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HYPER

RIVISTA DI ATENEO

TUTELA E SICUREZZA DEL LAVORO

UNIVERSITÀ DEGLI STUDI DI MILANO BICOCCA
DIPARTIMENTO DI SCIENZE ECONOMICO-AZIENDALI E DIRITTO PER L'ECONOMIA

NUMERO 2
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La legislazione finalizzata alla "*tutela e sicurezza del lavoro*" interessa e condiziona i principali settori del diritto e dell' economia, al fine di assegnare loro disciplina e protezione.

Ovvia la considerazione della sua matrice lavoristica, come naturale luogo di nascita e di previsione della sua regolamentazione; eppure, altrettanto evidente è la sua rilevanza in relazione a tutte quelle branche del diritto che con essa necessariamente si intersecano: tanto il diritto pubblico quanto quello privato, nelle svariate letture del diritto economico e in particolare nell'accezione del diritto punitivo dell'impresa (sia penale che amministrativo), concorrendo, tutti, ad assicurarne salvaguardia ed operatività; ma non solo: assolutamente evidente è la sua rilevanza nella prospettiva economico-aziendale, risultando, quale imprescindibile variabile esterna dell'attività d'impresa, fondamentale nella definizione delle linee di programmazione e strutturazione della governance aziendale.

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Sommario

pagina

SAGGI

THE EU-GEORGIA ASSOCIATION AGREEMENT: REPORT ON THE ADOPTION OF EUROPEAN AND INTERNATIONAL STANDARDS IN CERTAIN FIELDS OF LABOUR LAW

ANDREA BORRONI
General editor

INTRODUCTION

Georgian citizens are by and large in favour of the European Union; according to a 2017 poll, 93 % of respondents from Georgia had a positive or neutral image of the EU.[1]
Over the years, the European Union's underlying policy towards Georgia has been to support state-building processes by encouraging economic and political reforms and assisting them in their successful transition to democracy.
To this end, on 27th June 2014, Georgia signed an "Association Agreement" with the European Union and their Member States and the Deep and Comprehensive Free Trade Agreement (DCFTA) and granted the Country visa-free travel to the Schengen Area; this Agreement came into force on 1st July 2016.
Nowadays, we are in the middle of the 2017-2020 term where four priority sectors for intervention have been selected:
1) economic development and market opportunities, including smart, sustainable and inclusive economic growth; 2) strengthening institutions and good governance, including the rule of law and addressing security; 3) connectivity; 4) mobility and people-to-people contacts.
As a consequence of the Association Agreement, Georgia had to modify its labour law (see Chapter 14 of the Association Agreement, titled Employment, social policy and equal opportunities, articles 348-349).
Specifically, Article 348 mandates that: "*[t]he Parties shall strengthen their dialogue and cooperation on promoting the Decent Work Agenda, employment policy, health and safety at work, social dialogue, social protection, social inclusion, gender equality and anti-discrimination, and corporate social responsibility and thereby contribute to the promotion of more and better jobs, poverty reduction, enhanced social cohesion, sustainable development and improved quality of life*".
Furthermore, Article 349 states that:
"*[c]ooperation, based on exchange of information and best practices, may cover a selected number of issues to be identified among the following areas:*

a) poverty reduction and the enhancement of social cohesion;
b) employment policy, aiming at more and better jobs with decent working conditions, including with a view to reduce the informal economy and informal employment;
c) promoting active labour market measures and efficient employment services, as appropriate, to modernise the labour markets and to adapt to labour market needs of the Parties;
d) fostering more inclusive labour markets and social safety systems that integrate disadvantaged people, including people with disabilities and people from minority groups;
e) equal opportunities and anti-discrimination, aiming at enhancing gender equality and ensuring equal opportunities between men and women, as well as combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
f) social policy, aiming at enhancing the level of social protection and the social protection systems, in terms of quality, accessibility and financial sustainability;
g) enhancing the participation of social partners and promoting social dialogue, including through strengthening the capacity of all relevant stakeholders;

[1] http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621833/EPRS_STU(2018)621833_EN.pdf. *The EU-Georgia Association Agreement: Report on the Adoption of European and International Standards in Certain Fields of Labour Law*.

h) promoting health and safety at work."

At the basis of the Agreement were the strong links and common values and characterising Georgia and the EU and also of the acknowledgment of the common desire of the Parties to further develop, strengthen and extend their relations and also taking into account the European aspirations and European choice of Caucasian Country.
In particular, in Article 227 (2) the commitment is confirmed to pursue sustainable development because the parties acknowledge that economic and social development are interdependent and mutually each other. They underline the benefit of considering trade-related labour issues as part of a global approach to trade and sustainable development.
Subsequently, Article 228 (1) recognises the right to determine sustainable development policies and priorities, to establish own levels of domestic labour protection, and to adopt or modify accordingly relevant law and policies, consistently with their commitment to the internationally recognised standards and agreements referred to in Articles 229 and 230 of the Agreement.
In particular, at Article 228 (2) the parties to the agreement bound themselves to endeavour to ensure that their law and policies provide for and encourage high levels of environmental and labour protection and shall strive to continue to improve its law and policies and the underlying levels of protection.
Article 229 (2) in accordance with their obligations as members of the ILO the Parties oblige *to respecting, promoting and realising in their law and practice and in their whole territory the internationally recognised core labour standards, as embodied in the fundamental ILO conventions, and in particular:*
(a)*the freedom of association and the effective recognition of the right to collective bargaining;*
(b)*the elimination of all forms of forced or compulsory labour;*
(c)*the effective abolition of child labour; and*
(d)*the elimination of discrimination in respect of employment and occupation*.

Then, the Parties reaffirm their commitment to effectively implement, in their law and practice, all the ILO conventions ratified by Georgia and the Member States respectively (229,3).
It is of great relevance that according to article 229 (5): "*The Parties recognise that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes*".
In order not to reduce the safety standard at the workplace, Article 231, after having recognised that trade and labour share coherent standards and policies, underlines the beneficial role that core labour standards and decent work can have on economic efficiency, innovation, and productivity.
Even more clearly, Article 235 states that:
1. "*The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental or labour law.*
2. *A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour law as an encouragement for trade or the establishment, the acquisition, the expansion or the retention of an investment of an investor in its territory.*
3. *A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental and labour law, as an encouragement for trade or investment*."

Within this framework, the authors have been asked to compile a Report offering recommendations concerning the possible measures that maybe adopted by the Georgian legislature in order to bring Georgian labour law in line with International and European standards.
The authors, for that purpose, have focused on the *Active Employment policies* (Roberta Caragnano/Edoardo Gandini), *Health and safety in the workplace* (Andrea Borroni/Francesco Bacchini), and *Anti-Discrimination Law in the Workplace* (Andrea Borroni/Marco Seghesio).

All parts of this Report follow the same pattern.
After a short presentation of the legal situation in Georgia, the authors illustrate what European law has to say on the subject and then they discuss the solutions adopted in a few selected legal systems chosen because they are representative of a legal family (for instance, the UK for common law systems, Italy and France for civil law systems and Denmark for Nordic systems).
Although divided in three parts, however, the Report should be considered a single body of work, which is demonstrated by the fact that the final recommendations have been crafted by all authors together and addressed all the topics examined in the previous parts.
Before moving on, the authors would like to thank the Georgian Government for the trust placed in us and professor Vakhtang Zaalishvili and the International Black Sea University for the precious assistance.

PREMISE

Summary – **1.** Introduction - **2.** Legal transplants - **3.** The Report

1. Introduction

Several years ago, Prof. Otto Kahn-Freund affirmed that "*labour lawyers do not often show an interest in comparative law, and even more that few comparative lawyers pay much attention to labor law*."[1]
Legal scholars described the attitude of courts, legislatures, labour law scholars, practitioners, employers, and unions as "solipsistic",[2] where "labor relations is seen as a self-contained world of its own which alone is worthy of study."[3]
If, in the United States, the interest in researching about comparative labour has weakened since the beginning of the eighties,[4] in Western Europe, on the contrary, the adoption of labour laws and industrial relations practices pioneered in other countries (including the United States) has become an increasingly significant source of innovation.
For European labour lawyers, 'comparativism' has become an "urgent necessity."[5]
This trend has been accelerated by the process of drafting and adopting European Union (EU) Directives and Regulations.
Many scholars underlined the theoretical necessity to apply comparative law methodology to tackle these challenges.[6]
What maybe was lacking was a clear understanding of how useful this tool could be from a substantive and operative point of view.
It has been said in the US that "labor law scholars will turn increasingly to the study of comparative labor law and industrial relations, and that employers and unions will make

[1] O. KAHN-FREUND, Pacta Sunt Servanda - *A Principle and Its Limits: Some Thoughts Prompted by Comparative Labour Law,* 48 TUL. L. REV. 894, 1974, p. 906. Despite its other qualities, R. DAVID & J. BRIERLEY, *Major Legal Systems in the World Today*, 2d ed., 1978, omits virtually any analysis of labor law systems.
[2] B. AARON, *Labor Relations Law in the United States from a Comparative Perspective,* 39 WASH. & LEE L. REV. 1247, 1253, 1982, p. 1248. For pleas against "solipsism" in law reform, see R. SCHLESINGER, *Comparative Law 24-25*, 4th ed., 1980; R. SCHLESINGER, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience,* 26 BUFFALO L. REV. 361, 363-64, 1977.
[3] B. AARON, *The Comparative Labor Law Group: A Personal Appraisal,* 2 COMP. LAB. L. 228, 235, 1977. A similar view has been expressed by other eminent American labor law scholars. See, *e.g.,* D. C. BOK, *Reflections on the Distinctive Character of American Labor Laws,* 84 HARV. L. REV. 1394, 1397, 1971; C. W. SUMMERS, *American and European Labor Law: The Use and Usefulness of Foreign Experience,* 16 BUFFALO L. REV. 210, 1966.
[4] See J. G. SCOVILLE, *A Review of International and Comparative Research in the 1970s,* in *Industrial Relations Research in the 1970s: Review and Appraisal 1*, pp. 1-7, T. KOCHAN, D. MITCHELL and L. DYER eds. 1982 [this book is hereinafter cited as Industrial Relations Research]. A recent bibliography on comparative industrial relations mentions only 16 items.
[5] R. BLANPAIN, *Preface to Comparative Labour Law and Industrial Relations*, 9, R. Blanpain ed., 1982; see also B. HEPPLE, *The Effect of Community Law on Employment Rights,* 1 POLYTECHNIC L. REV. 50, 1975 (examining decisions of European Court of Justice involving other countries to determine extent to which measures in other European Economic Community countries have created individual employment rights enforceable in British courts).
[6] See, S. BARKIN, W. DYMOND, E. KASSALOW, F. MEYERS, and C. MYERS, *International Labor*, 1967; H. GUTTERIDGE, Comparative Law: An Introduction to the Comparative Method of Legal Study and Research, 2d ed. 1971; A. STURMTHAL, *Comparative Labor Movements: Ideological Roots and International Development*, 1972; A. WATSON, *Legal Transplants: An Approach to Comparative Law*, ch. 1, 1974; O. KAHN-FREUND, *Comparative Law as an Academic Subject,* 82 LAW Q. REV. 40, 1966, [hereinafter cited as Kahn-Freund, *Comparative Law*]; O. KAHN-FREUND, *On Uses and Misuses of comparative Law,* 37 MOD. L. REV. 1, 1974 [hereinafter cited as Kahn-Freund, *on Uses*]; M. SCHMITTHOFF, *The Science of Comparative Law,* 7 CAMBRIDGE L.J. 94, 1939; A. WATSON, *Legal Transplants and Law Reform,* 92 LAW Q. REV. 79, 1976. For a list of comparative works in labor law, see Ziskind, *Labor Law Comparison in Perspective,* 2 COMP. LAB. L. 209 (1977).

use of their research."[7]

As it was said, "[i]n current labor law reform debates, there are signs that comparative analysis may yet play a significant role. For example, the demise of the employment-at-will doctrine,[8] should it occur, will have been heavily influenced by comparative studies".[9]

A clear example of comparative labour law applied, indeed, is seen in the British experience: "labor law has come to be seen as a source of Britain's economic woes, comparisons with other countries have become an integral part of the reform process. The independent Royal Commission on Trade Unions and Employers' Associations, for example, considered a variety of foreign laws and practices and made a number of international comparisons in preparing its 1968 report"[10].

So far that, "Taft-Hartley comes to Great Britain" was how one American commentator described it in 1972.[11]

International and foreign standards have "helped to promote a more positive attitude towards regulatory labour legislation,"[12] and this fervour shows little sign of abating.[13]

Of course, EEC and EU Council Directives and Regulations, not to mention ILO Conventions, in particular, have had a noteworthy influence.

The adoption of international standards and foreign practices has affected British labour law in other ways as well. The relevant ILO Convention of 1951 and the European Social Charter[14] influenced the British Equal Pay Act of 1970.[15]

Similarly, American models, especially Title VII of the Civil Rights Act of 1964[16] and, to a lesser extent, the EEC Treaty and Regulations,[17] had a significant effect on the employment and union membership provisions in later British race relations statutes[18] and

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[7] B. AARON, *Future Trends in Industrial Relations Law,* 23 INDUS. REL. 52, 56-57, 1984.

[8] See C. J. PECK, *Unjust Discharges from Employment: A Necessary Change in the Law,* 40 OHIO ST. L.J. 1, 1979; T. J. ST. ANTOINE, *The Role of Law,* in *U.S. Industrial Relations 1950-1980: A Critical Assessment*, 159, 194-95, J. STEIBER, R. MCKERSIE & D. MILLS eds., 1981.

[9] See, *e.g.,* J. R. BELLACE, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee,* 16 U. MICH. J.L. REF. 207, 218-31, 1983; Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal,* in *36 Record of the Ass'n of the Bar of the City of N. Y.*, 170, 175-80 1981; D. H. J. HERMANN & Y. S. SOR, *Property Rights in One's Job: The Case for Limiting Employment-at-Will,* 24 ARIZ. L. REV. 763, 807-12, 1982; C. J. PECK, *Some Kind of Hearing for Persons Discharged from Private Employment,* 16 SAN DIEGO L. REV. 313, 320, 1979; H. L. SHERMAN, *Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries,* 29 AM. J. COMP. L. 467, 1981; J. STEIBER, *Protection Against Unfair Dismissal: A Comparative View,* 3 COMP. LAB. L. 229, 1980; C. W. SUMMERS, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 VA. L. REV. 481, 508-19, 1976.

[10] See, ROYAL COMM'N ON TRADE UNIONS AND EMPLOYERS' ASS'NS 1965-1968, REPORT, CMND. NO. 3623, 1968, p. 4.

[11] See, W. B. GOULD, *taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971,* 81 YALE L.J. 1421, 1421, 1972; J. W. GARBARINO, *British and American Labor Market Trends: A Case of Convergence?,* 17 SCOT. J. POL. ECON. 319, 319, 1970. As another scholar maintained "[t]he 1971 Act introduced principles from both of these American statutes into English law: bargaining unit determinations and sole bargaining agents were established, collective agreements were to be presumed legally enforceable, the concept of a union unfair industrial practice was introduced, prohibitions were imposed on closed shops, and emergency procedures based on cooling-off and compulsory ballot orders were incorporated. The revolutionary nature of the 1971 Act should not be underestimated. The creation of a legal framework of positive rights and restrictions stood in complete contrast to what had previously existed." WHELAN, p. 1428.

[12] See O. KAHN-FREUND, *Labour and the Law*, pp. 55-57, P. DAVIES & M. FREEDLAND eds., 3d ed., 1983, p. 57.

[13] See N. VALTICOS, *Comparative Law and International Labor Law,* in *International Law in Comparative Perspective*, 277, W. BUTLER ed., 1980.

[14] European Social Charter, Oct. 18, 1961, art. 4(3), 529 U.N.T.S. 89, 96, 1965. The Charter has been ratified by thirteen countries and enforced since Feb. 26, 1965. It sets out principles concerning economic and social rights, including trade union activities, by which the ratifying countries agree to be bound. See O. KAHN-FREUND, *The European Social Charter,* in *European Law and the Individual*, 181, F. JACOBS ed., 1976. Article 4(3) refers to equal pay for work of equal value. The Charter was ratified by the United Kingdom on July 11, 1962.

[15] Equal Pay Act, 1970, ch. 41.

[16] 42 U.S.C. §§ 2000e to 2000e-17 (1982).

[17] EEC Treaty of Rome, at arts. 48-49; Council Regulation of October 15, 1968, (EEC 1612/68) art. 8; 11 O.J. EUR. COMM. (No. L. 257) 475 (1968).

[18] Race Relations Act, 1968, ch. 71, §§ 1, 3-4 (making it illegal for employer to discriminate against any person on the basis of

on the Sex Discrimination Act of 1975.[19]

2. Legal transplants

The "transplantability"[20] of labour law institutions within a foreign legal system is a "compelling area of research"[21], even if legal scholars disagree on its feasibility.
Hence, Kahn-Freund,on the one hands, maintains that rules or institutions are transplantable, however, on the other, there is always a risk of rejection, and comparative methodology requires "knowledge not only of the foreign law, but also of its social, and above all its political context."[22]
In other words, the mere legal perspective is liable to lead those who rely on comparative law to misapprehensions and misunderstandings if the context of the law is overlooked.[23]
Specifically, in Kahn-Freund's opinion, the degree to which any rule can be transplanted depends primarily upon how it fits into the foreign structure of political power.
Watson disagrees: "[s]uccessful transplanting from a very different legal system, even from one at a much higher level of development and of a different political complexion, has frequently been accomplished."[24]
The Scottish professor adds that a law reformer looking at foreign systems should look at an idea that can be actually adapted to fit into the legal framework of its Country.[25]
Therefore, he thinks "a systematic knowledge of the law or political structure of the donor system was not necessary",[26] although he concedes that "a law reformer with such knowledge would be more efficient."[27]
Prof. Stein retorts by depicting Watson as "plucking ideas from 'black letter' rules in complete ignorance of how the rules operate as 'living law' and where they fit into the legal system".[28]

"colour, race or ethnic or national origins" by failing to hire him, dismissing him, or not affording him the same work conditions as like employees, or for unions to so discriminate); *cf.* 42 U.S.C. § 2000e-2(c)(1), (d)(1982) (affording similar protection); Race Relations Act, 1976, ch. 74, §§ 1, 4, 11 (making it unlawful for employers, labor unions, or other joint labor-management committees to exclude individuals from membership or participation in job training programs because of race, colour, religion, sex, or national origin). The definition of "discrimination" in the Race Relations Act statute was amended following the United States Supreme Court's decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971) which held that employment practices which exclude blacks and in unrelated to job performance constitutes discrimination even absent discriminatory intent.

[19] Sex Discrimination Act, 1975, ch. 65, §§ 6, 12 (dealing with discrimination against women). Griggs v. Duke Power Co., 401 U.S. 424 (1971), has been cited with approval by the British Employment Appeal Tribunal in Steel v. Union of Post Office Workers, 1978 Indus. Cas. Rep. 181, 188, regarding the application of § 1(1)(b)(ii) of the Act.

[20] See, in general, A. WATSON, *Society and Legal Change*, 1977 (positing that transplantation partially accounts for the inability of many laws to fulfill the particular needs of society); A. WATSON, *The Making of the Civil Law*, 1981; O. KAHN-FREUND, *Comparative Law, supra* note 13 (discussing the importance of international comparative law studies); A. WATSON, *Comparative Law and Legal Change,* 37 CAMBRIDGE L.J. 313, 1978 (discussing transplantation from the perspective of the relationship between legal rules and society).

[21] J. C. SCOVILLE, *supra* note 5, p. 36. Professor Scoville had expected a "stream of writing" on the subject in the 1970s, *id.,* but found not a trace, despite the "rejection" of the Industrial Relations Act transplant. In fact, there was some writing on this subject. *E.g.,* H. R. SANDISON, *A Rejected Transplant: The British Industrial Relations Act (1971-1974),* 3 INDUS. REL. L.J. 247, 1979.

[22] O. KAHN-FREUND, *On Uses, cit.*, p. 27.

[23] Id.

[24] A. WATSON, *supra* note 21, p. 79

[25] *Id.;* see also A. WATSON, *supra* note 21, p. 17 (discussing the value of comparative law to an aspiring reformer); Id., pp. 315-16 (discussing the historical reality of legal development by transplantation, which makes a comparative approach most valuable to an understanding of particular rules).

[26] Id., p. 79. Indeed, Watson argued that "[e]ven unsystematic knowledge can be very useful in a practical way for, say, law reform." Id., pp. 17-18.

[27] Id., at 79; see also Id., p. 17 n.4 (acknowledging that a rule working well in one system might work badly in another).

[28] E. STEIN, *Uses, Misuses - and Nonuses of Comparative Law,* 72 NW. U.L. REV. 198, 214, 1977 (referring to H. E. YNTEMA,

As Whelan holds, "[l]egal ideas do not have an independent existence outside their own local setting".[29]
This view is not isolated, indeed.
In fact, already in 1939, also prof. Schmitthoff wrote that rules and practices do not develop in a vacuum, but constitute an outgrowth of a culture's legal, political, and social structure.[30]
Furthermore, prof. Kassalow also cautions that "[w]ithout a fair understanding of the social, economic and political setting of the industrial relations system in a given country one can make errors of analysis or judgment, or, even more likely, learn only half-truths about the significance of particular industrial relations policies or practices in foreign countries."[31]
This means that any law-giver should not be provincial in his attitude towards (labour) law reform and be careful not to ignore the need for continuous changes to adjust to changes in society.[32]
Prof. Stein critically maintains that debates about the ease and jeopardy of transplants[33] have almost no relevance if carried out "without a tacit assumption that a law maker does in fact use the method and considers foreign law models."[34]
Hence, "the comparative method can be useful to the practitioner as well as the reformer in demystifying complex labor law questions that are now approached only with deeply entrenched, unexplored assumptions. Current law reform debates could also be enriched by comparative studies of other recent European developments such as workplace and board-level worker participation, information rights, and rights of unions or union officers to undertake union-related activities during working hours or while being paid by the employer".[35]
Thus, it is worthwhile to consider, before new legislation is enacted, how it could impact employers' adaptation to the incoming rules. As a scholar affirmed "[t]his information might not alter deeply entrenched views, but for the reformer it could give new proposals empirical support".[36]

Comparative Legal Research - Some Remarks on "Looking out of the Cave", 54 MICH. L. REV. 899, 1956), p. 209. Whether or not factors such as the large volume of American investment abroad have made awareness of foreign law and practice essential to certain forms of legal practice here, it remains true that, with certain exceptions, American legal scholars and law reformers have neglected use of the comparative method. A prominent exception is Roscoe Pound. See R. POUND, *The Development of American Law and Its Deviation from English Law,* 67 LAW Q. REV. 49, 1951.

[29] WHELAN, cit., p. 1434.

[30] See M. SCHMITTHOFF, *supra* note 7, pp. 97-99.

[31] E. KASSALOW, *The Comparative Labour Field*, 99 Int'l Inst. for Labour Studies Bull. No. 5, 1968.

[32] See D. THOMSON, *A View from Abroad,* in *U.S. Industrial Relations 1950-1980: A Critical Assessment*, 297, 298, 301, J. STEIBER, R. MCKERSIE & D. MILLS eds., 1981.

[33] Kahn-Freund refers to this as the "degree of transferability." O. KAHN-FREUND, *On Uses, cit.*, p. 6.

[34] Stein, cit., pp. 209-10. *See generally* H. MAINE, *Village-Communities in the East and West* 4, (3d ed. 1913) (arguing that "the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law"); A. WATSON, *supra* note 21, pp. 317-18 (arguing that the most valuable contribution of comparative law is that it makes possible the improvement of one legal system by implementing rules and structure from another legal system). "But even if the comparative method is not generally used to transplant alien ideas", perhaps because municipal attitudes to labor law reform do differ so markedly from others foreign views, "comparative studies are still valuable. Comparative study can demonstrate, for example, how static American labor relations law has become; it may surprise American labor lawyers to discover the ways in which EEC countries have been developing their labor relations laws. Although Europe has always regulated the individual employment relationship more than the United States, Europe is now witnessing the dynamic development of a range of collective rights that have either scarcely been considered in the United States or have been considered and rejected. In Europe a duty has been placed upon employers to consult trade unions regarding collective or mass dismissals". Whelan, cit., pp. 1443-1444.

[35] WHELAN, p. 1444. See, *e.g.,* J. R. BELLACE & H. F. GOSPEL, *Disclosure of Information to Trade Unions: A. Comparative Perspective,* 122 INT'L LAB. REV. 57, 1983 (evaluating and comparing the law of disclosure of management information to trade unions in the United States, United Kingdom, and Sweden).

[36] WHELAN, p. 1444.

The comparative perspective also provides "just that kind of imagination and willingness to explore new paths which we seem to need in confronting old and persistent problems in labor law."[37]

Setting aside some criticism,[38] many surveys – for instance, about industrial conflict,[39] constitutional aspects of labor law,[40] and legal systems as a whole[41] – clearly illustrate the merit of legal comparison.

This means that, thanks to comparative methodology, the goal is to discover whether an institution, doctrine, practice, or tradition is inevitable and universal, or whether it is the outcome of specific social, historical, or geographical conditions, and to distinguish that which is inherent in the nature of the institutions, the customs, and the doctrines of a Country from that which is geographically and historically accidental.[42]

In the "old and philosophically now discredited terms," the aim is to ascertain "what rules are essential for the purposes of the law and what rules are accidental, products of history and tradition."[43]

And, labour law and industrial relations are entangled; therefore, differences in collective labour agreements may be caused by differences in the industrial relations structure, and not vice versa.[44]

Consequently, it is quite common for comparative lawyers to compare law not only with

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[37] C. W. SUMMERS, *supra* note 7, p. 228. For a recent example of use of foreign experience to confront other such problems, see J. WEILER, *supra* note 7.

[38] In 1960, John Dunlop commented on the lack of a "long view" in all parts of the NLRA framework. Excessive short-term influences he cited included the depression (which gave rise to the Wagner Act), the post-war inflation and strike-wave that presaged passage of the Taft-Hartley Act, and the findings of the McClellan Committee that led to passage of the Landrum-Griffin Act. See J. DUNLOP, *Consensus and National Labor Policy,* 1960 INDUS. REL. RESEARCH A. PROC. 2, 1986. Little appears to have changed. Mangum, for example, notes that "few of the manpower programs legislated during the 1960s had their base in research identifying either problems or solutions." G. L. MANGUM, *Manpower Research and Manpower Policy,* in *A Review of Industrial Relations Research*, 87, G. SOMERS ed., 1971; see KOCHAN, MITCHELL & DYER, *supra* note 5, pp. 370-71 (pointing out that "the major labor relations law debate of the 1970s -- The Labor Law Reform Act of 1977-1978 -- took place devoid of any empirical or theoretical contributions (other than through expert testimony and personal lobbying)"). If the labor law reform process is indeed dominated by the iron law of necessity, then this increases the need to locate the forum for serious comparativism in the law school. The obstacles to comparative research and international collaboration -- travel and language difficulties, costs, and time -- have been discussed by B. AARON, *supra,* note 8, pp. 233-34.

[39] See, *e.g.,* B. AARON, X. BLANC-JOUVAN, G. GIUGNO, T. RAMM, F. SCHMIDT & K. WEDDERBURN, Industrial Conflict: A Comparative Legal Study, B. AARON & K. WEDDERBURN eds., 1972 (comparing all aspects of industrial action in Great Britain, the United States, Sweden, West Germany, France, and Italy); J. R. BELLACE, *Regulating Secondary Action: The British and American Approaches,* 4 COMP. LAB. L. 115, 1981 (exploring the legal methods by which Great Britain and the United States have regulated "secondary" industrial action such as strikes, picketing, and boycotts).

[40] See O. KAHN-FREUND, *The Impact of Constitutions on Labour Law,* 35 CAMBRIDGE L.J. 240, 1976 (illustrating the impact of constitutions on labor law with specific legal developments and incidents in the United Kingdom, United States, Canada, Australia, Germany, and Switzerland); *cf.* J. JACONELLI, Enacting a Bill of Rights: The Legal Problems, 135-36, 1980 (discussing EEC law as a source of fundamental rights and protections for workers in member states).

[41] See O. KAHN-FREUND, *supra* note 34, p. 69 (observing that trade unions are more effective in counterbalancing management than are the laws of nations); Id. (illustrating the value of the comparative approach in understanding developments and attitudes in collective labor law); see also J. GRODIN, *Union Government and the Law: British and American Experiences*, 1961 (comparing statutory and common law bearing upon the unionworker relationship as it affects intraunion government and autonomy); A. F. BARTLETT & D. R. LOWRY, *Collective Agreements in the United States and Britain: Status and Consequences,* 1979 UTAH L. REV. 469, 1982 (discussing the different approaches taken by United States and Britain toward collective bargaining agreements); J. R. BELLACE, *A Foreign Perspective,* in Comparable Worth: Issues and Alternatives, 137 E. LIVERNASH ed., 1980 (comparing attempts by the European Community, Sweden, Canada, and New Zealand to achieve equal pay for women); D. R. LOWRY, A. F. BARTLETT & T. J. HEINSZ, *Legal Intervention in Industrial Relations in the United States and Britain - A Comparative Analysis,* 63 MARQ. L. REV. 1, 1979 (examining factors that make successful transplantation of American labor law in Britain improbable). See generally O. KAHN-FREUND, *supra* note 41 (illustrating the value of the comparative approach in understanding developments and attitudes in collective labor law).

[42] See O. KAHN-FREUND, *supra* note 34, p. 2.

[43] O. KAHN-FREUND, *Comparative Law*, *supra* note 34, p. 60.

[44] See, O. KAHN-FREUND, *supra* note 41, p. 55

other merely legal regulations, but also with institutions of a non-legal or meta-legal character and with the needs shared by the societies.[45]
Therefore, as Kahn-Freund indicated divergences in union attitudes and tradition "show how dependent the comparative lawyer is on the help he must derive from the empirical social sciences."[46]
Of course, this study is delicate and complex and rich of obstacles[47] and risks in term of law and methodology.[48]
As lord Wedderburn pointed out: "[t]he bane of 'comparative law' is the spurious attempt to compare the incomparable; and labour law suffers more than most at the international level from this vice."[49]
It is not surprising, therefore, that some comparative analysis "has not been notably successful."[50]
In practice, American corporations abroad sometimes have found it difficult to adapt their industrial relations practices to the European context.[51]

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[45] Similarly, a comparative study of the absence of law -- in Britain, for example, there are no laws prohibiting the undercutting of collectively agreed-upon terms, imposing a duty to bargain, abolishing yellow-dog contracts, or restraining employer unfair labor practices -- would have to go beyond the mere fact of omission to explain why trade unions have not demanded such laws. WHELAN, p. 1448. See generally O. KAHN-FREUND, *Labour Law*, in *Law and Opinion in England in the 20th Century*, 215, M. GINSBERG ed., 1959. See generally O. KAHN-FREUND, *Comparative Law*, *supra* note 34 (arguing that institutions, mores, and rules outside the law have shaped it and that a comparative lawyer must investigate these extralegal influences).

[46] O. KAHN-FREUND, *supra* note 34, p. 56. If the comparativist is interested in the broader question of the social purposes of law, he may have to supplement comparativism with social science. Labor law practitioners, for whom such knowledge is unnecessary, might contest this proposition, but they are unlikely to face the fundamental structural questions regarding labor law that a reformer might face. WHELAN, cit., pp. 1447-1448. One comparative scholar has commented that the "real challenge of comparative industrial relations" is that it forces us to adopt an interdisciplinary and multidisciplinary approach to our subject. J. SCHREGLE, *Comparative Industrial Relations: Pitfalls and Potential,* 120 INT'L LAB. REV. 15, 29, 1981. See A. WATSON, *supra* note 21, pp. 320-21 (arguing that comparative law requires historical approach). Examples of comparative historical analysis include E. CORDOVA, *A Comparative View of Collective Bargaining in Industrialised Countries,* 117 INT'L LAB. REV. 423, 1978 (identifying common trends and problems among different industrialised countries); J. HOLT, *Trade Unionism in the British and U.S. Steel Industries 1888-1912: A Comparative Study,* 18 LAB. HIST. 5, 1977 (explaining the comparative weakness of American labor organization); G. V. RIMLINGER, *Labor and the Government: A Comparative Historical Perspective,* 37 J. ECON. HIST. 210, 1977 (analyzing the manner in which the state in England, the United States, and France defined and implemented the worker's right to collective economic coercion of employers in the course of industrialization).

[47] See B. AARON, *supra* note 8, p. 1247-48 (discussing the scarcity of previous work in the comparative labor law field).

[48] Walker has warned against the use of descriptive comparative studies, which merely show the variety of practices without throwing any light on the factors that determine variations among them. He argues that these studies are unlikely to do more than encourage "ritualism" (copying a foreign practice without considering its appropriateness for transfer) or "isolationism" (ignoring all experience other than one's own) according to the predilection of the practitioner. A. WALKER, The Comparative Study of Industrial Relations, 107, Int'l Inst. for Labour Studies Bull. No. 3, 1969.

[49] K. WEDDERBURN, *Discrimination in the Right to Organise and the Right to Be a Non-Unionist,* in *Discrimination in Employment*, 367, 459, F. SCHMIDT ed., 1978.

[50] D. THOMSON, *supra* note 5, p. 297. Reservations about the value of existing comparative industrial relations research have also been expressed by J. SCHREGLE, *supra* note 7, p. 15-18, and by M. SHALEV, *Industrial Relations Theory and the Comparative Study of Industrial Relations and Industrial Conflict,* 18 BRIT. J. INDUS. REL. 26, 1980. Despite these reservations, many influential comparative industrial relations studies have been published over the years. See generally D. BOK & J. DUNLOP, *Labor and the American Community*, 1970, at vii (noting previous American studies had "lacked intellectual rigor and discipline"); H. BROWN, *Origins of the Trade Union Power*, 1983 (reinforcing a historical analysis of British trade union development by comparisons with other countries); H. CLEGG, *Trade Unions Under Collective Bargaining: A theory Based on Comparisons Between Six Countries*, 1, 1976 (noting inadequacies of previous "trade unionism" analyses); J. DUNLOP, *Industrial Relations Systems*, 1985, at vii (noting that previous American studies had "lacked intellectual rigor and discipline"); W. GALENSON, *Preface* to Comparative Labor Movements, W. GALENSON ed., 1952, at ix-xii (indicating the broad lines of trade union history, organization, and function in seven countries); E. KASSALOW, *Trade Unions and Industrial Relations: An International Comparison*, 5-6, 1969 (noting that despite diversity among Western societies, comparative analysis is possible after allowing for the variations); C. KERR, J. DUNLOP, F. HARBISON & C. MYERS, *Industrialism and Industrial Man*, 5-6, 2d ed., 1964 (discussing the need for adequate comparative studies on industrial relations).

