpired to be unhelpful. Although, of course, I did my best. It is not easy to regulate life through legal standards; jurisprudence is demanding and has one set of rules, whereas life has another set of rules and is much faster. Problems are getting more complex and I am always keen to search for new solutions. It is one of the reasons why I was nominated for my current position.

Chai Feldblum: I grew up as an Orthodox Jew – my father was a Holocaust survivor from Lithuania and my mother came from a long line of Hasidic Rabbis in Eastern Europe. Although I stopped observing Orthodox Judaism by the time I was a young adult, my early childhood years were shaped by a commitment to social justice and a belief in treating all people on their merits. That commitment stayed with me throughout my professional career.

As a young lesbian lawyer in the mid-1980s, I saw the devastation wrecked on the gay community because of AIDS and because of the discrimination suffered by people with AIDS and HIV infection. That led to my work in helping to draft and negotiate the Americans with Disabilities Act of 1990, while I was a lawyer with the national American Civil Liberties Union (ACLU). The ADA provides far-reaching protection for all people with disabilities, including

people with AIDS. I also continued to work towards equality for LGBT people, both at the ACLU and later as a consultant to various national LGBT groups. In that role, I helped draft early versions of the Employment Non-Discrimination Act, which would have prohibited employment discrimination based on LGBT status in employment if Congress had passed it.

As a professor for 18 years at the Georgetown University Law Center in Washington, D.C., I was able to do legislative and administrative work to fight poverty in this country by supervising law students who worked for Catholic Charities USA. I feel incredibly grateful that my early commitment to making the world a better place has allowed me to be involved in these various efforts – culminating in my current position as a Commissioner at the national government agency charged with enforcing employment discrimination laws.



Chai Feldblum

Equal Rights Trust: Although the law in many countries is developing to prohibit discrimination in the workplace, discrimination continues to be a daily experience for many people when they go to work. What do you think are the key issues that need to be addressed in order to combat this?

Chai Feldblum: The biggest issue to combat, from my perspective, is the attitude that a person's characteristic – be it race, national origin, sex (including pregnancy, sexual orientation or gender identity), religion, age or disability – has any relevance to a person's ability to do a job, assuming that person is otherwise qualified to do the job. If we could magically erase that assumption, we could probably get rid of most discrimination tomorrow.

But because that is not going to happen tomorrow, the most important issue is to achieve accountability in the workplace. The heads of most companies or organisations don't want discrimination to happen in their workplaces. They know that discrimination is bad for business and bad for productivity. But discrimination won't stop unless every single manager that permits discrimination to happen is called to account. If people knew they would be fired if they engaged in or participated in unlawful discrimination that would be a great motivator to stopping discrimination. And that could happen tomorrow.

Brankica Janković: Unfortunately, we live in circumstances when, due to the world economic crisis, it is extremely hard to find a job and most employees are forced to put up with

different forms of discrimination, due to their fear for their own existence. This is a terrible situation, as no form of discrimination can be tolerated, no matter how “small” or “bearable” it is. In my opinion, the laws in Serbia are able to effectively combat discrimination and they provide full protection against discrimination. However, there is a problem in the application of those laws; the way in which provisions are interpreted and how court proceedings are organised. To combat discrimination, authorities, independent institutions such as the Commissioner for Protection of Equality, and an independent judiciary must identify and condemn discrimination. The operation of market rules and the desire for profit can also be useful to combat discrimination; no company wants to be stigmatised or recognised as a violator of its employees’ rights to non-discrimination.

In addition to and alongside that, the politics of a country should be based on a strong will to stop discrimination – to prevent and punish it. The Commissioner’s office, through its preventive work, public speaking and recommendations (both in individual cases and as general measures), does a lot but we cannot be alone in this combat. Our natural partners are the legislative, executive and judicial powers. For example, we are very proud of the results we have achieved together with the National Employment Service and key job advertisers, who have followed our recommendation in relation to drawing employers’ attention to discriminatory elements in their job advertisements. Through this, we have broadened the knowledge about discrimination which in turn leads to a wider implementation of laws and prevents discriminatory behavior.

Last but not least, the role of the media is crucial. The media can help ensure the successful implementation of laws and the prevention of discrimination. Collectively, it has to find its place in this combat against discrimination as it has a key role in shaping the social reality. In this era of the media, journalists and editors should understand how strong and powerful their influence is when it comes to promoting equality in society. The Commissioner’s office therefore engages in continual cooperation with the media in Serbia.

Equal Rights Trust: International human rights law recognises that everyone has the right to work. Discrimination exists both within the workplace and as a barrier to obtaining employment. How significant do you think the impact of discrimination is in restricting people’s right to work?

Brankica Janković: Discrimination has a lot of forms. Every day, the Commissioner’s office encounters direct and obvious forms of discrimination as well as indirect and latent ones, which are harder to recognise. It takes place in all aspects of employment; in the recruitment process, in the workplace, when changing your job, etc. Discrimination in Serbia is quite widespread in the area of employment and access to employment.

Let’s take gender, for example, as a personal characteristic. Women often say that they have been unable to keep their job because they want to have children. This is the result of a long-standing practice. Questions like “are you planning to start a family” are quite common during job interviews. This is a clear example of unlawful, discriminatory behaviour on the

part of an employer. There are also similar situations happening within the workplace. Women are transferred to lower positions after coming back to work from maternity leave and sometimes they are even dismissed while still on maternity leave. There is a lot of talk about reconciliation between family and work life but achieving that demands full implementation of anti-discrimination and other relevant laws.

Whether a person is offered or loses a job or is promoted or demoted is often dependent on their political or trade union affiliations, though it is very difficult to prove discrimination in these situations. It is an obvious restriction of people's right to work and the rights that certain categories and groups of people are entitled to. A person's age is also determinative of whether an employer will hire that person or dismiss them. Employers often don't want older employees and take decisions which cannot be justified at all by objective criteria. All of this tells us that the reasons why people's right to work is restricted can be discriminatory to a great extent. And this is especially true during a long-standing economic crisis such as that which is taking place in Serbia, where there are no strict market rules and there is no control of the enforcement of laws.

Chai Feldblum: As you know, the United States does not recognise a general right to work either as a federal statutory or Constitutional right. Our law does prohibit using certain characteristics as the basis for any employment decision, including hiring, promoting, firing, and setting terms and conditions of employment. These characteristics are: race; national origin; sex (including pregnancy, sexual orientation and gender identity); religion; age and disability. But if a person is fired or not hired for a reason that is not on this list (for example, the person has red hair or the person grew up in New York City or for any other arbitrary reason), the person has no federal legal right to contest that employment action. However, as you note, even in countries where there is a general right of work, that right can be undermined if discrimination occurs and people cannot enter the workplace because of that.

I think that employment discrimination has decreased in the United States since the passage of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990. More people have been able to enter the workforce and get jobs that are commensurate with their abilities. They have no longer been held back because of their race, national origin, sex, religion, age or disability.

With regard to not being held back because of sex, the EEOC, the Commission on which I serve, was the first to rule that a woman who was discriminated against because of pregnancy had been discriminated against on the basis of sex. Ultimately, it took Congress to affirm that common-sense conclusion. In recent years, the EEOC has ruled that a lesbian, gay, bisexual, heterosexual or transgender person who is discriminated against on the basis of sexual orientation or gender identity has been discriminated against on the basis of sex. My guess is that the courts will agree with this common-sense conclusion as well in the coming years.

The decrease in employment discrimination in the United States has been due to changes in social attitudes and vigorous enforcement of our employment civil rights laws. But there is

no doubt that discrimination still hinders the ability of too many people to get and keep jobs that are commensurate with their abilities. The EEOC recently issued a report called *American Experiences v American Expectations*, which vividly describes the advances we have made in workplace diversity and the challenges we have yet to overcome.⁵

Equal Rights Trust: In your country how easy is it for victims of workplace discrimination to access justice? What more, if anything, needs to be done?

Brankica Janković: We are an unjustifiably long way from justice in Serbia. I see it as one of the main challenges in the process of developing a more modern and efficient society and state in which everyone has to participate, all institutions, civil sector, both male and female citizens. The Commissioner will be a leader but, of course, only within its legal competence. What else is needed in the fight for a better position for the employees? An independent judiciary, independent institutions established by the law and Constitution, an efficient Labour Inspectorate and other bodies in charge of solving problems and settling disputes in the workplace, a free media and free market, well-organised trade unions whose ultimate goal is the protection of employees, and more work, in fact more vacant positions.

As I mentioned above, the unemployment rate in Serbia is very high due to the undeveloped labour market and the economic crisis. As a result, employees and those looking for a job are ready to make many sacrifices in order to keep, or to get, a job. We therefore can't say that there is an easy way to justice. On the contrary, a person who has experienced discrimination may not decide to look for justice with the Commissioner or in court if they fear they will be victimised and lose their livelihood or experience revenge or bullying in the workplace. Discrimination is also difficult to prove as all the evidence is in the hands of an employer, and witnesses to discrimination are mostly colleagues who are afraid to testify. That is why the reversal of the burden of proof is of great importance and is applied in proceedings in front of the Commissioner. The Commissioner strives to build a relationship of mutual trust with citizens based on everyday results, professionalism, devotion, integrity, independence and efficiency so that people will be encouraged to ask us for help and protection against discrimination.

Chai Feldblum: The law in the United States establishes an effective administrative complaint system that makes it relatively easy for victims of workplace discrimination to access justice. However, two barriers in our country still exist that reduce access to justice and need to be addressed.

A charge of employment discrimination can be brought to any EEOC office across the country to take advantage of this administrative process. There is no need for a person to have a lawyer to file a charge. We make it easy for people to contact us. We use a range of publicity measures and we take calls from around the country. Once people bring their charges to us,

5 US Equal Employment Opportunities Commission, *American Experiences v American Expectations*, July 2015.

we can often help them early in the process. For example, in our last fiscal year, we helped 15,318 individuals get some form of relief from employment discrimination, without those individuals or us as an agency having to go to court. All of these resolutions came about because the employer agreed to some voluntary settlement. However, the reason employers often settle is that they know that either we as the government agency, or the person who has experienced discrimination, can bring a lawsuit in court if a settlement is not reached.

Unfortunately, we can help only a fraction of the people who come to us with stories of discrimination. And we bring only about 200 cases a year in court as an agency. For most people, we simply issue a notice allowing them to bring their discrimination claims in court. But once a person goes to court, access to money becomes a factor. Building an effective case requires an effective lawyer and a person generally needs money to secure the services of an effective lawyer. While there are efforts around the country to provide lawyers (and often law students working under lawyers) to help low-income workers file employment cases, the demand way outstrips the supply. This is a significant barrier that reduces access to justice in the United States. Providing free legal services to people on low incomes is the only way to eliminate this barrier.

The second barrier, and one that has increased in recent years, is the practice of employers requiring employees to arbitrate their employment discrimination claims in a non-judicial setting, often using an arbitrator hired by the employer. This significantly restricts the ability of millions of employees to access the courts. This barrier would be most effectively reduced if Congress prohibited mandatory arbitration agreements in cases of employment discrimination.

Equal Rights Trust: The US Supreme Court has recently held, in *Equal Employment Opportunity Commission v Abercrombie & Fitch*, that an employer who had not employed a Muslim woman whose head scarf was not in accordance with their “Look Policy” had discriminated against her. Where do you think the balance lies with accommodating religious freedom in the workplace?

Chai Felblum: I think our federal law strikes the right balance in accommodating religious freedom in the workplace. Under our federal Constitution, religious organisations can hire employees in ministerial positions without being bound by our federal civil rights law. That is an appropriate accommodation for the rights of religious organisations to hire the people they want for unique ministerial positions that lie at the core of religious practice. There is also a statutory exemption that permits religious organisations to discriminate on the basis of religion (e.g. to prefer persons of their own religion in hiring) in employment, but that exemption does not permit discrimination on any other basis such as sex, race, national origin, and disability.

Second, under our federal statutory law, a private employer with more than 15 employees (that is not a religious organisation) may not discriminate on the basis of religion. This means an employer may not refuse to hire someone because of that person’s religion (or lack of religion) or because of the religion of those with whom the person associates. Our law also

requires an employer to accommodate the religious practices of an employee, if doing so will enable the employee to do the job. For example, an employer may have to make an exception to a “no head coverings” rule in order to allow a female Muslim employee to wear a hijab while at work. This rule is appropriate because we do not want religious people in our country to have to choose between having a job and following their religious observances. However, our law also places a limit on the right of the religious employee. If accommodating an employee’s religious practice would place an undue hardship on the employer, the law does not require the employer to make that accommodation. For example, assume a religious employee asks for a shift assignment that would allow that person not to work on the Sabbath. In many cases, this request will not be problematic and so the employer is required under the law to make that accommodation. But if there are particular circumstances in the workplace that would make such an accommodation an undue hardship (perhaps because of the limited people available to do the job), then the law relieves the employer of that obligation. Determining when an accommodation would pose an undue hardship is necessarily a very factually specific determination. But this type of individualised analysis is precisely what is required to strike the right balance between the employee’s religious need and the needs of the employer’s business.

As an overall matter, I think our federal and constitutional law strikes the right balance to ensure that religious pluralism in our country flourishes and that employers get the work done.

Brankica Janković: The answer to this question is very complex and can’t be given in a few sentences or without a thorough consideration of each and every case. In order to illustrate that fact, I will give you an example. In the case *Kurtulmuş v Turkey*, a ruling of the European Court of Human Rights (ECtHR),⁶ a university professor was banned from wearing a veil as a symbol of her religion. However, the ECtHR didn’t rule in her favour, stating that, in that particular case, when we are talking about the relations between the state and religion, the role of the state carries considerable weight. The court decided that in a democratic society the state has the authority to put a restriction on wearing veils if this kind of practice is against the interest of other people’s protection and their rights. In *Kurtulmuş*, the Court held that the plaintiff decided to work in public administration and the dress code in public administration was the same for all employees, with an aim of supporting the principles of secularism and neutrality of public administration and public education in particular and could be justified. In the *Abercrombie & Fitch* example, on the other hand, the defendant was an entrepreneur who applied the company’s policy, which banned all employees from wearing caps (but did not define cap). The court ruled in the plaintiff’s favour. The plaintiff, as the court established, should have received different treatment.

There are many examples that are similar to both cases. I remember the case of a nurse who was banned from wearing a necklace with a cross, the symbol of her Christian religion. The ECtHR ruled against the nurse as the hospital clearly emphasised that the ban was in place

⁶ *Kurtulmuş v Turkey*, App. No. 65500/01, 24 January 2006.

for safety reasons and, given their particular work, there was potential danger if nurses wore that kind of pendant on a necklace.⁷

Accordingly, the answer to this question is very complex and the specific facts of every particular case should be taken into consideration. In my opinion, we are still far from finding the balance you are talking about. We persistently have to work on it – trying to find common denominators of problems, bearing in mind that every religion is unique but never disregarding the legitimate interests that may oppose it. It is critical that we find solutions that do not deny anyone their human rights or discriminate against any person for any reason.

Equal Rights Trust: The introduction of paternity rights or flexible parental rights is increasingly being seen as one way to promote gender equality in the workplace. How significant do you think the introduction of such rights can be?

Chai Feldblum: Parental rights and workplace flexibility are important means to promote gender equity in the workplace. First, providing mothers a reasonable amount of paid time off after childbirth or adoption is an important factor in keeping women connected to the workforce and hence promotes gender equity. Second, if fathers get paid time off in such circumstances as well and use that time for caregiving, that practice increases gender equity both at home and in the workplace. Third, as we all know, caregiving for children and aging parents can last many years as one is holding a job, and hence flexible work arrangements that are used equally by women and men to deal with caregiving responsibilities also promote gender equity.

For these reasons, paid parental leave (used equally by women and men) and flexible work arrangements would advance gender equity in the workplace and beyond. Employers, employees and government actors here in the United States are beginning to understand the importance of these policies and are grappling with how to best institute them in our country – understanding the utility of encouraging voluntary efforts by employers, but also the need for mandatory labor standards to provide some of these rights.

Brankica Janković: Equality between men and women, especially in traditional societies like ours in Serbia, is not easy to achieve, including when it comes to having a job, doing business, and supporting a family. In Serbia, unfortunately, you will often hear women say that some things are not a man’s job. It doesn’t mean that a man will refuse to do them but a woman will do them instead of him no matter what. In addition to these stereotypes, there are even more widespread stereotypes that a man in Serbia cannot do a “female job” as he will be considered weak. In addition to implementing the laws to combat discrimination, we have to raise awareness about equality between men and women and its importance. The Commissioner’s office has been doing this for some time. Of course, many things have

⁷ Case of *Chaplin v the United Kingdom*, one of four cases heard together in *Eweida and Others v the United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

changed and they change every day. For example, fathers are on leave taking care of their children while mothers are at work. But it is still an exception, not a rule. Future generations have to be taught that gender equality is not a sacrifice made by one side and it is not a shame but a “normal” type of behaviour typical of a democratic, developed society.

I strongly support the initiation of parental rights; this is the proof of the gender equality that Serbia is striving for and hopefully will achieve very soon. For me as a woman, mother and as Commissioner for Protection of Equality, this is one of the most important mechanisms for achieving equality for all citizens, both male and female. I am also of the opinion that it is necessary to introduce some measures to incentivise fathers to use this right more often as their role in the life of a child is as important as that of mothers.

Equal Rights Trust: The compulsory retirement age is being abolished in an increasing number of countries. Do you see this as a positive step? What can be done to prevent discrimination against older workers?

Brankica Janković: Increasing the compulsory retirement age limit or abolishing it all together, which has become quite common recently, can have its advantages and disadvantages. On the one hand, there are people who are, regardless of their age, still vigorous, able to work and whose contribution is, due to their experience, really priceless. On the other hand, there are a considerable number of professions that simply “wear out” a person and he or she can’t do his or her job anymore. When raising the compulsory retirement age limit, it is necessary to consider the life expectancy in each particular country. In the future, decision-makers have to take into consideration that, although Serbia has made a huge step forward in this field, it has not yet reached the average European life expectancy for either men or women. I hope and wish that this European standard will soon be reached. We must also ensure full implementation of protective and health measures in the workplace in order to protect the mental and physical health of employees so that they can work later in life.

The issue of age discrimination in employment is particularly relevant as it is currently on the increase as many middle-aged persons are made redundant due to the global economic crisis. These professionals find it very difficult to find a new job or retrain for a new one. The main task of the Commissioner is to deal with these cases as soon as they are discovered or reported. However, I want to emphasise that this issue should be addressed by the whole of society, not just those who make political, economic and legal decisions.

Chai Feldblum: I remember being surprised, when I spoke at an international conference in London several years ago, that mandatory retirement was still permitted in many countries. It has been prohibited in the United States since 1967, when Congress passed the Age Discrimination in Employment Act. If you are an employee working for an employer with 15 or more employees in the United States today – you cannot be forced to retire at any mandatory age.

I welcome the fact that mandatory retirement is being abolished in more countries. There is no reason to have a blanket rule that a person may not work past a certain age. That makes

no sense in light of the ongoing capacity and interest in working that we all have as we age. Of course, no person should be retained in a job if he or she is not doing the job as required. But the reason to let that person go is because the person is not doing the work up to the required standards, not because of the person's age.

Prohibiting mandatory retirement will, however, never be enough to stop discrimination against older workers. There are many other ways in which older workers are discriminated against in the workplace. Sometimes these ways are subtle and sometimes they are disturbingly direct. The subtle forms of discrimination lie in negative attitudes towards older workers – the belief that they will be difficult to manage, are not comfortable using the latest technologies, or cannot learn new tasks. The direct ways occur when managers are explicitly told to hire “young, fresh faces” (or something along those lines) or are told to get rid of older workers to save money. These are the forms of age discrimination we are fighting right now in the United States.

Equal Rights Trust: Migrant workers continue to face significant abuses of their rights, including forced labour, trafficking and dangerous conditions of work. Do you think that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families goes far enough in protecting migrant workers and, if not, what more should be done?

Brankica Janković: Serbia became a signatory to this important Convention in 2004 but it has not ratified it yet. It is the first international treaty that regulates the rights of migrant workers and their families. I believe that the Convention does go far enough to initiate work on the protection against discrimination of this group of people. However, the fact that it has been ratified by only 46 countries tells us a lot about how slowly we are progressing from the initial steps of protecting their rights. I also find it very important to consider which countries have signed and ratified this Convention. Most countries that have a huge influx of migrants are not signatories. It is not enough just to pass good conventions, we must fully and efficiently implement them. It is therefore necessary to work on further ratification of this important international document and reinforce mechanisms that will control abuse of the position of migrant workers and their families.

Serbia is mostly a transit country for migrants on their way to their final destination. Discrimination against migrant workers is forbidden by law in Serbia and the Commissioner's office monitors the situation of migrant workers and is ready to sanction all discriminatory acts against them. However, preventing discrimination alone is not enough, it is necessary to introduce special interim measures that will provide those people and their families with fair treatment and make them feel dignified while they are in Serbia. In my opinion, we as a state and society are responsible for this.

Chai Feldblum: I don't have a position on the Convention, since it is not within the purview of the EEOC. However, I believe all of us – across the globe – must fight as hard as we can to protect migrant workers against abuses. This has been a top priority for the EEOC over the

past decade. In a plan in which we set forth our strategic enforcement priorities, protecting migrant and immigrant workers was among those priorities. Over the past five years, we have brought a number of high-profile cases challenging abusive employment practices against migrant workers. The legal tool we have is our employment law that prohibits discrimination based on national origin and we have used that tool effectively in a number of cases.

Equal Rights Trust: The right to form and join trade unions is recognised in international human rights law. What is your opinion of the contribution of unions to combating discrimination in employment and in light of this, how significant do you think the right to join a trade union is?

Chai Felblum: In the United States, the right to join a union and the right to be free of employment discrimination are considered two distinct rights. The right to join a union is protected under the National Labor Relations Act; the National Labor Relations Board and the courts enforce that right. The right to be free of employment discrimination based on certain characteristics is protected under a series of civil rights laws; the EEOC and the courts enforce those rights. My knowledge and practice therefore lie in the latter area.

The research shows, however, that these two rights are interdependent. As a historical matter, the union movement has been a major force behind enactment of every employment civil rights law in the United States. As a practical matter, individuals who are members of unions have additional avenues to use for redress in discrimination claims. So on both the macro and micro level, I believe greater union representation in a country is a positive element in reducing discrimination in the workplace.

Brankica Janković: I remember the saying “a powerful trade union, a powerful state”. Today, both in theory and practice, it is proven that a well-organised trade union is very important in the fight for workers’ rights, and that trade unions can contribute a lot to the prevention of discrimination and the promotion of workers’ equality. The workers’ right to join such powerful, well-organised and successful trade unions and to enforce their rights in that way is therefore of great importance in the fight against discrimination, and our Labour Law recognises this by guaranteeing employees absolute freedom in joining and gathering in trade unions.