[51] WHELAN, cit., p. 1448. See J. C. SHEARER, *Industrial Relations of American Corporations Abroad,* in *International Labor*, 109, S. BARKIN, W. DYMOND, E. KASSALOW, F. MEYERS & C. MEYERS, eds., 1967, pp. 113-20. A series of studies comparing the laws, policies, and practices that affect the employer-employee relationship in five European countries and the United States were published

From a practical point of view, so, the immediate answer comparative labour law as a tool of reform might provide is in the area of individual or regulatory labour law.[52]
In fact, there are lower barriers to the transplant of a single provision compared to the imposition of general changes concerning collective labour relations that are generally cryptotypically tied to historical memories, political balances, and traditions.
ILO conventions and recommendations are evidence of this theory. They are drafted to create international standards of individual safeguards and this was the cause of much of the success of "this gigantic enterprise of transplantation."[53]
As a labour scholar observed: "[t]he drafters of the ILO Conventions and of the European Social Charter also distinguished between individual and collective labor law. With respect to individual rights such as freedom of association, strictly legal terminology was used mandating conformity with the standards. With respect to collective rights such as the principle of collective bargaining, much weaker language was used".[54]
Undeniably, notwithstanding theoretical legal commitments, it is evident that national governments could undermine objectionable transplants resorting to vague, ambiguous, or unworkable regulations,[55] and, in the domain of individual labour law, "deeply engrained legal ideologies may set a limit to transplantations."[56]
In conclusion, the comparative analysis of labour law should always be the acknowledgement of its limitations as well its strengths; and, as a result, comparative law is a tool to be used advisedly.
In conclusion, as Prof. Blainpain affirmed: "*[c]omparativism is no longer a purely academic exercise but has increasingly become an urgent necessity for industrial relations and legal practitioners, due to the globalization of the economy, the growth of multinational enterprises, and the impact of international and regional organizations aspiring to harmonize rules*".[57]

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between 1968 and 1970 with the object of equipping "corporate headquarters staff with the information and understanding necessary to the proper discharge of their international responsibilities." The law firm of SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, *Labor Relations and the Law in the United Kingdom and the United States*, 1968, at vi. See The law firm of SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, *Labor Relations and the Law in Belgium and the United States*, 1969; The law firm of SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, *Labor Relations and the Law in Italy and the United States*, 1970; he law firm of SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, *Labor Relations and the Law in the United Kingdom and the United States*, 1968; he law firm of SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, *Labor Relations and the Law in the United Kingdom and the United States*, 1969. For a more recent study, see SECTION OF LABOR RELATIONS LAW, INTERNATIONAL LABOR LAW COMMITTEE, AMERICAN BAR ASSOCIATION, THE LABOR RELATIONS LAW OF CANADA, 1977. The same Committee Section plans to publish a similar volume to be entitled THE LABOR RELATIONS LAW IN BRITAIN. These volumes also are aimed at assisting American organizations in their foreign dealings by helping the practitioner to become more aware of differences in labor laws and labor relations.

[52] See N. VALTICOS, *supra* note 8, p. 278-84 (discussing the role of comparative law in formulating an international labor legislation).

[53] O. KAHN-FREUND, *On Uses, supra* note 41, p. 21.

[54] WHELAN, cit., p. 1449. For example, mandatory language -- "shall" -- can be found in 1 INT'L LABOUR CONFERENCE & INT'L LABOUR ORGANIZATION, THE INTERNATIONAL LABOUR CODE -- 1951 arts. 2-616 (1952) (Employment and Unemployment, General Conditions of Employment, Employment of Young Persons, of Women, and Industrial Health and Safety). Weaker language can be found, for example, in arts. 873 & 874 (Right to Organise), 876(A)-(G) (Collective Agreements Recommendation), and 876(H) (Conciliation). Art. 617 n.1 (Social Security) makes allowance for countries where income security benefits during illness are a complete novelty. The use of weaker language for collective rights provisions is discussed in *id.* at xxvi.

[55] See J. CLARK & L. WEDDERBURN, *Modern Labour Law: Problems, Functions and Policies,* in *Labour Law and Industrial Relations, Building on Kahn-Freund*, 127, 209-10, L. WEDDERBURN, R. LEWIS & J. CLARK eds., 1983.

[56] O. KAHN-FREUND, *On Uses, supra* note 34, p. 24.

[57] R. BLAINPAIN, *Editor's preface*, in R. BLAINPAIN (ed.), Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 10th ed., New York, 2010.

3. The Report

The growing need for selective, updated, and readily accessible information on labour law and industrial relations in specific subjects in order to compare the national situation with the European Union and its Member States led to the preparation of this Report. [58]
The purpose of the Reporters is to present the most relevant features and outlooks in specific issues of labour law – limiting the survey to a selected number of Countries representative of significant legal families (France and Italy for civil law systems, Germany for the central European tradition, England for common law, and Denmark as model of Scandinavian legal systems).
The Report is divided into three parts: the first part dealing with employment issues (terminology, statistics, active policies etc.), the second part dealing with the safety in the workplace, and the final part with discriminatory issues, plus an introduction, conclusions, and a list of recommendations.
Prof. Weiss pointed out that "[d]ue to new challenges labour law no longer can be treated merely as a phenomenon within national borders. No country any longer can escape the impact of international norm-setting and the consequences of globalization. Therefore, comparative labour law has become more important than ever before and will become even more important in the future. Comparative labour law, however, is only useful if certain prerequisites are fulfilled. Functions and not institutions are to be compared. This is only possible if the analysis is focusing on the interaction of all the elements of a specific system and if it goes beyond terminology and traditional categories. Of utmost importance is an interdisciplinary approach, allowing for integration of extra-legal factors. It also is necessary to include soft law and its impact on the function of labour law as whole."[59]
Then, Schregle underlines that "[i]n every country, North and South, workers, employers, and governments have both common and divergent interests, short term and long term. The divergent interest must be accommodated and reconciled".[60]
This divergence is solved differently depending on the school of thoughts a scholar subscribes to.
The convergence school holds that the spread of industrialisation and globalisation would gradually bring labour law national systems closer to one another[61]; whereas, the school of divergence, on the other hand, highlights that each labour law national system is a sub-structure of political and cultural value and peculiar conditions.
According to Blainpain, "[t]his view is gain momentum in recent years as a result of the efforts made by developing countries to depart from Western systems inherited from colonial times and to mould their own labour relations system in light of their own development requirements".[62]
This holds true for Georgia as well, since for a long time the Country was under the control of a foreign power. This was further compounded by the fact that this power had imposed

[58] Indeed, "*many national systems are more or less mature and capable of resolving the cases with which the legal profession in a given country has to deal … Except for dramatic circumstances, as a consequence of wars, or drastic revolutions, massive transfers of legal systems do not longer take place. Rarely are there, in actual times, such dramatic legal gaps in a given country that a wholesale transfer is needed, advocated and carried through, although this may partially occur*". R. BLAINPAIN, *supra* note 58, cit., p. 6
[59] M. WEISS, *The Future of Comparative Labour Law as an Academic Discipline and as a Practical Tool*, Comparative Labor Law and Policy Journal, 25, 2003, pp. 169-182.
[60] J. SCHREGLE, *supra* note 7, p. 27.
[61] J. DUNLOP, *supra* note 52, and G. J. BAMBER et al., *Regulating Employment Relations, Work and Labour laws: International Comparison between Key Countries*, Bulletin of Comparative Labour Relations, 2010, p. 19.
[62] R. BLAINPAIN, *Comparativism in Labour law and Industrial Relations*, in R. BLAINPAIN (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 10th ed., New York, 2010, p. 4.

socialism as its legal philosophy. After independence, so, Georgia needed to free itself not only of the Russian yoke, but also from this entire body of legal rules and principles that, by the 1990s had ultimately proved a failure. As a result, new inspirations and new paradigms were necessary. That is why Georgian authorities decided to resort to comparative law, drawing inspiration from other legal systems.[63]
The seed that was planted then was subsequently nurtured and thrived.
Georgian scholars went abroad and foreign scholars went to Georgia.
Such a successful dialogue proved fruitful. In keeping with this approach philosophy when it was time to review labour law legislation, Georgia decided to ask a group of foreign experts to lend an helping hand.
Nowadays, Georgia can be described as one of the most vibrant legal environment to work in.
From another point of view, another characteristic of this Report is that the authors have adopted a comparative approach which in this area of law is not that common because experts and practitioners tend to always remain within the boundaries of their own systems.
Such an approach was also made required in the light of the fact that Georgia is under a legal obligation under the 2014 Association Agreement to bring its own legal system in line with that of EU Member States.[64]
One of the aims of this Report should be seen in that context, namely the desire to point out some tendencies and changes, so to allow "*to find out to what extent [Georgian] national system is synchronized with such trends, whether it precedes them, lags behind them or even moves in a different direction. This opens up fascinating prospects*."[65]
In that direction, a comparative analysis could anticipate some evolution and the need for adaptation: this is particularly necessary if the increasing internationalisation efforts and the growing influence of multinational companies are taken into account.[66]
This process, inevitably, also involves social changes owing to the improvement in working conditions enjoyed by workers thanks to the strengthening of their rights.
Of course, the transplant of a specific institution or practice is a quick way to kick start this process and to drive it forwards; however, it is possible that legal system of the Country that is making a transplant "may suffer from inconsistencies between the system introduced and the social context of that country".[67]
Indeed, "labour law is a part of a system, and the consequences of change in one aspect of the system depend upon the relationship between all elements of the system. Since those relationships may not be similar between the two societies, the effects of similar legislation may differ significantly as between the two differing settings."[68]
In drafting the final Recommendations, it is of paramount importance to bear in mind that labour relationships are power relationships, based upon the distribution of power within a

[63] See, N. VALTICOS, *supra* note 8, p. 274.
[64] "These occasions currently being rare, references to a foreign system are in many countries not frequent for purposes of day-to-day practice. There are, however, very important exceptions". Id., p. 8. These are the cases in which the legal scholars are influential (e.g. German labour law scholar influenced Austria and Switzerland systems, favoured by the common language and by the highly well-functioning labour law system). Indeed, this is also the case of Georgia where many law professors and legal practitioners share a German background and legal mind. This is true until a certain point: the courts rarely refer – as it is common in Germany – to foreign experiences and practices to interpret the general clauses.
[65] J. SCHREGLE, *supra* note 7, cit., p. 24.
[66] U. R. KUBAL, *U.S. Multinational Corporations Abroad: A Comparative Perspective on Sex Discrimination Law in the United States and the European Union*, 25 N.C.J. Int'l L. & Com. Reg. 207, 1999.
[67] R. BLAINPAIN, *supra* note 54, cit., p. 8
[68] F. MEYERS, *The Study of Foreign Labour and Industrial Relations*, in Barkin et al., eds, International Labour Law, New York, 1967, p. 243.

given society.
If this is true in States sharing the same political, socio-economic background (as it happens in more or less all the Member States of the European Union), the balance of power is, on one hand, affected by the actions of the different groups, e.g. trade unions, employers' associations, politicians, cultural groups, universities and even the religious associations, and on the other hand, such balance is delicate and any move may have major ripple effects.
In conclusion, rules relating to the power dynamics within as a society and within the field of labour relationships in particular, are the most complex and sensitive to modify or even to transplant.
In these cases, even when performed in an emergency and to satisfy compelling needs, the foreign model would be completely absorbed and transformed into a new and unique one.
In the light if the foregoing, the rapporteurs acknowledge that the recommendations concerning the adoption (or the transplant) of individual rules will be more feasible than the ones relating to social relationships (e.g. the inspectorate of labour and *similia*) which would require much more attention and ongoing monitoring by all of us.

References

B. AARON, *Future Trends in Industrial Relations Law,* 23 INDUS. REL. 52, 56-57, 1984.

B. AARON, *Labor Relations Law in the United States from a Comparative Perspective,* 39 WASH. & LEE L. REV. 1247, 1253, 1982.

B. AARON, *The Comparative Labor Law Group: A Personal Appraisal,* 2 COMP. LAB. L. 228, 235, 1977.

B. AARON, X. BLANC-JOUVAN, G. GIUGNO, T. RAMM, F. SCHMIDT & K. WEDDERBURN, Industrial Conflict: A Comparative Legal Study, B. AARON & K. WEDDERBURN eds., 1972.

G. J. BAMBER et al., *Regulating Employment Relations, Work and Labour laws: International Comparison between Key Countries*, Bulletin of Comparative labour Relations, 2010.

S. BARKIN, W. DYMOND, E. KASSALOW, F. MEYERS, and C. MYERS, *International Labor*, 1967.

A. F. BARTLETT & D. R. LOWRY, *Collective Agreements in the United States and Britain: Status and Consequences,* 1979 UTAH L. REV. 469, 1982.

J. R. BELLACE, *A Foreign Perspective,* in Comparable Worth: Issues and Alternatives, 137 E. LIVERNASH ed., 1980.

J. R. BELLACE, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee,* 16 U. MICH. J.L. REF. 207, 218-31, 1983.

J. R. BELLACE, *Regulating Secondary Action: The British and American Approaches,* 4 COMP. LAB. L. 115, 1981.

J. R. BELLACE & H. F. GOSPEL, *Disclosure of Information to Trade Unions: A. Comparative Perspective,* 122 INT'L LAB. REV. 57, 1983.

R. BLAINPAIN, *Comparativism in Labour law and Industrial Relations*, in R. BLAINPAIN (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 10th ed., New York, 2010.

R. BLAINPAIN, *Editor's preface*, in R. BLAINPAIN (ed.), Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 10th ed., New York, 2010.

R. BLANPAIN, *Preface to Comparative Labour Law and Industrial Relations*, 9, R. BLANPAIN ed., 1982.

D. C. BOK, *Reflections on the Distinctive Character of American Labor Laws,* 84 HARV. L. REV. 1394, 1397, 1971.

D. BOK & J. DUNLOP, *Labor and the American Community*, 1970.

H. BROWN, *Origins of the Trade Union Power*, 1983.

J. CLARK & L. WEDDERBURN, *Modern Labour Law: Problems, Functions and Policies,* in *Labour Law and Industrial Relations*, *Building on Kahn-Freund*, 127, 209-10, L. WEDDERBURN, R. LEWIS & J. CLARK eds., 1983.

H. CLEGG, *Trade Unions Under Collective Bargaining: A theory Based on Comparisons Between Six Countries*, 1, 1976.

Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal,* in *36 Record of the Ass'n of the Bar of the City of N. Y.*, 170, 175-80 1981.

E. CORDOVA, *A Comparative View of Collective Bargaining in Industrialised Countries,* 117 INT'L LAB. REV. 423, 1978.

R. DAVID & J. BRIERLEY, *Major Legal Systems in the World Today*, 2d ed., 1978.

J. DUNLOP, *Consensus and National Labor Policy,* 1960 INDUS. REL. RESEARCH A. PROC. 2, 1986.

J. DUNLOP, *Industrial Relations Systems*, Holt-Dryden, 1985.

W. GALENSON, *Preface* to Comparative Labor Movements, W. GALENSON ed., 1952.

J. W. GARBARINO, *British and American Labor Market Trends: A Case of Convergence?,* 17 SCOT. J. POL. ECON. 319, 319, 1970.

W. B. GOULD, *taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971,* 81 YALE L.J. 1421, 1421, 1972.

J. GRODIN, *Union Government and the Law: British and American Experiences*, 1961.

H. GUTTERIDGE, Comparative Law: An Introduction to the Comparative Method of Legal Study and Research, 2d ed. 1971.

B. HEPPLE, *The Effect of Community Law on Employment Rights,* 1 POLYTECHNIC L. REV. 50, 1975.

D. H. J. HERMANN & Y. S. SOR, *Property Rights in One's Job: The Case for Limiting Employment-at-Will,* 24 ARIZ. L. REV. 763, 807-12, 1982.

J. HOLT, *Trade Unionism in the British and U.S. Steel Industries 1888-1912: A Comparative Study,* 18 LAB. HIST. 5, 1977.

J. JACONELLI, Enacting a Bill of Rights: The Legal Problems, 135-36, 1980.

O. KAHN-FREUND, *Comparative Law as an Academic Subject,* 82 LAW Q. REV. 40, 1966.

O. KAHN-FREUND, *Labour and the Law*, 55-57, P. DAVIES & M. FREEDLAND eds., 3d ed., 1983.

O. KAHN-FREUND, *Labour Law*, in *Law and Opinion in England in the 20th Century*, 215, M. GINSBERG ed., 1959.

O. KAHN-FREUND, *On Uses and Misuses of comparative Law,* 37 MOD. L. REV. 1, 1974.

O. KAHN-FREUND, Pacta Sunt Servanda - *A Principle and Its Limits: Some Thoughts Prompted by Comparative Labour Law,* 48 TUL. L. REV. 894, 1974.

O. KAHN-FREUND, *The European Social Charter,* in *European Law and the Individual*, 181, F.

JACOBS ed., 1976.

O. KAHN-FREUND, *The Impact of Constitutions on Labour Law,* 35 CAMBRIDGE L.J. 240, 1976.

E. KASSALOW, *The Comparative Labour Field*, 99 Int'l Inst. for Labour Studies Bull. No. 5, 1968.

E. KASSALOW, *Trade Unions and Industrial Relations: An International Comparison*, 5-6, 1969.

C. KERR, J. DUNLOP, F. HARBISON & C. MYERS, *Industrialism and Industrial Man*, 5-6, 2d ed., 1964.

U. R. KUBAL, *U.S. Multinational Corporations Abroad: A Comparative Perspective on Sex Discrimination Law in the United States and the European Union*, 25 N.C.J. Int'l L. & Com. Reg. 207, 1999.

D. R. LOWRY, A. F. BARTLETT & T. J. HEINSZ, *Legal Intervention in Industrial Relations in the United States and Britain - A Comparative Analysis,* 63 MARQ. L. REV. 1, 1979.

G. L. MANGUM, *Manpower Research and Manpower Policy,* in *A Review of Industrial Relations Research*, 87, G. SOMERS ed., 1971.

F. MEYERS, *The Study of Foreign Labour and Industrial Relations*, in Barkin et al., eds, International Labour Law, New York, 1967.

C. J. PECK, *Some Kind of Hearing for Persons Discharged from Private Employment,* 16 SAN DIEGO L. REV. 313, 320, 1979.

C. J. PECK, *Unjust Discharges from Employment: A Necessary Change in the Law,* 40 OHIO ST. L.J. 1, 1979.

R. POUND, *The Development of American Law and Its Deviation from English Law,* 67 LAW Q. REV. 49, 1951.

G. V. RIMLINGER, *Labor and the Government: A Comparative Historical Perspective,* 37 J. ECON. HIST. 210, 1977.

H. R. SANDISON, *A Rejected Transplant: The British Industrial Relations Act (1971-1974),* 3 INDUS. REL. L.J. 247, 1979.

R. SCHLESINGER, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience,* 26 BUFFALO L. REV. 361, 363-64, 1977.

R. SCHLESINGER, *Comparative Law 24-25*, 4th ed., 1980.

M. SCHMITTHOFF, *The Science of Comparative Law,* 7 CAMBRIDGE L.J. 94, 1939.

J. SCHREGLE, *Comparative Industrial Relations: Pitfalls and Potential,* 120 INT'L LAB. REV. 15, 29, 1981.

J. G. SCOVILLE, *A Review of International and Comparative Research in the 1970s,* in *Industrial Relations Research in the 1970s: Review and Appraisal 1*, 1-7, T. KOCHAN, D. MITCHELL and L. DYER eds. 1982.

M. SHALEV, *Industrial Relations Theory and the Comparative Study of Industrial Relations and Industrial Conflict,* 18 BRIT. J. INDUS. REL. 26, 1980.

J. C. SHEARER, *Industrial Relations of American Corporations Abroad,* in *International Labor*, 109, S. BARKIN, W. DYMOND, E. KASSALOW, F. MEYERS & C. MEYERS, eds., 1967.

H. L. SHERMAN, *Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries,* 29 AM. J. COMP. L. 467, 1981.

T. J. ST. ANTOINE, *The Role of Law,* in *U.S. Industrial Relations 1950-1980: A Critical Assessment*, 159, 194-95, J. STEIBER, R. MCKERSIE & D. MILLS eds., 1981.

J. STEIBER, *Protection Against Unfair Dismissal: A Comparative View,* 3 COMP. LAB. L. 229, 1980.

E. STEIN, *Uses, Misuses - and Nonuses of Comparative Law,* 72 NW. U.L. REV. 198, 214, 1977.

A. STURMTHAL, *Comparative Labor Movements: Ideological Roots and International Development*, 1972.

C. W. SUMMERS, *American and European Labor Law: The Use and Usefulness of Foreign Experience,* 16 BUFFALO L. REV. 210, 1966.

C. W. SUMMERS, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 VA. L. REV. 481, 508-19, 1976.

D. THOMSON, *A View from Abroad,* in *U.S. Industrial Relations 1950-1980: A Critical Assessment*, 297, 298, 301, J. STEIBER, R. MCKERSIE & D. MILLS eds., 1981.

N. VALTICOS, *Comparative Law and International Labor Law,* in *International Law in Comparative Perspective*, 277, W. BUTLER ed., 1980.

A. WALKER, The Comparative Study of Industrial Relations, 107, Int'l Inst. for Labour Studies Bull. No. 3, 1969.

A. WATSON, *Comparative Law and Legal Change,* 37 CAMBRIDGE L.J. 313, 1978.

A. WATSON, *Legal Transplants and Law Reform,* 92 LAW Q. REV. 79, 1976.

A. WATSON, *Society and Legal Change*, 1977.

A. WATSON, *The Making of the Civil Law*, 1981.

K. WEDDERBURN, *Discrimination in the Right to Organise and the Right to Be a Non-Unionist,* in *Discrimination in Employment*, 367, 459, F. SCHMIDT ed., 1978.

M. WEISS, *The Future of Comparative Labour Law as an Academic Discipline and as a Practical Tool*, Comparative Labor Law and Policy Journal, 25, 2003.

H. E. YNTEMA, *Comparative Legal Research - Some Remarks on "Looking out of the Cave",* 54 MICH. L. REV. 899, 1956.

REPORT 3

Anti-Discrimination Law in the Workplace

di Andrea Borroni e Marco Seghesio

Index

ANTI-DISCRIMINATION LAW IN THE WORKPLACE

Summary – **1.** Introduction - **2.** Georgian Framework - **2.1.** Constitution of Georgia - **2.2.** National Legislation - **2.2.1** Labour Law Code of 1973 - **2.2.2.** 2006 Labour Code - **2.2.3.** Special Law - **2.2.3.1.** Law on Trade Unions - **2.3.** Prohibition of Employment Discrimination - **2.3.1.** Contents of Employment Discrimination - **2.3.2.** Direct Discrimination - **2.3.3.** Indirect Discrimination - **2.3.4.** Justified Treatment - Differentiation - **2.4.** Categorization of Grounds of Employment Discrimination - **2.4.1.** Gender Age - **2.4.2.** Race, Colour, Ethnicity, Nationality, Origin, Language - **2.4.3.** Political and other Views, Membership of Religious or other Associations - **2.4.4.** Disability - **2.4.5.** Grounds that are

not stipulated by the Georgian Labour Code - **2.5.** Scope of Application of Prohibition of Employment Discrimination - **2.5.1.** Pre-contractual Relations - **2.5.2.** Process of Work Performance - **2.5.3.** Dismissal from the Work - **2.5.3.1.** Termination of Employment Relationships based on the Expiration of Agreement Term - **2.5.3.2.** Termination of Employment Relationships Based on the Contract Termination - **3.** EU Law - **3.1.** Race-Based Discrimination - **3.2.** Discrimination on the Grounds of Religion or Belief, Disability, Age or Sexual Orientation - **3.3.** Gender-Based Discrimination - **3.3.1.** The Recast Directive - **3.3.1.1.** Positive Action Measures - **3.3.2.** The Equal Treatment in Social Security Directive - **3.3.3.** The Pregnancy Directive - **3.3.4.** The Goods and Services Directive - **3.3.5.** The Parental Leave Directive - **3.3.6.** The Equal Treatment for the Self-Employed Directive - **3.4.** Further Evolutions of the Non-Discrimination Principle - **3.5.** Concluding remarks - **4.** Italy - **4.1.** Introduction - **4.2.** Relevant Legislation - **4.3.** Scope of Application - **4.4.** Overview of the Main Principles - **4.5.** The Enforcement of the Law - **5.** France - **5.1.** Main legislation **- 5.2.** Main principles and definitions - **5.3.** Material scope - **5.4.** Enforcing the law - **5.5.** Equality bodies - **5.6.** Key issues - **6.** Germany - **6.1.** Main legislation - **6.2.** Main principles and definitions - **6.3.** Material scope - **6.4.** Enforcing the law - **6.5.** Equality bodies - **6.6.** Key issues - **7.** United Kingdom - **7.1.** Introduction - **7.2.** Relevant Legislation - **7.3.** Scope of Application - **7.4.** Overview of the Main Principles - **7.5.** The Enforcement of the Law - **8.** Denmark - **8.1.** Main legislation - **8.2.** Discrimination Grounds - **8.2.1.** Ethnic origin and religion - **8.2.2.** Disability - **8.2.3.** Age - **8.2.4.** Sexual orientation - **8.2.5.** Multiple discrimination - **9.** Conclusions.

1. Introduction

The concept of antidiscrimination and of equality rests on fundamental moral values in Western legal societies.[1]
The principle of antidiscrimination features also the rules governing the employment relationships.[2] The so-called "Employment Discrimination Law" is an enlarging labour law field affecting culture in general, and the market dynamics and labour performances in particular.[3]
Even if the antidiscrimination principle is widely shared in the international legal documents and conventions, it was unknown by the Georgian legal system and it entered effectively only with the 2006 Labour Code.

[1] See M. MALIK, *Anti-Discrimination Law in Britain*, in *Gleichbehandlungsrecht*, 135, B. RUDOLF and M. MAHLMANN eds., 2007: "*British anti-discrimination law was imported from the United States. It has now been exported to Europe through its influence on the directives that regulate discrimination in the European Union*". See also B. HEPPLE, *The European Legacy of Brown v. Board of Education 605*, at 609, U. Ill. L.R., 2006, arguing that "*disparate impact" or "indirect discrimination" as it was renamed, was drawn directly from U.S. law (in particular from the Supreme Court ruling in Griggs v. Duke Power Co.) into British law and then in turn "borrowed" by the European Court of Justice, and later again introduced into the major pieces of EU antidiscrimination legislation. See, at 620, "I have tried to show that Brown and its progeny - in both legislation and case law - were major stimuli for legal interventions in Britain from the 1960s and (much later) in other parts of Europe*".
[2] P. BREST, *In Defence of the Antidiscrimination Principle*, in: *Foundations of Employment Discrimination Law*, J. Donohue (Ed.), New York, Oxford University Press, 1997, p. 17.
[3] J. MCDONALD, F. RAVITCH, P. SUMNERS, *Employment Discrimination Law, Problems, Cases and Critical Perspectives*, New Jersey, Pearson Prentice Hall, 2006, Preface.

2. Georgian Framework
2.1. Constitution of Georgia

The principles of equality of the human beings and the one of non-discrimination are fully embraced by the Constitutions of democratic Countries and considered as core values.[4]
Article 14 of the Georgian Constitution states that: "*Every human being is born free and is equal before the law regardless of race, color, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence*".
Then, Article 4 (Legal state) reads at its paragraph 2 as follow: "*[t]he State acknowledges and protects universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law. The Constitution shall not deny other universally recognised human rights and freedoms that are not explicitly referred to herein, but that inherently derive from the principles of the Constitution.*"
And, more relevantly, Article 11 – Right to equality – states that:
"1. All persons are equal before the law. Any discrimination on the grounds of race, colour, sex, origin, ethnicity, language, religion, political or other views, social affiliation, property or titular status, place of residence, or on any other grounds shall be prohibited.
2. In accordance with universally recognised principles and norms of international law and the legislation of Georgia, citizens of Georgia, regardless of their ethnic and religious affiliation or language, shall have the right to maintain and develop their culture, and use their mother tongue in private and in public, without any discrimination.
3. The State shall provide equal rights and opportunities for men and women. The State shall take special measures to ensure the essential equality of men and women and to eliminate inequality.
4. The State shall create special conditions for persons with disabilities to exercise their rights and interests."
According to the jurisprudential formant, the main feature of the right for equality is its universal extension towards all the sectors covered by legitimate legal rights.[5] So, it is natural that it is also part of the employment dealings.[6]

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[4] G. QUINN and E. FLYNN, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 Am. J. Comp. L. 23, 2012; B. DE WITTE, *New Institutions for Promoting Equality in Europe: Legal Transfers*, National Bricolage and European Governance, 60 Am. J. Comp. L. 49, 2012; J. SUK, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 Am. J. Comp. L. 75, 2012; R. RUBIO-MARIN, *A New European Parity-Democracy Sex Equality Model and why it won't Fly in the United States*, 60 Am. J. Comp. L. 99, 2012; K. Linos, *Path-dependence in Discrimination Law: Employment Cases in the US and the EU*, 35 Yale J. Int'l L. 115, 2010,.
[5] Case No 1/1/493, Constitutional Court of Georgia, 2010, available (in Georgian) at: <http://www. constcourt.ge>.
[6] The judgement # N2/7/219 of 2003 of the Constitutional Court of Georgia stated that: "equality before the law means recognition and protection of all rights and freedoms of individuals who are in the equal conditions and have adequate perceptions towards issues identified by the law. The mentioned principle also deals with the lawmaking activities of a state to ensure that individuals who are in the equal conditions are granted equal privileges and imposed equal obligations. It is obvious that different legal regulation should not be per se considered to be a violation of principle of equality before the law. A lawmaker is entitled to prescribe differentiated conditions that should be justified, rational and reasonable. At the same time, persons in equal conditions should enjoy the same level of differentiation."
According to the interpretation of T. KERESELIDZE, *Analysis of Georgian Labour Legislation - Gender-Based Discrimination in the Workplace and Its Legal Implications*, Tbilisi, 2014, p. 15, "*LCG provides that differentiation is legitimate if it serves for achieving a legitimate objective and is a proportionate and necessary means of achievement of that objective. Practical example #1: A person employed at airport whose main function is to check persons or objects at border cross points may be chosen based on sex. Taking into account the fact that checking procedures include physical contact with the checked person it is mandatory that the procedure is conducted by a person of the same sex. Practical example #2: The law provides quotas of participation of women in public service;*

Due to its general scope, the Georgian Constitution does not detail the provision, while other Countries, like Italy, for instance, beside the right to receive the equal pay for the equal work, expressly dictates that all women employees must have the same rights as men[7] and that women have equal rights to work and right for equal working conditions.[8]

2.2. National Legislation
2.2.1. Labour Law Code of 1973

The Georgian Code of Labour Laws of 1973 was directly inspired by the Principles of Soviet Legislation (*Osnovy zakonodatel'stva SSSR i soinznykh respublik o trude)*[9]*;* the 1973 Code was in force until the 2006 and it does not face the matter of ban of discrimination, limiting itself only to tackle the employment discrimination.
Indeed, Article 17, paragraph II of 1973 Labour Code establiehd that "*in the process of hiring it is not allowed to limit human rights directly or indirectly or to give preference based on race, colour of skin, language, gender, religion, political and other views, ethnic and social origin, origin, proprietary and title status and residential address*."
As clearly appears from the black letter of the Article 17, only the hiring process was considered by the provision.

2.2.2. 2006 Labour Code
This Code considers for the first time the issue of employment discrimination consenting "*regulation of discrimination grounds, discriminative actions and justified actions*".[10]

2.2.3. Special Law
On 26 March 2010 the Parliament of Georgia adopted Law on Gender Equality.[11]
Until 2010 Georgian legislation did not make systemic and special regulation of gender discrimination in employment relationships.
The above area has been regulated via the No 100 convention of International Labour Organization on the "equal remuneration for women and men for the work of the same

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therefore it is legitimate to recruit only women within the set quotas. The regulations provide different treatment based on gender taking into account specifics of the work. F.e. article 18 of the LCG prohibits employing pregnant women for a night job as the latter means working during night that is harmful for a women and a foetus who need special care and protection; therefore pregnant women are not allowed to work at night. However it is impossible to specify every situation and abstract provisions are included in legislation that create a broad margin for interpretation. In every case legality of unequal treatment of a man and a woman should be evaluated individually". In other words, substantial protection is provided by the Labour Code in case of women during the maternity period. Women employees are allowed to the maternity leave for 730 calendar days to be freely distributed for pregnancy, childbirth and childcare determinations, but the remuneration is limited to 183 days (200, in case complications). Special rules are given for adopted children under 12 months of age. The State Budget standardised the compensation for these periods in 1000GEL monthly. The mother who is feeding their children can avail herself of an extra hour of break per-day; moreover, overtime can be allowed only with the consent of the parties (article 17,2 of the Labour Code), similarly it is prohibited to perform difficult, unhealthy, or hazardous works, or to employ her from 22.00 to 6.00. Above all, the termination of the job relationship is deemed illegal if made during the maternity leave period from the moment the pregnancy is communicated to the employer. See, Z. SHVELIDZE, *Georgia*, in R. BLANPAIN (ed.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, Alphen aan den Rjjn, 2017, pp. 75-76.

[7] T. TREU, *Italy*, in *International Encyclopedia for Labour Law and Industrial Relations*, R. BLANPAIN (Ed. in Chief), Vol.8, The Hague/London/ Boston, Kluwer Law International, 1998, p. 82.

[8] P. MANDRUZZATO, *Italy*, in *International Labour and Employment Laws*, W. KELLER, T. DARBY (Eds-in Chief), 3rd Edition, Volume IA, Covering through 2007, Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 6-87.

[9] E. CLARK BROWN, *Fundamental Soviet Labor Legislation*, in *Industrial and Labor Relations Review,* vol. 26, n. 2, 1973, pp. 778-792.