However, I am afraid that, in previous decades, the work of trade unions in fighting for human rights – the right to work, the right to a wage that will provide a dignified life to a worker and his or her family – was disregarded. What we, as a body that combats discrimination, are therefore striving for is to educate people that solving a problem of discrimination actually leads to improvements in the labour market, in the health care system, in education or wherever a discriminatory act is eradicated. Our aim is to make trade unions able to recognise a discriminatory act, to combat it using legal tools and to be a natural associate and partner with the Commissioner on Equality, thereby realising their important role in the combat against discrimination.

Equal Rights Trust: Governments around the world have been introducing austerity measures in response to financial crises. In your country, what impact do you think that such measures have on equality in employment?

Brankica Janković: Austerity measures are necessary in order to overcome the crisis. However, the point is to strategically define the goals of such measures, balance priorities, define a starting point and make joint efforts to overcome the crisis. We always have to take a wider view and be very careful when executing austerity measures; they shouldn't restrict human rights in any way. It seems to me that by applying some solutions, we go back in time 20 or 30 years to a time that was not good for promoting equality. As I mentioned earlier, people in Serbia do not recognise the importance of combating discrimination and the positive impact this has on the labour market. Thirty-six percent of the complaints the Commissioner receives are in the field of employment. Much of the everyday discrimination we see is not related to austerity measures; giving a job to a less qualified man but not to a woman just because she is a woman doesn't have much to do with money. Or dismissing a pregnant woman and hiring another person. Changing our stereotypes, the prejudices that inhibit us in promoting equality in society, can be an easier way of solving problems that are caused by the economic crisis. In this regard, Serbia has introduced legislative amendments for positive action when employing vulnerable groups.

Chai Feldblum: One way to respond to a financial crisis is for a government to introduce austerity measures. However, the response of the United States to the 2008 economic crisis was to engage in stimulus activities, rather than austerity measures. For that reason, I do not have an opinion on the impact that austerity measures instituted by a government would have on equality in employment.

I can tell you that the financial crisis itself – and the surge in unemployment that was part of that crisis – may well have resulted in greater inequality in employment. The statistics show that the unemployment rate for African-Americans was 14.8% immediately after the financial crisis in 2009. Today that number is down to about 9.1%. However, the unemployment rate for white persons is currently 4.6%, down from a high of 8.5% after the crisis. Of course, there are many variables that can cause these results, including discrimination. The goal of the EEOC is to root out those causes that stem from discrimination.

Equal Rights Trust: A recent report by the OECD, *In It Together: Why Less Inequality Benefits All*, concluded that the increase in the number of people either self-employed or employed in temporary and part-time work is one driver of growing income inequality. Do you agree that more needs to be done to create job stability if inequality is to be reduced?

Chai Feldblum: The issue of income inequality is a very significant one that all countries, including the United States, must grapple with and address. When income inequality derives from discrimination based on a protected characteristic under our civil rights laws, that is within the purview of the EEOC and, as I hope I've indicated, we are doing as much as we can

to combat such inequality. But discrimination is just one factor that causes income inequality and greater structural reforms are necessary as well.

While I don't have the opportunity to be working on those efforts right now, I applaud my many colleagues throughout the United States government and in non-governmental organisations who are doing this work. And who knows – maybe this will be one of the issues I will work on after I step down from the Commission when my term ends in July 2018. Certainly, it is a problem that will still be there – with plenty of people still needed to work on it.

Brankica Janković: Types of employment, having an employer or being self-employed, working hours and everything else that influences our earnings are regulated in different ways, in different European countries. I absolutely agree that job stability is necessary and it is one of the conditions needed to reduce inequality. But I also think that the examples you have given, do not themselves cause differences in earnings or job instability. Research has obviously confirmed that the above-mentioned examples affect stability, however, it is the choice of the individual employee to accept a particular type of employment (part-time, full-time etc.). Of course, this must be a free choice and not imposed by employers or the labour market. If the employer treats his employees differently on the basis of their working hours or temporary or permanent status etc., then the answer is to change the discriminatory behavior of the employer, not the model. This is the case particularly when we are talking about flexible working hours.

It is a good idea to also think about the advantages of a part-time job or self-employment. Let us look at those discussions about the necessity to create balance between work and family life with a particular emphasis on the position and discrimination of women. These models of engagement actually help to find that balance and employees, regardless of gender, can meet their needs in their work as well as in their private life.

Differences in earnings have to be identified in other segments as well. If a man and a woman do the same kind of job and they are not equally paid it is an employer's decision and nothing else. I absolutely agree with the statement that less inequality is beneficial to all and we have to strive to reach equality in the labour market. Reasons for inequality shouldn't be simplified. They should be fully exposed and tackled. That is exactly what the Commissioner for Protection of Equality is doing.

Interviewer on behalf of the Equal Rights Trust: Jade Glenister

TESTIMONY

“It is not the case that we must only raise issues of prejudice and unequal pay and glass walls once women are no longer being killed or beaten up. Why can’t we fight for all these issues at the same time? The right to education, the right to equal pay, and the right to marriage of choice? All at once, and all at the same time.”

“Shazia”



The “Small Incidents”: Sexual Harassment in the Media

Testimony from Pakistan

In 2014, Pakistan was the second lowest performing country in terms of gender equality in the World Economic Forum’s Global Gender Gap Report.¹ Discrimination against women is endemic in almost all areas of life, fueled by patriarchal attitudes and deeply-rooted stereotypes.² Despite the passing of the Protection against Harassment of Women at the Workplace Act 2010 and the establishment of a Federal Ombudsman to handle complaints of sexual harassment in the workplace, sexual harassment remains prevalent.³ In addition, women struggle to rise to positions of leadership within the workplace and are concentrated in low-skilled and low-pay jobs.⁴

The Equal Rights Trust spoke with Shazia (not her real name) about her experiences of discrimination and sexual harassment working in the print media in Pakistan. Her story, and those of her colleagues, highlight the sexism and stereotypes that pervade the every-day working life of women in Pakistan.

There is a Pakistan in which women do not enjoy equal rights, where they are less than equal, where there is violence and even what we call honour killings. And then, I thought, there was the Pakistan I inhabited – where I was as good if not better than the men. Where my male colleagues didn’t think my gender mattered.

And then one day, nearly two decades ago, the paper I worked at planned a story on sexual harassment. Overnight, an integrated team of friends and colleagues fell apart on the basis of gender. For the women on the team, it was a genuine issue that had not been discussed and highlighted, but for the men it was an issue that was best left in the personal realm. “It’s be-

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- 1 World Economic Forum, *The Global Gender Gap Report 2014*, 2014, available at: <http://reports.weforum.org/global-gender-gap-report-2014/rankings>.
 - 2 Committee on the Elimination of Discrimination Against Women, *Concluding observations on the fourth periodic report of Pakistan, adopted by the Committee at its fifty-fourth session (11 February–1 March 2013)*, UN Doc. CEDAW/C/PAK/CO/4 27 March 2013, Para 21.
 - 3 Aurat Foundation, *Pakistan NGO Alternative Report on CEDAW 2012*, 2012, p. 88.
 - 4 See above, note 1; and above, note 2, Para 29.

tween the man and the woman”, was one remark in the stormy news office. By the time the story had been put together, the editor asked one of the women to write the editorial to go with it, arguing that, “as a man, he didn’t feel equipped to write on the issue”. Late at night, grappling with the deadline, the remark was ignored but not for long.

A few weeks later, I asked if only women were equipped to write on sexual harassment, could only those with *bona fide* political credentials write an editorial defending democracy? The remark struck home. I didn’t realise then that this was a battle I would have to fight again and again. A few years later, at a different organisation and a different job the editor asked me to do an editorial on rape, adding (as what he probably thought were encouraging words) that it was probably a topic close to my heart. I bit back the why and later wondered if the editorials on politics were written by my male colleagues because they had politics close to their hearts!

There are so many similar incidents; the memories it seems are un-ending of when I have had to struggle to convince editors that I wanted to write on politics and not human rights and education because the latter were traditionally seen to be the domain of women in print. This is what a friend and colleague called the “glass wall”. Women had entered the profession and risen to senior positions including that of editor. In fact, one paper, at one time, had women heading its offices in Lahore, Karachi and Islamabad. However, there were few women with extensive experience in the field of reporting, especially political reporting. This was the



Photo credit: withgod/Bigstock.com

“glass wall” which women in Pakistan had to contend with before news channels entered the media and women reporters and anchors smashed it to smithereens. Even then, the battles continued at all levels. From the lack of bathrooms for women at newly established channels to harassment to issues of equal pay – we have experienced it all in Pakistan.

Sexual harassment is prevalent as more and more women join an ever expanding field. In 2013, *Dawn* newspaper printed a story on sexual harassment in the media and reported that:

A recently released report by the International News Safety Institute and the International Women’s Media Foundation states that 64.48 per cent of women journalists had experienced “intimidation, threats or abuse” in relation to their work (...) 46.12 per cent respondents said that they had experienced sexual harassment from work colleagues, bosses and interviewees.⁵

An experience narrated in the story by a woman, who didn’t disclose her identity, took place on a training workshop:

A TV reporter recalled her first brush with sexual harassment as a junior reporter in early 2010, when she was part of a group of Pakistani journalists sent abroad for media training. “The first night during dinner, the chief reporter of our TV channel and another journalist asked if I was ‘up for some fun’ and wanted to hang out. Feeling queasy, I declined and went straight to my room. Around 11 in the night, I received a call. The chief reporter summoned me to his room to discuss a news package. When I refused, he threatened me with a show cause notice”⁶

Such stories are unending in Pakistan but the attitudes don’t appear to be changing despite the Protection Against Harassment of Women at the Workplace Act 2010, which mandates a code of ethics for every organisation.

Colleagues still feel comfortable saying that it’s a personal matter if a male employer is rumoured to be involved with an employee. Harassment complaints continue to be ignored or dismissed rather than being taken seriously. All of this takes its toll on women in the field. Many suffer because they are not willing to pay the price being asked of them to get the more important assignment or the promotion. There are others who get disheartened and quit altogether – although it’s hard to tell if the environment would be better in other professions as so little information exists on sexism and the work place.

Unfortunately, this is not where the discrimination ends. There are so many manifestations of the latent sexism that is prevalent in the media. So many young women are now hired by

5 Jajja, S., “When the mirror lies”, *Dawn*, 25 December 2013, available at: <http://www.dawn.com/news/1073952>.

6 *Ibid.*

television channels to announce the topics and commercial breaks while men sit there and discuss politics. For me it is an example of the sexism that is a part of our society and our profession. Although I can understand if there are many who would argue that these are “smaller” issues in a society where women face a risk to life, there is a point to these small incidents. We must speak up about these incidents as it is our protest in a world where we are told to bear such injustices because many of our kind are facing domestic violence and brutal killings. Highlighting these small incidents is our way of saying that the fight for rights does not have to be linear. It is not the case that we must only raise issues of prejudice and unequal pay and glass walls once women are no longer being killed or beaten up. Why can't we fight for all these issues at the same time? The right to education, the right to equal pay, and the right to marriage of choice? All at once, and all at the same time.

Years ago, at a journalism workshop, an African American journalist told an audience that he carried the “burden of his race on his shoulders all the time”. His words still echo in my head for as a woman journalist I too have realised that I carry the burden of my gender with me all the time. It is a different burden from that of many other women in my country but it is not irrelevant. I have not been stopped from working or faced the kind of sexual harassment some others have, but my gender has always been of concern to those around me. From the matter-of-fact fears expressed by potential employers that I would get married and quit work, to those colleagues who asked if I could cook or questioned my ability to do my job – the stories I can tell are many and varied. Men have even refused to report to me. A thick skin and a good sense



Photo credit: khunaspix/Bigstock.com

of humour have been essential during the 20 years I have spent in this profession. Even in more senior positions, where I am no longer questioned about my competence or my “unhealthy” interest in politics (rather than human rights), gender is still a burden. It is next to impossible to have a conversation about work and gender. For most of our male counterparts, a woman colleague or a woman boss is hard to welcome. This is one reason most women will experience sexual harassment without having recourse to any protection. And for the few male colleagues who are more “gender sensitive”, so convinced are they of their open-mindedness that one still can’t point out any ingrained or unconscious sexism that crops up in daily life. It makes them uncomfortable and is seen simply as a sign of paranoia on the part of the woman.

I have been told, for instance, not to overreact; an adjective that would never be used if a man were being addressed. But to point this out is seen as another overreaction. Nevertheless, I have learnt to point this out and not let anyone convince me that I am paranoid. I have also learnt – as Madeline Albright advised recently – to interrupt and to do so forcefully. Not just in relation to work but also gender and the latent sexism that we face so often. Until this conversation is seen as our right and men’s obligation, we will not be able to work towards a better environment in Pakistan.

There needs to be better understanding of what a diverse newsroom means and how it functions. For many men in our industry, women journalists can only be good when they get to think like men. While for the rights activists, a woman journalist needs to make it to the top only to improve reporting on women’s rights or maternal issues. Both of these views are simply caricatures of what our role should be. The African American journalist’s words that still echo in my head include a second lesson: “we don’t want women in senior positions to think like men; we already have the men; we need them to think differently”. But to expect that the different thinking will only result in better or more reporting on women’s issues is unfair.

There is so much more to be achieved. Women have to bring different thinking to how the media reports war, politics, crime and everything else that is covered by the paper or the channel or the website. Diversity cannot be limited to gender – so that those of us who make it to senior positions are seen to do so because they were “as good as” the boys. But neither should our achievements be measured only by what we should be doing as women activists.

Women need to be present at every level and every position because 50% of the population deserves representation. And once they are there, they will bring change – to views, attitudes around us (this is evident in any newsroom over time that has women in greater numbers) and to the stories that get told. Diversity is limitless – if only everyone would understand that instead of trying to define it and limit it.

“The Abercrombie decision is part of a wave of recent progressive developments in relation to equality in US jurisprudence. These precedents are leading the way towards a more comprehensive understanding of equality in the US and imply a progressive approach adopted by the US Supreme Court (...) placing a growing emphasis on substantive as opposed to merely formal equality.”

Irina Sofia Ransom

“With its landmark judgment in CHEZ, the CJEU has made major contributions to the interpretation of Directive 2000/43/EC. This judgment should be welcomed as a further decisive step in clarifying the principle of equal treatment of persons irrespective of their ethnic origin.”

Rossen Grozev

Employment Decisions Stemming from Discriminatory Motives Outlawed: *Equal Employment Opportunity Commission, Petitioner v Abercrombie & Fitch Stores, Inc.*

US Supreme Court, 1 June 2015, 575 U.S. 14–86 (2015)

Iina Sofia Ransom¹

With its decision in the *Abercrombie* case, the US Supreme Court has shown growing understanding of equality in its true, substantive form. It has taken a significant step towards protecting applicants and employees from religious discrimination and shown its progressive approach by highlighting that, in order to comply with equality law, employers may need to provide accommodation for religious practices. Despite critique on the practical side of some aspects of the ruling, the Court has made a substantial contribution to enhancing equal opportunities in the US employment market. This note will briefly discuss why the judgment has such positive implications and attempt to address some of the practical challenges the ruling may impose.

1. Facts

Samantha Elauf, a practicing Muslim, wears a headscarf following her religious belief. She applied for a job at a clothing store, Abercrombie and Fitch, and was invited for an interview. During the interview neither Ms Elauf nor the interviewer mentioned the headscarf, and Ms Elauf was rated well for her skills. However, Ms Elauf was not offered the position, as her headscarf was deemed incompatible with the company's "Look Policy", which prohibited wearing "caps" at work. The policy was interpreted to prohibit all headwear worn by staff, religious or non-religious.

The Equal Employment Opportunity Commission (EEOC) filed a suit against Abercrombie and Fitch Stores (Abercrombie) on behalf of Ms Elauf, alleging that Abercrombie's refusal to

1 Iina Sofia Ransom is a volunteer at the Equal Rights Trust. She has benefited from the case summary of this judgment published by the Equal Rights Trust on 15 June 2015, which forms the basis for sections 1 and 2. The comment on this note is the author's own and does not necessarily represent the views of the Trust. The author would like to thank Joanna Whiteman for her helpful comments on the note.

hire her was discrimination on the basis of her religious practice, which breached Title VII of the Civil Rights Act 1964.

There was no dispute over the fact that an employer cannot refuse to hire an applicant for discriminatory reasons, such as religious practice. The question was, however, does the employer need to be informed of a need to accommodate such a practice in order for the prohibition of discrimination to apply?

It is worth noting that Title VII of the US Civil Rights Act² distinguishes between “disparate treatment” (often referred to as “intentional discrimination”) and “disparate impact” discrimination. Intent to discriminate is linked to the provision on “disparate treatment”, while the “disparate impact” refers to a discriminatory effect, an outcome that creates a disadvantage even when there was no discriminatory motive for the treatment in question. The EEOC relied on the disparate-treatment provision stating that Ms Elauf was intentionally discriminated against when she was not hired because she wears a headscarf. Abercrombie, on the other hand, argued that there cannot be discriminatory intent without actual knowledge of the applicant’s need for accommodation. Abercrombie further claimed that the “Look Policy” was neutral towards all applicants, and could not as such constitute “intentional discrimination”.

2. Decision

The Court ruled in favour of the EEOC with a majority of eight to one.³ It reversed the previous judgment by the Tenth Circuit, and remanded the case for further consideration consistent with the Supreme Court’s opinion. Justice Scalia, who delivered the majority opinion, rejected the “knowledge requirement” suggested by Abercrombie as being part of the test for disparate-treatment discrimination by concluding that the applicant needs only to show that his or her need for accommodation was a motivating factor in the employer’s decision.

The Court noted that while some anti-discrimination statutes do actually impose a requirement of actual knowledge (e.g. the Americans with Disabilities Act 1990), this was not the case in the relation to religious practice. On the contrary, the prohibition of disparate treatment in Title VII outlaws certain motives, regardless of the level of the employer’s knowledge. With this decision, the Court confirmed that an employer cannot make employment decisions based on an applicant’s religious practice, or a need for accommodation that may rise from it. The important point the Court made is that it will not matter whether the need for accommodation is actual or only suspected. While a request for accommodation may in practice make it easier to infer motive in any subsequent decision not to hire, it was not considered a necessary condition of liability.

2 Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. §2000e2(a) and §2000e(j).

3 Justice Alito filed an opinion concurring in the judgment. Justice Thomas filed an opinion concurring in part and dissenting in part.

The Court stated that ruling in favour of Abercrombie on this point would have required it to read words into Title VII in order to produce what Abercrombie considered as a desirable result. As such, changing the existing law was not a matter for the Court, but for Congress.

Further, the Court rejected Abercrombie's view that the issue should have been addressed as a disparate-impact claim, not as a disparate-treatment claim. The Court noted that the meaning of "religion" includes one's religious practice. Hence, religious practice is part of the protected characteristics that cannot lead to disparate treatment, and must be accommodated. While an employer is entitled to have a general no-headwear policy, the policy will need to be adapted to an applicant's need for an accommodation of their religious practice.

In a concurring judgement Justice Alito took the view that knowledge should generally be required, but in this case the evidence was sufficient to show Abercrombie did know of Ms Elauf's religious practice. The only one dissenting was Justice Thomas, who held that the application of a neutral staff policy could not be taken as "intentional discrimination", and hence the case should not have succeeded as a disparate-treatment claim.

3. Comment

This case has two main merits in terms of equality: firstly, it is an important step towards acknowledging the right to "substantive equality" in the US jurisprudence as it clarifies that an employer cannot make a need to reasonably accommodate an applicant's religious practice a factor in its recruitment decision, and secondly, it recalls that an applicant does not have a duty to inform an employer of such a need in order to receive protection against discrimination.

The Supreme Court's judgment is an important approach from the perspective of achieving "substantive equality" in this case. In equality law, it is commonly held that treating everyone the same, pursuing "formal equality", will not guarantee full equality. Formal equality will not ensure possibility for individuals from diverse backgrounds to participate in the society on equal footing. This is due to the fact that treating everyone in the same manner upholds majority norms. If rules of procedure, expected behaviour and institutional arrangements such as Abercrombie's Look Policy are the same for all applicants, the ones who differ from the majority norm will most likely be disadvantaged based on the differences between them and the norm of a "white, able-bodied, heterosexual, Christian male".⁴

As mentioned, the second significant aspect of the Court's ruling was the emphasis it placed on the motive behind an employment decision, abandoning the "knowledge requirement". By doing so, the Court outlawed discriminatory motives regardless of whether they are based on actual knowledge or a mere suspicion. The Court was right to draw a causal link between the protected characteristic and the disparate treatment – the existence of this link is what

4 Faculty of Law, University of Hong Kong, *Case study on equality*, Based on *Dothard v Rawlinson*, 433 U.S. 321 (1977) and Fredman, S., *Discrimination Law*, Oxford University Press, 2002, p. 9.

ultimately decides whether a situation amounts to discrimination or not. Denying this causality would allow employers to freely discriminate unless they had received a direct, explicit notice that the applicant required accommodation for their religious practice. Such an end result would hardly have been in the interests of any applicant protected by the Title VII non-discrimination provisions.

The parties to the case spent considerable time debating the difference between the disparate-treatment and disparate-impact provisions of Title VII. In *Abercrombie*'s view, the existence of a neutral Look Policy could not as such amount to disparate-treatment discrimination – this view was also supported by the dissenting Justice Thomas. It may well be a legitimate question to ask whether the mere existence of a seemingly neutral staff policy can amount to disparate treatment. On the surface it would appear not to, as generally a disadvantage created by a policy that is neutral in wording would be described as having a disparate impact, which may happen irrespective of discriminatory motive. However, this exactly is the clue – when the motive is discriminatory, the act itself is intentional (disparate-treatment) discrimination. The issue in the *Abercrombie* case was not the existence of the disputed Look Policy, but the fact that *Abercrombie* did not make an exception to the policy in order to accommodate Ms Elauf's religious practice. By failing to do this, *Abercrombie* violated Title VII's disparate-treatment provision, which prohibits certain motives, regardless of the employer's knowledge.

Following the Court's reasoning, the applicant needs only to show that the need for accommodation for religious practice was a motivating factor in the decision not to hire. While this certainly is the correct finding to provide applicants with protection from discrimination, it could be argued that enforcing it may be challenging in practice. As knowledge and motive are separated as concepts, motive being the one that matters, it may be difficult for the applicant to show the employer had a discriminatory motive, as opposed to showing they held the relevant knowledge. The employer might claim that while they did indeed know about the need for accommodation, it was not the reason for denying an applicant a job.

The Court acknowledged that if the applicant requests accommodation, or the employer is certain accommodation would be needed, it may be easier to infer motive when that applicant is then not hired, but declined to opine whether the motive requirement can be met without showing that the employer at least suspects that the practice in question is a religious one. In the case at hand it did not make a difference as it was clear that *Abercrombie* suspected a religious practice would prevent Ms Elauf from complying with the Look Policy if it were strictly applied, but for the future application of this precedent, elaboration of this issue would have been helpful.