[10] Z. SHVELIDZE, *Prohibition of Employment Discrimination in Accordance with the Georgian Legislation*, Journal of Law, 2013, p. 226.

[11] *Law of Georgia on Gender Equality*, Georgian Legislative Magazine, No 18, 2010. See, https://matsne.gov.ge/en/document/view/91624?publication=7

value".[12]

But, since the ILO Conventions are not *per se* self executing, the ratifying State has to adopt the legislative acts necessary to implement it.[13]

Therefore, in execution of the obligations entailed with the ratification of the ILO Convention No. 100, Georgia adopted the Law on Gender Equality whose Article 2 define its purposes (i) the elimination of discrimination in all areas of social life, and so also in the employment relationships and (ii) the establishment of the basis for the obtainment for the achievement of equal rights, liberties and opportunities for every human beings.

The Law on Gender Equality on 26 March 2010 promotes equality between women and men in a range of areas namely: employment; general, vocational and higher education; health care; social protection; family relations; access to information; and in the political sphere. Section 6 expressly prohibits both direct and indirect discrimination in employment, with a specific prohibition of sexual harassment. Section 7 of the Law guarantees equal access to general, vocational and higher education, and obliges the State to ensure equal conditions in receiving general, vocational or higher education by women and men in all educational institutions "including participation in the implementation of educational and scientific processes". [14]

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[12] In examining the implementation of the 1951 Equal Remuneration Convention, (No. 100) ratified in 1993, ILO underlined the absence of legislation giving full expression to the principle of equal remuneration for men and women for work of equal value. Even if the Law on Gender Equality was adopted on 26 March 2010, providing a broad legal framework for gender equality, including prohibiting direct and indirect discrimination in labour relations (section 6), nothing gives full expression to the principle of equal remuneration or capture the key concept of "work of equal value", hindering progress in eradicating gender-based pay discrimination. This concept encompasses work that is of an entirely different nature but is nevertheless of equal value. ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Geneve, 2012, at 511, available at https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2012-101-1A).pdf.

[13] In this regards, the Committee of Experts on the Application of Conventions and Recommendations, ILO, 2014, 294-295 "*while normally non-discrimination and equality provisions are important, they will not normally be sufficient to give effect to the No. 100 Convention, as they do not capture the key concept of 'work of equal value'. This concept lies at the heart of the fundamental right of equal remuneration for men and women for work of equal value, and the promotion of equality. The concept of 'work of equal value' is fundamental to tackling occupational sex segregation, as it permits a broad scope of comparison, including, but going beyond equal remuneration for 'equal', 'the same', or 'similar' work, and also encompasses work that is of an entirely different nature, which is nevertheless of equal value*".

[14] In Georgia, actualization of equality law was related to enactment of the Law of Georgia "On Elimination of All Forms of Discrimination", N2391-IIს (2014), which created general safeguards against unequal treatment. Enactment of the law represented part of the Action Plan on Visa Liberalisation concluded between Georgia and the EU (available <http://migration.commission.ge/files/vlap-eng.pdf> accessed 22.06.2018). Practically, "[t]*he law on discrimination does not require that the discriminative actions and/or elimination of their results stop. Instead, this issue will be discussed by a civil court which will assess the facts of the case. Code of Civil Procedure of Georgia, Article 36, part 3(a)(b). The law states that the Public Defender (PD), and not an inspector, is obliged to react to a case of discrimination. The Public Defender can give recommendations to both governmental institutions and to private persons committing discriminative actions. Georgian law on elimination of all forms of discrimination, article 6, paragraph 2(f). Thus, if these recommendations are not being taken into consideration, he has the right to sue the administrative body*." Ibid. it is evident that even if the Public Defender's mandate has a wide extension, the lack of possible penalties available in the law slow down the process of elimination of the barriers related to unequal treatment in pre-contractual relation. L. JALAGANIA and T. NADAREISHVILI, *Gender Discrimination in Labor Relations*, USAID, Tbilisi, 2014. Even if it has been adopted in 2010, there are no precedents of a recourse to the Georgian Law on "Gender Equality" in practice. Therefore, "*[t]he law is ineffective and provides no guarantees to achieve equality between women and men. The gender equality law does, contrary to the anti-discrimination legislation, distinguish particular fields that need special regulations and approaches*". Id. As clearly appears in the Special Report 2015, on discriminatory issues, the Public Defender plays a crucial role: he exercise proactive functions granted by the law in the process of examining discrimination cases not only reviewing cases but also also initiate actions. Then, it is innovative the mediator role assigned (if the Public Defender deems it appropriate s/he is authorised to schedule hearing and invite parties to settle the case by mutual agreement). Moreover, the Public Defender has the right to issue a recommendation and general proposal against the perpetrator and require from the latter to undertake certain actions. If an administrative body refuses to comply with the Public Defender's recommendation, the Public Defender is authorised to apply to court and demand from perpetrator to issue an administrative act. Public defender (Ombusdam) of Georgia, Special Report on combating discrimination, its prevention and the Situation of equality in the country, Tbilisi, 2015, at 39. The same Public Defender underlines some shortcomings in the procedural provisions. As already mentioned, the antidiscrimination law has granted the

To sum up, the Law points out the core safeguards for the execution of the principle of equal rights, freedom and opportunities dictates by the aforementioned Articles of the Constitution of Georgia.

2.2.3.1. Law on Trade Unions

The 1997 Law on Trade Unions has just a norm inhibiting the discrimination, limited to the trade union membership.[15]
On the same issue, Article 40.2 titled "Prohibition of discrimination" of the 2013 Labour Code was enacted.
The freedom of association which is granted by art. 40(1) (*General Provisions*) against interferences and control exercised by public authorities is ensured on the level of the relationships among private individuals by the provisions set forth in art. 40(2).
In particular, under paragraph 1 of art.40(2), it is forbidden to discriminate against the worker "for [his] being a member of an association of employees and/or against the participation in the activities of such an association" as well as to perform "any other act aimed at the hiring of an employee or maintaining a job for such an employee in lieu of their renouncing his/her membership or withdrawing from the association of employees" or "the termination of labour relations with or otherwise harassing the employee for being a member of an association of employees and/or participating in the activities of such association".
Art. 40(2) is a specific legal rule laying down detailed provisions as opposed to the general principle set forth in article 2, paragraph 3 of the Georgian Labour Code forbidding "any and all discrimination in a labour and/or pre-contractual relations due to", among others, "social, political or other affiliation, including affiliation to trade unions".
Hence, the prohibition concerns both the 'genetic' phase of the labour relation (encompassing also the pre-contractual phase, namely the selection stage of potential employees) as well as the performance of the relation.
A further corollary of the principle of non-discrimination is article 37(b) of the Labour Code (which is expressly referenced in paragraph 3 of art. 40(2), as it will be explained hereunder) forbidding the termination of labour relations "by grounds of discrimination" as provided for in art. 2 of the Code.
The wide-ranging wording of this provision – which neither defines nor specifies the types of prohibited discriminatory conducts – permits to subsume under it any behaviour aimed at, or implying, in practice, the discrimination against an individual due to his being a

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Public Defender of Georgia with the function of supervising the elimination of discrimination and ensuring equality. Even if the Law does not provide the Public Defender with the monitoring function, it established a "*mechanism aiming to assist the Public Defender in the provision of equality, in particular the investigation of discrimination cases, settlement procedure and a right to issue recommendations and general proposals to the private and public entities. Notwithstanding these provisions, some procedural obstacles make the effectiveness of the discipline weak. This is particularly true in two respects*". Therefore, numerous disputes and opportunities of prompt resolution are left beyond the scope of the Public Defender's competence. The same happens with Article 9, par. 1, subpar "b" of the law of Georgia on the Elimination of All Forms of Discrimination, the Public Defender of Georgia shall suspend proceedings if due to the same alleged discrimination administrative proceedings are under way. The administrative procedure has a peculiarity: pursuant to the Article 8, paragraph 4 of the law of Georgia on the Elimination of All Forms of Discrimination "any administrative, local self-government and state body (including the Prosecutor's Office, investigation and court bodies) shall be obliged to transfer materials, documents, other information and explanations related to the case hearing to the Public Defender of Georgia within 10 calendar days after the request as provided for by law." Pursuant to the same article the private persons are entitled to provide information only voluntarily. There is no leverage, a certain compulsory mechanism in the law through which it will be possible to receive materials, documents, explanations and other information related to the hearing from legal persons of private law and natural persons and it is only based on their good will. *Id*. at 41.

[15] See, the Article 11, paragraph VI 2 April 1997 "*it is not allowed to discriminate the employee by the employer due to his/her membership or not membership of trade union*".

member of a trade union or his participating in the latters' activities.
The Georgian provision under examination does not make reference to the right of the individual to choose not to associate with trade unions (the so called libertà sindacale negativa, 'negative' freedom of association). While, it is constitutionalizied the Freedom of Association by means of Article 22 of the Georgian Consitution:
"*1. Freedom of association shall be guaranteed.*
2. An association may only be dissolved by its own or a court decision in cases defined by law and in accordance with the established procedure."
The ban concerns, in fact, only those conducts aimed at discriminating against the worker owing to his "being a member of an association of employees", or which condition his hiring to his "renouncing" his participation in a trade union or, additionally, in case of dismissal or harassment due to the employee's "membership" in trade unions.
Then, Georgian provision lays down the prohibition, but it does not specifies the sanctioning consequences in case of violation of the ban itself, if not in the Article 54 - Unlawful and immoral transactions - of the Civil Code that provides that "[a] transaction that violates the rules and prohibitions laid down by law or that contravenes the public order or principles of morality shall be void"; and, if it is not otherwise provided, there is a general action on tort based on the Article 992 CC: "[a] person who unlawfully, intentionally or negligently causes damage to another person shall compensate the damage to the injured party". An immediate comparison with the lenses of the Italian literature points out that art. 40(2) under examination prohibits "any […] act", without mentioning the prohibition also the possible "agreements".
Therefore, there is a concern whether, the Georgian Labour Code may actually be applied only to mere practical behaviours of the employer which are not integral part of *strictu sensu* contractual agreements, that maybe potentially waived by a contractual agreement[16].
Similar doubts have surfaced also as regards the employer's potential failure to act due to discriminatory reasons.
Such issues, however, shall not arise in relation to article 40(2) for, given the wide-ranging wording used by the Georgian legislator, this provision is apt to encompass any agreement and conduct - including practical conduct and failures to act – which are integral part of a (either direct or indirect) discrimination against the worker.
In light of this, it might be argued that the general prohibition set forth in art. 40(2), paragraph 1, section 1, covers not only the employer's behaviours which are aimed at harming one or more workers due to their participation in trade unions' activities, but also those acts or behaviours carried out by the employer to the purpose of favouring other workers, whom he prefers, precisely because they have not joint any trade union or, in any case, do not participate in the activities promoted by trade unions.
Thus, the Georgian article shall apply, alongside to the most typical forms of discrimination (such as the non-awarding of bonus payments, or the non-attribution of qualifications or tasks or the improper and instrumental use of the disciplinary authority, etc.), also to the employer's concession of economic treatments, benefits or profits, to employees who are not members of trade unions in order to favour them to the detriment of unionised workers.
The general notion of discrimination will be gradually extended as a result of the ongoing approximation towards the European measures. See, for instance, the Directive

[16] In this regard, see L. MONTUSCHI, G. GHEZZI, G. F. MANCINI, L. MONTUSCHI and U. ROMAGNOLI, *Statuto dei diritti dei lavoratori*, in A. Scialoja and G. Branca, Commentario del Codice Civile, 1972, p. 42; as well as M. MARIANI, *Art. 15*, in M. Grandi, G. Pera, Commentario breve alle leggi sul lavoro, R. De Luca Tamajo and O. Mazzotta (eds.), 2013, p. 761, and see also the references cited therein. Cf., also the judgment of Cass. 20.3.1980 n. 2054 in Foro It. (1980), I,1, at 2508.

2000/43/EC for equal treatment between persons irrespective of racial or ethnic origin, the Directive 2000/78/EC for equal treatment in employment and occupation, and the Directive 2006/54/EC concerning the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[17].

Coming back to the black letter of the Labour Code, Article 40(2), paragraph 3 of the Georgian Labour Code, established that "[t]he burden of proof for the claim filed in the case provided for by Paragraph (1)(b) of this Article and/or on the grounds prescribed by Article 37(3)(b) of this Law shall rest with an employer if the employee alleges the circumstances providing a reasonable cause to believe that the employer acted in breach of the requirement(s) of Paragraph (1)(b) of this Article and/or Article 37(3)(b) of this Law."[18]

In the first place, it is noteworthy that art. 40(2), paragraph 3, restricts the particular facilitated system of rules of evidence only in case of appeals against the termination of the labour relation or the harassment of the employee due to his being a member of trade unions or his taking part in the latter's activities ("the case provided for by Paragraph (1)(b) of this Article and/or on the grounds prescribed by Article 37(3)(b)"). Hence, under any other circumstances, the worker has to give evidence of the discrimination which he claims to have suffered.

Secondly, on the basis of the literal wording of the provision, only the worker concerned (and not the collective subjects which are indirectly affected by the discrimination) should be authorised to take legal action – at least in case of the trials provided for in art. 40(2), paragraph 3.[19]

Lastly, the article setting forth the prohibition of discrimination includes also a provision which grants workers the right to participate in trade unions' activities during the working time.

Under art. 40(2), paragraph 2, "[t]he employee[s] may participate in the activities of an association of employees during working hours by agreement with the employer".

The systematic setting of this provision seems to further strengthen the protection which is generally granted by paragraphs 1 and 3, to unionised workers or, in any case, to workers who participate in trade unions' activities.

In this case too, the Georgian legislator has opted for a provision drafted in open terms: the "activities" carried out by employees' associations are not specified and may be performed during the working time as long as, however, the employer consent to it.

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[17] Furthermore, Art. 1 of the ILO Convention n. 87, of 1949 grants workers an "adequate protection against acts of anti-union discrimination in respect of their employment".

[18] ILO, Giving globalization a human face, Geneve, 2012, at 71, note 407 still stresses the fact that the Law on trade unions and section 2(3) of the Labour Code prohibit in very general terms anti-union discrimination and do not appear to constitute sufficient protection against anti-union discrimination at the time of the hiring of workers and of termination)

The Committee noted that the Government reiterates the information it had previously provided by referring to the general prohibition of anti-union discrimination enshrined in the Constitution (articles 14 and 26), the Law on Trade Unions (section 11(6)), the Labour Code (section 2(3)) and the Criminal Code (section 142). The Government considers that the legislation clearly prohibits any type of discrimination, including anti-union dismissals, and sufficiently protects against violations of these rights and is therefore in compliance with the Convention. ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, Geneve, 2012, at 155. With regard to section 5(8) of the Labour Code, the Government indicates that, in practice, an employee becomes a trade union member after recruitment and that there have been no cases of a person not being recruited because of his/her trade union membership. Id., at 156.

[19] In this regard, two other provisions are relevant, *i.e.* art. 16 and 28 of the Statute, in relation to the comparison with the Georgian provision. Under art. 16 of the Statute – forbidding the awarding of discriminatory collective economic treatments – not only workers who have been discriminated against, but also the trade unions to which they have conferred the relevant authority, can take legal action. Under art. 28 of the Statute only collective entities (local branches of national trade union organizations concerned) may take legal action by resorting to the peculiar *rito sommario* which is provided for in order to stop anti-union conducts.

The assembly and the referendum constitute two traditional instruments of direct participation of workers in the activities of trade unions, and the provision under examination is apt to encompass both of them.
The assemblies may concern all workers indiscriminately or groups of them and are called either singularly or jointly by the trade union representations in the company in relation to trade union and labour matters.
Individual workers have the right to assemble, whereas, the power of convening assemblies is exclusively granted to trade union representations.
The Georgian provision clearly ascribes the right to assemble to individual workers without conditioning the exercise of said right – the participation in trade unions' activities during the working time – to the existence of other prerequisites (such as, for instance, the requirement that specific collective entities convene the assembly).
It might be reasonably argued that, even though it fails a specific provision in the article at issue, the "activities of the employees' associations" in which workers can take part during the working time should concern trade union matters or, in any case, should be related to the workers' interests.
Furthermore, it seems that the right set forth in the Georgian Labour Caode requires always the cooperation/agreement of the employer and not a duty to cooperate on the employer so as to enable workers to exercise such right.
As stated above, the referendum may fall under the category of the trade unions' "activities" in which the worker, pursuant to art. 40, paragraph 2, may take part during the working time and upon agreement with the employer.
Lastly, for the purposes of this analysis, the proselytizing activity along with the collection of contributions to trade unions may undoubtedly constitute activities of the employees' associations.[20]

[20] In its annual survey, the ILO Committee analyzing the reception of the 1949 Right to Organise and Collective Bargaining Convention, (No. 98) ratified in the 1993, is critical on the antidiscrimination discipline in force for anti trade union practices. This opinion has been strengthened by the observations of the International Trade Union Confederation (ITUC) received on 1 September 2017 and the observations of the Georgian Trade Union Confederation (GTUC) received on 4 September 2017 containing allegations of acts of anti-union discrimination and violation of the right to bargain collectively, as well as the Government's reply thereon. In its previous comments, the Committee had noted that according to section 5(8) of the Labour Code, an employer was not required to substantiate their decision for not recruiting an applicant, even in the event of an allegation of anti-union discrimination. So, ILO asked the Government to offer information on any complaints of anti-union discrimination at the time of hiring and any relevant court judgments. In this regards, indeed, the Law of Georgia on the Elimination of All Forms of Discrimination was adopted in 2014 and the Public Defender of Georgia was enabled with the power (i) to monitor issues regarding elimination of discrimination, (ii) to ensure equality and (iii) to discuss the applications and complaints for discrimination. Furthermore, the Public Defender is authorised to issue a fine for public institutions, organizations, private and legal entities for not fulfilling recommendations on the facts of discrimination in labour pre-contractual relations. ILO, *Application of International Labour Standards 2018*, Geneve, 2018, at 85, available at https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2018-107-A).pdf. Last visited October 2018.
According to the Official Special Report, *"[d]uring the reporting period, the Public Defender's Office started to examine 113 new discrimination cases including 106 cases on the basis of applications submitted to the Office and seven cases by the initiative of Public Defender. Moreover, the Public Defender issued 12 recommendations and two general proposals and submitted the friend-of-the-court opinions to common courts in regards with five cases. At present, the Public Defender is considering 76 cases. The reporting period saw the termination of 41 cases of which four applications did not concern discrimination, but sought opinions of Public Defender regarding the equality issue. Consequently, after responses had been sent to the applicants, the examination of the cases was terminated. Moreover, 19 applications were deemed inadmissible, six cases were suspended as the applicants filed complaints with courts (five) and administrative proceedings was launched (one). Three public statements were also made on equality issues. The largest amount of cases being considered by the Public Defender concerns discrimination on the grounds of political or other views (18%), religion (17%) and nationality/ethnicity (14%). Also, a significant amount of cases involve alleged discrimination on the grounds of sex (10%), sexual orientation/gender identity (8%) and disability (7%). Discrimination on other grounds is claimed by 8% of the applicants. It is worth noting that there is a difference between the given statistics and the data of previous reporting period – it shows an increase in alleged discrimination on the ground of political and other views by 3%, on the religious ground by 6% and on the ground of nationality/ethnicity by 4%. Conversely, the applications concerning alleged discrimination on the grounds of sexual*

2.3. Prohibition of Employment Discrimination
2.3.1. Contents of Employment Discrimination

Discrimination, generally, is the unjust or prejudicial treatment of different categories of people[21]; it is a negative dissimilarity grounded on a specific basis creating different treatments for persons given to their own peculiarities.[22]
On a different perspective, discriminatory is a violation of equality or, the equal treatment forbids any sort of discrimination.[23]
Legal scholars underline that, in any case, *"[f]or differential treatment to be discriminatory, it needs to be treating comparable cases differently or treating non-comparable cases equally. If the cases are not comparable, the difference of treatment does not need to be*

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orientation/gender identity and disability decreased by 3%. Similarly to the previous reporting period, discrimination is equally committed by public and private persons. Some 55% of cases were against public persons whilst 45% of cases were against natural and legal persons in private law". Special Report on Combating and Preventing Discrimination and the Situation of Equality, 2016, at 18.
In its previous 2013 Report, then, the Committee noted the Government's reply do not address in detail the issues raised.
According to the Committee since – as every worker – the representative of a trade union could be fired just paying a one-month-salary indemnification, unless otherwise envisaged by the contract, the Labour Code did not offer the required protection, since at the moment, there is not an explicit provisions banning dismissals by reason of union membership or participating in union activities. The ILO Committee is still waiting for the detailed information on the application of the Convention in practice, including statistics on the number of confirmed cases of anti-union discrimination, the remedies provided and sanctions imposed. The Government indicated that prohibition of anti-union discrimination is applicable both at the recruitment and employment termination stages and that penal sanctions may be applied in case of violation of workers' rights. An employer's request to disclose membership in any association, including trade unions, during recruitment, is illegal and punishable. Furthermore, the Government points out that there are no reported cases when a person was not recruited based on his/her trade union membership. Furthermore, the Government indicates that it was able to retrieve ten cases in which trade union members appealed to the courts and that only one involved allegations of antiunion discrimination. In this respect, the Government indicates that most of the cases in which the GTUC claims discrimination concern dismissals of trade union leaders without prior consent of the trade union and not alleged antiunion discrimination per se. Then, an employer is obliged to provide facts to justify that the dismissal of a worker was not based on an illegitimate reason. The Government refers to the ruling of the Supreme Court (Case No. 343-327-2011, 1 December 2011), according to which, in the course of the termination of a labour contract, the fundamental human rights, including protection against discrimination envisaged by the Labour Code, should be ensured. Thus, in case of a dismissal of a worker, it should be meaningfully investigated whether the dismissal was based on discriminatory grounds; in this case, the burden of proof lies with the employer. The Committee notes that the Supreme Court case referred to by the Government concerns a dismissal of a trade union leader and that according to the court's reasoning, the Labour Code allows termination of employment of any employee, including an elected trade union officer. According to the court, election to a trade union office does not provide any additional privileges. This is true, mostly, because it extremely complex proving real nature of denial of employment, especially when seen in the context of blacklisting of trade union members, which is a practice whose very strength lies in its secrecy. Since it may often be difficult, if not impossible, for a worker to prove that he/she has been the victim of an act of anti-union discrimination, legislation could provide ways to remedy these difficulties, for instance by stipulating that grounds for the decision of non-recruitment should be made available upon request. The Committee considers, for example, that options compatible with the Convention would include: (i) a system establishing preventive machinery by requiring that a dismissal is authorized by an independent body or public authority (labour inspectorate or courts); (ii) a system which provides for the reinstatement of an unfairly dismissed worker; (iii) or a system providing for compensation for the prejudice suffered as a result of an act of anti-union discrimination and sufficiently dissuasive sanctions imposed on employers found guilty of anti-union discrimination, which also act as an effective deterrent to prevent in practice anti-union dismissals. In the light of the above, the Committee considers that the system currently in place in Georgia does not afford adequate protection. ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Geneve, 2013, 103-104 available at https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2013-102-1A).pdf.
[21] R. BLANPAIN, *Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations*, Blanpain R. (General Editor), 2nd Revised Edition, Deventer/Antwerp/London/ Frankfurt/Boston/New York, Kluwer Law and Taxation Publishers, 1985, p. 453.
[22] A. ADLERCREUTZ, Sweden, in: International Encyclopedia for Labour Law and Industrial Relations, Blanpain R. (General Editor), Vol.13, The Hague/London/Boston, Kluwer Law International, 1998, p. 120.
[23] R. BLANPAIN, Belgium, in: International Encyclopedia for Labour Law and Industrial Relations, Blanpain R. (General Editor), Vol.3, The Hague/London/Boston, Kluwer Law International, 2001, p. 102.

justified and is not discriminatory".[24]
In the workplace, a discrimination is a situation in which employees are treated unfairly because of their race, sex, age, religion, physical or health problems.
As ILO remembers, "discrimination in employment and occupation is a universal and permanently evolving phenomenon"[25] to some extent, the equal treatment is a human right.[26]
As the Constitutional Court of Georgia explains "*in the process of discussing the issue of discrimination the court shall first of all determine: 1) are the persons (groups of persons) essentially equal; it has decisive importance as these persons shall form comparative categories; they must be assigned to similar categories, analogues circumstances for some content, criteria, must be essentially equal for the specific circumstance or relationship; the same persons can be considered as equal for some relationships, conditions, but not for other conditions; 2) the different treatment of essentially equal persons should be evident (or equal treatment of essentially unequal persons) based on certain grounds, in the areas protected by rights*".[27]
So, it could be said that an unequal treatment is not deemed a discriminatory conduct if three concomitant elements coexist: a) the essence or the peculiarities of the job and its performance; b) the purpose to achieve an admissible and legal target; c) the differentiation is proportionate and needed to gain that objective[28].
Similarly, the Georgian Law on the Elimination of All Forms of Discrimination says: "any distinction, exclusuion, or preference with respect to a particular job, activity, or sphere, based on its inherent requirements, shall not be considered discrimination".[29]
Article 2.1 of the Labour Code states that 'Labour relations is the performance of work by an employee for an employer in exchange for remuneration under organised labour conditions'. Even if terms are broad the issue could be of some relevance for discrimination discourses if there is a distinction between the terms 'employee' and 'worker'. For example, it could affect the regulation pertaining the categories of worker/employees who may be self-employed or working through third parties such as

[24] See, S. BESSON, *Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe*, 60 Am. J. Comp. L. 147, 2012, p. 156. The same scholar adds that: "a differential treatment of comparable cases on prohibited grounds is only discriminatory when it cannot be justified by objective reasons". But this last statement is expressly excluded by some legislative regulations. Id., at 156.

[25] See, https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/equality-of-opportunity-and-treatment/lang--en/index.htm. Last visiteD OCTOBER 2018.
ILO provides standards on equality to eradicate discrimination in all aspects of the workplace but in the society at large. They also offer the ground upon which gender mainstreaming strategies could be enacted in the labour sector.

[26] ILO: Equality at work: The continuing challenge – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Geneva, 2011. See also M. OELZ, S. OLNEY, M. TOMEI, *Equal Pay – An introductory guide*, ILO, Geneva, 2013.

[27] Case No 1/1/493, Constitutional Court of Georgia, 2010, available (in Georgian) at: <http://www.constcourt.ge>. translation of Z. SHVELIDZE, *Prohibition of Employment Discrimination in Accordance with the Georgian Legislation*, Journal of law, 2012, p. 227. The Court, in other words, explained that differentiation and discrimination if grounded on objective contingencies have to be clearly distinguished. Differentiation per sè is not enough to prove the existence of discrimination; indeed, there is discrimination when the difference could not understood or a prudent appraisal is absent, since discrimination is meant to be a subjective and unjustified differentiation. So, the very odea of equal treatment does not forbid a different treatment in general, but a diverse treatment that is voluntary, unreasonable, and subjective.

[28] See, Z. SHVELIDZE, *Georgia*, in R. Blanpain (ed.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, Alphen aan den Rjjn, 2017, p. 80.

[29] Moreover, the Law on Gender Equality establishes that in the course of the recruitment stages as well as during the employment relationship, workers could be placed in an unequal setting and/or "given priority over others on the basis of sex, due to the substance abd specificity of work or due to specific conditions required for its performance, and also if it serves a legitimate purpose and is appropriate and necessary for achiving that purpose". See, Z. SHVELIDZE, *Georgia*, in R. Blanpain (ed.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, Alphen aan den Rjjn, 2017, 80-81.

temporary employment agencies or sub-contractors. It is worth mentioning that the EU gives a wide definition of the term worker as anyone who, for a period of time, provides services to another person or company, and is under the direction of another person and who receives remuneration for those services.[30]

For the purposes of employment protection, it is important to establish who is protected and where that protections ends, what are the limits and where is the divide between the self-employed (especially those in a dependent relationship) and the employed. Such clarity is, of course, also important for employers.

The article in comment, underlines that "[l]abour relations is agreements reached, under the principle of equality".[31] The principle of equality is put before all the discourses: it pervades all the subject related to the antidiscrimination policy.[32]

According to an eminent scholar, the employment contract conceals "the realities of subordination behind the conceptual screen of contracts concluded between equals"[33], when, indeed, these are contracts between institutions and individuals and, radically, freedom of contract is a voluntary act of submission by the individual.[34]

Then, another academician details saying that "[t]he lawyer's model of a freely bargained individual agreement is misleading. In reality, without collective or statutory intervention, many terms of the 'agreement' are imposed by the more powerful party, the employer, by what Fox has called 'the brute facts of power".[35]

Thus, a merely contractual approach to the employment relationship is inadequate because it seems proposing that there are two equal parties negotiating the single clauses of the agreement when in practice it is still an uneven covenant.[36]

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[30] See, Case C-66/85 *Deborah Lawrie Blum v Land Baden-Württenberg.*

[31] S. KERASHVILI, *The Meaning of Prohibition of Discrimination for the Freedom of Contract (In the perspective of horizontal effect of human rights)*, Journal of law, 2017, p. 188.

[32] A relevant distinction is between a formal equality approach and a substantive equality approach. The former is concerned with equality of opportunity, whilst the latter is concerned with equality of outcomes.
As prof. Sargeant pointed out in this regard, "*[a] useful example is in education which affects future life choices. Across OECD countries for example 18 per cent of boys aim to work in engineering and computing whilst less than 5 per cent of girls wish to do the same. One of the outcomes of these types of career choices is a gender pay gap as girls enter lower paid occupations than boys. A formal equality approach will be concerned with making sure everyone has the same opportunities in career choices. A substantive approach might be to open up male dominated occupations to women*". Sargeant, comment sub article 2, cit., at 31. While equality of opportunities does not only mean the removal of obstacles to disadvantaged categories, but it also calls for a positive approach to ensuring that disadvantages are compensated for, equality of outcomes means levelling out the finishing point as well as the starting one. This is a very controversial political strategy (for example, a quota system for women to make sure that there are as many women as men on specific places would be a way of achieving such equality, but it could end up preventing some men with higher merits from being placed in those posts). Likely, the issue with this last approach is that to achieve some form of equality the one not belonging to the protected group could be unfairly discriminated. As N. GVELESIANI, *Parity Democracy as a Guiding Principle of Gender Policy (In the Prism of Constitutional Reform)*, sclj, 2017, p. 216 recently pointed out: "*[f]ormal equality implies equal treatment, whereas substantive equality means equality of chances and equality of results meaning that everyone has the right to claim an equal share of state benefits. Equality between men and women implies that both sexes are given the same opportunities to develop their resources in all aspects of their working, political, family and cultural lives. Substantive equality implies taking temporary and special measures to attain factual equality. Therefore, it justifies introduction of gender quota as a certain temporary special measure, which ensures equal representation of women and men in the political field. Article 14 of the Constitution of Georgia provides for formal equality, i.e., the general principle of fairness, under which it is impermissible to treat the equal unequally and vice versa. Formal equality is a negative, probative measure, whereas substantive equality is its antipode, a positive measure that is not guaranteed by the Constitution of Georgia*".

[33] M. SARGEANT, Comment sub. Article 2, in A. Borroni (ed.), Commentary on the Labour Code of Georgia, Tbilisi, 2014, p. 27.

[34] See P. DAVIES & M. FREEDLAND, Kahn-Freund's Labour and the Law, 1983.

[35] LORD WEDDERBUM OF CHARLTON, *The Worker and the Law*, 1986.

[36] As M. SARGEANT, *supra* note 857, says: "[l]abour law is about the regulation of the relationship between employer and worker or, put in another way, the relationship between the user of labour and the supplier of labour. This regulation takes place at an individual level and at a collective level. At an individual level the law takes the view that the contract of employment is like any other contract, namely a legally binding agreement that two equal parties have voluntarily entered into. At a collective level

Then, Article 2, 3 par., enumerates the cases on which the issue of discrimination emerges: "*Any and all discrimination in a labour and/or pre-contractual relations due to race, skin colour, language, ethnic or social belonging, nationality, origin, material status or title, place of residence, age, sex, sexual orientation, marital status, handicap, religious, social, political or other affiliation, including affiliation to trade unions, political or other opinions shall be prohibited*".[37]

Article 2, paragraph IV of Labour Code provides the definition of employment discrimination, stating that any "*direct or indirect harassment of a person aimed at or resulting in humiliation of person's dignity and intimidating, hostile, humiliating, degrading, or abusive environment for that person, or creating the circumstances for a person directly or indirectly causing their condition to deteriorate as compared to other persons in similar circumstances*".[38]

This general statement fixes the legal formula for determining when a discrimination takes place (i.e., the creation of the conditions for any human being that causes a downgrading of their status as compared to the one of another human being in similar conditions) and connects discrimination with the abuse of equality.

It is relevant that the Labour Code makes harassment equal to discrimination, if directly or indirectly, is aimed or creates *intimidating, hostile, humiliating, degrading, or abusive environment.*[39]

According to the abovementioned Law on Gender Equality discrimination is– "*Any differentiation, separation or/and limitation based on gender, which is manifested in the different acknowledgement of rights and main liberties, unequal provision, weakening or rejection of opportunities which is implemented through the direct or indirect discrimination*".[40]

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workers and employers have banded together into trade unions and employers' associations in order, partly, to give themselves greater bargaining power with each other". M. SARGEANT, *supra* note 858, at 28.

[37] On the interpretation of Article 2, 3 see Case No AS-549-517-2010, Constitutional Court of Georgia, 2010, available at: <http://www.constcourt.ge>.

[38] There is, of course, a problem of defining what is meant by the broad concept of dignity. It has to be said that there is no satisfactory answer to the problem of definition. See M. SARGEANT, Discrimination and the Law, London, 2013. The Courts in Canada have considered this in a number of cases and in onethe Supreme Court held that "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment... Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society." *Law v Canada*(Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

[39] To fit the Code definition it is required that the harassment has a detrimental effect on a person's status. A legal scholar questioned if it would not be enough for a person to be subject to an intimidating and hostile environment. Prof. Sargeant says: "[h]arassment may affect an individual in a way that is unacceptable as normal behaviour but may not have an effect upon their status at work". Sargeant, Article 2, cit., p. 36. The UK's 2010 Equality Act, section 26, provides a clear taxonomy of what an harassment is. It amounts to an unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating victim's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for (protected characteristics are age, disability, gender reassignment, race, religion or belief, sex or sexual orientation); or, any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has that effect; and, furthermore, if the victim's rejection of or submission to conduct (whether of the perpetrator's or not) related to sex or gender reassignment, the perpetrator treats the victim less favourably than how the victim would have been treated if the victim had not rejected or submitted to the conduct (Section 26(3)). The essential characteristic of sexual harassment is that it is words or conduct which are unwelcome to the recipient and it is for the recipient to decide for themselves what is acceptable to them and what they regard as offensive (and undermining the victim's dignity at work also creating an 'offensive' or 'hostile' environment for the victim). The complainant's perception is therefore of the utmost significance. According to the words of Prof. Sargent, "[t]hat perception should not be dismissed just because the tribunal does not think that the actions of the respondent amounted to sexual harassment, although there still needs to be evidence of harassment". Id., p. 37. These questions are still not answered by the Georgian legal system.