Much like other critics of the decision, *Abercrombie* reasoned that abandoning the knowledge requirement is going to leave employers in an unfair "Catch 22" situation trying to avoid stereotyping and at the same time trying to avoid litigation for probing applicants' suspected religious views. The ruling has raised questions of when and how any need for accommodation of a religious practice can be discussed without any later hiring decision being seen as

stemming from a discriminatory motive. While a concern over how to discuss a possible need for accommodation of a religious practice within the limits of the law may be legitimate, it is not one that could not be overcome.

As Abercrombie argued, direct enquiries about an applicant's convictions and engaging in religious stereotyping are not recommended practices. Indeed, employers should not ask applicants about their religion in an interview nor should they assume certain religious views or practices based on stereotypes. However, this does not exclude the possibility of an open, interactive process between the employer and the applicant. The interviewer can, for example, explain the key requirements of the job, and then enquire whether the applicant will be able to comply with them. If the applicant replies that his or her religious practice conflicts with the requirement(s), the interviewer can ask what type of accommodation would be needed, and then review whether accommodation could be provided without undue hardship.⁵ The details of the review should be documented and shared with the applicant in order to ensure a transparent process. It is especially crucial to outline the reason(s) behind a possible negative decision to make sure the reasons are not unlawful.

Finally, managers responsible for hiring should be trained following the Abercrombie decision to raise awareness of the importance of seeking to accommodate religious practices where possible. It should be emphasised that the possible need for accommodation is irrelevant for the hiring process in a similar way that one's race or gender is.⁶

It is to be noted that the Abercrombie decision does not impose a new duty on employers, but merely clarifies the existing standard of Title VII when no explicit request for accommodation of a religious practice has been made by an applicant.⁷ As such, it does not result in insurmountable difficulties for hiring managers as suggested by Abercrombie, but rather challenges them to review their practices to comply with the existing equality law.

The Abercrombie decision is part of a wave of recent progressive developments in relation to equality in US jurisprudence. In July, it was followed by the case of *Obergefell v Hodges*,⁸ which legalised same-sex marriage unifying the legislation across the country. These precedents are leading the way towards a more comprehensive understanding of equality in the US and imply a progressive approach adopted by the US Supreme Court for placing a growing emphasis on substantive as opposed to merely formal equality.

5 Colling and Sokolowski discuss employers' obligations following the Abercrombie case in Collins, C. and Sokolowski, J., *Supreme Court sides with EEOC in Abercrombie & Fitch Hijab Case*, Labor & Employment Law Blog, 12 June 2015.

6 *Ibid.*

7 *Ibid.*

8 *James Obergefell, et al., Petitioners v Richard Hodges, Director, Ohio Department of Health, et al.*, 576 U.S. 14–556 (2015).

A Landmark Judgment of the Court of Justice of the EU – New Conceptual Contributions to the Legal Combat against Ethnic Discrimination

Rossen Grozev¹

Introduction

On 16 July 2015, the Court of Justice of the European Union (CJEU) delivered its judgment in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*.² The importance of this judgment, delivered by the Grand Chamber, can hardly be overestimated. The curious factual background will certainly mean that the case will be remembered by future generations of European Union (EU) law students. However, the odd situation addressed by the judgment is only the starting point. The judgment offers new perspectives on the interpretation of Directive 2000/43/EC³ in at least four areas: i) outlining the Directive's personal scope of application; ii) clarifying certain aspects of its material scope; iii) bringing new perspectives to the perennial dilemma of distinguishing between direct and indirect discrimination; and iv) detecting problems with the conformity of several national legal provisions with EU anti-discrimination law. These aspects of the judgment will be examined below after a brief introduction to the factual background of the case.

1. Factual Framework

In the course of national judicial proceedings, a Bulgarian court decided to use the opportunity provided by the preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU) to pose a number of questions to the CJEU through a preliminary ruling request. The case pending before the national court concerned

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2 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, 16 July 2015.

3 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

the practice of placing electricity meters used for the commercial measurement of electricity consumption at a height of 7m in the predominantly Roma-populated urban district Gizdova Mahala in the town of Dupnitsa, making it impossible for people living in that district to read them, while meters were positioned lower than 2m above ground in non-Roma districts. This practice, according to the company that was using it – one of the largest electricity companies in Bulgaria (CHEZ Razpredelenie Bulgaria AD) – was necessary because of the large number of instances of tampering with the commercial measuring instruments and of unlawful connections to the electricity network in the district. A local shopkeeper (Ms Nikolova), who lived in the district and was unable to check her electricity consumption herself, issued legal proceedings, which eventually reached the Sofia Administrative Court and prompted the national judge to refer a long list of 10 questions to the CJEU for preliminary ruling. These 10 questions can be summarised as follows:

1. Could the expression “ethnic origin” used in Directive 2000/43/EC be interpreted as covering a homogeneous group of Bulgarian citizens of Roma origin such as those living in a district of the town of Dupnitsa?;
2. Was the practice at issue a form of direct or indirect discrimination within the meaning of Article 2(2)(a) and (b) of Directive 2000/43/EC?; and
3. Was Article 2(2)(b) of Directive 2000/43 – defining indirect discrimination – to be interpreted as meaning that the practice of the electricity company in relation to the security of the electricity network and the correct recording of electricity consumption was objectively justified? Was that practice necessary when there were other technically and financially feasible means of securing the commercial measuring instruments?

Unlike the similar *Belov* case,⁴ where the CJEU declared the referral for preliminary ruling inadmissible since it was made by a national equality body which was not considered a court of law capable of referring questions for preliminary rulings (in accordance with Article 267 TFEU), in *CHEZ* there was no doubt whatsoever about the judicial nature of the referring national court and the request was declared admissible.

2. Personal Scope of Directive 2000/43/EC

a. *The Scope of the Term “Ethnic Origin”*

Firstly, the referring court asked whether the term “ethnic origin” used in Directive 2000/43/EC should be interpreted as covering a homogenous group of Bulgarians of Roma origin such as those living in a particular district of the town Dupnitsa. The CJEU gave a positive answer and this in itself is not surprising. The more astonishing fact is that *CHEZ* was actually the first ever case to be decided by the CJEU on discrimination against Roma people – the largest ethnic minority in the EU.

⁴ *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others*, C394/11, 31 January 2013.

It is noteworthy that Directive 2000/43/EC does not define the concepts of racial or ethnic origin. It is left to member states to decide whether they should define these concepts in their national law and in what way. However, taking into account the crucial importance of the interpretation of the term “ethnic origin” for delimiting the very scope of application of the Directive, an independent interpretation is needed and the substance of this notion should not be left exclusively within the discretion of member states. In principle, the term should be given a broad reading, since a narrow interpretation of “ethnic origin” would restrict the application of the Directive and thus decrease the level of protection against discrimination, endangering the aims, and the effectiveness, of the Directive.⁵

Even without an in-depth inquiry, the expression “ethnic origin” used in Directive 2000/43/EC should be interpreted as covering a homogeneous group of Bulgarians of Roma origin such as those living in the Gizdova Mahala district, having in mind the general recognition of Roma as an ethnic group. Whether they are referred to as Gens du voyage, Travellers, Sinti, etc., these people have similar cultural features and are treated in many international documents as belonging to the “Roma” ethnicity, this term being employed as a useful generalisation. Several policy and legal instruments adopted by the EU regarding Roma consider that they are an ethnic group⁶ and are thus covered by Directive 2000/43/EC.

The referring court pointed out that most of the population of the Gizdova Mahala district consisted of people of Roma origin, constituting a group with a common ethnic origin. The European Court of Human Rights (ECtHR) has already had the occasion to interpret the concepts of ethnicity and race in the context of applying the Article 14 right to non-discrimination of the European Convention on Human Rights. The ECtHR concluded that:

Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.⁷

There was a general agreement by the intervening parties in *CHEZ* that, in the absence of a definition of “racial or ethnic origin” in Directive 2000/43/EC, the ECtHR definitions could serve as a point of reference for interpretation of the Directive. However, the CJEU did not make a definitive comment in this respect. Instead it stated that the concept of “discrimination on the grounds of ethnic origin” for the purpose of Directive 2000/43/EC must be interpreted as applicable

5 *Firma Feryn*, C-54/07, 12 March 2008, decision of the Advocate General, Para 15.

6 See, for example, Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States.

7 *Timishev v Russia*, App. No. 55762/00 and 55974/00, 13 December 2005, Para 55.

to the circumstances of the case.⁸ It is regrettable that the CJEU only concluded *ad hoc* that the particular factual background was covered by the notion of “discrimination on the grounds of ethnic origin”, without going a step further by formulating some general criteria to be applied to determine whether ethnic discrimination could be found to exist. That said, the CJEU’s approach has the advantage of not restricting or pre-determining the development of any future jurisprudence on the thorny issue of less favourable treatment based on ethnic origin.

b. Discrimination by Association

The question concerning the personal scope of Directive 2000/43/EC, and in particular whether “ethnic origin” covers a homogeneous group of persons of Roma origin, was not facilitated by an unexpected twist in the development of the case while pending before the CJEU. Quite importantly, in her submissions to the CJEU, the immediate plaintiff in the initial national proceedings, Ms Nikolova, rejected the national court’s assessment that she was of Roma origin. Instead, she declared that she neither self-identified nor was identified as Roma.

Directive 2000/43/EC does not appear to require that the alleged victim possess the protected characteristic. If it were to be interpreted otherwise it would only privilege a certain category of human beings with protection from discrimination. Moreover, if direct discrimination was to be detected in this particular case, any unfavourable treatment on the grounds of presumed origin or by association would not be covered by the general prohibition.

More specifically, the case had to be dealt with as covered by Directive 2000/43/EC. Both systematically and logically, the Directive should be construed as implying that Ms Nikolova may have suffered discriminatory treatment connected to ethnic origin, although she herself is not Roma. Indeed, it was the Roma ethnic origin of the majority of the population of the district where she conducted her business activities which led to her less favourable treatment.

There is a precedent for the conclusion that discrimination by association is covered by the Directive and this was relied upon by the European Commission in its submission to the CJEU. In *Coleman v Attridge Law*,⁹ the CJEU ruled that although the person subjected to direct discrimination on grounds of disability was not herself disabled, the fact remained that it was the disability which, according to Ms Coleman, was the ground for the less favourable treatment which she claimed to have suffered. The Court pointed out that Directive 2000/78/EC,¹⁰ which seeks to combat all forms of discrimination on grounds of disability in the field of employment and occupation, applied “not to a particular category of persons but by reference to the grounds mentioned in Article 1”.¹¹

8 See above, note 2, Para 60.

9 *S. Coleman v Attridge Law and Steve Law*, C-303/06, 17 July 2008.

10 See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

11 See above, note 9, Para 50.

Similarly, in *CHEZ*, Ms Nikolova was a victim of discrimination by her association with Roma people. She experienced treatment which was less favourable as compared to that of people living in other districts without a majority Roma population, precisely because she tried to develop her business in a predominantly Roma quarter. As in Directive 2000/78/EC, Directive 2000/43/EC provides, in its Recital 13, that “any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community”.