[40] It has also said that the prohibition of sexual harassment is not "effectively secured and law enforcement agencies seldom investigate related suits". US Department of State, Country Report on Human Rights 2011, Georgia, p. 42. It has also been observed that the content of the provision dealing with the sexual harassment is in line with international standards, even if the lack of enforcement mechanisms also delay the development of relevant case law and the implementation of the discipline.

The distinct class of discrimination - harassment is the sexual harassment, which is the gender based form of direct discrimination.[41]
The same hypothesis is ruled by the article 6, paragraph I.b of the Law on Gender Equality according to which "*[i]t is prohibited in labour relationships to have any type of sexual verbal, non-verbal or physical behaviour, which is aimed at or causes violation of person's dignity or creation of humiliating, hostile or offensive environment for the person*."
It is worth-mentioning that the proscription of employment discrimination spread onto all employers notwithstanding their dimension or legal forms[42].

2.3.2. Direct Discrimination

Discrimination can be direct and indirect. [43]
The direct discrimination is based on spoken evidence and it creates a diverse treatment due to the peculiar feature of the worker.[44]

According to a detailed survey "*[u]ntil today, there is no precedent of the practical application of the gender equality law. Obviously, this is not only the result of the gap in legislation because sexual harassment is a sensitive and personal issue. The delicacy of the subject and its hidden character hinder its identification*."
L. JALAGANIA and T. NADAREISHVILI, *Gender Discrimination in Labor Relations*, USAID, Tbilisi, 2014, p. 54. The ILO asked the government to expose: "[h]ow and by which entity is sexual harassment records Law on Gender Equality, which should include information about the compensation and sanctions." ILO, Direct Request (CEACR)-adopted 2013, published 103rd ILC session (2014), Georgia. Then, ILO wonder if any statistical information have never been collected by the court or any other agency or authority. The 2013 ILO request has never been fulfilled and, so far, Georgia does not keep statistics on sexual harassment in the workplace (also because, an on-site inspection body is not working neither rin general terms). Moreover, no case law is available in Georgia. ILO experts observe that even if there is not trace of suits on sexual harassment occurred in the workplace, this is not an irrebutable evidence that these conducts are not happening in Georgia. See, Giving Globalization a Human Face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, Report III (Part 1B), 2008, Para. 790.
And, maybe it is more plausible that, "*it reveals even more serious symptoms that indicate a gap in the legislation, the ineffectiveness of the law, a lack of knowledge or understanding of sexual harassment by the judges and the absence of any reconciliation strategies and plans. It can also mean that the enforcement mechanism is ineffective, a gap in the access to court and mistrust towards the victims which could explain why they prefer to keep silent. Therefore, a clear definition of sexual harassment is necessary to ensure that the legislative framework covers all its forms*". L. JALAGANIA and T. NADAREISHVILI, *Gender Discrimination in Labor Relations*, USAID, Tbilisi, 2014, p. 54.
[41] Sexual harassment means any form of verbal, non-verbal or body behavior of a sexual nature whereby those, who engage in it, know or should know that this is contrary to the dignity of men and women at work, see: R. BLANPAIN, Belgium, in: *International Encyclopedia for Labour Law and Industrial Relations*, Blanpain R. (General Editor), Vol.3, The Hague/London/Boston, "Kluwer Law International", 2001, p. 102.
[42] See Article 3, Paragraph II of Labour Code of Georgia according to which "The employer is a natural or a legal person and/or an association of persons, for which certain work shall be performed under a labour agreement". In the United States, for example, this is not the case, since the 1964 Civil Rights Act forbids only employers with 15 or more workers for each work day of at least 20 weeks a year. A. GOLDMEN, United States of America, in: International Encyclopedia for Labour Law and Industrial Relations, Blanpain R. (General Editor), Vol.13, The Hague/London/Boston, Kluwer Law International, 1996, p. 178.
[43] Direct discrimination is verified when, due to one of the protected features, a person/worker is treated less favourably than another who does not share that traits would be treated. This includes cases where there has been a generalised assumption that people belonging to a given category has or lack certain characteristics. To be relevant for the antidiscrimination law, it should be found a less favourable treatment compared to another's treatment or compared to the way that 'would be treated'. Hence, lacking an actual term of comparison, it is possible to make recourse to a hypothetical one.
[44] Departures from equality must be based on a legitimate purpose and the chosen means must be proportionate to this end. In cases of direct (facial) discrimination, the grounds for derogation are typically specified in the relevant equality norm. S. PAGER, *Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality*, 51 Am. J. Comp. L. 553, 2003, pp. 555-556. The grounds on which indirect discrimination may be justified are left open. In either case, assuming the purpose is prima facie legitimate, the justification must be tested for proportionality. Proportionality requires that the measure be both (1) suitable and (2) necessary to meet the stated end, and that (3) the burdens it imposes be proportionate to the benefits. As in US equal protection, proportionality thus looks at both ends and means, and establishes an appropriate relation between them. See Jans, "Proportionality Revisited", 27 J. Legal Issues of Econ. Int. 239, 243-48 (2000); cf. Tussman & Tenbroek, "The Equal Protection of the Laws", 37 Cal. L. Rev. 341, 343-53 (1949). Then "[i]n cases referred to it through Article 234 (ex 177) preliminary references, the

Hence, direct discrimination happens when a difference in treatment relies directly and explicitly on distinctions based solely on a specific ground of discrimination forbidden by the law.[45]
For instance, a call for a "female chef" is a direct gender-base discrimination, since males receive a worse treatment compared to females since they are not allowed to apply for the job. But similar examples are envisageable for discrimination based on religious and political believes, and so on.

2.3.3. Indirect Discrimination

Indirect discrimination (or disparate impact effect doctrine in USA terms) is verified when a law, policy or practice does not seem to be discriminatory, but has a same-like effect when implemented. This could happen, for instance, when men or women are deprived compared respectively to women or men with regard to the enjoyment of an actual occasion or advantage due to pre-existing differences, such as minimum height requirements for peculiar employment.[46]
During indirect discrimination the violation of equality in rights is not expressed, however it indirectly affects the person with the specific characteristic.[47] In case of indirect discrimination neutral stipulation, measure or way of treatment affects the specific group, and the mentioned group thus is under unequal treatment due to its characteristic.[48]

Court sometimes defers to the national court to assess proportionality. Under Article 234, the European Court's jurisdiction is limited to answering questions of European law in abstract; it remains for the national court to apply this law to the facts of the case - including the proportionality assessment. In practice, the ECJ often tailors its answer according to the facts presented, and, in doing so, may engage in its own analysis of proportionality. Where the facts are technically complex or politically sensitive, the European Court is more likely to defer to the national court". See Jacobs, "Recent Developments in the Principle of Proportionality in European Community Law," in E. ELLIS, (ed.), *The Principle of Proportionality in the Laws of Europe 19-20*, 1999. A couple of example may be enlightening. In Hofmann v. Barmer Ersatzkasse, an extended maternity leave was alleged to discriminate against men. The Court had to decide whether the benefits could be justified under Article 2(3), which granted an exception to equal treatment for "the protection of women, particularly as regards pregnancy." Case 184/83, 1984 ECR 3047, at PP 26-27. See, Article 2(3) of Equal Treatment Directive. The Court declined to subject the benefits to a test of proportionality, holding that "Member States enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation." Id., p. 27. By contrast, in Johnston v. Constable, the Court held that Article 2(3) "must be interpreted strictly" as a derogation from an individual right. Accordingly, the Court refused to allow the exclusion of female police officers from duty in Northern Ireland to be justified "on the ground that public opinion demands that women be given greater protection." Case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 ECR 1651 (1986). The Court also made clear that such derogations from equal treatment must pass a strict proportionality test limiting them to "what is appropriate and necessary for achieving the aim in view and ... be reconciled as far as possible with [equal treatment]." Id., pp. 39-40.

[45] V. JIVAN & C. FORSTER, *Challenging Conventions: In Pursuit of Greater Legislative Compliance With CEDAW in the Pacific*, 10 Melbourne J. of Int'l Law 655, 2009, p. 662.

[46] See J. HERSCH, *Employment Discrimination, Economists, and the Law*, in K. MOE (ed), *Women, Family and Work: Writings on the Economics of Gender,* 2003, pp. 217-228.

[47] Indirect discrimination happens where a policy which applies in the same way for everyone has an impact that specifically disadvantages workers with a protected characteristic. When a specific category is disadvantaged in this way, a worker in that category is indirectly discriminated against if he or she is put at a disadvantage; unless it can be proved that it is a proportionate way of achieving a legitimate purpose.

[48] Therefore, indirect discrimination scrutiny is subject to, in large part, on what kind of justifications are allowed. See Evelyn Ellis, Sex Discrimination Law (2d ed., 1998).
As Sacha Prechal has explained, "the objective pursued ... must take priority over the principle of equal treatment (i.e., must be sufficiently important). This test implies in fact that a balancing of interests must be made." S. PRECHAL, *Combatting Indirect Discrimination in the Community Law Context*, Leg. Issues of Eur. Integ. 81, 1993, p. 87.
Perhaps for this reason, the Court has often preferred to defer to national courts to assess justification, as they are more likely to be familiar with the facts of the particular case. When the ECJ has intervened, it has generally done so at the level of purpose,

As a result, indirect discrimination imposes much heavier burden over the certain group of people compared with other group.[49]
For example, a position asking for a relevant amount of overtime or mobility requirements could be detrimental for women, statistically over burdened with child care obligations.[50]
A relevant theoretical impact to the concept of indirect discrimination in labour law was given by the USA Supreme Court at the beginning of the seventies[51] dealing with the requirement posed by a high school restricting the new hires to the high school graduated. The Supreme Court held that since Afro-Americans have been less opportunity to gain that qualification, this criterium end up being a screening device to a class of individuals. Even if, the Supreme Court concluded, discrimination could be found on the basis of disparate impact as well as an overtly discriminatory purpose. Employers thus could not camouflage their discriminatory intent through ostensibly neutral tests that disfavoured certain groups

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vetting justifications a priori, while leaving proportionality to be assessed by the national court.
The ECJ's indirect gender discrimination jurisprudence began with Bilka, a case in which the exclusion of part-time workers from the company's occupational pension scheme was alleged to discriminate against female employees, since part-timers were mostly women. Case 170/84, Bilka-Kaufhaus GmbH v. Weber von Hartz, 1986 ECR 1607. An earlier case, Jenkins, had confused matter by suggesting that proof of discriminatory intent might be required. See Jenkins, 1981 ECR 911, 926, P 14. In Rummler, the ECJ took a small step toward stricter review (and more active supervision at the European level). Case 61/81, Rummler v. Dato-Druck GmbH, 1982 ECR 2601. The case considered whether "muscle demand" could be used as a criterion to determine pay, even though this would "tend to favour male workers [who] in general ... are physically stronger." Rummler, judgment, pp 8, 15. The plaintiff had sought to have pay based on effort exerted, a standard which would permit women to be paid more for lifting the same amount. Id. at pp 4, 18.
The Court held that use of such a criterion was permissible, if objectively justified by the nature of the work. It noted that a contrary rule would have the perverse effect of making women higher-cost employees, encouraging discrimination. The Court did stipulate, however, that the job classification system must be considered as a whole and that it must "be established ... if the nature of the tasks in question so permits [that] regard is had to other criteria in relation to which women workers may have a particular aptitude." Id. at P 15. The Court did not offer examples of such "female" criteria, nor elaborate on how to identify them.
Blanpain R., Belgium, in: International Encyclopedia for Labour Law and Industrial Relations, Blanpain R. (Editor in Chief), Vol.3, The Hague/London/Boston, "Kluwer Law International", 2001, 102.

[49] See, Case No 1/1/477, Constitutional Court of Georgia, 2011, available (in Georgian) at: <http://www. constcourt.ge>. Evidence of "the disproportionately prejudicial effect on a particular group" it is enough to presume indirect discrimination. This can be proven by means of official statistics (Hoogendijk v. Netherlands (2005) 40 EHRR SE22, 207. See also DH and others v. Czech Republic [GC] (2008) 47 EHRR 3, at para. 188), but also through other means if the available sources are reliable. Opuz v. Turkey (2010) 50 EHRR 28. See also Orsus and Others v. Croatia [GC] (2011) 52 EHRR 7, at paras. 152-53, 155. Once statistical evidence has been supplied, the indirect discrimination is regarded as established and the resitant has to provide an objective and proportional justification for the discrimination rather than evidence of an absence of discriminatory intent. On the use of statistical evidence to prove indirect discrimination, see Zarb Adami v. Malte 2006-VIII; (2006) 44 EHRR 3, at paras. 78, 82-83; Opuz v. Turkey (2010) 50 EHRR 28, para. 198 (indirect sex discrimination); DH and others v. Czech Republic [GC] (2008) 47 EHRR 3, at paras. 179-80, 187-95; Orsus and Others v. Croatia [GC] (2011) 52 EHRR 7 (indirect race discrimination). For a discussion, see E. DUBOUT, *La Cour europeenne des droits de l'homme et la justice sociale - a propos de l'egal acces a l'education des membres d'une minorite*, 84 Revue trimestrielle des droits de l'homme 987-1011, 2010. See also J-F. AKANDJI-KOMBE, *Le droit a la non-discrimination vecteur de la garantie des droits sociaux*, in *Le droit a la non-discrimination au sens de la Convention europeenne des droits de l'homme* 183-96 (F. Sudre & H. Surrel eds.) 2008; Edouard Dubout, Vers une protection de l'egalite "collective" par la Cour europeenne des droits de l'homme ?, 68 Revue trimestrielle des droits de l'homme 851-83 (2006); Frederic Sudre, La protection des droits sociaux par la Cour europeenne des droits de l'homme: un exercice de jurisprudence fiction?, 55 Revue trimestrielle des droits de l'homme 755-72 (2003).

[50] M. BORZAGA, *Company and Labor Law: Accommodating Differences: Discrimination and Equality at Work in International Labor Law*, 30 Vt. L. Rev. 749, 2006. Direct discrimination is defined as regulations, laws, and policies that "explicitly exclude or disadvantage workers on the basis of characteristics" such as sex, age, or disability. ILO, Director-General, Time for Equality at Work: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, at 3, delivered to the 91st Session of the International Labour Conference, Report I(B) (Mar. 2003), para. 56; see M. TOMEI, *Discrimination and Equality at Work: A Review of the Concepts*, 142 INT'L LAB. REV. 401, 405-06, 2003, p. 402 (defining direct discrimination as "when rules and practices explicitly exclude or give preference to certain individuals solely on the basis of their membership of a particular group").Discrimination is indirect where regulations or practices are facially neutral, but in effect negatively impact "a disproportionate number of members of a particular group" of workers. ILO Report Time for Equality at Work, para 58. Indirect discrimination may also occur when particular categories of workers receive different treatment compared to other workers.

[51] Griggs v. Duke Power Co., 404 US. 424, United States Supreme Court, 1971.

without being targeted to test their job ability.[52]
The Supreme Court requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race, and if, as here, an employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. This does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless they are demonstrably a reasonable measure of job performance.[53]
In other words, even if a requisite to be hired is general and not explicitly directed to the work performance, that very requisite should be deemed as indirect discrimination with the respect of the fact that such restraint has disproportionate consequence on the people with specific features (in the case at stake, the skin colour).[54]
From here comes the theory on disparate impacts or disparate effects, (consequences).[55]
Following this theory, "*a facially non-discriminatory employment practice that disproportionally screens out a higher percentage of protected class members is an unlawful employment practice unless it can be demonstrated that the practice is required by business necessity or has a manifest relationship to job performance*".[56]
The examples are numerous in foreign literature: from the requisite of having beard (excluding women)[57], or the prohibition of wearing specific clothes or jewels could limit some religion believers[58], or the obligation to work every Sunday[59], as well, not to forget a

[52] M. S. WEISS, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 Chi.-Kent L. Rev. 1427, 1993, p. 1447 explains that "Americans would apply the European label "direct" discrimination to what our courts categorise as "intentional discrimination, "including facial discrimination and disparate treatment. "Indirect discrimination" would roughly correspond to "disparate impact"".
[53] Griggs v. Duke Power, at 425.
[54] According to the courts' decisions, three test questions are involved in indirect discrimination:
1. Is the law sex neutral? That is, a law must be formulated with no direct link to sex, so that its requirements can be fulfilled by both women and men.
2. Is one sex affected more heavily than the other? In other words, is the percentage of members of one sex that is or could be negatively affected by the requirements of the law considerably greater than that of members of the other sex?
3. Is the law objectively justified, suitable and necessary? If the form taken by the law's requirements is not objectively justified, indirect discrimination is present. A provision is justified if the member state can show that the means chosen by the law actually serve to promote its social policy.
If the discrimination can be objectively justified, indirect discrimination is not present only if:
a. the discriminatory measure is suited to the achievement of this goal, and
b. the discriminatory measure is necessary to achieve this goal.
These three test questions have found broad acceptance, especially in the literature on labour law and in jurisprudence. Rust, cit., pp. 443-444.
[55] J. SHAW, *Gender and the European Court of Justice*, in G. de Burca & J. Weiler, (eds.), *The European Court of Justice,* 2001; A. PETERS, *The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law - A Conceptual Analysis*, 2 Eur. L.J. 177, 1996; H. FENWICK & T. HERVEY, *Sex Equality in the Single Market: New Directions for the European Court of Justice*, 32 Comm. Mkt. L. Rev. 443, 1995. C. HERDEGEN, *The Relation Between the Principles of Equality and Proportionality*, 22 Comm. Mkt. L. Rev. 683, 684-85, 1985. (quoting variant formulations of the equality principle in EC case law), with Aristotle, Ethica Nicomachean, vol. 3: 1131a-1131b (W. Ross trans. 1925). Objective justification amounts to a determination that the two likes are unalike for the relevant purpose. See generally P. WESTEN, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537, 564-69 (1982). C. BARNARD and S. DEAKIN, *'Negative' and 'Positive' Harmonization of Labor Law in the European Union*, 8 Colum. J. Eur. L. 389, 2002. M. MAHLMANN, *Antidiscrimination Law in the European Union: Prospects of German Antidiscrimination Law*, 14 Transnat'l L. & Contemp. Probs. 1045, 2005.
[56] Z. SHVELIDZE, *supra* note 854, p. 230. See also, R. BLANPAIN, *Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations*, General Editor Blanpain R., 2nd Revised Edition, Deventer/ Antwerp/London/ Frankfurt/Boston/New York, Kluwer Law and Taxation Publishers, 1985, p. 453.
[57] P. CALLAGHAN, *UK, in: International Labour and Employment Laws*, W. Keller and T. Darby (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, BNA Books, 2009, pp. 8-171.
[58] For example, the Sikh. See, Singh v Rowntree Mackintosh, 1979; Kaur v Butcher & Baker Foods Ltd , 1997 (in Bell A., Employment Law, Nutcases, 3rd Edition, London, "Thomson, Sweets & Maxwell", 2007, 62) and for a comment see B. HEPPLE, S.

maximum age limit (restricting women in their fertile age or child care)[60], a minimum height (discriminating for women, whose average height is lower)[61], or an announcement calling for recent graduates (discriminating the older)[62].

In is noteworthy that the Georgian Labour Code does not define the concept of indirect discrimination that is, instead, provided by the Law on Gender Equality as "l*egal act, program or other public policy which does not indicate to discrimination directly, but its implementation is related to the discriminative result*".[63]

The lack of a substantial regulation on indirect discrimination in Labour Code was underlined by the 2009 ILO Report of the Committee of Experts on the Application of Conventions and Recommendations of International Labour Organization.

In this Report, Georgian government was asked how the indirect discrimination was regulated.[64]

The Committee recalled that, by ratifying the ILO Convention, the Georgian Government undertook to address direct and indirect discrimination in respect to all aspects of employment and occupation, including access to employment and particular occupations. [65]

The 2010 ILO yearly Report makes reference to the response coming form the Georgian government according to which the issue of indirect discrimination is already addressed by article 142 of Criminal Law of Georgia[66], and article 2, paragraph 4 of the Labour Code[67].

FREDMAN, and G. TRUTER, *Great Britain*, in *International Encyclopedia for Labour Law and Industrial Relations*, Blanpain R. (Editor in Chief), Vol. 6, The Hague/London/Boston, Kluwer Law International, 2002, p. 188.

[59] Copsey v.WWB Devon Clays Ltd., 2005 (in A. BELL, *Employment Law*, Nutcases, 3rd Edition, London, "Thomson, Sweets & Maxwell", 2007, p. 71).

[60] Price v Civil Service Commission, 1978 (in A. BELL, *Employment Law*, Nutcases, 3rd Edition, London, "Thomson, Sweets & Maxwell", 2007, p. 58); P. CALLAGHAN, UK, in *International Labour and Employment Laws*, pp. 8-171.

[61] R. BLANPAIN, *Equality and Prohibition of Discrimination*, p. 453.

[62] P. CALLAGHAN, *UK*, in *International Labour and Employment Laws*, pp. 8-201.

[63] Article 3, Published in Legislative Magazine, No 18, 2010. The same Law defines the direct discrimination as "placing the person in discriminative condition for his/her gender based on legal act, program other public policy". Id. in any case, the Constitutional Vourt of Georgia prohibits both of them. See, Case No 1/1/493, Constitutional Court of Georgia, 2010, available (in Georgian) at: <http://www. constcourt.ge>.

[64] Report of the Committee of Experts on the Application of Conventions and Recommendations of International Labour Organization, 378-379, available at, https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2009-98-1A).pdf. Last seen on October 2018). The ILO Committee noted that the Labour Code adopted in 2006 provides in section 2(3) that "*any type of discrimination due to race, colour, ethnic and social category, nationality, origin, property and position, residence, age, gender, sexual orientation, limited capability, membership in a religious or other union, family conditions, political or other opinions is prohibited in employment relations*". While noting that this provision covers all the grounds of discrimination listed in Article 1(1)(a) of the Convention, the Committee also notes that by referring to discrimination "in employment relations" it does not appear to prohibit discrimination that occurs during selection and recruitment, including job advertisements. Noting that under section 5(8) of the Labour Code the employer is not required to give reasons for his or her decision when a candidate is not hired, the Committee is concerned that this provision may effectively bar candidates from successfully bringing discrimination cases.

[65] The Committee, so, requested the Government to provide information on: (i) whether and how the Labour Code or any other legislation provides protection from discrimination with regard to access to employment and particular occupations, including discriminatory recruitment practices; (ii) whether section 2(3) of the Labour Code is intended to prohibit direct and indirect discrimination and to indicate whether consideration is being given to including definitions of direct and indirect discrimination into the legislation; (iii) the procedures and mechanisms available to lodge complaints concerning discrimination in employment and occupation, including complaints to contest recruitment decisions that are allegedly discriminatory, and to provide information on any cases that may have been decided concerning sections 2(3) and 5(8) of the Labour Code. Id.

[66] Violation of human beings' equality due to his/her race, skin colour, language, gender, attitude towards the religion, beliefs, confession, political or other positions, nationality, belonging to national, ethnic, social, title or society unions, origin, residential address or proprietary status, which has essentially violated human being's right, is punished by the penalty or correctional type works for the period of up to one year or imprisonment for the period of up to 2 years. The same action: a) Abusing the work authority; b) which caused the heavy results is punished by the penalty or imprisonment for the period of up to 3 years, prohibiting appointment on official position or depriving from the implementation of activities for the period of up to 3 years or without the above.

Thus, the committee of experts based on the reply from the Government of Georgia, fixes the strict recommendation to change the antidiscrimination legislation and to give relevant definitions for the direct and indirect discrimination.[68]
The 2012 ILO Report of the Committee of Experts on the Application of Conventions and Recommendations underline how it was asked again to the Government of Georgia, without obtaining an adequate answer, to provide an official definitions of what is meant for direct and indirect discrimination.[69]

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[67] The 1958 Discrimination (Employment and Occupation) Convention, (No. 111) ratified in the 1993. In its previous observation the Committee asked the Government whether the Labour Code□s prohibition of discrimination "in employment relations" (section 2(3)) covers discrimination at the stage of recruitment and selection and whether it covers direct and indirect discrimination. The Committee notes the Government□s statement that the Georgian legislation protects the population from any kind of discrimination, including "discrimination in employment and occupation processes", referring to article 14 of the Constitution, section 2(3) of the Labour Code, and non-discrimination clauses contained in a number of other laws. The Government further states that indirect discrimination is prohibited by the Georgian legislation, inter alia, referring to section 142 of the Penal Code and section 2(4) of the Labour Code which addresses the issue of harassment. The Government has not explicitly confirmed whether section 2(3) of the Labour Code is interpreted as prohibiting indirect discrimination, although it generally states that in the absence of a legal definition of indirect discrimination, it is for the courts to deal with this matter on a case-by-case basis. However, the Government has no information on any discrimination cases lodged before the court under the Labour Code. Taking into account the Government's statements that the legislation is meant to cover all forms of discrimination in employment and occupation, including discrimination in respect of recruitment and selection, as well as indirect discrimination, the Committee strongly recommends that the existing non-discrimination provisions of the Labour Code be amended: (i) to provide for a clear definition of direct and indirect discrimination; and (ii) to clarify that the prohibition of discrimination also applies to recruitment and selection, in accordance with the Convention. The Committee also asks the Government to provide information on the measures taken or envisaged to sensitise the judiciary, labour inspectors and the public regarding the prohibition of direct and indirect discrimination in employment and occupation. Please also provide copies of relevant court decisions. See, ILO, Report 2010, 446, available at https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2010-99-1A).pdf. Furthermore, ILO referred also to the Equal Remuneration Convention, 1951 (No. 100) ratified in 1993. The ILO Committee recalled also that the 2006 Labour Code contained no provision regarding equal remuneration for men and women for work of equal value and that the Committee therefore pointed to the need to introduce legislation giving effect to this principle, as set out in the Convention. In its reply to the Committee□s comments, the Government of Georgia stated that the legislation guarantees gender equality and that it protects women from any kind of discrimination, referring to article 14 of the Constitution and to section 2(3) of the Labour Code. Then, the Committee recalled that the concept of "work of equal value" is the cornerstone of the Convention and is at the heart of the fundamental right of equal remuneration for men and women for work of equal value, and the promotion of equality. The importance of the concept of work of equal value lies in its requirements that the content of the work performed is the focus when comparing remuneration received by men and women, and that the scope of comparison is not restricted to situations where men and women perform the same, identical or similar jobs, but extends to jobs that are of an entirely different nature, which are nevertheless of equal value. Furthermore, the application of the Convention□s principle is not limited to comparisons between men and women in the same establishment or enterprise, but the reach of comparison should be as wide as allowed by the level at which wage policies, systems and structures are coordinated. The Committee considered that legislation that is more restrictive in its scope than is required to give effect to the principle of equal remuneration for men and women for work of equal value is not in conformity with the Convention. Finally, the Committee notes that the absence of court cases regarding equal remuneration, as reported by the Government, may well indicate the lack of an appropriate legal basis for bringing such cases. Noting that the Action Plan on Gender Equality for 2007–09 provides for the creation of a legal framework for gender equality, the Committee urges the Government to strengthen the legislation by giving full legislative expression to the principle of equal remuneration for men and women for work of equal value, with a view to ensuring full and effective implementation of the Convention.

[68] Id, pp. 417-418.

[69] The ILO Committee had previously noted section 2(3) of the Labour Code, which prohibits discrimination "in employment relations", and asked the Government to indicate whether the provision covered direct and indirect discrimination, and discrimination at the stage of recruitment and selection. The Committee notes the Government□s statement that section 2(3) of the Labour Code, prohibits both direct and indirect discrimination. The Committee also notes that the Government again states that the Georgian legislation protects the population from any kind of discrimination, referring to article 14 of the Constitution, sections 2(3) and (4) of the Labour Code, section 142 of the Penal Code, and non-discrimination provisions contained in a number of other laws. With respect to discrimination at the stage of recruitment and selection, the Committee notes the Government□s statement that the Georgian legislation does not need to be amended since, according to the Government, the Labour Code ensures adequate protection against any kind of discrimination in labour relations including recruitment and selection processes. The Committee further notes that the Government has no information concerning cases lodged before the court under the Labour Code. Noting that the Government again states that the legislation is intended to cover both direct and indirect discrimination in employment and occupation, including discrimination in respect of recruitment and selection, the Committee asks the Government to consider taking steps to clarify the existing non-discrimination provisions of the Labour Code by including a

This lacuna has been answered by the enactment of the Law of Georgia on the Elimination of All Forms of Discrimination, number 2391-IIს of the 2 May 2014
This law provides:
"*Article 2 - Notion and prohibition of discrimination*
1. All forms of discrimination shall be prohibited in Georgia.
2. Direct discrimination is the kind of treatment or creating the conditions when one person is treated less favourably than another person in a comparable situation on any grounds specified in Article 1 of this Law or when persons in inherently unequal conditions are treated equally in the enjoyment of the rights provided for by the legislation of Georgia, unless such treatment or creating such conditions serves the statutory purpose of maintaining public order and morals, has an objective and reasonable justification, and is necessary in a democratic society, and the means of achieving that purpose are appropriate.
3. Indirect discrimination is a situation where a provision, criterion or practice, neutral in form but discriminatory in substance, puts persons having any of the characteristics specified in Article 1 of this Law at a disadvantage compared with another persons in a comparable situation, or equally treats persons who are in inherently unequal conditions, unless such situation serves the statutory purpose of maintaining public order and morals, has an objective and reasonable justification, and is necessary in a democratic society, and the means of achieving that purpose are appropriate.
4. Multiple discrimination is discrimination based on the combination of two or more characteristics.
5. Any action carried out for the purpose of forcing, encouraging, or supporting a person to discriminate against a third person within the meaning of this article shall be prohibited.
6. Under the conditions provided for in this article, discrimination shall exist regardless of whether a person actually has any of the characteristics defined in Article 1, on the basis of which the person was discriminated against.
7. Temporary special measures intended to accelerate de facto equality, especially in gender, pregnancy, and maternity issues, also, with respect to persons with limited capabilities, shall not be considered discrimination.
8. Any distinction, exclusion, or preference with respect to a particular job, activity, or sphere, based on its inherent requirements, shall not be considered discrimination.
9. Differential treatment, creation of different conditions and/or situations shall be permissible if there is an overwhelming state interest and the necessity of state intervention in the democratic society."
and
Article 3 - Scope of regulation of the Law
The requirements laid down in this Law shall apply to the actions of public institutions, organisations, and to the actions of natural and legal persons in all spheres, only if the actions are not regulated by other legal acts, which are in conformity with the provisions of Article 2(2)(3)."
Therefore, the just mentioned ILO criticism has been softened by these provisions.

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specific definition and prohibition of direct and indirect discrimination at all stages of employment and occupation, including the recruitment and selection stage, and to provide information in this regard. The Committee also asks the Government to take steps to raise the awareness of the judiciary, labour inspectors and other public officials, as well as the public in general regarding the prohibition of direct and indirect discrimination in employment and occupation, and to provide information on any relevant cases addressing discrimination. The Committee is raising other points in a request addressed directly to the Government. ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Geneve, 2012, at 512, available at https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2012-101-1A).pdf.

2.3.4. Justified Treatment - Differentiation

Not every difference in treatment causes discrimination: objective circumstances may justify unequal treatment[70] but, of course, discrimination presupposes some differences.[71] Discrimination, in other words, happens if there is no a solid ground to rationalise it.
As the legal literature clearly highlights "*[d]iscrimination is only intended (subjective), unjustified differentiation. Therefore, the right for equality prohibits not differentiated treatment in general, but the intended and unjustified differentiation*".[72]
It is does not mean that for specific jobs, there could be also subjective reasons to explain some limitation to the anti discrimination principle, "*the essence and specifications of which require employment of persons for their specific sign –characteristic or characteristic of physical person is essentially related to the nature of works to be performed*".[73]
These differences, indeed, are based on objective, legitimate, and prudent considerations allowing employment in unequal conditions.
Article 2, paragraph 5 of Georgian Labour Law states that "[t]he need to differentiate persons will not be considered as discrimination if it is a result of work nature, specification or conditions for work implementation, contributes to the achievement of legitimate aim and is the proportionate and necessary mean".
Similarly, the Law on Gender Equality, dictates that: "[i]n the process of hiring and fulfilment of job tasks it is allowed to place persons in unequal conditions based on their gender or/and giving them preference, proceeding from the nature and specification of the work or conditions for its implementation and this is the proportionate and necessary mean for its achievement."[74]
Since the European Union labour law does not justify any kind of direct discrimination[75],

[70] R. BLANPAIN, *Equality and Prohibition of Discrimination*, p. 453.
[71] Equality is not meant to be the same of "identical treatment". While in some circumstances, certain legal discrepancies in handling (or "differential treatment in a formal sense") could give life to practical inequality, in other frameworks they could be the solution to achieve the substantive equality (or "equal treatment in a substantive sense"). According to the jurisprudential formant, "the accommodation of differences … is the essence of true equality"; therefore, in some backgrounds, it could "be necessary to make distinctions." Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143, at 169 (per McIntyre J.). in the same way, the same recipe to all (or "equal treatment in a formal sense") could create substantive equality, in different settings, being not able "to take into account the underlying differences between individuals in society" could determine substantive inequality (or "differential treatment in a substantive sense"). Law v. Canada (Minister of Employment and Immigration [1999] 1 S.C.R. 497, at para. 25. The phrase "differential treatment in a substantive sense" is occasionally used as synonymous with "substantive inequality" and from time to time to define that formal identical treatments could allow diverse outcomes de facto, even substantive differential action that are not discriminatory. See also Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143, at 164, 168, 169, 171. As it has been underlined by the scholarly writing, "[i]t follows that the finding of identical treatments or of legal distinctions in treatment based on enumerated or analogous grounds is never sufficient to establish substantive equality or inequality. The real impact of the law on individuals and groups must also be considered". See, L. B. TREMBLAY, *Promoting Equality and Combating Discrimination Through Affirmative Action: The Same Challenge?*, Questioning the Canadian Substantive Equality Paradigm, 60 Am. J. Comp. L. 181, 2012, p. 185.
[72] Z. SVELIDZE, *supra* note 851, p. 233. See Case No 1/1/493, Constitutional Court of Georgia, 2010, available (in Georgian) at: <http://www. constcourt.ge>.
[73] Z. SVELIDZE, *supra* note 851, p. 233. For example the gender of person at the jobs, such as actor, fashion model, dancer; person's race for the jobs such as waitress at Chinese restaurant, political views for employees of political organization, religious confession for employees of religious organization and etc., see: R. BLANPAIN, *Equality and Prohibition of Discrimination*, pp. 462-464.
[74] It is quiet interesting that at the European Union level, it is not allowed to justify direct discrimination in contrary to the indirect discrimination. Kenner J., The European Union, in: International Labour and Employment Laws, Keller W., Darby T. (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, 1-238.
[75] N. BAMFORTH., Pro*hibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap*, "The Cambridge Yearbook of European Legal Studies", Vol. 9, 2007, 11; Blanpain R., Belgium, in:

the chance to show that an action has been taken for some work interests is not allowed.[76] In a different way, Georgian Labour Code does not embrace this legal structure and so far that article 2, paragraph 5 applies to both direct and indirect discrimination.