Therefore, by applying the reasoning of the CJEU in *Coleman* to *CHEZ*, it could also be maintained that the principle of equal treatment enshrined in Directive 2000/43/EC applied not to a particular category of persons but by reference to the ground of racial or ethnic origin in general. A narrow interpretation of the notion of discrimination “on grounds of racial or ethnic origin” as referring to a person who possessed the racial or ethnic origin which was the basis for the discrimination would restrict the field of the Directive’s application and weaken the positive effect which had been envisaged by the EU legislature in its drafting.¹²

In this respect, it was suggested by one of the intervening parties in *CHEZ* that the analysis of Advocate General Poiares Maduro in his Opinion in *Coleman* could be relied on by analogy. Advocate General Maduro explained the mechanics of Directive 2000/78/EC, observing that:

*[W]hat determines whether the employer’s conduct is acceptable or not, and triggers the law’s intervention, is the ground of discrimination relied on by the employer in each case.*¹³

Therefore:

*As soon as we have ascertained that the basis for the employer’s conduct is one of the prohibited grounds then we enter the realm of unlawful discrimination.*¹⁴

According to Maduro:

*[T]he Directive performs an exclusionary function, since it excludes religious belief, age, disability and sexual orientation from the range of permissible reasons an employer may legitimately rely upon in order to treat one employee less favourably than another.*¹⁵

12 See also by analogy the remarks of the Advocate General Maduro in *Firma Feryn*, C54/07, 12 March 2008, Para 15, on the interpretation of Directive 2000/43/EC and its application to cases where it is difficult to identify concrete victims.

13 *S. Coleman v Attridge Law and Steve Law*, C-303/06, 31 January 2008, decision of the Advocate General, Para 16.

14 *Ibid.*, Para 17.

15 *Ibid.*, Para 18.

On this basis, he concluded that:

[I]ncluding discrimination by association in the scope of the prohibition of direct discrimination and harassment is the natural consequence of the exclusionary mechanism through which the prohibition of this type of discrimination operates.¹⁶

In any event, in the *CHEZ* proceedings, one of the intervening parties emphasised that, as in *Coleman*, the fact that the plaintiff *may* have been a victim of discrimination based on a prohibited ground did not mean that she was *actually* a victim of such discrimination, so the matter could be resolved without prejudicing the outcome of the case at issue.

To summarise, the self-identification of Ms Nikolova as non-Roma could not be considered as a relevant factor in deciding whether Directive 2000/43/EC could be relied upon. On the basis of the *Coleman* jurisprudence, although Ms Nikolova did not possess the protected characteristic, she was entitled to avail herself of the protection against discrimination on the protected ground, since she was living in a predominantly Roma neighbourhood and, therefore, was also subjected to the contested practice. The CJEU accepted this line of reasoning and, accepting that Ms Nikolova was not of Roma origin, declared that it was the Roma origin of most of the other inhabitants of the district in which she carried on her business that constituted the basis for the discrimination she allegedly faced.¹⁷

3. Material Scope of Directive 2000/43/EC

a. *The Notion of “Apparently Neutral Provision, Criterion or Practice” (Article 2(2)(b) of Directive 2000/43/EC)*

Through its question No. 6, the referring court sought clarity on the interpretation of the notion of “apparently neutral practice” in the definition of indirect discrimination in the Directive. It questioned whether such a notion meant that a certain practice must be “obviously neutral” or that it “only seems neutral, at first glance”. Prior to *CHEZ*, this aspect of the definition had not been interpreted by the CJEU, so its findings in *CHEZ* represent a conceptual advancement in the understanding of the EU anti-discrimination directives.

In general terms, indirect discrimination occurs when an apparently neutral provision, criterion or practice would put persons having a particular characteristic at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹⁸ The traditional perception of an “apparently neutral” measure in the context of indi-

¹⁶ *Ibid.*, Paras 18 and 19.

¹⁷ See above, note 2, Para 59.

¹⁸ According to the exact wording of Article 2(2)(b) of Directive 2000/43/EC, indirect discrimination is considered as having taken place when “an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons”.

rect discrimination is a measure which, albeit formulated in neutral terms (i.e. by reference to other criteria not related to the protected characteristic) nevertheless leads to the result that persons possessing that characteristic are put at a disadvantage.¹⁹

With the *CHEZ* judgment, the CJEU added a new hermeneutic perspective to the “neutrality” notion. The concept of indirect discrimination is based on the perception that some provision, criterion or practice, which at first sight would appear neutral (i.e. not introduced in connection with a protected characteristic) is actually not neutral because the effects it produces on different groups of persons are deeply diverging.

One possible approach in interpreting the notion of “apparently neutral provision, criterion or practice” is for the national court to turn towards analysis of the constituent aspects of indirect discrimination, if a conclusion has been reached that direct discrimination could not be proved. In applying this “fall-back” solution, it would seem without real importance whether a certain practice is “obviously neutral” or “only seems neutral, at first glance”. What actually counts is that all the elements defining direct discrimination cannot be assembled and that all remaining requirements for finding indirect discrimination are in place.

The CJEU in its judgment preferred a different analytical approach – namely, to interpret directly the notion of “apparently neutral practice”, choosing between a practice whose neutrality is particularly “obvious” and a practice that is neutral “ostensibly” or “at first glance”. In this respect the Opinion of Advocate General Kokott was particularly helpful.²⁰ The Advocate General concluded that the term “apparently” in Article 2(2)(b) of Directive 2000/43/EC must be understood as referring to an *ostensibly* or *prima facie* neutral measure. The term is not restricted to provisions or practices which are only manifestly neutral. Otherwise, an absurd situation could occur, preventing any finding of indirect discrimination if the contested practice or measure proves to be less neutral than it might seem during its initial assessment.

Following this line of reasoning, the CJEU preferred to understand the notion of “apparently neutral practice” as a practice that is neutral “ostensibly” or “at first glance”. In addition to the fact that such an understanding corresponded to the most natural meaning of the term used, that perception was deemed by the Court as required in light of its established jurisprudence on the concept of indirect discrimination, according to which, unlike direct discrimination, indirect discrimination might be the consequence of a measure which, although neutrally formulated (i.e. by reference to other criteria not related to a protected characteristic), nevertheless produces the result that mainly individuals possessing that characteristic find themselves in a disadvantageous position.²¹

19 See *Z. v A Government department and The Board of management of a community school*, C-363/12, 18 March 2014, Para 53 and the case-law cited therein.

20 *CHEZ Razpredelenie*, C-83/14, 12 March 2005, decision of the Advocate General, Para 92.

21 See above, note 2, Paras 93–94.

b. The Notion of “Particular Disadvantage” and the Intensity of the Negative Effect of “Less Favourable Treatment” (Direct Discrimination) and “Particular Disadvantage” (Indirect Discrimination)

One very interesting and previously relatively unexplored aspect of the definitions of direct and indirect discrimination is whether a material difference exists between the concepts of “less favourable treatment” and “particular disadvantage”, specifically whether there is a difference between the intensity of the negative effect required for “less favourable treatment” (used for defining direct discrimination) and that required for “particular disadvantage” (an element of the definition of indirect discrimination).²²

The CJEU was prompted to provide its interpretation on this issue by a question of the referring court in *CHEZ* relating to the conformity of certain national provisions with Directive 2000/43/EC. The national provisions required “less favourable treatment” for direct discrimination and “placing in a less favourable position” for indirect discrimination. The uncertainty of the Bulgarian judge was caused by the fact that the national legal rules did not, unlike the directive, “make a distinction according to the degree of seriousness of the unfavourable treatment concerned”.²³

The perception that the EU legislator intended to incorporate such a difference in the legal constructions of direct and indirect discrimination is not without justification. Indeed, given that in the case of indirect discrimination the negative effect is caused by a provision, criterion or practice adopted for some other reason, and not explicitly on the grounds of the protected characteristic (which, in the context of direct discrimination, deserves harsh and automatic condemnation even without producing particularly nefarious results), it could be expected that more severe consequences need to be demonstrated for a case of indirect discrimination to be established, than for a case of direct discrimination to be established.

The CJEU disagreed with this viewpoint, perhaps prompted to a certain extent by the majority of submissions in the case and by the position of the Advocate General.

Indeed, there seems to be no substantial difference between the concepts of “less favourable treatment” and “particular disadvantage.” One possible explanation for the different wordings is that they are connected to the need to distinguish the definitions terminologically, in order to avoid blurring the notions of direct and indirect discrimination. The finding of direct discrimination presupposes that one individual is treated less favourably because of his or her ethnic origin. On the other hand, in order to prove indirect discrimination, a group of individuals should be found to be at a disadvantage “compared with other persons”. The only mandatory distinction seems to be that the disadvantage should concern a group of persons who share a characteristic and not a single person. Otherwise, the strength of the effects of

22 See above, note 3, Article 2(2)(a) and (b).

23 See above, note 2, Para 37.

the “particular disadvantage” is not required to exceed the intensity of the effects produced by the “less favourable treatment” in direct discrimination. It was suggested that the CJEU does not need to determine whether or not there is any legally significant difference in the required degree of “unfavourable treatment” or “disadvantage” between the concepts of direct and indirect discrimination.

Advocate General Kokott observed that the expression “put (...) at a particular disadvantage” in Directive 2000/43/EC should not be mistakenly conceived to mean that only particularly serious inconveniences for members of an ethnic group could amount to indirect discrimination. On the contrary, this wording means that indirect discrimination exists where an apparently neutral provision, criterion or practice affects certain individuals (representatives of a particular ethnic group) more harshly than others. The severity of the disadvantage could, however, eventually matter in terms of justification for the measure: if the inconvenience caused is particularly serious, the eventual justification should meet stricter standards.²⁴

The CJEU agreed with the Advocate General and developed this line of reasoning, accepting that the expression “particular disadvantage” employed in Article 2(2)(b), together with the other elements of the definition, does not mean that such a circumstance can exist solely when there is an especially noteworthy, evident and extreme instance of disparity. This condition must be considered met if individuals of a certain ethnic origin are hindered as a result of the measure.²⁵

The Court stated that this understanding stemmed from its jurisprudence, which interprets indirect discrimination as emerging when a national measure, even with neutral wording, is detrimental for “considerably more” or “far more” individuals having the protected characteristic than for individuals without it.²⁶ Such a reading, the Court went on, is more compatible with the aims of the EU legislator than an understanding which would imply that “only serious, obvious and particularly significant cases of inequality fall within Article 2(2)(b) of Directive 2000/43”.²⁷

4. Distinguishing between Direct and Indirect Discrimination

The definitions of direct and indirect discrimination contained in Article 2(2)(a) and (b) of Directive 2000/43 are the starting point of any discussion:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

24 See above, note 20, Para 93.

25 See above, note 2, Para 99.

26 See in particular, above note 19, Para 53 and the case-law cited therein; and *Cachaldora Fernández*, C-527/13, 14 April 2015, Para 28 and the case-law cited therein.

27 See above, note 2, Paras 101–102.

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In a preliminary ruling such as *CHEZ*, it is not the task of the CJEU to determine whether, on the basis of the facts of the case, a form of direct or indirect discrimination has occurred. It is only the national court, following further investigation of the facts and assisted by the guidance provided by the preliminary ruling of the CJEU, which can make this determination. However, in its judgment in *CHEZ*, the CJEU analysed the notions of direct and indirect discrimination in the light of the facts of the case and came to rather unambiguous conclusions, albeit abstaining from directly determining the issue.

a. The Elevated Electricity Meters as a Form of Direct Discrimination?

Three cumulative conditions must be found to exist in order to conclude that direct discrimination has taken place in the case of the elevated electricity meters in the Roma neighbourhoods: the situation has been created and maintained on the basis of the ethnic origin of the concerned population; the situation amounts to a certain negative result; and the situation of those affected is less favourable than that of others in a “comparable” situation.

i. Grounds of Ethnic Origin

It is not difficult to imagine that the basic defence of the electricity company against the accusation of direct discrimination was to deny that the specific positioning of the electricity meters in the Roma neighbourhood was due to the ethnic origin of its inhabitants. Instead, CHEZ maintained that this practice – far from intending to discriminate – was designed exclusively to prevent illegal tampering with the electricity meters and unauthorised connection to the electricity distribution network. Naturally, it will be for the referring national court to decide whether the real reason was the ethnic origin of the majority of the electricity consumers or something else. The CJEU, however, gave several quite explicit signs of how it viewed the situation.