2.4. Categorization of Grounds of Employment Discrimination

For the application of the legal discipline on antidiscrimination, it is needed that the unequal treatment has been included in the list given by legislation.[77]
Therefore, ex Article 2, paragraph 4 are worthy of special protection the actions against *race, skin colour, language, ethnic or social belonging, nationality, origin, material status or title, place of residence, age, sex, sexual orientation, marital status, handicap, religious, social, political or other affiliation, including affiliation to trade unions, political or other opinions.*[78]
These categories will be shortly analysed in the following pages.[79]

2.4.1. Gender, Age

Gender discrimination remains a very sensitive issue in the domain of labour discrimination notwithstanding all the international and national regulation trying to face and solve the problem. In operative terms, gender discrimination is a women discrimination since their work happens to be less well paid if compared to the men's one.[80] The target of the antidiscrimination policy is, therefore, the diverse remuneration due only to the gender and not to the quality, volume and quantity of the work carried out in same working conditions.[81]
Article 6 of the Law on Gender Equality: "*[i]n employment relationships discrimination, pursuit or/and forcing of the person which is aimed at or causes violation of person's dignity or creation of humiliating, hostile or offensive environment for the person is prohibited.*" Furthermore, this Law innovate in the field equal opportunities[82] and treatment[83] and introduces the definition of extraordinary measures.[84]

International Encyclopedia for Labour Law and Industrial Relations, Blanpain R. (Editor in Chief), Vol.3, The Hague/London/Boston, "Kluwer Law International", 2001, 102.

[76] B. HEPPLE, S. FREDMAN, G. TRUTER, *Great Britain*, in: *International Encyclopedia for Labour Law and Industrial Relations*, Blanpain R. (Editor in Chief), Vol.6, The Hague/London/Boston, "Kluwer Law International", 2002, 187.

[77] R. BLANPAIN, *Equality and Prohibition of Discrimination in Employment, Comparative Labour Law and Industrial Relations*, Blanpain R. (General Editor), 2nd Revised Edition, Deventer/Antwerp/London/ Frankfurt/Boston/New York, "Kluwer Law and Taxation Publishers", 1985, 453.

[78] There is clearly overlap between some of them, for example race, skin colour, language, origin, nationality or ethnicity could easily be formed as one category.

[79] Similar method is used by professor Roger Blenpain, Ib.

[80] R. FAHLBECK and B. J. MULDER, *Sweden*, in *International Labour and Employment Laws*, W. Keller and T. Darby (Editors-in-Chief), 3rd Edition, Volume IIA (Covering through 2007), Additional Economies (EU and Other European), Chicago, "BNA Books", 2008, pp. 19-89.

[81] P. JACOBSEN, Updated by O. HASSELBALCH, *Denmark*, in *International Encyclopedia for Labour Law and Industrial Relations*, R. Blanpain (Editor in Chief), Vol.5, The Hague/London/Boston, "Kluwer Law International", 1998, p. 166.

[82] Equal Opportunities. According to Article 3 of the Law on Gender Equality the equal opportunities are defined as the system of means and conditions for achievement of equality of rights and liberties for women and men.

[83] Equal Treatment. According to Article 3 of the Law on Gender equality the equal treatment is defined as acknowledgement of equality of rights and opportunities for persons of both gender in the process of determining the education, labour and social-political conditions in the areas of family relationships and other areas of social-political life; non-acceptance of discrimination based on gender sign.

[84] The measures which aim to correct results of discrimination and directed towards the circle of persons, requiring special protection due to gender characteristics. The example of special measures envisaged by the legislation is additional vacation for

Among the gender discrimination issues should also be considered the cases against pregnant women[85], transgender[86] and, older workers[87].
This last hypothesis has already been discussed in a Georgian court where it was held that firing an employee for his pension age was a discriminatory treatment.[88]
Article 4 of the Labour Code of Georgia lists the age requirements set by the lawmaker for a minor to be allowed to legally enter into an employment contract. These rules are meant to curb the pernicious phenomenon of child labour, which has been described as "the single most important source of child exploitation and child abuse in the world today"[89].
Article 4, 1 is general in nature, whereas the ones following it list the various exceptions thereto, and it states that, as a matter of course, children may lawfully work from the age of 16.
It is, however, also possible for children aged 14 to 16 to be legally employed with the consent of the child's parents or guardians[90]; still, in these cases, in consonance with the current international consensus, the employment of a child is permitted only if it does not run counter to his interests, does not have a detrimental effect on his "moral, physical and mental development" and does not interfere with his getting the mandatory primary and basic education. A further exception is then made for minors under the age of 14, who may be employed, but only in the field of sports, arts, culture and, also, to perform in advertisements.
Notwithstanding the foregoing provisions and in keeping with art. 3 of the 1999 *Worst Forms of Child Labour Convention*, there are certain cases where the employment of minors, regardless of their age, is always prohibited; these are listed in paragraphs four and five of the article under examination. The former contains a series of activities which are presumed to conflict with a minor's "moral, physical and mental development; in particular, a child may never be employed to perform any activities associated with gambling, nightclubs, preparation, transportation and sale of erotic and pornographic products and/or pharmaceutical and toxic substances". The latter, on the other hand,

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women due to pregnancy, child birth and child care, prohibition of night work for women who recently have birth to child or are breast feeding the child, right for additional one hour break for mother breast feeding their children.

[85] J. KENNER, *The European Union, in: International Labour and Employment Laws*, W. Keller and T. Darby (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009, pp. 1-192.

[86] R. BLANPAIN, *supra* note 902, pp. 453-454.

[87] Z. SVELIDZE, *supra* note 851, p. 233.

[88] Case No AS -24-24-2012, Constitutional Court of Georgia, 2012, case is available on an official web-page of the Constitutional Court of Georgia: <http://www.constcourt.ge>.

[89] ILO, *Child labour. Targeting the intolerable. Report 86 VI (1)*, 1998. The thorny issue of child labour has been addressed also in a recent collection of essays on Georgian labour law (cf. S. CHACHAVA, V. ZAALISHVILI (Eds.), *Employment Law III*, Collection of Articles, Tbilisi, 2014, and specifically in the article *Conformity of Rules Reltated to Work of Minors to the European Standards*, authored by Nino Utiashvili, whereby it is maintained that almost one third of all minors in Georgia perform types of hard work which contradict both the policy and the standards laid down by ILO, overtly going to the detriment of the minor's interests. Such work activitites, in fact, impair children's moral, physical and mental development, preventing them from enjoying their right to education. All this is obviously strictly related to the issue of the minimum age requirement: international treaties and conventions set that the types of work which can be lawfully assigned to minors should be specifically determined by the domestic legislation. Georgian law differentiaties between three age groups: under 14-year-of-age, between 14 and 16 years of age, and between 16 and 18 years of age, and determines the permitted jobs for each group (job permission), while establishing also conditions pertaining to, among others, working time and overtime, periods of rest and breaks, night work, holidays and leaves, the right to a safe and healthy working environment. Additionally, the Labour Code lists the works which underage workers cannot perform and ensures also the protection of the latter's interests. In particular, the abovementioned article examines the importance of the procedure related to work permissions for minors and the mechanism of the subsequent supervision and control over the process, while focusing also on the role and function of special governmental body which was abolished in 2006 leading to an increase in uncontrolled child labour.

[90] The article clarifies that the consent of a child's legal guardian remains in force – and, therefore, does not need to be iterated – for "any further similar labour relations as well".

generically makes it illegal to employ children for "hard, harmful or hazardous" activities and also extends *ope legis* to pregnant and nursing mothers; to allow for the enforcement of the provision, the Government has composed a list of such activities.[91]
Also, before Georgia's restoration of independence, in the Soviet Union, the State's intention was to stop child labour and the exploitation of children; therefore, in 1922, the minimum age to be lawfully employed was set at 16, although exceptions could be granted to children aged 14 and older, provided the Labour Commissariat and the trade unions expressed their consent. In 1956, the minimum age was lowered to 15, on the condition that the local trade union committees gave their assent and, in 1974, new rules were enacted which stipulated the conditions for children aged 14 and older to work: namely, the job in question was not hazardous for their health and one of the parents, the child's educational institution and the trade union of the enterprise involved all expressed their agreement. Finally, in 1988, the threshold to be lawfully employed was set at 14 years.
Despite these rules, however,
"considerable anecdotal evidence suggests that involving children in forced labour was a widespread practice […]; such forced labour, although perhaps affecting children and young people disproportionately, was not confined solely to them, but was part of a widespread practice of compulsory participation in agricultural work, which also involved students, industrial workers and other urban dwellers"[92].
As a result, it is necessary to distinguish between what authorities officially maintained concerning child labour and what actually happened, although it is also opportune to point out that these forms of compulsory work were not entirely unregulated, because they "took place within a heavily controlled framework of education and non-market political and ideological relationships"[93].
After the fall of the USSR, the Russian Federation, which has ratified both the 1973 *Minimum Age Convention* and the 1999 *Worst Forms of Child Labour Convention*, chose not to modify the legislation concerning the restrictions on child labour; today, children may be employed, with the consent of one of the parents or guardians, from the age of 16, even though those aged 14 and older may be assigned light work, which must however be neither hazardous for their health nor disruptive to their education; furthermore, children who have not yet completed their compulsory basic education may only be employed outside of school time. However, "[w]hile the Labour Code acknowledges the existence of, and is designed to protect, working children by including them in its provisions from the age of 15, there is no corresponding legislation to protect working children less than 15 years old. Nor are these children protected from the need to work by other laws. This makes their position both ambiguous and vulnerable"[94].
With regard to agricultural occupations, children, regardless of their age, may be employed, at any time, by their parents or guardians for any activity on a farm they own or operate. Children aged 16 or older may perform at any time, including school hours, any activity, even if it has been declared hazardous by the Secretary of Labour, whereas children aged 14 to 16 may only perform, outside of school hours, those activities which have not been declared hazardous. Children aged 12 and 13 may be employed, outside of school hours, with written parental consent on a farm where at least one of the minor's parents or guardians are also employed. Finally, children under 12 years of age may be employed with written parental consent on any farms where employees are exempt from

[91] See, M. SEGHESIO, *Article 4*, in A. BORRONI (ed.), *Commentary on the Labour Code of Geoegia*, Tbilisi, 2014.
[92] S. STEPHENSON, Child Labour in the Russian Federation, University of North London, 2002, p. 1.
[93] *Id.*, p. 2.
[94] *Id.*, p. 17.

Federal minimum wage provisions[95].
However, when nonagricultural occupations are concerned, stricter standards are applied instead. The general minimum legal working age for nonagricultural occupations which have not been declared hazardous by the Secretary of Labour is 16; the age required to perform hazardous tasks is 18. Nonetheless, children aged 14 to 16 may be employed outside of school hours, but only for those specific tasks and time periods which have been deemed by the Secretary of Labour not to interfere with their schooling and their welfare; occupations not explicitly allowed are forbidden. The statute, however, does not apply to child actors or performers; to children aged 16 and older employed by their parents, provided their occupation is not among those described as hazardous by the Secretary of Labour; to children younger than 16 years of age employed by their parents "in occupations other than manufacturing or mining, or occupations declared hazardous" and to children delivering newspapers to consumers[96].

2.4.2. Race, Colour, Ethnicity, Nationality, Origin, Language

Discrimination based on ethnicity is forbidden by the Georgian legislation.[97] It means that a different treatment deriving form any featuring sign of a worker (race, colour, etc.) is not allowed and so prohibited. From a probatory point of view, it is complex to identify which is the ground according to which the discrimination is conducted since race, skin, nationality, language and so on are generally interconnected. The risk is even higher if one observes that of the very notions under analysis are not clearly defined and even if they are, they are still too vague and wide.
As the literature points out, for instance, the concept of nationality could imply the birthplace, the ancestrors, the belonging to a national group or to a group that has not political autonomy yet.[98]
In the Georgian case law, it is quoted a case in which the discriminatory ground for a dismissal based on the megrelian origin of the employee. The court decided that the dismissal was licit since not done in violation of the Article 2 of Georgian Labour Code.[99]

2.4.3. Political and other Views, Membership of Religious or other Associations

The freedom of confession, expression, and associations is not only a discrimination labour law topic but it is part of the more general human rights fields.[100]
In Georgia, there are many cases (whose relevance has already been stressed by the ILO) dealing with discrimination on trade union membership,[101] and cases of discrimination

[95] http://www.dol.gov/whd/regs/compliance/childlabor102.pdf.
[96] http://www.dol.gov/whd/regs/compliance/childlabor101.pdf.
[97] According to the legal scholarly writing "'ethnic origin' implies a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common past". Z. SHVELIDZE, supra note 851, p. 236. R. BLANPAIN, *Equality and Prohibition of Discrimination*, p. 456.
[98] P. MICKEY, *United States*, in *International Labour and Employment Laws*, W. Keller and T. Darby (Editors-in-Chief), 3rd Edition, Volume IB (Covering through 2007), Major Economies (NAFTA) and International Issues, Chicago, "BNA Books", 2009, p. 28.
[99] Case No AS – 1803 – 1779 – 2011, Constitutional Court of Georgia 2012, available (in Georgian) at: <http://www.constcourt.ge>.
[100] Connected to this kind of discrimination there is the prohibition of discrimination for the marital status of the employee, being married, divorced, not married, widowed.
[101] Case No AS-680-1010-07, Supreme Court of Georgia, 2008; case No AS-695-1025-07, Supreme Court of Georgia, 2008; case No AS-795-1010-08, Supreme Court of Georgia, 2008; case No AS-358-677-09, Supreme Court of Georgia, 2009; case No AS -343-327-2011, Supreme Court of Georgia, 2011; decisions are published and available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

for political[102] or other kind of opinion.[103]

2.4.4. Disability

The Law on Social Protection of Disabled Persons states that "*the person is disabled if due to disease, trauma, mental or physical defect his/her organism's life functions are out of order as a result of disorders in health of various degrees, which causes full or partial loss of capacity of professional work or/and causes difficulties in day-to-day living*."[104]
Since Labour law safeguards the right of disabled employees to be hired for a job reasonably within the latitude of their capabilities, it is crucial to determine if a disabled person can be employed for a certain position.[105]
The just mentioned Law on Social Protection of Disabled Persons stated that the employment contract cannot impose job conditions (remuneration, breaks, working time, vacations etc.) worse than the terms agreed with employees, and, furthermore, that "*[i]t is not allowed to refuse the disabled person for the conclusion of work agreement or promotion, dismissal under the initiative of administration or transfer to other job without consent from the disabled person, except for the cases when according to the medical-social expertise conclusion implementation of professional duties are harmful to the health or the health and work security of other is threatened*."
To be in line with the best practices and standard, the scope of the notion of disabled person should cover discrimination on the ground of health condition (disease) and on physical defect.[106]

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[102] Case 2/1107-08, Chamber of Civil Cases, Tbilisi Town Court, 2008, available only in the archive of the court. Case No AS-519-493-2011, Supreme Court of Georgia, 2011. The same dispute, repeated review at Supreme Court of Georgia - case No AS – 1803-1779-2011, Supreme Court of Georgia, 2012; decisions are published and available at the official web-page of the Supreme Court of Georgia at <http://www.supremecourt.ge/>.

[103] Case No AS-549-517-2010, Supreme Court of Georgia, 2010, case is available (in Georgian) at: <http://www.constcourt.ge>.

[104] The law has been adopted by the Parliament of Georgia on 14 June 1995 year (Divisions of the Parliament of Georgia, 27-30, 1994-1995, Article 633); initially the law was titled as "on Social Protection for Invalids". On 20 June 2001 year the amendments and additions were made to the law, according to which the word "invalid" in the title and the law text was replaced with the word "disabled person".

[105] A. GOLDMEN, *United States of America*, in *International Encyclopedia for Labour Law and Industrial Relations*, R. Blanpain (Editor in Chief), Vol.13, The Hague/London/Boston, "Kluwer Law International", 1996, p. 190.

[106] The legal literature points out two models of disability discrimination: the medical and social models. The medical model focuses on the disability and on how to deal with that disability. The social model puts emphases on society and maintains that the obstacles to participation in society of disabled people are society's responsibility and the disability of a single person has no relevance. See M. SARGEANT, *Discrimination and the Law*. According to the United Nations it 'follows decades of work by the United Nations to change attitudes and approaches to persons with disabilities. It takes to a new height the movement from viewing persons with disabilities as "objects" of charity, medical treatment and social protection towards viewing persons with decisions for their lives based on their free and informed consent as well as being active members of society'. The Convention is available at http://www.un.org/disabilities/default.asp?id=150 (last viewed October 2018). It is important to prohibit any action which gives rise to a threat of legal or actual segregation, i.e. separation of groups from one another or isolation of one group from the main group on the ground of protected characteristic. Segregation mainly represents not the prevention of a concrete person from exercising any right but exercise of this right by a segregated group of persons in isolation so that the exercise of the right is actually not restricted. Consequently, it is relevant to define segregation as one of the forms of discrimination.
As noted above, Article 12 of the Anti-discrimination Law prohibits victimization, i.e. the negative treatment of or influence on a person for submitting an application or a complaint to relevant bodies or for cooperating with them in order to protect himself/herself from discrimination. However, it should be noted that victimization is not defined as one of the forms of discrimination; therefore, "*a question arises as to whether the burden of proof standard, which is applied in discrimination cases, should be used with regard to Article 12. As Article 12 provides, protection against discrimination applies to cases when a person a) for the aim of protecting himself/herself from discrimination b) applies to a relevant body*". However, "*instruction to discrimination is a stricter form of violation of equality than the support of discrimination. The latter may not be deliberate and may result from incorrect information or established stereotypes. However, instruction to discrimination implies that a person applies his/her own power to force another, subordinate person to commit discrimination - this is the coercion to discriminate rather than the support to discriminate. Explicit definition of this notion in the law will also ensure the right of a subordinated person to defend his/her interests in case of such*

A Georgian authoritative author points out that "*Georgian Labour Code prohibits discrimination based on the current (active) disability*"[107] and that "*[i]n addition to the inclusion in discrimination grounds, the disabled persons are subject to positive discrimination in labour law*".[108]

2.4.5. Grounds that are not stipulated by the Georgian Labour Code

The catalogue of discrimination cases listed in article 2, 3 of the Labour Code of Georgia is comprehensive, not extensible analogically and according to the EU lenses it does not cover all the relvant cases so it is somehow unsatisfactory.[109] For instance, it lacks the reference to the health condition as express ground of prohibited discrimination. So, questions related to the physical appearance, including physical defect of the person, the over weight of an employee are still without an answer.[110]
Hence, this limited availability of grounds to claim a discriminative behavior from the employer's side end up narrowing the chances to activate the unequal treatment claims.[111]

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instruction and to disobey the instruction". Special Report on Combating and Preventing Discrimination and the Situation of Equality, September 2016, p. 15.
Then, the Report underlines that according to Paragraph 4 of Article 2 of the Law on the Elimination of All Forms of Discrimination, multiple discrimination is discrimination based on the combination of two or more characteristics. So, "*[t]his provision is an additional reminder that in some cases discrimination may occur on the ground of two characteristics and only one characteristic may not be sufficient to prove discrimination; for example, when an employer is against employing a woman who has a child with disability whereas is not against employing a man with such a child or a woman who does not have a disabled child. In such a case, one characteristic – sex, shall not be sufficient to prove discrimination, because the employer does not disfavour those women who do not have children with disabilities. However, the combination of sex and disability creates a group who are treated differently. Despite such an explanation, we believe that the mentioned provision is not explicit and an unprofessional person may not understand the provision in such a way as to ensure the protection of his/her right*". Id.
It is worth mentioning also that "*[i]ntersectional discrimination and segregation as forms of discrimination are totally absent from the Georgian legislation, which indicates that there is need for reflecting those in the legislation. In the discussion regarding intersectional discrimination, it is important that its relation to multiple discrimination is considered.*
[107] Z. SHVELIDZE, *supra* note 851, p. 239.
[108] Id. in the common law legal terminology, this notion is known also as "affirmative action", in the USA and as "positive discrimination" in Britain.
[109] The Georgian Constitional Court Decision of March 18, 2011 N 2/1/473 in the case Georgian citizen Bichiko Chonkadze and others against the Minister of Energy and Constitutional Court Decision of March 31, 2008 N2/1-392 in the case Georgian citizen Shota Beridze and others against Georgian Parliament affirmed that the list of catalogue should not a limited list; there is also a political will to make the changes to the Constitution effective (in particular the right to equality as set out in article 11). See the Constitutional law of Georgia "Regarding Changes to the Constitution", N1324-[illegible], Art. 3 (2017)).
[110] They are also without a specific regulation, the case of illness, physical defects, citizenship, discrimination for trade union activities, pregnancy. See, See, Z. SHVELIDZE, *Georgia*, p. 77.
[111] The data offered by the Public Defender of Georgia showed that "*[t]he highest percentage of the cases received by the Department of Equality concerned incidents of alleged discrimination on account of political or other opinions (18%); religion (17%); and national/ethnic origin (14%). The number of applications concerning alleged discrimination on account of sex (10%) was also substantial. Discrimination based on other grounds was alleged by 8% of the applicants. Furthermore, in the previous reporting period, compared to the current period, there were fewer applications concerning incidents of alleged discrimination on account of sexual orientation/gender identity (8%) and disability (7%). The majority of the cases of alleged discriminatory incidents examined by the Public Defender are about labour and pre-contractual relations. The Public Defender studied discriminatory job announcements published on various websites based on the applications as well as on his own initiative. The majority of vacancies contain sexist phrases. For example, a male is a desirable candidate for those important positions with high salary. Some employers seek an "unmarried girl with pleasant looks and aged between 18 to 25" for positions that do not require special qualifications*". Public Defender of Georgia, Special Report on the Fight Against Discrimination, Its Prevention, and the Situation of Euality, September 2017, p. 8.
"*Due to the fact that employment websites do not screen for vacancies containing discriminatory phrases, they facilitate employers to discriminate at the employment stage, on the one hand, and on the other hand, they circulate discriminatory practices. All of those criteria, except for sex, fall under subjective categories, which are impossible to define objectively. Considering all this, in reality, on the one hand employers discriminate as they expressly indicate discriminatory terms in vacancy notices; on the other hand, job websites, by disseminating vacancies containing discriminatory criteria, contribute to the reinforcement of negative stereotypes concerning gender roles of woman and man in the field of employment, as well as encouraging discrimination on account of age*". Id.

On the issue, it is extremely relevant the opinion of the Constitutional Court of Georgia, interpreting article 14 (protected area) of the Constitution of Georgia. The leading interpretative canon is that the "essence of equality" should go beyond the letter of the code.

In the theoretical thoughts of the Constitutional Court of Georgia the catalogue given by article 14 of the Constitution of Georgia, "*[a]t first glance, in terms of grammar, is comprehensive; however the objective of the norm is much wider than prohibition of discrimination according to the provided limited list*". Then, the reasoning continues sustaining that, "*[o]nly the narrow grammatical definition would exhaust the article 14 of the Constitution of Georgia and would jeopardize its importance in constitutional-legal area*".[112] And, finally, "[c]*onsidering the list provided in article 14 of the Constitution of Georgia as complete would itself cause confirmation of the fact by the court, that differentiation with any other ground is not discriminative, as it is not protected by the Constitution. It is natural that such approach would not be correct, as non-mentioning of each sign in the article 14 of the constitution does not exclude the unjustified nature of differentiation*".[113]

Even if this statements is not related to article 2, par. 3 of the Labour Code and it regards the constitutional law domain, it is possible to conclude that "[f]or the complete realization of any right and effective defense in the court the definition of contents and validity scale of the norm has the substantial importance".[114]

According the Constitutional Court to settle a case it is necessary to consider both the fact-finding and their inclusion in the scope (content) of the legal provision.[115]

So, if the actual elements of fact provided by the claimant do not match the content of the Article 2, par. 3 of the labour Code, the judges cannot decide for the discriminated employee.

Hence, the claimants for health condition or/and physical appearance (physical defect), at large, discriminatory conducts, can apply only on the general claim of posed by the legislation with little chance to have their despoiled right restored.[116]

De iure condendo, this shortcoming could be diminished just amending the code inserting after the already mentioned register of anti-discriminative cases the words: "and for other grounds". In that way, a higher degree of responsibility is given to the courts and the list becomes exemplificative and apt to be updated with the social changes occurring nowadays.[117]

This kind of an approach is followed ty the European Convention of Human Rights. Article 14 of this Convention states that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The open-ended formula 'or other status' open the door for the tribunals to protect other characteristics which may arise in the future, allowing the court the necessary flexibility to

[112] Case No 2/1-392, Constitutional Court of Georgia, 2008, available (in Georgian) at: <http://www.constcourt.ge>.
[113] Case No 1/1-493, Constitutional Court of Georgia, 2010, available (in Georgian) at: <http://www.constcourt.ge>.
[114] Z. SHVELIDZE, supra note 851, 241. Case No 1/1-477, Constitutional Court of Georgia, 2011, available (in Georgian) at: <http://www.constcourt.ge>.
[115] Case No-AS -700-920-08, Supreme Court of Georgia, 2009 available (in Georgian) at: <http://www. supremecourt.ge/>.
[116] F. BERNNAN, *The Race Directive Recycling Racial Inequality*, "The Cambridge Yearbook of European Legal Studies", Vol. 5, 2004, p. 321.
[117] Public defender of Georgia, *Women's Rights and Gender's Equality, The Role of the Media in Achieving Gender Equality*, Tbilisi, 2016.

elaborate the rules to reflect newer societal developments.[118]

2.5. Scope of Application of Prohibition of Employment Discrimination
2.5.1. Pre-contractual Relations

In the original version of Article, article 2, par. 3 Labour Code of Georgia limited its operativity to the "employment relationships"; in so doing, the norm covered only employment relationships concluded with a labour agreement and/or effectively started.
The missing reference to the pre-contractual stage of the relations raised the already mentioned concerned by the ILO.
The last amendments of the first phrase of the Article 2, in comment place a valuable remedy to this gap[119]. In fact, now par 3 of Article 2 of the Labour Code reads as follow:
Labour and pre-contractual relations, including at the vacancy[120] announcement and the

[118] Another key point worthy to be mentioned is the need for a well functioning enforcement mechanism and the desirability of having an effective and well-funded national equality body.

[119] According to a survey, there are several cases of gender discrimination during both the application process and in the workplace, namely calls frequently include declarations that only male (or female) applicants are eligible for the post. Announcements, in some cases, indicate age or physical appearance of women (for example: "good" or "pleasant" looking") as specific hiring criteria. Moreover, "it is impossible to evaluate or measure its effectiveness. Nowadays, the country has no vision on how to ensure women's involvement on the labour market or how to establish equal working conditions from a labour accessibility standpoint. The existing situation on the labour market requires immediate and comprehensive actions from the government. Despite providing general regulations at the employment level, women's accessibility to labour as a means to eliminate discrimination is still limited. Even at the preliminary stage, starting from the job announcement, women face discrimination, reflected in the contents of unequally formulated announcement in terms of gender". L. JALAGANIA and T. NADAREISHVILI, *Gender Discrimination in Labor Relations*, p. 14.
Some announcements calls for "stable", "pleasant looking", "unmarried" women to apply. For example, the job announcement should not be formulated in a way based on a man's special skills to carry out specific work "better than women", based on which the job advertisement only addresses male candidates. During the interview process, questions about a woman's marital status, her plans about having kids or pregnancy put them in unequal conditions compared to men and can serve as a basis for discrimination. Id. Then, "[u]ntil today, no research has been carried out in Georgia that takes a look at the job announcements and analyzes their gender sensitivity. For this very purpose, a special section was elaborated within this research which identifies gender-related terms in job announcements published on the web pages jobs.ge and hr.gov.ge. The research covered the period from 2010 to October 2014. During this period, the web page jobs.ge published 71 360 and hr.gov.ge – 14 376 job announcements. 10.01% of the announcement used terms related to the female gender and 24.02% referred to male candidates. To be more specific, the keyword "man" was used 1 088 times on jobs.ge and 394 times on hr.gov.ge. The keyword "pleasant appearance" was found in 1 589 announcements (2.235) and the word "stable" in 780 announcements." Id., at 15. Then "*[the] law does not provide any general requirements regulating equal access to work during pre-contractual relations. This by itself limits the awareness about a candidate's rights at the stage of the job interview and hinders the protection of these rights. Monitoring gender equality is the responsibility of the Gender Equality Council of the Parliament of Georgia, however the committee is not equipped with any legal mechanism that would allow for a prompt and effective reaction to facts of discrimination*". Id. It is also relevant, that at the present time, the social networks indirectly provide easy, cheap, and accessible ways to obtain information about a person (see, for instance, the data available on Facebook). Legal and ethical concern on this way of catching information during the precontractual stage to base a potential employment is critical and should be regulated somehow, and especially basing any decision of employing a particular candidate on such information.

[120] See, the following practical example taken from According to the interpretation of T. KERESELIDZE, *Analysis of Georgian Labour*, p. 15,
#1.A Company advertises a vacancy for IT manager. The section of requirements provides that male candidates with high education will prevail.
2: A Company advertises a vacancy for Secretary. The section of requirements provide that female candidates with high education will prevail.
3: A security service advertises a vacancy for lawyer. The advertisement provide that candidates with mandatory military service will prevail.
The first and the second examples contain threat of direct discrimination, while the third case may raise concerns on indirect discrimination as under the Georgian legislation only men are subjected to mandatory military service.

selection stages[121], shall prohibit any type of discrimination due to race, skin colour, language, ethnicity or social status, nationality, origin, material status or position, place of residence, age, sex, sexual orientation, marital status, handicap, religious, public, political or other affiliation, including affiliation to trade unions, political or other opinions" (emphases of the author). [122]

Trying to sketch a taxonomy, the balance between the interest of an employer to receive information and the one of the candidates to shield their privacy is guided by two conditions: 1) information should be relevant for assessment the ability of the candidate to accomplish the job performance and 2) an employer has no right to acquire information on such circumstances, which are not crucial and have no connection with the peculiarities of the workplace, if it regards the private sphere of a person.[123]

The literature distinguishes the questions to receive information in (i) admissible, (ii) mainly inadmissible, and (iii) inadmissible questions.

Thus, the "admissible" questions do not interfere with the private life of a candidate and are necessary to reach decisions on the employment (meaning questions on education, professional skills and work experience are admissible).

Then, "mainly inadmissible" questions could be seen through the telescope of the direct discrimination lenses, since they are related to the essence, specifications and the performing conditions of the concrete work. These kind of questions could have discriminatory relevance, but may be legitimate in concrete if they are necessary to ascertain the attitude of the candidate (criminal transport record or tendency towards

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[121] Prof. Chachava dedicated some clear pages on the issue. She acknowledges that "[i]n case of a dispute between a candidate and an employer over the fact of discrimination, it is rather difficult to establish the fact of discrimination due to absence of vacancy requirements". Thus, it could be advisable to determine in advance the information to be included in a vacancy announcement; she said: " *... an employer shall include name of the vacant position, essence, location, starting date and requirements to be fulfilled by a candidate in the announcement. The employer shall also indicate a place and term for admitting applications*".

Also the permissible questions should be determined; for instance, "Questions about health and pregnancy shall be allowed only if pregnant women or people with certain illness are prohibited from performing the work". "Questions about prior conviction or criminal prosecution shall be allowed if they are incompatible with work to be performed".

Then, "An employer shall be authorized to establish verification of compatibility of candidate's health with the work to be performed as a requirement for concluding a labour agreement, and to choose a medical facility in agreement with the candidate. In such cases, an employer should only be informed about whether health of a candidate corresponds to the work to be performed. When determining compatibility of candidate's factual qualification with the work to be performed, only the circumstances that are objectively necessary shall be examined and examination shall be carried out without violating candidate's dignity". See, S. CHACHAVA, *Georgian Labour Law gap analyses and recommendations*, Tbilisi, 2011, pp. 7 ss. See, also T. KERESELIDZE, *Legal Outcomes of Discriminatory Question Asked by an Employer to a Candidate Prior to Conclusion of a Labor Contract, Labor Law*, compilation of articles, 2011, p. 226, as well as N. STURUA, *Damage Compensation for Violating Pre-Contractual obligations in Labor Law*, 2011, p. 255.

[122] The last amendments to the Labour Code, affecting the precontractual stage, are extremely relevant.

Paragrapgh 7 shall be added after Section 6 of 2nd article:

7. It is prohibited to terminate the employment contract and/or any other negative treatment of the employee and influence on him/her because he/she has filed an application or complaint before the relevant body in order to be protected from discrimination or cooperated with it.

Article 5, par. 1 shall be read as follows:

1. An employer may obtain information about a candidate, except the information that is not related to the performance of the work and is not required to evaluate candidate's ability to perform a particular work and to make the appropriate decision. In addition, the employer has no right to request from the candidate the information relating to his religion or belief, handicap, sexual orientation, ethnicity, pregnancy, except when there is a need for the distinction defined by paragraph 5 of Article 2.