Firstly, the Court noted that it was widely accepted and not contested by CHEZ that the company had introduced the disputed practice only in urban districts known to be inhabited predominantly by people of Roma origin.²⁸ Secondly, the company’s position was not reinforced by its own frequent assertions in similar cases before the Bulgarian equality body that in its view the illegal tampering and connections to the distribution network were mostly carried out by Roma. The CJEU observed that such a standpoint could actually imply that the contested practice is based on prejudices and ethnic stereotyping.²⁹ Thirdly, the CJEU noted that, despite requests from the

²⁸ *Ibid.*, Para 31.

²⁹ *Ibid.*, Para 82.

referring Bulgarian court, CHEZ was unable to produce evidence of the alleged damage, meter tampering and unlawful connections, claiming only that they were common knowledge.³⁰

Finally, the CJEU invited the referring court to keep in mind the compulsory, widespread and lasting nature of the disputed practice, when assessing the real reasons for it. In fact, the practice had been applied indiscriminately to all persons living in the district, regardless of whether their individual meters had been manipulated, whether these citizens were responsible themselves for unauthorised connections or whether the real identity of the perpetrators had ever been discovered. In addition, this measure was still in place almost 25 years after its introduction. These findings in their entirety implied a generalised perception that all individuals living in a predominantly Roma-populated district could be involved in illegal activities with regard to electricity consumption.³¹

The interpretative tools applied by the CJEU provide quite instructive factors for the referring court to take into account in any future cases in which it is required to determine whether the reason for a certain practice was the ethnic (or racial) origin of its targets: the factual finding that the contested practice existed in places with a high concentration of representatives of certain racial or ethnic origin; justifications of the practice which smack of ethnic stereotypes or prejudices; lack of evidence suggesting any other plausible reason for applying the practice; and the compulsory, widespread and lasting nature of the practice.

ii. Less Favourable Treatment

The second element required for a finding of direct discrimination under Directive 2000/43/EC is the finding of effects unfavourable to the interests of the persons concerned. According to the CJEU, it was irrefutable that the act of putting electricity meters on poles 7m high amounted to unfavourable treatment of the occupants of the relevant urban area, taking into account not only the troublesome procedure for them to control their electricity meters, but also the humiliating and stigmatising character of the disputed measure.³²

iii. Comparable Situation

Finding a comparable situation in which the electricity company's practice is more favourable is crucial in order to determine whether direct discrimination existed in the case at issue. The CJEU considered that the referring court may have been perplexed by the fact that it was both true that not all inhabitants of the affected district were Roma and that Roma living outside the affected district were not suffering the less favourable treatment in question. The CJEU recalled that in determining the comparability of situations in the context of applying the equal treatment principle, all aspects of the juxtaposed situations should be taken into consideration.³³

30 *Ibid.*, Para 83.

31 *Ibid.*, Paras 81–84.

32 *Ibid.*, Para 87.

33 See, in particular, *Arcelor Atlantique et Lorraine and Others*, C-127/07, 16 December 2008, Para 25.

By adopting this approach, the CJEU identified an extremely broad comparator in the case. It held that, as a matter of principle, all final electricity consumers who lived in an urban area and were supplied by the same company should be considered as being in a comparable situation.³⁴

This expansive choice of comparator almost predetermines the outcome of the case. The electricity company may have rebutted the claim of direct discrimination if another comparator had been identified. For example, it could have identified as comparators people living in other areas where cases of illegal tampering with the electricity meters and unauthorised connection to the distribution network are abnormally numerous (be they areas inhabited by persons of Roma origin or not). However, such a choice of comparator would have presupposed capability – and probably willingness – on the part of the electricity company to present strongly convincing statistical and technical data proving that electricity meters are put at height of 7m only in areas with high frequency of illegal interventions with the electricity meters and/or the distribution networks. The electricity company had not presented such evidence at any point in the proceedings.

The electricity company made a number of contentions. It claimed that the disputed measure has been introduced as a reaction to concrete problems faced by it on the ground: attempts of illegal interference with electricity meters, as well as attacks against its technical staff. Further, the measure had already been in place when the electricity company was privatised. In addition, there were a combination of negative factors in the relevant neighbourhoods, e.g. illegal construction, poverty and social exclusion. CHEZ maintained that it did not have at its disposal any statistical data on the ethnic origin of the concerned population. The contested measure could not be appealed against by individuals because they were not taken as a reaction to an individual situation. The individual decisions were the responsibility of CHEZ's technicians, who acted without consulting the payment data but in response to the information they possessed regarding “non-technical losses” of electricity. The disputed measure was presented as a reaction to a phenomenon observed on the ground, the logic behind the measure being that it simply rendered more difficult the attempt to steal electricity.

In the light of such unconvincing statements, it seems quite unlikely that the electricity company will be ready to change its defensive tactics by presenting more convincing proofs before the national court which is to finalise the case after the CJEU's preliminary ruling.

iv. Reversal of the Burden of Proof

Article 8(1) of Directive 2000/43/EC³⁵ makes clear the burden of proof to be applied by the national court when determining whether the measure amounts to direct discrimination.

34 See above, note 2, Para 90.

35 “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”

Since it is for the referring Bulgarian court to examine the facts of the case, it is also for the same court to determine whether the plaintiff has established before it (or, previously, before the Bulgarian equality body) facts from which it may be presumed that there was direct discrimination. If this is found to be the case, the respondent must then prove that there has been no breach of the principle of equal treatment.

The evidence already adduced in earlier proceedings indicates that there is strong reason to suspect ethnic discrimination on the part of the electricity company. As the CJEU rightly points out, in the event that the national court finds a presumption of discrimination to exist, the reasonable recourse to the equal treatment principle demands that the burden of proof shifts to the electricity company. This would require CHEZ to prove that the practice has been introduced and maintained due to some objective, non-discriminatory reason which is not connected with the predominant ethnic origin of those inhabiting the district(s) where the measure still exists.³⁶

b. The Elevated Electricity Meters as a Form of Indirect Discrimination?

i. Indirect Discrimination as a Fall-Back Solution

It should be recalled that, according to the dichotomy established by Directive 2000/43/EC, in principle discrimination is either direct or indirect (except for cases of harassment). Accordingly, a methodical and reasonable approach would be to analyse whether the electricity company has indirectly discriminated only if, for some reason, direct discrimination could not be regarded as having taken place. In *CHEZ*, the CJEU seems to indicate that this would be the logical approach for the national court to take in making its final determination on the facts.³⁷

ii. Possibility and Conditions for Objective Justification

According to one of the basic tenets of EU anti-discrimination law, the possibility for objective justification exists, in principle, only in cases of indirect discrimination.³⁸ An indirectly discriminatory practice can be justified only if it pursues genuinely legitimate aims and the means of achieving these aims are appropriate and necessary.

36 See above, note 2, Para. 85.

37 *Ibid.*, Para 105.

38 A rare exception to this principle is Article 6(1) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which stipulates that member states may provide that differences in 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. It has been rightly pointed out in the legal theory that this is not the same test as for objective justification of indirect discrimination under Article 2(2)(b) of Directive 2000/78/EC, since under Article 6(1) of the same Directive could be justified not only indirect, but even direct discrimination. See Barnard C., *EU Employment Law*, Fourth Edition, Oxford University Press, 2012, p. 371.

Legitimate Aims

The electricity company in *CHEZ* argued that the contested practice has been introduced in order to respond to and prevent illegal damage to and tampering with electricity meters, and unauthorised connections to the distribution electricity network, which had resulted in huge “non-technical losses of electricity” in the relevant district. In addition, it argued that the measure was aimed at preserving the health of the consumers in the district (who could injure themselves while tampering with the network) and maintaining the integrity of the whole electricity supply system.

Both the Advocate General and the CJEU agreed that, considered as a whole, such aims constituted legitimate aims recognised by EU law.³⁹ Of course, the CJEU was answering the question in order to assist the national court only if the latter concluded that these were the real aims of the company as a matter of fact. The CJEU itself did not determine the question of facts but provided strong indications that it did not believe these were the facts.

Appropriateness

As to the appropriateness of the adopted measure, the CJEU accepted the interpretation of the Advocate General⁴⁰ that the measure could be regarded as capable of effectively counteracting illegal practices involving manipulation of individual measuring devices and interference with the distribution infrastructure, so – for the needs of the objective justification test – the measure could be recognised as appropriate in achieving the aims already assessed as legitimate.⁴¹

Necessity

In its assessment of the necessity of *CHEZ*'s practice, the CJEU seemed strongly influenced by the submission that when evaluating the proportionality of the contested measure, the practice of the other electricity companies active in Bulgaria should also be taken into account. The information provided by the Bulgarian equality body was that these other enterprises had abandoned the practice, choosing other means for combating illegal interventions and connections, and had installed individual measuring devices at a height not exceeding 1.5–2m.⁴² Accordingly, the national court will need to consider the existence of different and not so stringent measures and whether they are capable of achieving the objectives declared by *CHEZ*. If it finds that alternate measures are so capable, the national court is expected to

39 See above, note 2, Paras 113–114.

40 See above, note 20, Paras 121–124.

41 See above, note 2, Para 119.

42 For example, installing controlling electricity meters in consumers' premises, or measures for enhanced physical protection of the measuring devices, combined with remote reading of the electricity meters.

declare that the means chosen by the electricity company cannot be deemed necessary in the sense of Article 2(2)(b) of Directive 2000/43/EC.⁴³

iii. *The “Broader” Proportionality Test Adopted By the CJEU*

It appears that an additional, or at least broader, proportionality test has been embraced over time by the CJEU;⁴⁴ it requires not only that the means of reaching a certain aim should be appropriate and necessary for achieving that aim but, in addition, the disadvantages caused by these otherwise appropriate and necessary means should be proportionately compensated by the advantages associated with the aim pursued. Such an approach undoubtedly enlarges the scope of application of the proportionality principle by requiring a consideration of the possible negative effects of the measures taken to achieve a legitimate aim as weighed against the eventual positive aspects of the aim. This element of the proportionality test was explained by Advocate General Kokott in her Opinion for the *Belov* case,⁴⁵ where the factual background was virtually the same as that in *CHEZ*. The Advocate General underlined that according to the principle of proportionality, measures which negatively encroach on a right defended by EU law – in the discussed case, the prohibition of discrimination based on ethnic origin – must not cause disadvantages for the individual which are disproportionate to the aims pursued.⁴⁶ It is hardly surprising that the electricity company vigorously opposed that this final step was part of the proportionality test rightly understood and instead submitted that there were judgments of the CJEU (for example, the judgment *Kachelmann*⁴⁷) where a lighter standard for proving proportionality in discrimination cases had been applied.

After considering this point, the CJEU recommended that a three stage analysis be adopted by the national court to determine whether the disadvantages associated with the contested measure were proportionate to the envisaged aims and whether the measure at issue unduly prejudiced the legitimate interests of those living in the affected district:

- Assess the legitimate interests of final consumers in enjoying access to the electricity distribution service under conditions free of offensive or stigmatising effects;
- Take into account “the binding, widespread and long-standing nature” of the contested measure and the fact that it does not provide for drawing any distinction between those inhabitants of the predominantly Roma district who could be blamed for certain unauthorised actions and those who are innocent of such conduct; and

43 See above, note 2, Paras 120–122.

44 See *Ingeniørforeningen i Danmark*, C-499/08, 12 October 2010, Paras 32 and 47; and *Nelson and Others*, C-581/10 and C-629/10, 23 October 2012, Para 76 *et seq.*

45 See above, note 4.

46 See *Tempelman and van Schaijk*, C96/03 and C97/03, 10 March 2005, Para 47; and *ERG and Others*, C379/08 and C380/08, 9 March 2010, Para 86.