Finally, par. 9 shall be added to article 5:

9. During pre-contractual relations before concluding employment contract the employer is obliged to inform the candidates about the provisions of the equal treatment defined by the legislation of Georgia, and take measures to ensure the protection of the principle of equal treatment of individuals in the workplace, including incorporation of the provisions prohibiting discrimination in internal regulations, collective agreements and other documents and ensuring their performance.

[123] R. LIPARTELIANI, *PDO Special Report on Discrimination Against Women in the Workplace*, Tbilisi 2014, pp. 42-43.

alcohol for a driver of a school bus; religious believes for a guardian in religious premises). Finally, "inadmissible" demands deal with the private life of a candidate with no connection at all with the position (see, for example, the one inquiring on pregnancy or family status).[124]

2.5.2. Process of Work Performance

Since the Discrimination regulatory norms are located in part I "General provisions" and chapter I "Introductory provisions", a systematic interpretation makes it possible to guarantee its extension in order to cover: remuneration, work conditions (including work and break times, conditions for allocation of paid vacations), issuing instructions and delegation of work assignments, promotion, transfer to other job, training-re-qualification, establishment of trade unions and membership and etc.
Georgian case law plays a fundamental role in the finding of the law action.
Many cases regard the salary.[125] In a case, the employee disputed that he was discriminated for a lower salary compared with other employees;[126] in another case, the discrimination was sustained because the employer was paying bonus to other employees for overtime, but not to him/her.[127]

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[124] The practice of the Labour Courts of the German Federation inspired this tri-partition. There, questions are divided in admissible, essentially inadmissible and inadmissible and determine if the candidate should respond or not. Admissible are the demands on professional skills, experience and qualification, and education (since the employer has the interest in the background of candidate who should respond). An essentially inadmissible question regards the private life of the candidate and go beyond the legitimate interest of an employer. Inadmissible are questions on pregnancy and family status as they could affect the equal treatment based on gender. See, T. KERESELIDZE, *Analysis of Georgian Labour*, p. 16. See, in other terms, S. J. KENNEY, *Pregnancy Discrimination: Toward Substantive Equality*, 10 Wis. Women's L.J. 351, 1995.

[125] Women in Georgia earn only 60% of the amount that men earn for similar work (World Bank, World Development Report, 2012: Gender Equality and Development (2011), p. 17). According to some opinions, some facts of inequality in payment are the result of horizontal and vertical segregation (Elisabeth Duban, Gender Assessment USAID/Georgia (2010), p. 26) and that legislative gaps only worsen the problem. For instance, Georgian regulations do not clearly protect the equal pay for equal work principle, which "hinders the elimination of discrimination in payment by gender." (ILO CEACR, observation: convention on equal renumeration, 1951 (#100), Georgia, 2011). Furthermore, "even in the fields where women are the majority, their monthly remuneration is lower than men's salary." See, *passim* , A. Borroni, Investire in Georgia, 2017. An USAID Report, further collected data from the National Statistics Office of Georgia. According to this survey, "*the average salary of employees in the second quarter of 2014 was GEL 864,4. This was GEL 1 051,4 in the second quarter for men and GEL 640,2 for women. The average man's salary rate is GEL 411,2 higher or 1.64 times more than women's average salary rate. It is important to note that in the fields where the number of women exceeds that of men's salary is significantly higher. For example, about 70% of employees in the educational field are women and their average salary is GEL 381,9; men in the same sector earn GEL 484,1. Similarly, about 60% of hotel and restaurant staff are women and are paid GEL 416 on average; men – GEL 635,2. This data shows that unequal pay on the basis of gender on the Georgian labor market is a serious problem and that the skills and competence of women is undervalued. For example, a female cashier's salary is lower than that of her male coworkers*". L. JALAGANIA and T. NADAREISHVILI, *Gender Discrimination*, 2014.
The job market sees three kinds of differences between salaries: (i) the "collapsed bottom" – has to do with the situation when inequality increases at the expense of deterioration of the lowest salaries; (ii) – "flying top" – represents opposite to the first, when the highest salaries grow faster than the low level salaries;(iii) when both changes happen simultaneously, which causes "polarization" of salaries. The most of the Georgian female workers are affected by all of these models. Indeed, due to the horizontal professional segregation they are mainly represented in the low paying jobs and, thus, they feel the impact of the "collapsed bottom". Because of the vertical segregation, women rarely have high salaries and compensations, as very few of them achieve high career positions in private as well as public sectors. See, R. LIPARTELIANI, *PDO Special Report*. But, according to the data of Global Gender Gap Index, the index of equal pay for equal work Georgia ranks 14th among 136 Countries. In Georgia, "despite the fact that more women are employed, their average salary differs from the average index of men's income, which is preconditioned by women being employed in the low income jobs and the existence of 'glass ceiling'". Id.

[126] Case No-AS -1112-1376-09, Supreme Court of Georgia, 2010. In the above dispute cassator was relating the existence of discrimination with the fact that his/her salary was lower compared with other employees. On the above the court defined that agreement on salary/wage based on the labour agreement does not mean that there is discrimination in place. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

[127] Case No-AS -519-493-2011, Supreme Court of Georgia, 2011. According to the statement of the employee the other employees were given bonus for overtime; however he/she was not given such bonus. Despite the fact that the claimant was working

In a different case, the employer's conduct was challenged on the discrimination ground for a transfer to lower position[128]; then, in another case, it was disputed the fact that the employer gave the employee 24-day vacation unlike the other employee;[129] again, discrimination was called upon to contest non-payment of compensation for unused leave, unlike the treatment of other persons.[130]
In a peculiar case, the claimant went for the discrimination claim since she was the only one, out of 134 employees, whose monthly contract was not renewed.[131] Similarly, discrimination was stood since the claimant was the only employee whose contract was suspended.[132]
In another interesting case, the employer was sued for discrimination since he concluded for some cases 5-year contract term employment agreement and 1-year contract with the remaining employees.[133]
Finally, a claimant maintained the presence of discrimination since the employer resort to the Labour Code to terminate some contracts while in the others, even if in similar conditions, the employers used the Law on Public Service for the same purpose.[134]

2.5.3. Dismissal from the Work

As the Georgian labour law scholars have already underlined, "[t]he principle of non-discrimination applies to the termination of employment relationships with the employer's initiative."[135]
According to the Labour Code of Georgia, the discriminative termination of labour relationships can be observed when the agreement expires or during the process contract termination.

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overtime from 9 o'clock in the morning until 9-10 o'clock in the evening including weekends, he was not paid any overtime bonus. Case is available (in Georgian) at the official webpage of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

[128] Case No-AS -1803-1779-2011, Supreme Court of Georgia, 2012. According to the claimant's view his/her discriminative treatment was expressed in her/his transfer to the lower position of sector assistant. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www. supremecourt.ge/>.

[129] Case No-AS -832-1047-08, Supreme Court of Georgia, 2009. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>. The court considered it confirmed that the claimant was granted the vacation for the period of 24 working days, which is in accordance with the requirements envisaged by the article 21 of Labour Code of Georgia. Thus the court did not consider the actions of the employer as discriminative considered under the Labour Code. Case is available at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

[130] Decision of the Supreme Court of Georgia dated 24 May 2010 year, on the case No-AS -326-304-2010. The claimant was declaring that the discrimination has taken place towards him/her as the employer reimbursed the disputable amount (compensation for un-used vacation) to other persons. The decision is published and available (in Georgian) at the official page of the Supreme Court of Georgia.

[131] Case No 2/1107-08, Board for Civil Cases, Tbilisi Town Court, 2008. Decision is available only at the court archive.

[132] Case No-AS -401-374-2010, Supreme Court of Georgia, 2010. The court decided that termination of labour agreements by the enterprise with the employees was caused by the difficult financial situation. The labour agreements were terminated with other employees too. Therefore the statement if the claimant that he/she was under the unequal conditions compared with other employees and there was discrimination in place was not confirmed by the case materials. Case is available at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

[133] Case No-AS -138-113-2010, Supreme Court of Georgia, 2010. In the discussed case the Supreme Court deemed it indisputably confirmed that the labour agreement between the parties was concluded with indefinite term. Therefore, the fact of discrimination was not confirmed. Case is available at the official webpage of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

[134] Case No-AS -702-657-2010, Supreme Court of Georgia, 2011. The claimant stated that he/she was in identical situation with the other employed person, towards who (the other employee) the different decision was made based on law on "Public services". According to the claimant the employer made different decision about the persons in the same situations and in case of claimant the employer used the norms envisaged under the Labour Code for the agreement termination; the above was the discrimination. Case is available at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

[135] Z. SHVELIDZE, *supra* note 851, p. 245.

2.5.3.1. Termination of Employment Relationships based on the Expiration of Agreement Term

The case at the heading is a tricky one since it should be governed by the economic freedom of the employer and by the party autonomy principle. In other words, the employer is free to continue or not a contract expired and the employer is not obliged to justify the decision not to continue the agreement term.[136]
The line of court precedents confirms that since the continuation of a contractual (even a labour) relationships relies on the will of parties, the employer is free not renew the contract.[137] Thus, a dismissal from the contract for the expiration of the term is not *per se* a discrimination.[138]
Indeed, the burden of proof is not in line with the European standard. The labour contract is governed by the Georgian Civil Procedure Code and the general principle that claimants have to prove the facts for their assertions. Therefore, it is for the potentially discriminated employee to prove the discrimination suffered. *A contrariis*, the EU changed the burden-of-proof rule in 1997 with the Council Directive 97/80/EC; here, in cases of gender-based discrimination 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.
As Shvelidze points out: *"[c]onsidering the existing legislation and practice in respect of burden of proof, Georgian case law probably is the unique example, where even not a single case can be quoted admitting the breach of equal treatment principle. In all employment discrimination cases, as usually judges rule that plaintiff failed to prove the existence of discrimination*".[139]
The same author provide a translation of an exceptional case (2011 June Supreme Court Judgment of Supreme Court of Georgia) where it is concluded, "*in cases related to dismissal, it is necessary to investigate whether or not the reason of termination was discrimination based on one of the grounds indicated in Article 2, in addition, the employer bears the burden of proof. Namely, where the employee argues that termination of employment relationship was a discriminative action, the employer shall prove legitimacy of his will on dismissal and existence of nondiscriminatory grounds for termination. Otherwise, the person's dismissal shall be deemed illegal*."
This Supreme Court's interpretation could serve as vehicle to promote an alike uniform approach pertaining to burden of proof in discrimination disputes.[140]

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[136] In this case the decisive factor is the issue of burden of proof in disputes on discrimination. If in absence of discriminative treatment the burden of proof is on the side of the employer, it is possible to apply nondiscrimination principle over the cases of employment relationship termination based on the expiration of agreement term.
[137] Case No 2/1107-08, Board for Civil Cases, Tbilisi Town Court, 2008. Decision is available (in Georgian) only at the court archive.
[138] Case No-AS -250-235-2010, Supreme Court of Georgia, 2010. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.
[139] As Z. SHVELIDZE, *Transition from Soviet to Liberal Labour Law: Labour Standards in Georgia*, Tbilisi 2012, p. 11.
[140] See, Supreme Court Ruling №As-1493-1413-2017, January 26, 2018. The Court rejected plaintiff's pleading who referred to discriminatory treatment, without producing the due evidence. According to the Chamber of Appeals, section 1 of article 102 of Civil Procedure Code of Georgia: [e]*ach party shall prove the circumstances upon which it bases its claim or response,* As the burden of proof of discrimination was on the party that argued the existence of discrimination; therefore, the fact of discrimination must be reliably proved by the claimant, who failed to prove wrongfulness of employer's declared intent and, consequently, also failed to meet the burden of proof of the existence of the discrimination. See, Supreme Court Ruling №As-344-322-2017, October 11, 2017 who decided a case of assumed unequal treatment relating to a fine. While analyzing the issue of discrimination, the

Cassation Chamber also applied Article 14 of the Constitution of Georgia, which constitutes the main provision that all persons are free from birth and are equal to the law, as to the distinctive characteristics listed in the norm, are not exhaustive and in controversy based on the aforementioned reservation, there is a need for broad definition, i.e. on the grounds of any characteristics including one not envisaged in the norm, different treatment of the person may be subject to examination within the anti-discrimination legislation. In its reasoning, the Supreme Court relied on the practice of the ECHR on following cases: „Savez crkava "Riječ života" and others v. Croatia", Willis v. the United Kingdom, #36042/97, Konstantin Markin v. Russia, #30078/06, Petrovic v. Austria, #20458/92, D.H. and others v. the Czech Republic, #13378/05, The Supreme court also applies judicial law of the Constitutional Court of Georgia. The constitutional jurisdiction of Georgia recognises the "strict assessment" and "rational differentiation tests", first of which is used to research the fact of discrimination on so-called "classical" grounds (directly prescribed by law) and the other - in all other cases (Decision #1/1/493 of the Constitutional Court of Georgia, December 27, 2010). In order to analyze the burden of proof regarding discrimination, the Cassation Chamber is guided by the provisions of the section 7^3 of Civil Procedure Code, in particular: according to article 363^3, *When filing a claim, a person shall present to the court those facts and evidence that provide grounds to assume that a discriminating action has been committed. After this, the burden of proof that that he/she has not committed the discriminative action shall be imposed on the defendant.* This provision establishes that the one affirms a fact has to provide the relevant evidence, so, the basis for the assumed unequal treatment. The Court stated that the defendant has to: A) justify different treatment with objective and reasonable arguments which overweight different treatment and are justified by democratic values; B) prove the absence of different treatment. On the burden of proof, the Court takes inspiration from European Court of Human Rights, according to which the applicant has to show the existence of different treatment; the respondent, on the other side, has to to prove that it was justified (Chassagnou and Others v. France [GC], #25088/94, #28331/95). In this case, since there was a *prima facie* evidence, that circumstance is capable of transferring the burden of proof to the respondent (Nachova and Others). In conclusion, in the rationale of the Supreme Court, it emerges that there are no procedural barriers in the acceptance of evidence or the predefined formula for its evaluation. Furthermore, the Court concluded that its judgment muse be grounded on the evaluation of all evidence, including element deriving from the facts and reasoning brought by the parties. Then, the Court also acknowledged that it is not strictly obliged to apply "affirmanti incumbit probatio" principle (Aktas v. Turkey no.24351/94, § 272, ECHR 2003 V). In some cases, when the fact pattern is largely incorrect, and one of the parties is in the most suited position to provide the evidence, the burden of proof may be shifted on that party (Salman v. Turkey [GC], no. 21986/93, § 100, ECHR 2000-VII; Anguelova v. Bulgaria, no. 38361/97, § 111, ECHR 2002-IV). The Court decide the case disposing that the applicant has to prove the very existence of the different treatments; then the employer should show the justification for this treatment.

On the merit, the court stated that a conduct to paramount to a discrimination could also meet not only the standard envisaged by the Georgian legislation but it could also violate the international standards or be in contrast with the universal principle of equality.

See, Supreme Court Ruling №As-1122-1042-2017, November 24, 2017. The Supreme Court, dealing with a claim for discriminative dismissal, dealt again with the burden of proof in discrimination cases. The Court of Appeals also discussed the failure to prove discrimination against the claimant and referred to Article 363^3 of the Civil Procedure Code of Georgia, according which *when filing a claim, a person shall present to the court those facts and evidence that provide grounds to assume that a discriminating action has been committed. After this, the burden of proof that that he/she has not committed the discriminative action shall be imposed on the defendant.* The same rule is established in Article 8 §2 of the Law of Georgia on Elimination of All Forms of Discrimination: A person shall submit the facts and relevant evidence to the Public Defender of Georgia that give reason to suspect discrimination, as a result of which the alleged discriminating person shall bear burden of proving that discrimination did not occur. Thus, the law establishes that the discrimination facts must be addressed to the Court by the party (presumed victim of discrimination) in order to create a presumption of prima facie discrimination. As for the proving the alleged facts, the plaintiff must present the evidence in its availability or otherwise obtainable, and the defendant is obliged to represent the evidence beyond of obtainability of the claimant. Furthermore, the discrimination is not a category that the court must examine ex officio on its own initiative. Instead, the claimant is obliged to present facts showing the dismissal or discriminatory behavior was based on a given discriminatory grounds. According to the Constitutional Court of Georgia, the claimant should not only point out the circle of comparator persons, but also the substantial equality between the persons concerned. The determination of the comparator and the reasoning of the comparator's appropriateness is the subject of the claimant's proof. Furthermore, the Court considers that there may be different treatment in labor relations, but this may be caused by job specifics, skills of an employee, qualification, quality of work done and etc. Consequently, the employee should indicate the facts of unequal treatment to him/her (in comparison with whom) and why such treatment was discriminatory to him (protected characteristics).

The Supreme Court Ruling №As-589-564-2016, November 16, 2016 dealt with a dismissal of a math teacher for the expiration term of his contract. The Court of Cassation is very careful and prudent when discussing the employer's decision on personnel/staff policy; thus, the Court emphasised the qualitative equality of the claimant with other candidates: "It is noteworthy that in case of satisfying the competition terms the plaintiff could take part in the announced competition. Considering this, the legal conclusion that the claimant faced discriminatory treatment is not reasonable." The fact that the plaintiff was a member of the political party and made statements on various issues, does not give court the basis for concluding the existance of a discriminatory treatment towards him. Considering aforementioned, the Supreme Court stated that give the circumstances, it has not been proven, lacking the presumed discriminatory element, the new labour contract would be signed with the claimant.

Recently, the Supreme Court Ruling №As-864-831-2016, July 3, 2017 explained, that filing a claim, a person shall present to the court those facts and evidence that provide grounds to assume that a discriminating action has been committed. Once this is

In a more recent article, Shvelidze said that: "*[u]nder the 2013 Amendment, the burden of proof is shifted to the employer to show that there has been no breach of the principle of equal treatment; if the employee provides a prima-facie case that the employer has violated anti-discrimination norms, and then the burden of proof is imposed on the employer to prove that no such discrimination took place*".[141]
The Author recalling the Article 40, bis, 3 of the Labour Code the burden of proof for the claim filed in the case provided for anti-union or discriminatory dismissal on any grounds shall rest with an employer if the employee alleges the circumstances providing a reasonable cause to believe that the employer acted in breach of the requirement(s) of the principle of prohibition of discrimination.[142]

2.5.3.2. Termination of Employment Relationships Based on the Contract Termination

The employer's termination of the labour relation is a common place for discriminatory practices.
The Supreme Court of Georgia, as a basic principle, affirms that the termination of employment agreement, as an expression of employer's will, should not contradict the core values of the Constitution of Georgia, including nondiscrimination principle envisaged by the Labour Code of Georgia.[143]
The courts in Georgia[144] are overwhelmed with dismissed employee claims contesting the termination of their employment agreement; especially for unmotivated dismissal, this is seen as a form of inequality conduct by the employer.[145]
Courts, in any case, hold that, even if unmotivated, the termination in itself is not an epiphany of discrimination.[146] But, on the other side, the courts recognised that the

done, the burden of proof that a discriminative action has not been committed lies on the defendant. Hence, if the claimant provides the basis for the assumption of unequal treatment towards a person, the defendant must justify the different treatment with objective and reasonable considerations, which overweight different the said treatment. See, also, reproducing the same legal reasoning, the Supreme Court Ruling №As-941-891-2015, January 29, 2016, the Supreme Court Ruling №As-940-890-2015, February 22, 2016.

[141] Z. SHVELIDZE, T*he Degree of Europeanization of Labor Regulations in the South Caucasus Region: A Comparative Study of Labor Standards in Armenia, Azerbaijan and Georgia*, South Caucasus Law Journal, 2014, p. 374. For a comparative overview, see, S. ENGELS, *Problems of the Proof in Employment Discrimination: The Need for a Clearer Definition of Standards in the United States and the United Kingdom*, 15 Comp. Lab. L. 340, 1994.

[142] See, Z. SHVELIDZE, *Georgia*, p. 78. This is true also in case of a precontractual antidiscriminatory claim. This is due thanks to article 363, 3 of the Code of Civil Procedure, according to which "when discrimination related claim is filed, the claimant shall submit before the court facts and relevant evidence that gives possibility to establish a reasonable doubt that there was discrimination and after that the respondend shall prove that there was no discrimination". This rule applies to all the discrimination cases, so also in hypothesis of a candidates who presumes not to be hired for discriminatory reasons. Id.

[143] Case No-AS -343-327-2011, Supreme Court of Georgia, 2011. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

[144] The court practice established following the enforcement of new Labour Code in 2006 is meant.

[145] Case No-AS -265-250-10, Supreme Court of Georgia, 2010; case No- AS- 596-562-2011, Supreme Court of Georgia, 2011; case No – AS – 890-933-2011, Supreme Court of Georgia, 2011; case No – AS – 12651285-2011, Supreme Court of Georgia, 2011; case No – AS – 1597-1593-2011, Supreme Court of Georgia, 2012; case No – AS- 1605-1599-2011, Supreme Court of Georgia, 2012. Cases are available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.

[146] Case No-AS -265-250-10, Supreme Court of Georgia, 2010. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>. The fact that order on dismissal was not properly grounded, or that employment relations were terminated with only one of 14 persons at similar positions, shall not be sufficient to make conclusion that the contract was terminated for discriminative reasons. (Decision of the Department of Civil Cases of Supreme Court of Georgia of 18 October 2012, Verdict, № AS-952-895-2012); so, in examining contract termination, it is necessary to establish, whether dismissal reason was discriminative or not. (Decision of the Department of Civil Cases of Supreme Court of Georgia of 24 June 2012, Verdict № AS519-493-2011).

dismissed employees are not at unequal conditions compared with other employees.[147] So, the employee generally contested the termination on a discriminative ground, without highlighting the specific treatment justifying the reason.[148] Such a practice contradicts the same spirit of the discrimination law, always asking for a specific indication of which treatment discriminated a specific trait of the employee. In other words, the indication of the specific ground of discrimination is required. Only on a legal ground it is possible to ascertain if a fact pattern has amounted to a discrimination.[149]
Therefore, in a subsequent jurisprudence, the Supreme Court affirmed that, in case of person's dismissal, the judge shall consider, if this relied upon one of article 2 discriminative bases but, the burden of proof shall be borne by the employer.
In other word, in case of discriminatory dismissal, it is up to the employer to show the fairness of the dismissal grounded on non non-discriminative elements.[150]
So, it has been stated that "[a]ccording to the court's explanations, in termination of employment relations, the employee shall specify the discriminative facts of termination of employment relations and the burden of proof shall be borne by the employer, on this basis the most significant principle – the right to apply to the court – is observed. According to the court's explanations, for lawful exercising of the right, it is necessary to properly distribute the burden of proof between the parties. Such judicial practice is adopted, partly, as a result of amendments, according to Section 3, Art. 40^2 of Georgian Labour Code and in contract termination for the discriminative reasons the burden of proof is vested in the employer, if the employee specifies the circumstances providing the basis for reasonable belief that the employer's actions had discriminative basis. Such distribution of burden of proof in case of termination of employment contracts for the discriminative reasons is in correspondence with the EC directives".[151]
But, it has still to be considered that there is a deficiency on the LC that is not providing a shift of the burdent of proof on precontractul stage.
Though there is come case law referring to the so called reasonable distribution of burden of proof, it should be useful to mention it directly in the letter of the law.

3. EU Law

Non-discrimination has been part of EU law since the beginning: the 1957 Treaty of Rome, establishing the European Economic Community, prohibits discrimination connected to

[147] Case No-AS -1177-1322-08, Supreme Court of Georgia, 2009. Case No – AS – 864-1150-09, Supreme Court of Georgia, 2010. Cases are available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.
[148] Case No-AS -115-109-10, Supreme Court of Georgia, 2010; case No – AS-510-479-2010, Supreme Court of Georgia, 2010; case No – AS – 1840-1813-2011, Supreme Court of Georgia, 2012; case No- AS – 271-2622012, Supreme Court of Georgia, 2012; case No – AS – 339-324-2012, Supreme Court of Georgia, 2012. Cases are available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.
[149] Case No-AS – 864-1150-09, Supreme Court of Georgia, 2010. Case is available (in Georgian) at the official web-page of the Supreme Court of Georgia at: <http://www.supremecourt.ge/>.
[150] Decision of the Department of Civil Cases of Supreme Court of Georgia of 24 June 2012, Verdict № AS-519-493-2011. The ground for termination was a political discrimination.
[151] N. STURA, *Termination of Employment Contract*, Journal of Law, 2015, p. 194.

nationality in regard to the citizens of Member States[152] and also bans gender discrimination in pay[153].
Furthermore, the Treaty also contained provisions dealing with free movement, banning discrimination on the basis of nationality in the context of employment[154].
That said, the 1957 Treaty was, essentially, a trade agreement and, so, the original anti-discrimination provisions ought to be read in that light[155].
In *Defrenne v Sabena (No 2)*[156], one of the first cases dealing with the issue, the European Court of Justice held that

> *[i]n fact, since article 119 [of the Treaty of Rome] is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.*
> *[…] Therefore, […] the principle of equal pay contained in article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.*

The Court, however, argues that the first aim of the principle of equal pay is to avoid the risk that one enterprise that has actually implemented this principle may suffer unfair competition from another that has failed to do so. So, for the Court, this principle is mainly economically driven[157], although the judges themselves also recognise that

> *this provision forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the preamble to the treaty.*

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[152] Art. 6 of the original treaty, now contained in art. 18 of the Treaty on the Functioning of the European Union, under which, "[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."
[153] Art. 119 of the original treaty, now contained in art. 157 of the Treaty on the Functioning of the European Union, under which, "[e]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied." On this issue, see also Council Directive 75/117/EEC of 10 February 1975, now repealed by 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
[154] On which, see Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, now replaced by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.
[155] On this issue, Prof Watson writes that "[t]he Ohlin Committee, set up in 1956 to examine what the social aspects of the future EEC should be, concluded that there was only one aspect of social policy that should be regulated on a European level and that was the pay levels of the female workforce." (P. WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012, pp. 1428-1429) For a general summary of the committee's report, see *Social Aspects of European Economic Co-operation*, International Labour Review., vol. 74, 1956, pp. 99 ff.
[156] [1976] C-43/75
[157] Which, it has been held, explains why "the concepts of discrimination and inequality seen both in early secondary legislation and case law emanating from the ECJ (now the CJEU) were very formalistic, concerned principally with addressing differences in treatment connected to the, limited, protected characteristics (gender and nationality)." (K. MONAGHAN, *Equality and Non-Discrimination*, Judicial Review, vol. 16, no 4, 2011, p. 419)

> *This aim is accentuated by the insertion of article 119 into the body of a chapter devoted to social policy whose preliminary provision, article 117, marks 'the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'.*

Still, the Court, interpreted this notion strictly in another suit brought by the same plaintiff, concluding that "article 119 of the treaty cannot be interpreted as prescribing, in addition to equal pay, equality in respect of the other working conditions applicable to men and women."[158]

To correct that problem, three directives were adopted: the 1976 Equal Opportunities Directive[159], the 1978 Equal Treatment in Social Security Directive[160], and, subsequently, the 1986 Equality of Treatment in Occupational Welfare Schemes Directive[161].

And, after the adoption of the Single European Act, the Pregnancy Directive entered into force[162], which, with very few and limited exceptions, makes it illegal for an employer to dismiss a pregnant woman from the moment the pregnancy begins until the end of the maternity leave period.

Although early EU law did not offer any definition of "discrimination" and "inequality", the European Court of Justice, in its case-law, clarified that these provisions in addition to direct discrimination[163] also prohibited indirect discrimination .For instance, in *Bilka - Kaufhaus GmbH v Karin Weber von Hartz*[164], the Court held that "article 119 of the ECC treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex."

Still, since, at this time, anti-discrimination provisions were inspired by economic principles, little if any attention was paid to positive discrimination[165]. To be fair, there was

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[158] *Defrenne v Sabena* (No 3), [1978] C-149/77

[159] 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, now replaced by 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)

[160] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

[161] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, now repealed by 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)

[162] 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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

[163] See, for instance, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, [1990] C-177/88

[164] [1987] C-170/84. Along the same lines, in *John O'Flynn v Adjudication Officer*, [1996] C-237/94, the Court held that "[u]nless objectively justified and proportionate to the aim pursued, a provision of national law, even if applicable irrespective of nationality, must be regarded as indirectly discriminatory, and hence not complying with the equality of treatment prescribed by Article 7(2), if it is simply intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage."

[165] Whereas, positive discrimination measure are usually adopted when the principle of equality and non-discrimination are seen as based on the need to respect human dignity and democratic values. On which, see, for instance, G. HUSCROFT, *Discrimination, Dignity, and the Limits of Equality*, Otago Law Review, vol. 9, 2000, pp. 697 ff., and D. G. REAUME, *Discrimination and Dignity*, Louisiana Law Review, vol. 63, 2003, pp. 645 ff. For an example of this approach, it is possible to mention *Nancy Law v Minister of Human Resources Development*, [1999] 1 SCR 497, where the Supreme Court of Canada held that "[i]n general terms, the purpose of s. 15(1) [of the Canadian Charter of Rights and Freedoms] is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all

a recommendation on the promotion of positive action for women, where the Council encouraged Member States to "adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practices, while fully respecting the spheres of competence of the two sides of industry."[166]
However, it was not binding.
And, under art. 2(4) of the 1976 Directive, it was permissible to adopt "measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities".
Nonetheless, art. 2(4) was interpreted strictly by the European Court of Justice in *Eckhard Kalanke v Freie Hansestadt Bremen*[167], where it was held that

> *[t]hat provision is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life.*
> *It thus permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. Nevertheless, as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly.*[168]

In *Hellmut Marschall v Land Nordrhein-Westfalen*[169], on the other hand, a similar provision was considered compatible with EU law, because the rule in question contained a so-called "saving clause" that allowed the male candidate to indicate an alternative criterion of preference, in order to show that he was a better choice for promotion compared to his female colleague; since there was no automatism, in this case, the ECJ chose not to strike down the clause.
In 1997, the Treaty of Amsterdam was signed, authorising the European Council to legislate, in general terms, on issues related to discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[170]
Between 1997 and 2000, then, further directives were enacted with the aim of removing the remaining forms of discrimination that were still present in the workplace, so as to implement more fully the principle of equality of treatment.
Firstly, the Council enacted a directive dealing with the burden of proof in cases of gender-based discrimination[171], codifying the case law of the European Court of Justice. Under art. 4(1),

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persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration." See also *Her Majesty The Queen v John Michael Kapp et al.*, 2008 SCC 41

[166] Council recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women; on this topic, see also Council Resolution of 12 July 1982 on Community action to combat unemployment

[167] [1995] C-450/93

[168] In that judgment, the Court concluded that "[n]ational rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive. [...] The answer to the national court' s questions must therefore be that Article 2(1) and (4) of the Directive precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart."

[169] [1997] C-409/95

[170] The Treaty of Amsterdam introduced art. 13 of the EC Treaty, now art. 19 of the TFEU.

> *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.*

Secondly, the Council adopted the 1997 Part-Time Work Directive[172] and the 1999 Fixed Term Work Directive[173], aiming to remove all forms of discrimination between part-time and full-time workers and between fixed-term employees and permanent employees.
Lastly, in 1996, the Council adopted the Parental Leave Directive[174], giving "parents the right to leave for the purpose of bringing up children and in cases of force majeure relating to illness requiring the presence of a parent."[175]

3.1. Race-Based Discrimination

The first major piece of legislation dealing, in a systematic manner, with the topic of discrimination, was the 2000 Race Directive[176]. In art. 1, the Directive clarifies that its aim is to "lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment." Under art. 3(2), though, the Directive does not cover difference of treatment based on citizenship.
Within the confines of the powers vested in the European Union, the Directive not only applies to matters related to employment, but also to other issues, such as "social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing."[177] As a result, the scope of this Directive is much broader compared to the others dealing with equality of treatment and non-discrimination. This breadth of scope coupled with the vagueness of some of the expressions chosen, however, is liable to create uncertainties.
For instance, it may be difficult to determine in which cases the Directive would come into play when dealing with health care or housing, considering that these are not matters over which the European Union usually has jurisdiction.[178]

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[171] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, now replaced by 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)
[172] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC
[173] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP
[174] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, now repealed by Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC
[175] P. WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012, p. 1438
[176] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
[177] Art. 3 of the Directive.
[178] On the issue of housing, it has been written that "[i]f the matter came before the ECL it might have difficulty, on a strictly legal basis, in upholding the Directive. Two possibilities would seemingly be open to it. It could refer to housing as being simply a

But also the expression "access to and supply of goods and services which are available to the public" is problematic, owing to its ambiguousness, for if the terms "goods" and "services" are "defined in accordance with their respective definitions in free movement law, it is doubtful whether certain services such as environmental services (e.g. refuse collection) will be caught, owing to the fact that they are not normally offered for direct remuneration."[179]

On the other hand, it has been said that the Race Directive should have compelled Member States to take measures to eliminate all forms of discrimination in general public services.[180]

Another problematic aspect concerns the issue of whether the Directive also covers discrimination based on skin colour, since art. 2 only mentions race and ethnic origin; that said, interpreting the Directive in a teleological manner, the solution needs to be that skin colour is one of the protected characteristics.[181]

In consonance with previous legislation and case law, the Race Directive prohibits both direct and indirect discrimination[182], including harassment[183] and instructions to discriminate.

In this respect, the European Court of Justice has adopted a somewhat loose interpretation of what constitutes direct discrimination; for instance, in *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*[184], the ECJ held that "[t]he fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination."

However, art. 2(2)(b) contains an exception, under which a difference of treatment based on racial or ethnic origin may be permissible[185], provided that "that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary." Similarly, under art. 4, employers may treat employees differently on the basis of racial or ethnic origin, as long as "by reason of the nature of the

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manifestation of the provision of goods and services-a matter for which the Community has competence. Alternatively, it could point to Article 9 of Regulation 1612/68 as authority for housing to be a matter of (indirect) EC competence. However, Article 9 can only sensibly be explained in Article 12 EC terms, in that access to housing without discrimination facilitates the free movement of workers, for which the Community has the competence to legislate. In any event this is an issue that remains unclear." (Christopher BROWN, *The Race Directive: Towards Equality for All the Peoples of Europe?*, Yearbook of European Law, vol. 21, no 1, 2001, p. 214)

[179] C. BROWN, *The Race Directive: Towards Equality for All the Peoples of Europe?*, Yearbook of European Law, vol. 21, no 1, 2001, pp. 214-215

[180] On this topic, see P. WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012, p. 1460 and C. BROWN, *The Race Directive: Towards Equality for All the Peoples of Europe?*, Yearbook of European Law, vol. 21, no 1, 2001, pp. 214-215

[181] M. BELL, *A Patchwork of Protection: The New Anti-Discrimination Law Framework*, Modern Law Review, vol. 67, no 3, 2004, pp. 467

[182] Under art. 2(3), "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."