47 *Bärbel Kachelmann v Bankhaus Hermann Lampe KG*, C-322/98, 26 September 2000.

- Consider the legitimate interest of the final electricity consumers in being able to verify and control their consumption on effective and regular basis (a right explicitly guaranteed by EU legislation⁴⁸).⁴⁹

It could well be that this more encompassing proportionality test would almost certainly be failed by the electricity company, although that is for the national court to decide. The CJEU seemed to accept the argument that the proportionality of the measure concerned has to be assessed at the time of determination rather than at the time, possibly 25 years ago, when the measure was first introduced.

Not surprisingly, CHEZ strongly opposed the view that the stigmatising effect of a certain measure should be taken into account when assessing the proportionality of this measure. In its judgment in *CHEZ*, while instructing the national court to be particularly demanding in applying the proportionality test in its broader dimension if the practice at issue is determined as having stigmatising effects on the Roma people involved, the CJEU does not go as far as to say that if a measure has a stigmatising effect, it should *never* be capable of objective justification.

Nevertheless, the message of the CJEU remains forceful and uncompromising. The proportionality conditions would not be satisfied if the national court found either that other appropriate and less restrictive means to achieve those aims existed, or that, in the absence of such other means, the contested measure excessively prejudiced the legitimate interest of the final electricity consumers inhabiting the district concerned in having access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly.

5. Problems of Conformity of National Legal Provisions with EU Anti-Discrimination Law

Last, but not least, the CJEU questioned the conformity of two provisions of the Bulgarian Law on Protection against Discrimination (*Zakon za zashtita ot diskriminatsia*) (ZZD) with Directive 2000/43/EC. These provisions define key concepts of the anti-discrimination law. Although these issues are specific to the Bulgarian legislation, it may be that there are similar problems with the wording in national anti-discrimination laws in other member states.

a. *Indirect Discrimination on the Basis of a Protected Characteristic?*

Article 4(3) of the ZZD provides:

(3) Indirect discrimination shall be taken to occur where, on the basis of characteristics mentioned in paragraph 1, one person is placed in a less favourable

48 See Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, in particular Article 3(3) and (7), as well as paragraph 1(h) and (i) of Annex I thereof.

49 See above, note 2, Paras 124–126.

position compared with other persons by an apparently neutral provision, criterion or practice, unless that provision, criterion or practice is objectively justified having regard to a legitimate aim and the means of achieving that aim are appropriate and necessary. (emphasis added)

However, Article 2(2)(b) of Directive 2000/43/EC establishes that:

*(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice **would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons**, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (emphasis added)*

These two provisions defining indirect discrimination are obviously worded in a different way. While Directive 2000/43/EC is interested only in whether an individual belonging to a certain race or ethnicity suffers a particular disadvantage, the Bulgarian legal provision demands that a person be placed in a less favourable position because of his/her racial or ethnic origin.

This discrepancy may produce outcomes incompatible with the Directive and the Bulgarian law is therefore not in conformity with it. The fact of treating a certain person unfavourably because of his or her racial or ethnic origin is an instrumental aspect of the definition of direct discrimination, which does not provide for any justification.⁵⁰ The Bulgarian legal definition of indirect discrimination, by requiring a person to be treated less favourably on the grounds of racial or ethnic characteristics (among others), decreases the level of protection against discrimination envisaged by Directive 2000/43/EC in two respects.

On the one hand, it suffices for finding indirect discrimination under the Directive that individuals of certain racial or ethnic origin are placed at a particular disadvantage. The exact ground or the possible explanation for less favourable treatment of these persons is immaterial. As Advocate General Maduro articulated, in situations involving indirect discrimination the intentions of the discriminator and the reasons she or he has to act or not to act are irrelevant.⁵¹ This is the main advantage of having a notion of indirect discrimination – the only thing that matters is that a measure has negative and unwarranted effects on a group of people sharing common characteristics.

On the other hand, the definition of indirect discrimination in Article 4(3) of the ZZD virtually coincides with the concept of direct discrimination under Directive 2000/43/EC (“on the ba-

50 Article 2(2)(a) of Directive 2000/43/EC establishes that: “direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”.

51 See above, note 13, Para 19.

sis of characteristics” – “on grounds of racial or ethnic origin”) but opens the door to general justification which, quite logically, is absent from the definition of direct discrimination under Article 2(2)(a) of the Directive. While Article 4(2) of the ZZD correctly prohibits direct discrimination without justification, Article 4(3) of the ZZD is formulated in such a way as to leave open the question whether direct discrimination based on race or ethnicity could be justified.

To summarise, the definition of indirect discrimination in Article 4(3) of the ZZD appears not to conform with the definition of indirect discrimination contained in Article 2(2)(b) of Directive 2000/43/EC.

This line of reasoning was supported by the findings of the CJEU in its *CHEZ* judgment. Although the CJEU has no jurisdiction to pronounce directly on the conformity of national rules with EU law in its preliminary rulings, the CJEU does have jurisdiction to provide the national court with guidance as to the interpretation of EU law necessary to enable the national court to rule on the compatibility of national legal provisions with EU law.⁵² The position expressed by the CJEU on Article 4(3) of the ZZD – as well as on Paragraph 1(7) of the Supplementary Provisions of the ZZD – was sufficiently unambiguous as to relieve the referring court and the Bulgarian authorities of any doubts about the incompatibility of the two Bulgarian provisions with Directive 2000/43/EC.

In discussing Article 4(3) of the ZZD, the CJEU reiterated that whenever it appears that a particular provision, criterion or practice determining unequal treatment has been adopted for reasons rooted in racial or ethnic origin, that measure must be classified as “direct discrimination” as understood in Article 2(2)(a) of Directive 2000/43/EC.⁵³

The CJEU further stressed the contrast with the concept of indirect discrimination, which does not contain a mandatory condition requiring the measure to be adopted on racially or ethnically motivated grounds. As evidenced by the existing jurisprudence,⁵⁴ any measure will be caught by Article 2(2)(b) of Directive 2000/43/EC, if the measure in question puts persons bearing a protected characteristic at a disadvantage, even if that is not the measure’s *raison d’être* and the measure uses neutral criteria.⁵⁵

In this context, the CJEU concluded that Article 2(2)(b) of Directive 2000/43 must be understood as contrary to a national provision such as Article 4(3) of the ZZD.⁵⁶

52 See *Placanica and Others*, C-338/04, C359/04 and C360/04, 6 March 2007, Para. 36 and the case-law cited therein.

53 See above, note 2, Para 95.

54 See above, note 19, Para 53 and the case-law cited therein.

55 See above, note 2, Para 96.

56 *Ibid.*, Para 97.

b. “Unfavourable Treatment” as Directly or Indirectly Prejudicing “Rights or Legitimate Interests”?

In one of its questions to the CJEU, the referring court sought to establish whether Paragraph 1(7) of the Supplementary Provisions of the ZZD, which defines “unfavourable treatment” as any act which directly or indirectly prejudices “rights or legitimate interests”, was in accordance with Directive 2000/43, or whether discrimination could be detected not only when rights or legitimate interests are infringed (as seemed to result from the national provision under discussion).

The latter of these two alternatives is correct as was clearly explained by Advocate General Kokott in her Opinion in *Belov*.⁵⁷ The Advocate General stated that behaviour giving rise to direct or indirect discrimination in the sense of Directive 2000/43/EC was not necessarily linked to an infringement of “rights and interests defined in law” – instead, it sufficed for such behaviour to result in less favourable treatment of persons because of their race or ethnic origin (the concept of direct discrimination) or to be capable of placing individuals belonging to certain race or ethnicity in a particular disadvantage with regard to other people (the notion of indirect discrimination). Advocate General Kokott considered national legal provisions which treated the infringement of “rights and interests defined in law” as a mandatory pre-condition for finding the existence of discrimination to be incompatible with Directive 2000/43/EC. In this context, the Advocate General noted that it was a duty of the national court to interpret any domestic rule in conformity with the EU *acquis* and, if such interpretation proved impossible because of a deep contradiction between the national and the relevant EU legal provision, not to apply the national rule.⁵⁸ She noted that this was particularly true when the national rule conflicted with the right to equal treatment as a fundamental right.⁵⁹ Of course, one possible question in the context of such logic is whether the notion “rights and interests defined in law”, employed in Advocate General Kokott’s analysis, is synonymous with “rights or legitimate interests” – the expression used by the Bulgarian legislator in the contested provision.

Probably in order to avoid such terminological subtleties, the CJEU in *CHEZ* seemed to choose a slightly different approach, albeit leading to the same result. The basic argument of the CJEU concentrated on the risk of restricting the level of protection against discrimination laid down in Article 2(2)(a) and (b) of the Directive.

This viewpoint is convincingly developed in the *CHEZ* judgment. The CJEU preferred to base its analysis on several parts of Directive 2000/43/EC, starting with Recitals 12 and 13, according to which among the Directive’s main objectives is that of ensuring the development of demo-

57 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others*, C394/11, 20 September 2012, decision of the Advocate General.

58 *Ibid.*, Para 83.

59 *Ibid.*

cratic and tolerant societies allowing the participation of all persons irrespective of racial or ethnic origin and, to this end, *any* direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by the Directive should be prohibited. Article 2(1) is framed in similarly expansive terms, stipulating that for the purposes of the Directive the principle of equal treatment shall mean that there shall be *no* direct or indirect discrimination based on racial or ethnic origin. The CJEU also noted that Recital 28 formulates another important objective of the Directive, namely to ensure a common high level of protection against discrimination in all member states. As a result, the CJEU underlined that the scope of Directive 2000/43/EC could not be defined restrictively. With these things in mind, the CJEU stated that a national provision such as Paragraph 1(7) of the Supplementary Provisions of the ZZD introduces a condition which does not stem from those provisions of the Directive and which, therefore, is capable of restricting the scope of protection that the Directive guarantees.⁶⁰

There could be disagreements with the CJEU's categorical conclusion that the Directive is incompatible with a national legal provision defining unfavourable treatment as treatment which prejudices rights or legitimate interests, following the assumption that the contested provision limits the scope of application of the Directive which prohibits "any" discrimination. An argument was advanced⁶¹ that within the Bulgarian legal system the expression "rights and legitimate interests" covers any activity and it could be hard to see what would remain outside this definition.

Nevertheless, the unambiguous finding of the CJEU in its highly representative and authoritative composition (the Grand Chamber) not only supports the conclusion that Paragraph 1(7) of the Supplementary Provisions of the ZZD is incompatible with Directive 2000/43/EC, but also – and more importantly – appears to send a clear message that the same fate would befall any national provision which could raise a reasonable doubt that the level of protection against discrimination fixed in Article 2(2)(a)–(b) of the Directive has been restricted.

Conclusion

With its landmark judgment in *CHEZ*, the CJEU has made major contributions to the interpretation of Directive 2000/43/EC. The Grand Chamber of this highest EU jurisdiction outlined the personal scope of application of the Directive, explained important elements of its material scope, produced insightful guidance as to the distinction between direct and indirect discrimination and identified problems with the conformity of several national legal provisions with the EU anti-discrimination law. This judgment should be welcomed as a further decisive step in clarifying the principle of equal treatment of persons irrespective of their ethnic origin.

60 See above, note 2, Paras 65–68.

61 Ilieva, M., "CJEU Ruling – Inaccessible electricity meters in Roma districts", *European network of legal experts in gender equality and non-discrimination*, 30 July 2015, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2911&Itemid=295.

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