[183] Under art. 2(3), "[h]arassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States."

[184] [2008] C-54/07

[185] The House of Lords correctly points out a peculiar aspect of art. 4, declaring that "[t]he suggestion in Article 4 of the proposed Directives that differences of treatment where there is a genuine occupational qualification 'shall not constitute discrimination' is puzzling: in reality it would seem that they do indeed constitute discrimination, albeit they are permissible." (House of Lords Select Committee on the European Union, *9th Report, EU Proposals to Combat Discrimination*, HL Paper, § 106)

particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

This exception was invoked in *CHEZ Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia*[186]. In this case, Ms Nikolova ran a grocer's shop in Bulgaria, in a district mainly inhabited by people of Roma origin. CHEZ RB, that usually installs electricity meters at a height of 170 cm, chose to install all meters in that district at an inaccessible height, which made it impossible for Ms Nikolova to check her meter. She lodged an application with the Commission for Protection against Discrimination, which concluded that the practice in question was indeed a form of discrimination. CHEZ RB appealed against that judgment and the case was referred to the European Court of Justice for a preliminary ruling.

Here the ECJ confirmed that, when faced with a case of apparent discrimination on the basis of racial or ethnic origin, it will interpret the exception *de quo* strictly. The Court, on this issue, writes that

> *[the practice in question is] said to be designed both to prevent fraud and abuse and to protect individuals against the risks to their life and health to which such conduct gives rise, as well as to ensure the quality and security of electricity distribution in the interest of all users.*
>
> *[…]*
>
> *In circumstances such as those at issue […] the company has the task at the very least of establishing objectively, first, the actual existence and extent of that unlawful conduct […]*
>
> *In order to discharge the burden of proof borne by it in this regard, CHEZ RB cannot merely contend that such conduct and risks are 'common knowledge', as it seems to have done before the referring court.*
>
> *In the third place, if CHEZ RB is able to establish that the practice at issue objectively pursues the legitimate aims relied upon by it, it will also be necessary to establish, as Article 2(2)(b) of Directive 2000/43 requires, that that practice constitutes an appropriate and necessary means for the purpose of achieving those aims.*

Art. 5 allows Member States to adopt positive action measures and the fact that the Directive refers to "positive action" rather than "positive discrimination" is telling. The ECJ has had the opportunity to opine on the question of measures designed to prevent or compensate for historical or systemic disadvantages in the context of gender-based discrimination.

As mentioned hereinabove, in *Kalanke*, the ECJ struck down a provision that gave automatic priority to women over men, in the event that both male and female candidates were equally qualified and provided that the women were underrepresented in the specific segment of the workforce involved. In *Marschall*, however, the Court adopted a more nuanced approach, in the light of the above-mentioned "saving clause".

Since when it comes to positive action provisions the European Court of Justice has, so far, tended to proceed on a case-by-case basis, it would certainly have been preferable for the legislature to provide a clearer definition, or at least give examples, of what constitutes admissible positive action measures.

[186] [2015] C-83/14

Under art. 6, the Directive mandates that Member States may adopt more favourable provisions and that "the implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive."
In addition, under art. 7, Member States must make judicial or administrative remedies available to anyone claiming to have suffered discrimination[187]; furthermore, "[t]he right to bring proceedings extends to associations, organizations, or other legal entities that have a legitimate interest in ensuring compliance with the directives. Member States may determine which groups have a legitimate interest."[188]
Art. 8 reverses the burden of proof and is worded identically to Article 4 of the 1997 Burden of Proof Directive. As a result, the plaintiff only has to show "facts from which it may be presumed that there has been direct or indirect discrimination" for the respondent to have to "prove that there has been no breach of the principle of equal treatment".
In addition, art. 13 binds Member States to set up a body or bodies tasked with the promotion of the principle of equal treatment without race-based discrimination.
And, finally, under art. 15, Member States must include "effective, proportionate and dissuasive" sanctions to punish those who violate the provisions of the Directive.
This Directive has been criticised on various grounds.
Firstly, it has been said that, in the light of the fact that it gives a greater level of protection compared to the other directives[189], the Race Directive has been said to create a hierarchy of discrimination grounds[190].
Secondly, the Race Directive does not include discrimination on the grounds of religion or belief, covered in another directive, although "religion is often closely related to racial and ethnic origin, so it can be difficult to distinguish between the two. Racial discrimination may be closely connected with discrimination on grounds of a person's religion or ethnicity."[191]
Thirdly, this Directive has also been animadverted on for it appears to strive to achieve formal equality rather than substantive equality, for which is it necessary to take into account the historical and systemic disadvantages and inequalities suffered by a specific group. And even when the Directive tries to move in the direction of substantive equality, critics have said that it fails to go far enough because it mainly focuses on equality of opportunities rather than equality of results[192].

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[187] Even if the relationship in the context of which the alleged unequal treatment occurred has ended.
[188] P. WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012, p. 1448
[189] In fact, on the one hand, the other directives only cover issue related to employment and occupation, in addition to the supply of goods and services, as a result of the enactment of the Goods and Services Directive, whereas the Race Directive also includes other areas, such as social protection, social advantages and education. And, on the other hand, the protection against discrimination on the grounds of racial or ethnic origin is stronger than the protection afforded against other forms of discrimination, seeing as, in this Directive, a difference of treatment can only be justified on the basis of genuine and determining occupational requirements and for positive action measures. As it will be discussed further down, the Good and Services Directives and the Framework Equality Directive do not afford a comparable level of protection.
[190] See L. WADDINGTON and M. BELL, *More Equal than Others: Distinguishing European Union Equality Directives,* Common Market Law Review, vol. 38, no 3, 2001, pp. 587-611; S. FRIEDMAN, *Equality: A New Generation?*, Industrial Law Journal, vol. 30, no 2, 2001, pp. 151-2; C. BROWN, *The Race Directive: Towards Equality for All the Peoples of Europe?*, Yearbook of European Law, vol. 21, no 1, 2001, pp. 222-223
[191] E. HOWARD, *The EU race directive: time for change?*, International Journal of Discrimination and the Law, vol. 8, no 4, 2007, p. 241 The author than goes on to highlight how "limiting the protection against religious discrimination to the area of employment – as it is under the Framework Directive – while the protection against racial and ethnic discrimination covers a much wider area might create a loophole: perpetrators could claim that they discriminate against victims because of their religion rather than because of their racial of ethnic origin and so evade legal action." (*Ibid.*)
[192] E. HOWARD, *The EU race directive: time for change?*, International Journal of Discrimination and the Law, vol. 8, no 4, 2007, pp. 242-243 See also M. P. MADURO, *The European Court of Justice and Anti-Discrimination Law*, European Anti-Discrimination Law Review, vol. 2, 2005, p. 25

Finally, as pointed out by the Lords in their assessment of the Directive, "[e]ffective anti-discrimination legislation must do more than provide individual remedies for the victims of discrimination—it must actively encourage public authorities and employers to promote equality."[193]

3.2. Discrimination on the Grounds of Religion or Belief, Disability, Age or Sexual Orientation

Few months after the Race Directive, the Council enacted the Equality Framework Directive[194]. The purpose of the Directive is declared in its first article, that is to say "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation"; however, unlike the Race Directive, the Equality Framework Directive only applies to issues related to employment and occupation[195]. In this regard, it has been said that "[w]hile the material scope of the Framework Directive does not fully reflect the legislative potential proffered by Article 13 EC, it nonetheless provides a level of protection not previously available at Community level to each of the grounds of discrimination falling within its personal scope."[196]
In respect of the purview of the Directive, the European Court of Justice has clarified that the expression "access to employment, to self-employment or to occupation" in art. 3(1) must be interpreted in a way that excludes a person who only applies for a post with the intention of acquiring a formal status entitling him to then seek compensation.[197] In this case, an insurance company was looking for trainees; one of the applicants was a lawyer, who had also previously served as manager at another insurance company. When his application was rejected, he complained in writing to the company, demanding compensation for age discrimination. However, the head of human resources replied that the rejection letter had been sent by mistake and invited him to an interview, the invitation was declined and demanded, once again, that compensation be paid; after that, he would be happy to discuss his job prospects. He then sued the company and, after finding out that all the trainees that had been hired had been women, he claimed further compensation. The European Court of Justice found that the original application "was not submitted with a view to obtaining that position but only with a view to obtaining the formal

[193] HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN UNION, *9th Report, EU Proposals to Combat Discrimination*, HL Paper, § 160. The Report, then goes on to state "[w]e recognise that the inclusion in the draft Directives of provisions on monitoring and the setting of targets for employers might present serious, possibly insuperable, obstacles to securing the agreement of the Member States. However, we believe that the Directives could give greater encouragement to Member States and employers to introduce positive equality policies. Monitoring should not be seen simply as a device for assessing the effectiveness of legislation. It should be seen as a positive and proactive requirement for employers to examine their own practices and policies with a view to creating equal opportunities for all. It is crucial that employers should monitor themselves, rather than that monitoring should be imposed on businesses from outside." (*Id.*, § 161)
[194] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
[195] Under art. 3(1), "[w]ithin the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
(c) employment and working conditions, including dismissals and pay;
(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations."
[196] R. WHITTLE, *The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective*, European Law Review, vol. 27, no 3, 2002, p. 305
[197] *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, [2016] C-423/15

status of an applicant with the sole purpose of claiming compensation on the basis of Directives 2000/78 and 2006/54,"[198] concluding that such conduct could be considered a form of "abuse of right".

Neither the Directive nor art. 19 TFEU provide a definition of – or, for that matter, any guidance on – "religion or belief, disability, age or sexual orientation", which has created a problem as regards the determination of what counts as "disability", especially in the light of the fact that the Directive only applies to discrimination based on one of the grounds specifically mentioned in art. 1.[199]

In *Chacón Navas v Eurest Colectividades SA*[200], the ECJ draws a distinction between mere sickness, which is not covered by the Directive, and disability, which is. In the judgment, the Court hold that the term "disability" must be taken to mean "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."

In another decision, *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL)*[201], the Court clarified that obesity *per se* is not covered by the Directive, but may be, when it results in a limitation that meets the criteria laid out in *Chacón Navas*.

As regards the verification of the "long-term" nature of the limitation in question, the Court, in *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal*[202], has indicated that the question is primarily factual in nature. Nonetheless,

> *the evidence which makes it possible to find that such a limitation is 'long-term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered; and*
>
> *in the context of the verification of that 'long-term' nature, the referring court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data.*

Art. 2 of the Directive, in consonance with the other directives targeting discrimination, prohibits both direct and indirect discrimination, including in the definition of discrimination both harassment and instructions to discriminate.

The article in question, however, contains a so-called "justification defenses", in that an indirectly discriminatory provision, criterion or practice may be permitted , as long as it is "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[203]

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[198] *Ibid.*

[199] See *S. Coleman v Attridge Law and Steve Law*, [2008] C-303/06 and *Ministerul Justiției și Libertăților Cetățenești v Ştefan Agafiței et al.*, [2011] C-310/10, where the European Court of Justice held that discrimination on the basis of membership of a socio-professional category or place of work did not fall within the purview of European law.

[200] [2006] C-13/05. Cf. *Z. v A Government department and the Board of management of a community school*, [2014] C-363/12, in which a woman, suffering from a rare condition whereby she had healthy ovaries and was fertile, but had no uterus and, so, could not support a pregnancy, was found not disabled within the meaning of art. 1 of the Directive; in that judgment, the Court added that "[t]he validity of that directive cannot be assessed in the light of the United Nations Convention on the Rights of Persons with Disabilities, but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention." See also *HK Danmark, v Dansk almennyttigt Boligselskab*, [2013] C-335/11, and *Wolfgang Glatzel v Freistaat Bayern*, [2014] C-356/12

[201] [2014] C-354/13

[202] [2016] C-395/15

[203] Art. 2(2)(b). In respect of the application of this principle to disability, it has been cautioned that "the crucial point to ensure in this regard is that the implementation of this defense within national legislation (as well as its application by the courts) demands

Cases in which the ECJ has found direct discrimination include *Werner Mangold v Rüdiger Helm* [204], where the ECJ held that a provision allowing employers to conclude fixed-term contracts without restriction with workers over the age of 52 constituted age-based discrimination, and *Sabine Hennigs v. Eisenbahn-Bundesamt*[205], where the Court held that a collective agreement under which the determination of basic pay, within each salary group, was determined on the basis of age was directly discriminatory. The *Mangold* decision is also interesting, because the ECJ clarified that the principle of non-discrimination – in this case, on the basis of age – in employment and occupation is a general principle of EU law; adding that its observance cannot "be conditional upon the expiry of the period allowed the Member States for the transposition" of the relevant Directive into national law.[206]

Another form of direct discrimination is present where an employer "treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee."[207]

Recently, the Court has had to adjudicate on the question of the prohibition on wearing an Islamic headscarf. In *Samira Achbita v G4S Secure Solutions NV*[208], the ECJ has held that an employer may lawfully ban the visible wearing of any and all political, philosophical or religious signs in the workplace, unless it is proved that the apparently neutral prohibition

> *results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary.*[209]

Then, in a case[210] dealing with a provision of Spanish law that permitted an employer to terminate an employment contract on the grounds of intermittent absences, provided the amounted to a certain percentage of the working hours, the ECJ found that the aim of combating absenteeism at work could be regarded as legitimate. However, the Court held that it still had to determine whether "the measures implemented by the national legislation in order to achieve that aim are appropriate and do not go beyond what is necessary in order to attain that aim." And, to do so, the panel indicated that, among other elements,

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an assessment that is based purely on objective criteria. Given that disability discrimination is often the result of fear, prejudice and misconception as to the very nature of disability, it is clear that the introduction of subjective elements into this test would only reintroduce the very prejudices that the law is seeking to remove." (R. WHITTLE, *The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective*, European Law Review, vol. 27, no 3, 2002, p. 310)

[204] [2005] C-144/04

[205] [2011] C-297/10

[206] A similar, albeit more general, principle had already been laid out in *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen*, [1977] C-117/76 and C-16/77 where the Court stated that "this does not alter the fact that the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified." Cf. *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, [2008] C-427/06.

[207] *S. Coleman v Attridge Law and Steve Law*, [2008] C-303/06

[208] [2017] C-157/15

[209] In another judgment laid down on the same date, *Asma Bougnaoui v Micropole SA*, [2017] C-188/15, the Court added that "the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision."

[210] *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA,* [2018] C-270/16

the referring court had to take into account "the risks run by persons with disabilities, who generally face greater difficulties than persons without disabilities in re-entering the labour market, and have specific needs in connection with the protection their condition requires." Furthermore, with respect to disabled people, art. 5 mandates that reasonable accommodation be provided, which 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."[211]

For instance, in *HK Danmark v Dansk almennyttigt Boligselskab*[212], the plaintiff was a woman who, through a physical impairment, could only carry out her work to a limited extent; as a result, she was asking for a reduction in working hours as a form of reasonable accommodation. In this case, the Court concluded that as long as this measure, in the light of all relevant circumstances, did not constitute a disproportionate burden, it could qualify as "reasonable accommodation" within the meaning of art. 5.

In addition to the exceptions already listed, under certain circumstances, the principle of equal treatment enshrined in the Directive can be limited.

The first such limit is contained in art. 2(5), under which the Directive applies without prejudice "to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offenses, for the protection of health and for the protection of the rights and freedoms of others." This provision is not present in any of the other directives dealing with discrimination and, apparently, was included in the Equality Framework Directive during the last round of negotiations. It has been said that "[i]t was thought necessary to prevent members of harmful cults, paedophiles, and people with dangerous physical and mental illnesses from gaining protection from the Directive."[213]

Recital 18 of the Directive probably announces another reason for this provision, namely the fact that, especially when it comes to "the armed forces, the police, prison, or emergency services", Member States ought not to be compelled to recruit or maintain in employment "persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform."

Among the few cases where this provision has been invoked, it is possible to mention *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*[214], where it was examined whether a provision of German law that set a maximum age of 68 for practice as a panel dentist violated the Directive. The aims of that rule were twofold: on the one hand, it was meant to preserve the employment opportunities of young doctors and, on the other, to protect patients' health.

The Court first focused on the latter aim and wrote that

> *in the context of Article 2(5) of the Directive, a Member State may find it necessary to set an age limit for the practice of a medical profession such as that of a dentist in order to protect the health of patients. That consideration applies whether the objective of the*

[211] See also art. 2(2)(b)(i), under which "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a [...] particular disability, [...] at a particular disadvantage compared with other persons unless [...]the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice."

[212] [2013] C-335/11

[213] E. ELLIS, *EU Anti-discrimination Law*, Oxford, 2005, p. 291, quoted in Philippa WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012, p. 1466

[214] [2010] C-341/08

> *protection of health is considered from the point of view of the competence of dentists or the financial balance of the national healthcare system. […]*
> *As to setting the age limit at 68, that age may be regarded as sufficiently high to serve as the endpoint of admission to practise as a panel dentist.*

However, in the instant case, the rule had four exceptions, the fourth of which was rather wide-ranging, in that it excluded all dentists not practising under the panel system, so that it would still be possible for doctors older than 68 years of age to continue practicing. Therefore, as a result, the Court reasoned that article 2(5) of the Directive would only apply if the aim of the measure was the preservation of the financial balance of the public health system.

Moving on to the other purpose of the law, the Court added that it had been previously held

> *that the encouragement of recruitment undeniably constitutes a legitimate social policy or employment policy objective of the Member States, and that that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers. Similarly, a measure intended to promote the access of young people to the profession of dentist in the panel system may be regarded as an employment policy measure.*

In such cases, however, the measure had to meet the criteria specified under art. 6(1)[215], including the requirement that the measure in question be appropriate and necessary to achieve a legitimate social policy or employment policy objective.

In the light of the foregoing, the Court concluded that the age limit in question could also be upheld if, taking into account the situation in the relevant labour market, it appeared appropriate and necessary to achieve the aim of preserving the employment opportunities of young doctors.

In *Reinhard Prigge et al. v Deutsche Lufthansa AG*[216], the ECJ had to adjudicate the validity of a provision which curtailed the privileges of the holders of a pilot licence that were 60 years of age or older. The court upheld the measure, recognising that its purpose was the protection of the life and health of the crew, passengers, and of the people living in the areas over which aircraft flew. In the case, the judges are fairly clear that

> *[i]n adopting that provision, the EU legislature, in the area of employment and occupation, intended to prevent and arbitrate a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the necessity of ensuring public order, security and health, the prevention of criminal offenses and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. The legislature decided that, in certain cases set out in Article 2(5) of the Directive, the principles set out by that latter do not apply to measures containing differences in treatment on one of the grounds referred to in Article 1 of the Directive, on condition, however, that those measures are 'necessary' for the achievement of the abovementioned objectives.*

[215] See below.

[216] [2011] C-447/09. For a case regarding the holder of a pilot licence, not engaged in commercial air transport, see *Werner Fries v Lufthansa CityLine GmbH*, [2017] C-190/16.

> *Moreover, as Article 2(5) establishes an exception to the principle of the prohibition of discrimination, it must be interpreted strictly. The terms used in Article 2(5) also suggest such an approach.*

All in all, art. 2(5) is couched in fairly broad terms, which may lead to problematic results, if its application is not carefully policed.

In addition to this exception, under art. 3(2) the Directive, just like the Race Directive, does not apply to "differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned." This exclusion can be explained by the fact that, on the one hand, discrimination based on nationality is covered by art. 18 of the TFEU, while this Directive was enacted on the basis of art. 19 of the treaty and, on the other, it is traditionally up to national parliaments to legislate on the right of third-country nationals to enter or stay in the country.

Furthermore, under art. 3(3), the Directive does not apply to "payments of any kind made by state schemes or similar, including state social security or social protection schemes", an expression which needs to be read in conjunction with recital 13, under which it does not cover "social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment." However, in *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*[217], the ECJ has clarified that survivors' pensions are not covered by this exception and, therefore, fall within the scope of the Directive.

Moreover, under art. 3(4), Member States may decide that the provisions of the Directive dealing with age- and disability-related discrimination do not apply to the armed forces, in order to ensure their combat effectiveness.

Pursuant to art. 4(2), Member States may also maintain[218] legislation allowing "churches and other public or private organisations the ethos of which is based on religion or belief" to treat people differently based on religion or belief. However, such a difference of treatment will only be permissible "where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos", adding that such organisations therefore may "require individuals working for them to act in good faith and with loyalty to the organisation's ethos".

In *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*[219], however, the ECJ has confirmed that it must be possible for court to examine whether the criteria set out in the paragraph in question are met and that, in addition to that, the provision at hand

> *must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.*

[217] [2008] C-267/06

[218] Or even introduce new legislation, as long as it incorporates "practices existing at the date of adoption of this Directive".

[219] [2018] C-414/16

Art. 6(2) contains exceptions that may justify differences in treatment on grounds of age, allowing Member States to "provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex."

In respect to this principle, the ECJ has clarified, in *Franz Lesar v Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt*[220], that only occupational social security schemes covering the risks of old age and invalidity fall within the meaning of the provision[221], adding that

> *Directive 2000/78 does not define what is to be understood by an 'occupational social security scheme'. A definition of that concept is, however, included in Article 2(1)(f) of 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, under which occupational social security schemes are 'schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional'.*

Furthermore, the Court specified that "not all aspects of an occupational social security scheme covering such risks come within the scope of that provision, but only those that are expressly referred to therein."

In the light of the foregoing, the ECJ, in the case at hand, upheld an Austrian rule which provided that the periods of employment or apprenticeship completed, while underage, by a civil servant could not be considered "for the purpose of granting a pension entitlement and the calculation of the amount of his retirement pension", because the relevant principle aimed to ensure uniformity of age as far as admission to the scheme and entitlement to retirement benefits are concerned.

In *David L. Parris v Trinity College Dublin*[222], the provision in question was relied upon by the ECJ to uphold an Irish statute that allowed pension schemes to stipulate that a widow or widower was entitled to receive a survivor's benefit, only as long as the marriage or civil partnership was entered into before the deceased turned 60.

Finally, the last two exceptions are contained under articles 4(1) and 6(1) of the Directive.

On the one hand, under art. 4(1), a difference in treatment may be permitted, "where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining

[220] [2016] C-159/15

[221] See also *Dansk Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet*, [2013] C-546/11, where the Court concluded that the article in question "must be interpreted as being applicable only to retirement or invalidity benefits under an occupational social security scheme."

[222] [2016] C-443/15

occupational requirement, provided that the objective is legitimate and the requirement is proportionate."
And, on the other, under art. 6(1) differences in treatment on the grounds of age may not constitute discrimination, if "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."
The provision, then, enumerates some differences in treatment that may be permissible under this paragraph, though this list is not intended to be exhaustive:

> *(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;*
> *(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;*
> *(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.*

In *Félix Palacios de la Villa v Cortefiel Servicios SA*[223], the European Court of Justice found that, insofar as art. 6(1) is concerned, it may not be interpreted as meaning that "lack of precision in the national legislation at issue as regards the aim pursued automatically excludes the possibility that it may be justified under that provision", provided that the courts may still infer the underlying aim from other elements – for example, "*travaux préparatoires*, Parliamentary debates or a statement of reasons for the law"[224] – and make sure that the measures adopted to pursue it are not inappropriate or unnecessary.
Subsequently, in *The Incorporated Trustees of the National Council on Ageing v Secretary of State for Business, Enterprise and Regulatory Reform*[225], the Court confirmed that, as far as the aims listed in art. 6(1) are concerned, Member States enjoy broad discretion[226], adding, however, that such discretion did not entitle Member States to frustrate the general prohibition on gender discrimination. Therefore, in order for the aims allegedly pursued by the legislature, enacting provisions under the article in question, to be permissible, "mere generalisations" are not enough. Furthermore, the Court clarified that it is up to the Member State to establish to "a high standard of proof the legitimacy of the aim relied on as a justification."
Looking at the case law of the European Court of Justice, articles 4(1) and 6(1) sometimes overlap in terms of scope; an example of this was *Colin Wolf v Stadt Frankfurt am Main*[227], a case concerning a provision of Hessian law under which recruitment to intermediate career posts in the fire service of the *Land* was only open to people under 30 years of age. The referring Court asked the ECJ whether such provision was compatible with art. 6(1) of the Directive, but the ECJ considered the issue under art. 4(1), instead. The Court took into account that "some of the tasks of persons in the intermediate career of the fire

[223] [2007] C-411/05
[224] These are examples of such "other elements" explicitly mentioned by the ECJ in *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, [2010] C-341/08
[225] [2009] C-388/07
[226] A conclusion already reached in *Mangold*
[227] [2010] C-229/08

service, such as fighting fires or rescuing persons, require exceptionally high physical capacities and can be performed only by young officials." Therefore, imposing a maximum age for recruitment, in this case, was permissible.
Similarly, in *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias*[228], the ECJ relied on art. 4(1) to uphold legislation under which certain police officer candidates had to be under 35 years of age to apply, because the duties they were supposed to perform, once recruited, may have implied "recourse to physical force and the performance of tasks in conditions where taking action is difficult, if not extremely difficult." Since a similar limitation did not apply to police officer candidates that would be charged only with administrative tasks, then the requirement of proportionality was met.
Another case dealing with gender-based discrimination was *Seda Kücükdeveci v Swedex GmbH & Co. KG*[229], a case where the plaintiff had been employed by Swedex since she was 18 years of age; after ten years, she was dismissed. However, her notice period was calculated as if she had worked for the company for three years rather than ten, pursuant to a paragraph of the *Bürgerliches Gesetzbuch* introduced in 1926. Under it, the duration of the notice period is determined on the basis of length of employment, without taking into account "the periods prior to the completion of the employee's 25th year of age."
According to the ECJ, such a rule was discriminatory in nature; as to whether it could be permissible nonetheless under art. 6(1), in the light of the fact that it may facilitate the recruitment of young people, since, in their case, employers enjoy more flexibility in terms of personnel management. Such a derogation could also be justified by the fact that, generally, younger people face fewer hurdles when looking for a new job, who can, then, be expected to accept "a greater degree of personal or occupational mobility."
The Court, however, found that the rule is not appropriate to achieve the aims stated by the German government, because "it applies to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal" and because "[it] affects young employees unequally, in that it affects young people who enter active life early after little or no vocational training, but not those who start work later after a long period of training."
In *Kücükdeveci*, the ECJ also stated that, since the prohibition of age discrimination in employment and occupation is a general principle of EU law[230], national courts, in the exercise of their discretion, may disapply any provisions conflicting with this principle without needing to refer the case to the European Court of Justice first.
On the other hand, in *Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH.*[231], the European Court of Justice found that art. 6(1) "must be interpreted as meaning that it does not preclude a measure such as the automatic termination of employment contracts of employees who have reached retirement age, set at 65", provided that such a provision is "objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market and, second, the means of achieving that aim are appropriate and necessary."

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[228] [2016] C-258/15 Cf. this judgment with *Mario Vital Pérez v Ayuntamiento de Oviedo*, [2014] C-416/13, in which the ECJ found that "[a]rticles 2(2), 4(1) and 6(1)(c) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which sets the maximum age for recruitment of local police officers at 30 years." The different conclusions reached in these two similar cases can be justified in the light of the fact that the police forces of Autonomous Communities carry out different duties – including physically demanding tasks –, compared to local police forces.
[229] [2010] C-555/07
[230] First stated in *Mangold* and subsequently confirmed, after this judgment, in *Prigge*.
[231] [2010] C-45/09

The case dealt with a woman who worked as a cleaner in a barracks. She had reached the age at which she would entitled to a pension; however, since it would be a rather low one, she preferred to continue working rather than retiring. Her contract, though, stipulated that it would automatically be terminated as soon as she would qualify for a pension or she would reach 65 years of age, whichever came later. The German government argued that such a measure served a way of "sharing employment between the generations", because by automatically terminating the employment contract of older people who qualify for a pension, new positions open up for young workers. The Court agreed and found that, even though such a rule was discriminatory, the aims it pursued could be said to objectively and reasonably justify it. Nonetheless, to be permissible under art. 6(1), the provision in question also had to be appropriate and necessary.
In respect of these two requirements, the ECJ observed that such a rule only covers people who "are entitled to financial compensation by means of a replacement income in the form of a retirement pension." However, in certain cases, such a provision can lead to economic hardship, especially in regard to people in part-time employment, such as the plaintiff in the case at hand, for their statutory pension may be too low to meet their basic needs. Then again, under German law, it is permissible for a person who has reached retirement age to decide to keep on working and, under similar circumstances, the person in question would continue to be protected from age-related discrimination, pursuant to the terms of the Equality Framework Directive. As such, this provision does not necessarily results in an employee being compulsorily forced out of the labour market.
In the light of the foregoing and taking into account the broad discretion Member States enjoy in the area of social policy and employment, the ECJ was of the opinion that the measure in question also met the requirements of appropriateness and necessity.
This decision has been criticised, because

> *[a]lthough theoretically a person can reenter the labor market after retirement, just how easy is it to get employment after retirement age in an employment culture that provides for automatic termination of employment at a given age? What about loss of seniority and other employment rights following the rupture of an employment relationship? What about the consequences for pension entitlement? These are issues that may place a person retired compulsorily in a much less favourable position than before retirement.*[232]

Lastly, in the aforementioned case *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, the Court found that preserving the employment opportunities of young doctors justified the imposition of a maximum age of 68 years of age for practice as a panel dentist.
Under art. 7(1), Member States are authorised to maintain or adopt positive action measures and, under art. 7(2), in respect of the disabled, the principle of non-discrimination will not be interpreted in such a way as to prohibit "provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment."
Moreover, as is customary in instruments dealing with non-discrimination, art. 8 of the Directive clarifies that its provisions only dictate the minimum level of protection that Member State are bound to recognise. Member States are free to introduce more

[232] P. WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012, p. 1476.

favourable rules than the one contained in the Directive and, at any rate, under art. 8(2) the implementation of the Directive cannot justify "a reduction in the level of protection against discrimination already afforded by Member States."
In addition, under art. 9, Member states must make judicial or administrative remedies available to anyone claiming suffered discrimination; furthermore, these remedies must also made available to "associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied," if the victim consents to their support or representation.
In relation to the implementation of art. 9, the ECJ has confirmed that, in the exercise of their discretion, Member States may not adopt provisions that are "less favourable than those governing similar domestic actions (principle of equivalence)" [233] or ones that "render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness)."[234] Nonetheless, the principle of equivalence ought not to be taken to mean that Member States are required to "extend their most favourable rules to all actions, such as the case in the main proceedings, brought in the field of employment law."[235]
Art. 10 deals with the burden of proof, incorporating the same principle enshrined in the Race Directive and in the 1997 Burden of Proof Directive. Here as well, the plaintiff only has to show "facts from which it may be presumed that there has been direct or indirect discrimination" for the respondent to have to "prove that there has been no breach of the principle of equal treatment".
However, in *Galina Meister v Speech Design Carrier Systems GmbH*[236], the ECJ has clarified that this provision

> *must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.*
> *Nevertheless, it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination.*

In another case, dealing with discrimination on the grounds of sexual orientation, the European Court of Justice found that an employer may not avoid this reversal of the burden of proof by merely relying on the fact that the facts from which it may inferred that discrimination has occurred came from a person who "while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters."[237] In that case, according to the Court, the fact that the employer failed to distance himself from the discriminatory statements made by others could be taken into account by the referring court.
In respect of the evidence that must be provided to rebut the presumption of discrimination, the defendant may use any legally permissible means to demonstrate that the apparently discriminatory decision was motivated by other, legitimate reasons; for

[233] *Susanne Bulicke v Deutsche Büro Service GmbH*, [2010] C-246/09
[234] *Ibid*.
[235] *Ibid*.
[236] [2012] C-415/10.
[237] *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, [2013] C-81/12

instance, the defendant may prove that "their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation."[238] However, in order to do so, the employer cannot be expected to show that he has employed people of a given sexual orientation, because that would be liable to violate the privacy rights of his employees.
Moreover, art. 12, dealing with the dissemination of information, binds Member State to ensure that "the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory."
And, finally, under art. 17, Member States must include "effective, proportionate and dissuasive" sanctions to punish those who violate the provisions of the Directive. According to the ECJ, these sanctions "constitute an adjunct to the substantive rules prohibiting discrimination" [239], that are "intended to ensure that those substantive rules are effective."[240]
As regards the measures to adopt, the European Court of Justice has confirmed that Member States are responsible for identifying both the appropriate sanctions and the procedures through which they may be imposed, as long as the comply with the requirements of effectiveness, proportionality and dissuasiveness, adding that

> *[i]n proceedings in which an association empowered by law to that effect seeks a finding of discrimination, within the meaning of Article 2(2) of Directive 2000/78, and the imposition of a sanction, the sanctions that Article 17 of Directive 2000/78 requires to be laid down in national law must also be effective, proportionate and dissuasive, regardless of whether there is an identifiable victim.*[241]

This means that purely symbolic sanctions breach art. 17; then again, non-pecuniary sanctions are not necessarily merely symbolic in nature, especially when "accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages."[242]

3.3. Gender-Based Discrimination

In addition to the already mentioned prohibition of gender discrimination in pay, provided for in art. 119 of the Treaty of Rome and now contained in art. 157 of the Treaty on the Functioning of the European Union, currently six directives seek to combat gender discrimination, namely the 1979 Equal Treatment in Social Security Directive[243], the 1992 Pregnancy Directive[244], the 2004 Goods and Services Directive[245], the 2006 Recast

[238] *Ibid.*
[239] *Ministerul Justiției și Libertăților Cetățenești v Ştefan Agafiței et al.*, [2011] C-310/10
[240] *Ibid.*
[241] *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, [2013] C-81/12
[242] *Ibid.* In this case, the ECJ found that a national provision whereby, under certain circumstances, a court, after making a finding of discrimination, could only impose a warning by way of sanction, was incompatible with art. 17.
[243] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
[244] 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.
[245] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Directive[246], the 2010 Parental Leave Directive[247], and the 2010 Equal Treatment for the Self-Employed Directive[248]. All Directives, except the Goods and Services Directive, concern discrimination in employment and occupation.
In addition to the aforementioned directives, there is a considerable number of precedents dealing with gender-related discrimination, establishing principles that have often been subsequently transposed into legislation.

3.3.1. The Recast Directive

The Recast Directive replaces four different directives concerning equal pay[249], equal treatment and opportunities[250], and the burden of proof in cases dealing with gender discrimination[251]; the directive also "reflects and incorporates the significant body of case law interpreting and applying those directives."[252]
Pursuant to art. 1, the Directive deals with gender discrimination in employment and occupation and namely to

a. *access to employment, including promotion, and to vocational training;*
b. *working conditions, including pay;*
c. *occupational social security schemes.*

Unlike the Treaty of Rome and the 1975 Equal Pay Directive, the Recast Directive specifies the meaning of "pay". Previously, although the Treaty of Rome incorporated the principle of equal pay for equal work, neither "equal pay" nor "equal work" were explicitly defined and the specific meaning of each expression had to be found in the case law of the European Court of Justice.
In *Gabrielle Defrenne v Belgian State*[253], the European Court held that

> *[a]ccording to the first paragraph of article 119 of the EEC treaty member states are required to ensure the application of the principle that men and women should receive equal pay for equal work.*
> *The provision in the second paragraph of the article extends the concept of pay to any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.*

[246] 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).
[247] Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC
[248] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC
[249] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (now no longer in force).
[250] 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 (now no longer in force) and Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (now no longer in force).
[251] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex now no longer in force).
[252] P. WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012, p. 1450.
[253] [1971] C-80/70

In *Eileen Garland v British Rail Engineering Limited*[254], the Court reiterated the same principle. The dispute concerned a policy of the British Rail Engineering Ltd, under which male employees continued "to enjoy travel facilities for their spouses and dependent children", although such a privilege did not extend to female employees. In their judgment, the Court found that the policy was discriminatory in nature and violated art. 119 of the Treaty of Rome. And in *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*[255], the Court found that art. 119 also covered the benefits that an employer pays to an employee in connection to his compulsory redundancy

As far as the concept of 'equal work is concerned', the ECJ has clarified that it includes work of equal value[256] and even work of higher value[257]. Finally, according to the ECJ the principle in question may not "be restricted by the introduction of a requirement of contemporaneity."[258]

In line with the aforementioned case law, the Directive, on the one hand, defines pay as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer."[259] And, on the other hand, it prohibits gender discrimination in pay, by stating that "[f]or the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated."[260]

This principle, however, does prevent a Member State from enacting rules under which a pregnant worker, for the duration of the pregnancy, ceases to be entitled to special allowances provided to her colleagues to reimburse them of costs incurred in the performance of their duties, as long as "that worker received, during that period, an income in an amount at least equivalent to that of the benefit provided for under national social security legislation which she would have received in the event of a break in her activities on grounds connected with her state of health."[261]

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[254] [1982] C-12/81

[255] [1990] C-262/88. In that judgment, the Court also added that "[i]t is contrary to Article 119 of the Treaty for a man made compulsorily redundant to be entitled to claim only a deferred pension payable at the normal retirement age when a woman in the same position is entitled to an immediate retirement pension as a result of the application of an age condition that varies according to sex in the same way as is provided for by the national statutory pension scheme. The application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers." But see the limitation of the effect in time of this judgment in respect of survivors' pensions, contained in *Gerardus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf*, [1993] C-109/91.
Limitation of the effect in time of the judgment in Case C-262/88 Barber.

[256] *Susan Jane Worringham and Margaret Humphreys v Lloyds Bank Limited*, [1981] C-69/80. In this case, the Court held that "[a] contribution to a retirement benefits scheme which is paid by an employer on behalf of employees by means of an addition to the gross salary and which therefore helps to determine the amount of that salary constitutes 'pay' within the meaning of the second paragraph of article 119 of the EEC Treaty."

[257] *Mary Murphy et al. v An Bord Telecom Eireann*, [1988] C-157/86. In this case, a group of women, employed as factory workers, and tasked with "dismantling, cleaning, oiling and reassembling telephones and other equipment" compared their pay to that of a male worker, employed as a stores labourer and tasked with "cleaning, collecting and delivering equipment and components and in lending general assistance as required."

[258] *Macarthys Ltd v Wendy Smith*, [1980] C-129/79. In this case, Ms Smith complained that her male predecessor was paid more than she was for the same work; the Court, here, excluded the requirement of contemporaneity, but added that "it must be acknowledged, however, that, as the employment appeal tribunal properly recognized, it cannot be ruled out that a difference in pay between two workers occupying the same post but at different periods in time may be explained by the operation of factors which are unconnected with any discrimination on grounds of sex. That is a question of fact which it is for the court or tribunal to decide."

[259] Art. 2(1)(e)

[260] Art. 4

[261] *Maria Cristina Elisabetta Ornano v Ministero della Giustizia, Direzione Generale dei Magistrati del Ministero*, [2016] C-335/15

In keeping with the other Directives dealing with discrimination, the Recast Directive prohibits direct discrimination, indirect discrimination, and harassment; however, the Directive also includes sexual harassment and, under art. 2(2), the concept of discrimination also explicitly encompasses

a. *harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;*
b. *instruction to discriminate against persons on grounds of sex;*
c. *any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.*

In line with the case law of the ECJ, referred to in recital 3 of the Directive, it can be said that, in respect of its scope, the Directive covers not only to discrimination on grounds of sex, but also to discrimination arising from gender reassignment, since to discriminate against a transgender person "is to treat him or her unfavourably by comparison with persons of the sex to which he or she was deemed to belong before that operation."[262]
Furthermore, as far as indirect discrimination is concerned, the ECJ clarified in *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*[263], that neutral rules affecting women comparatively much more than men violate the Directive, unless they can be "justified by objective factors unrelated to any discrimination on grounds of sex. That will be the case where the measures chosen reflect a legitimate social-policy objective of the Member State whose legislation is at issue, they are appropriate to achieve that aim and they are necessary in order to do so."
Under art. 3, Member States are allowed to maintain or adopt positive action measures.[264]
Then, art. 5, in the chapter devoted with "[e]qual treatment in occupational social security schemes", prohibits discrimination in relation to

a. *the scope of such schemes and the conditions of access to them;*
b. *the obligation to contribute and the calculation of contributions;*
c. *the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.*

This article incorporates the principles the European Court of Justice relied on to adjudicate *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*[265].
In terms of personal scope, the Directive covers "members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them"[266] and covers five types of

[262] *P v S and Cornwall County Council*, [1996] C-13/94
[263] [2012] C-385/11. The article dealt with a provision of Spanish legislation "which – as a consequence of the double application of the "*pro rata temporis* principle" – require[d] a proportionally greater contribution period from part-time workers (the vast majority of whom are women) than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work." Here, the Court observed that women make up more than 80% of part-time workers and, as a result, concluded that the rule in question ran counter to the Directive.
[264] See below
[265] [1990] C-262/88
[266] Art. 6

risk, namely: "sickness, invalidity, old age – including early retirement[267] –, industrial accidents and occupational diseases, and unemployment"[268].
Consequently, for instance, a Member State may not "provide for differences between male and female workers with regard to retirement age and minimum required service."[269]
In addition to the occupational social security schemes mentioned above, others that are included are those that "provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment."[270]
As a result, for instance, it runs counter to EU law for a supplementary retirement pension scheme to discriminate between the genders in respect of the age at which the surviving spouse is entitled to claim his or her survivor's benefit.[271]
Art. 8 lists some exceptions that are not covered by the Directive[272], while art. 9 enumerates some examples of discrimination[273].
Art. 14(1) clarifies the scope of "[e]qual treatment as regards access to employment, vocational training and promotion and working conditions", forbidding discrimination in regard to

> a. *conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;*
> b. *access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;*

[267] On the issue of early retirement on account of incapacity for work, see *Johann Buchner et al. v Sozialversicherungsanstalt der Bauern*, [2000] C-104/98.
[268] Art. 7
[269] *Commission of the European Communities v Hellenic Republic*, [2009] C-559/07
[270] *Ibid*. See *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune*, [1994] C-7/93 and *Dimossia Epicheirissi Ilektrismou (DEI) v Efthimios Evrenopoulos*, [1997] C-147/95.
[271] See *Jean-Marie Podesta v Caisse de retraite par répartition des ingénieurs cadres & assimilés (CRICA) et al.*, [2000] C-50/99.
[272] Under art. 8, "This Chapter does not apply to: (a) individual contracts for self-employed persons; (b) single-member schemes for self-employed persons; (c) insurance contracts to which the employer is not a party, in the case of workers; (d) optional provisions of occupational social security schemes offered to participants individually to guarantee them: (i) either additional benefits, (ii) or a choice of date on which the normal benefits for self-employed persons will start, or a choice between several benefits; (e) occupational social security schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis."
[273] Under art. 9, "[p]rovisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for (a) determining the persons who may participate in an occupational social security scheme; (b) fixing the compulsory or optional nature of participation in an occupational social security scheme; (c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof; (d) laying down different rules, except as provided for in points (h) and (j), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits; (e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes; (f) fixing different retirement ages; (g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer; (h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented; (i) setting different levels for workers' contributions; (j) setting different levels for employers' contributions, except: (i) in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more nearly equal for both sexes, (ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined; (k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme."

c. *employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;*
d. *membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.*

The Court, for instance, in one case found that it was direct discrimination to refuse to hire a woman on account of her being pregnant[274] or to dismiss her because she was at an advanced stage of *in vitro* fertilisation treatment[275].

Then, in another judgment, the ECJ struck down as directly discriminatory a provision of Greek law under which a male worker was deemed ineligible for parental leave on account of his wife's unemployment, unless he could prove that she was unable to meet the needs related to the child's upbringing[276].

The Court reached the same conclusion in respect of a rule, aimed at promoting the employment of young workers, which allowed employers to terminate the employment contract of an employee who had reached the normal pensionable age, fixed at 65 years for men and 60 for women.[277]

Similarly, the ECJ deemed directly discriminatory a regulation that set retirement age for both male and female dancers at 45, but gave the option of working for a further seven years to men and only two years to women.[278]

Nonetheless, under art. 14(2), Member States may provide for differences of treatment on the basis of gender "where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate."

Applying this principle, in *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*[279], the ECJ held that it is possible to treat men and women differently "for the purpose of safeguarding national security or of protecting public safety or public order".

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[274] *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, [1990] C-177/88. In that case, the Court held that "In that regard it should be observed that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex." Here, the employer chose not to hire a woman that was considered fit for the job, because, he she been hired, the employer would have had to hire a replacement, while, at the same time, being forced to also pay her, because under the rule in force at the time, the employer was not entitled to the reimbursement of the benefits paid in the event of an employee's pregnancy. In the judgment, the Court concluded that "[a] refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave."

[275] *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG*, [2008] C-506/06. In this judgment, the ECJ held that the "prohibition of dismissal of pregnant workers provided for in Article 10(1) of that directive must be interpreted as not extending to a female worker who is undergoing in vitro fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that in vitro fertilised ova exist, but they have not yet been transferred into her uterus." However, the Court relied on Dekker and concluded that such dismissal would constitute direct discrimination, for the operation in question, namely "a follicular puncture and the transfer to the woman's uterus of the ova removed by way of that follicular puncture immediately after their fertilisation", could only affect women.

[276] *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, [2015] C-222/14. But see also *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, [2013] C-5/12, where the ECJ upheld "a national measure [...] which provides that the father of a child, who is an employed person, is entitled, with the consent of the mother, who is also an employed person, to take maternity leave for the period following the compulsory leave of six weeks which the mother must take after childbirth except where her health would be at risk, whereas a father of a child who is an employed person is not entitled to take such leave where the mother of his child is not an employed person and is not covered by a State social security scheme."

[277] *Pensionsversicherungsanstalt v Christine Kleist*, [2010] C-356/09

[278] *Manuela Maturi et al. v Fondazione Teatro dell'Opera di Roma*, [2018] C-142/17

[279] [1986] C-222/84

The case concerned a policy adopted by the Royal Ulster Constabulary under which male officers were ordered to carry firearms in the line of duty, whereas their female colleagues were not trained in their use and were not equipped with them; consequently, women were excluded from the RUC full-time reserve. Here, the Court concluded that derogations justifying differences in treatment needed to be interpreted strictly; nonetheless, it continued

> *it must be recognized that the context in which the occupational activity of members of an armed police force are carried out is determined by the environment in which that activity is carried out. In this regard, the possibility cannot be excluded that in a situation characterized by serious internal disturbances the carrying of fire-arms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety.*

In *Commission of the European Communities v French Republic*[280], the ECJ deemed it permissible for a Member State to employ primarily men as guards in men's prisons and women in women's prisons. Furthermore, in similar cases, the derogation "extends to activities corresponding to the highest grade of the corps concerned, even if certain of those activities do not necessarily have to be carried out by persons of one sex". However, when a Member State intends to rely on the derogation at hand, it must specify in a transparent manner the occupational activities that are covered, so that the courts, the individuals hypothetically affected, and the Commission can ensure that recourse to such measures is justified.

In *Angela Maria Sirdar v The Army Board, Secretary of State for Defence*[281], the ECJ upheld a rule that excluded women from serving in the Royal Marines, on the grounds that combat effectiveness needed to be ensured, especially in the light of the fact that "the organisation of the Royal Marines differs fundamentally from that of other units in the British armed forces, of which they are the 'point of the arrow head'. They are a small force and are intended to be the first line of attack."

However, this precedent was held not to justify a rule that generally excluded women from posts in the military that involved the use of weapons[282]; on the other hand, no provision of EU law prevents a Member State from reserving compulsory military service to men.[283]

Along the same lines, in *Commission of the European Communities v Republic of Austria*[284], the European Court of Justice has clarified that Member States may retain or introduce provisions aimed at the protection of women in relation to pregnancy and maternity; however, it is impermissible to exclude women from certain types of employment "solely on the ground that they ought to be given greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection". Furthermore, EU law disallows Member States from excluding women from certain types of employment on the grounds that "they are on average smaller and less strong than average men, while men with similar physical features are accepted for that employment."

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[280] [1988] C-318/86
[281] [1999] C-273/97
[282] *Tanja Kreil v Bundesrepublik Deutschland*, [2000] C-285/98
[283] *Alexander Dory v Bundesrepublik Deutschland*, [2003] C-186/01
[284] [2005] C-203/03. In that case, the Court struck down "a general prohibition of the employment of women in work in a high-pressure atmosphere and in diving work, providing a limited number of exceptions in the former case."

Finally, in *Ypourgos Esoterikon, Ypourgos Ethnikis Pedias kai Thriskevmaton v Maria-Eleni Kalliri*[285], the Court held that this exception did not apply to a provision mandating that only candidates taller than 170 cm could participate in a competition for the selection of police officers; according to the ECJ, such a rule was indirectly discriminatory and could not be considered necessary because the aim it pursued, namely the desire to guarantee operational capacity and proper functioning of the police, could be achieved by adopting different measures that were less disadvantageous to women.

In respect of the remedies that national courts may adopt, whenever they find that the Directive has been breached "by legislative provisions or by provisions of collective agreements introducing discrimination contrary to that directive"[286], the ECJ has clarified that "the national courts are required to set aside that discrimination, using all the means at their disposal, and in particular by applying those provisions for the benefit of the class placed at a disadvantage, and are not required to request or await the setting aside of the provisions by the legislature, by collective negotiation or otherwise."[287] In such cases, Member States must act without delay, so that the principle of equal treatment is complied with as soon as possible; in the meantime, national courts "must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category."[288]

Under art. 15, a woman returning to work after maternity leave is entitled to go back to her previous post or "to an equivalent post on terms and conditions which are no less favourable to her"; in addition, she also has the right "to benefit from any improvement in working conditions to which she would have been entitled during her absence." The same level of protection must also apply to men who exercise their right to paternity or adoption leave, in the event that Member States have decided to extend to them such right. On the other hand, commissioning mothers having had a baby through a surrogacy arrangement can lawfully be refused maternity leave, for such a decision does not constitute gender discrimination.[289]

For instance, in Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol[290], the Court struck down a provision under which mandated that workers, who had elected to exercise their right to the full two-year parental leave permissible by law, would lose, "following that leave, their right to paid annual leave accumulated during the year preceding the birth of their child."

Similarly, in *Nadežda Riežniece v Zemkopības ministrija, Lauku atbalsta dienests*[291], the Court found that EU law precluded

> *a situation where, as part of an assessment of workers in the context of abolishment of officials' posts due to national economic difficulties, a worker who has taken parental leave is assessed in his or her absence on the basis of assessment principles and criteria which*

[285] [2017] C-409/16
[286] *Helga Kutz-Bauer v Freie und Hansestadt Hamburg*, [2003] C-187/00
[287] *Ibid*.
[288] *National Pensions Office v Emilienne Jonkman*, [2007] C-231/06
[289] *C. D. v S. T.*, [2014] C-167/12. See also the aforementioned *Z. v A Government department*, where the Court reached the same conclusion, clarifying also that "a refusal to provide paid leave equivalent to maternity leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement" constitutes neither gender-based discrimination nor discrimination on the grounds of disability.
[290] [2010] C-486/08
[291] [2013] C-7/12

> *place him or her in a less favourable position as compared to workers who did not take parental leave.*

Courts called upon to determine whether there was discrimination in the sense described above

> *must inter alia ensure 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*

In that judgment, the Court also held that EU law disallowed

> *a situation where a female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolishment of that new post, where it was not impossible for the employer to allow her to return to her former post or where the work assigned to her was not equivalent or similar and consistent with her employment contract or employment relationship, inter alia because, at the time of the transfer, the employer was informed that the new post was due to be abolished, which it is for the national court to verify*.

In *Loredana Napoli v Ministero della Giustizia – Dipartimento dell'Amministrazione penitenziaria*[292], the Court maintained that art. 15 prevents a Member State from excluding a woman on maternity leave from "a vocational training course which forms an integral part of her employment" and which she is required to take to improve her employment condition, even if the woman in question has been guaranteed that she will be allowed to participate in the next course at an unspecified date. According to the Court, such a delay also runs counter to art. 14(1)(c). The case is also interesting because the Court held that, being "clear, precise, and unconditional", articles 14(1)(c) and 15 have a direct effect.

Under art. 17, Member States are required to make judicial or administrative remedies available to anyone claiming to have suffered discrimination[293]; furthermore, "associations, organisations or other legal entities which have [...] a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive."[294] It is up to the Member States to determine which groups have a legitimate interest within the meaning of this paragraph.

Art. 18 binds Member State to introduce measures to ensure that those who have suffered discrimination may claim compensation or reparation, "which is dissuasive and proportionate to the damage suffered." The article at hand also precludes the possibility of fixing a ceiling on the amount that may be claimed, the only exception being the case where the only damage suffered by the victim was the "the refusal to take his/her job application into consideration."[295]

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[292] [2014] C-595/12

[293] Even if the relationship in the context of which the alleged unequal treatment occurred has ended.

[294] Art. 17(2)

[295] This prohibition incorporates the principles laid down, in respect of Council Directive 76/207/EEC, by the ECJ in *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, [1993] C-271/91, where the Court held that "that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid." See also *Nils Draehmpaehl v Urania Immobilienservice OHG*, [1997] C-180/95, where the Court clarified that the Directive prohibits provisions imposing "an

In respect of this provision, in *María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA*[296], the European Court of Justice confirmed its established case law[297] and held that, in order for the compensation awarded to be both proportionate and dissuasive, it is necessary

> *that the particular circumstances of each breach of the principle of equal treatment should be taken into account. In the event of discriminatory dismissal, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained*.

In that judgment, the Court clarified that punitive damages do not fall within the scope of art. 18, but rather within that of art. 25.

Art. 19 concerns the burden of proof. In line with the other directives concerning discrimination, the plaintiff only has to show "facts from which it may be presumed that there has been direct or indirect discrimination" for the respondent to have to "prove that there has been no breach of the principle of equal treatment". The provisions contained in this article also apply to "the situations covered by Article 141 of the Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC[298] and [2010/18/EU]."

Finally, art. 25 mandates that Member States must include "effective, proportionate and dissuasive" sanctions to punish those who violate the provisions of the Directive.

3.3.1.1. Positive Action Measures

The Race Directive, the Equality Framework Directive, and the Recast Directive all allow Member States to adopt positive action measures[299]. It has been said that "[p]ositive action shares the logic of affirmative action"[300], because "[b]oth allow for preferential treatment of certain groups to make up for historical wrongs or traditional discrimination against

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upper limit of three months' salary for the amount of compensation which may be claimed by an applicant discriminated against on grounds of sex in the making of an appointment where that applicant would have obtained the vacant position if the selection process had been carried out without discrimination" or imposing "a ceiling of six months' salary on the aggregate amount of compensation which, where several applicants claim compensation, may be claimed by applicants who have been discriminated against on grounds of their sex in the making of an appointment." In *Draehmpaehl*, however, the Court found that the Directive permitted "provisions of domestic law which prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant where the employer can prove that, because the applicant engaged had superior qualifications, the unsuccessful applicant would not have obtained the vacant position even if there had been no discrimination in the selection process."

[296] [20015] C-407/14

[297] Dating as far back as 1984, when, in *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, [1984] 14/83, the ECJ held that "Directive no 76/207/EEC does not require discrimination on grounds of sex regarding access to employment to be made the subject of a sanction by way of an obligation imposed on the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against. As regards sanctions for any discrimination which may occur, the Directive does not include any unconditional and sufficiently precise obligation which, in the absence of implementing measures adopted within the prescribed time-limits, may be relied on by an individual in order to obtain specific compensation under the Directive, where that is not provided for or permitted under national law. Although Directive no 76/207/ECC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member Dtate chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application."

[298] On which, see below *Elda Otero Ramos v Servicio Galego de Saúde, Instituto Nacional de la Seguridad Social*.

[299] See art. 5 of the Race Directive, art. 7 of the Equality Framework Directive, and art. 3 of the Recast Directive.

[300] D. CARUSO, *Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives*, Harvard International Law Journal, vol. 44, no 2, 2003, p. 332.

them."[301] Despite this similarity, though, in Europe, the common view is that, unlike affirmative action, positive action is more in keeping with the principle of equal treatment. The difference is that the expression "affirmative action" is often taken to refer to "'hard' measures of intervention, designed to reach fixed quotas of minority representation in education and the workforce."[302] On the hand, in Europe "soft" measures are preferred, for they still respect the principle of meritocracy, while helping minorities and other groups that have suffered historic or systemic discrimination to overcome such discrimination. In short, through positive actions measures "European governments only help marginalized groups to enter the game, promising them a fair chance but no certain victory."[303]

This difference can be seen in the already mentioned judgement *Eckhard Kalanke v Freie Hansestadt Bremen*, dealing with a provision of German law that, in sectors where women were underrepresented, made it compulsory for employers to give priority to female candidates, provided they were as qualified as the male ones.

The court found that that Member State could adopt

> *measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities, is specifically and exclusively designed to allow measures which, although apparently giving rise to discrimination on grounds of sex, are in fact intended to eliminate or reduce actual instances of inequality between men and women which may exist in the reality of social life.*

Therefore, according to the ECJ, the Directive allowed for national measures "which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men."

However, measures such as the one at hand were incompatible with it, because they went "beyond promoting equal opportunities" and, as a result, substituted "for equality of opportunity [...] the result which is only to be arrived at by providing such equality of opportunity."

In *Hellmut Marschall v Land Nordrhein-Westfalen*, the Court took a less strict approach, concluding that a not too dissimilar provision was considered compatible with the Directive, because the rule in question contained a so-called "saving clause" that allowed the male candidate to indicate an alternative (non-discriminatory) criterion of preference, in order to show that he was a better choice for promotion compared to his female colleague. The saving clause was vague; however, the Court maintained that it was enough to remove "the invidious automatism of gender preferences, replacing it with a personalized assessment of candidates' qualities"[304] and, so, chose not to strike down the clause.

Consequently, it can be said that, in the light of these precedents, it is necessary to draw a distinction between equality of opportunities, which is envisaged, and equality of results, which is prohibited, unless there is an adequate saving clause which allows male candidates to overcome the automatism favouring women.

This approach was confirmed in *Georg Badeck et al. v Hessische Ministerpräsident et al.*[305], where the ECJ declared that a system of "flexible result quotas" did not necessarily violate the Directive. In particular, the Court found that EU law did not preclude giving

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[301] *Ibid.*
[302] *Ibid.*
[303] *Ibid.*
[304] D. CARUSO, *Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives*, Harvard International Law Journal, vol. 44, no 2, 2003, p. 340.
[305] [2000] C-158/97

priority to female candidates, in sectors where women were underrepresented, as long as "candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates". In addition, the Directive also allows for national legislation that "allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there are not enough applications from women"[306].

Consequently, positive action measures can be compatible with EU law, but only as long as they do not unconditionally and automatically favour women over equally qualified men, and only if they provide for taking into account the personal situations of candidates.

In *Katarina Abrahamsson, Leif Anderson v Elisabet Fogelqvist*[307], the Swedish government, aiming to achieve "a fairer allocation of teaching posts", had enacted a regulation giving priority to candidates belonging to an underrepresented gender, only requiring that they had sufficient qualifications. The saving clause only operated if the male candidate could prove that "the difference in their respective qualifications [was] so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments."

The Court observed that

> *[t]he scope and effect of that condition cannot be precisely determined, with the result that the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and that this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex.*

For this reason, the measure in question was deemed discriminatory and struck down. The Court also added that such a policy would be incompatible with EU law even if it only applied "to procedures for filling a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures."

In this decision, however, the ECJ seems to hold that it would be permissible for a Member State to use gender as a tie-breaking criterion, when a male and a female candidate "possess equivalent or substantially equivalent merits", provided that their "candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates."

In *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij*[308], the Court deemed compatible with EU law

> *a scheme set up by a Minister to tackle extensive under-representation of women within his Ministry under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the Ministry to its staff is reserved for female officials alone whilst male officials may have access to them only in cases of emergency, to be determined by the employer.*

However, in order for such a scheme to be permissible, said "cases of emergency" had to include male officials taking care of their children by themselves.

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[306] But only "in so far as its objective is to eliminate under-representation of women, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training."

[307] [2000] C-407/98

[308] [2002] C-476/99

In *Lommers*, the Court also iterated that, even when positive action measures are concerned,

> *due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.*

Applying the foregoing principles, in *Serge Briheche v. Ministre de l'Intérieur et al.*[309], the Court struck down a rule reserving "the exemption from the age limit for obtaining access to public-sector employment to widows who have not remarried who are obliged to work, excluding widowers who have not remarried who are in the same situation."

In conclusion, Member States are allowed – but not compelled – to adopt measures that are meant to overcome historic and systemic discrimination, as long as they comply with the principle of proportionality and are meant to ensure equality of opportunity and not equality of results. Still, certain limited forms of equality of outcome may be permitted, as long as they also provide for saving clauses, so that women are not automatically and unconditionally given priority over equally qualified men and only as long as there is an objective assessment taking into account the personal situation of all the people involved, regardless of their gender.

Finally, it can be added that the foregoing analysis can be extended to positive action measures adopted under the Race Directive and the Equality Framework Directive.

3.3.2. The Equal Treatment in Social Security Directive

The 1979 Equal Treatment in Social Security Directive was enacted for the purpose of prohibiting gender discrimination, be it direct or indirect, in matters of social security. Under art. 2, the Directive covers the members of the working population, disabled workers and retirees; the concept of "working population" explicitly includes "self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment."

In *Bruna-Alessandra Züchner v Handelskrankenkasse (Ersatzkasse) Bremen*[310], the ECJ summarised its own case law and explained that

> *[t]he concept of working population in Article 2 of the directive is very wide and includes people who are working, those who are seeking employment and those whose work or efforts to find work have been interrupted by materialization of any of the risks mentioned in Article 3 of the directive. The Court has further held that a person is still a member of the working population even if it is in relation to an ascendant that one of the risks mentioned in Article 3 materializes, forcing him or her to interrupt his or her occupational activity (Case 150/85 Drake v Chief Adjudication Officer [1986] ECR 1995), or where the risk materializes while the person concerned is seeking employment immediately after a period without occupational activity (Case C-31/90 Johnson v Chief Adjudication Officer [1991] ECR I-3723), or where the employment in question is regarded as minor since it consists of less than 15 hours' work a week and attracts*

[309] [2004] C-319/03. See also *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, [2015] C-222/14

[310] [1996] C-77/95

remuneration of less than one-seventh of the average monthly salary (Case C-317/93 Nolte v Landesversicherungsanstalt Hannover [1995] ECR I-4625 and Case C-444/93 Megner and Sheffel v Innungskrankenkasse Rheinhessen-Pfalz [1995] ECR I-4741).
On the other hand, the directive does not apply to people who are not working and are not seeking work or to persons whose occupation or efforts to find work were not interrupted by one of the risks referred to in Article 3 of the directive (Joined Cases 48/88, 106/88 and 107/88 Achterberg-te Riele and Others v Sociale Verzekeringsbank, Amsterdam [1989] ECR 1963, paragraph 13, and Johnson, paragraph 20). The Court has also held that a person who has given up his or her occupational activity in order to attend to the upbringing of his or her children does not fall within the scope of the directive (Johnson, paragraph 19).

In the case at hand, Mrs Züchner's husband suffered an accident that left him disabled at a time when she was neither employed nor looking for employment; the plaintiff elected to take care of him, for which she had to undergo training. As a result, she argued that although she was not compensated for her work, it could still be assimilated to an occupational activity, which would make her a member of the working population. However, the Court disagreed, maintaining that art 2 of the Directive only applies to economic activities, that is to say activities for which a person is compensated.
In recent times, the ECJ has, once again, confirmed its case law, albeit only in an obiter dictum, by maintaining that a person can be regarded as a member of the working population, even if he only receives an income that is lower than that which would normally be required for subsistence – or which generally does not exceed 10 hours per week –, as long as the activity he performs can be deemed real and genuine by the competent national authorities.[311]
Under art. 3, the Directive applies to statutory schemes protecting against 5 types of risk, namely sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment. In addition, the Directive also applies to social assistance programmes intended to supplement or replace the schemes in question.
In respect of the schemes and programmes at hand, art. 4 prohibits discrimination, especially as far as the following aspects are concerned:

a. *the scope of the schemes and the conditions of access thereto,*
b. *the obligation to contribute and the calculation of contributions,*
c. *the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits*.

However, pursuant to art. 4(2), the Directive does not affect the provisions on the protection of pregnant and breastfeeding women.
The European Court of Justice has clarified, in *Sarah Margaret Richards v Secretary of State for Work and Pensions*[312], that this Directive prohibits not only gender discrimination, but also discrimination on the grounds of gender reassignment.

[311] *Hava Genc v Land Berlin*, [2010] C-14/09. The case concerned the interpretation of Article 6(1) of Decision no 1/80 of the Association Council of 19 September 1980 on the development of the EEC-Turkey Association, although ECJ made reference to its own case law regarding Directive 79/7/EEC
[312] [2006] C-423/04. See also *MB v Secretary of State for Work and Pensions*, [2018] C-451/16, in which the ECJ held that the Directive precluded "national legislation which requires a person who has changed gender not only to fulfil physical, social and

Not long after the Directive was enacted, the European Court of Justice held that it had direct effect, in *State of the Netherlands v Federatie Nederlands Vakbeweging*[313]. Then, in *Norah McDermott and Ann Cotter v Minister for Social Welfare and Attorney-General*[314], the Court confirmed that the provision in question had direct effect and held that, as far as unemployment benefits were concerned, women were entitled "to have the same rules applied to them as are applied to men who are in the same situation." In the subsequent case *Ann Cotter and Norah McDermott v Minister for Social Welfare and Attorney General*[315], the Court added that the prohibition of gender-based discrimination also applied in respect of the right to increases in social security benefits.
As a result, art. 4(1) of the Directive gives people a justiciable right.
In another case, *J. W. Teuling v Bestuur van de Bedrijfsvereniging voor de Chemische Industrie*[316], the ECJ was faced with a system of benefits in which the marital status or family situation of unemployed persons was taken into account to determine whether they were entitled to supplementary benefits. Such a system had discriminatory results, because significantly fewer women qualified for such supplements compared to men. As a result, the Court found that the provisions at issue appeared to violate the Directive, unless they could be justified by reasons that excluded gender discrimination. Considering the purpose of the supplements at hand, the Court found that they were meant to provide "a minimum subsistence income to persons with no income from work" thereby constituting an "integral part of the social policy of the member states." In that regard, the Court recognised that the supplements granted to those who also to take care of a dependent spouse or children were aimed at helping the beneficiaries to bear the additional burdens that single people would not have. Consequently, the ECJ concluded that, under EU law, such a system was permissible.
The prohibition of gender discrimination, however, can also be invoked by men. For instance, the ECJ has held that art. 4(1) makes it illegal for a Member State to enact legislation whereby, in order to determine the amount of a statutory social benefit to be paid to the victim of a work accident, "the different life expectancies of men and women are applied as an actuarial factor", if "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."[317]
The Directive permits numerous exceptions and derogations; in fact, under art. 7(1), the Directive

> *shall be without prejudice to the right of Member States to exclude from its scope:*
> *a. the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;*

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psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender."

[313] [1986] 71/85. The case concerned a provision of Dutch law, under which married women were excluded from unemployment benefits, for they could not be considered the breadwinners of their respective families.

[314] [1987] 286/85. In this case, the plaintiff were successful in showing that, since they were married women, they were entitled to unemployment benefits for a shorter period compared to men and unmarried women; in addition, they proved that they also received lower benefits compared to men.

[315] [1991] C-377/89

[316] [1987] 30/85

[317] *Request for a preliminary ruling from the Korkein hallinto-oikeus, in the proceedings brought by X*, [2014] C-318/13

b. advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;
c. the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife;
d. the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife;
e. the consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.

However, under art. 7(2), Member States have to periodically reconsider whether the hypothetical measure they have adopted pursuant to the previous paragraph can still be justified.

In respect of the rationale of such measures, in *Sarah Margaret Richards v Secretary of State for Work and Pensions*[318], the ECJ has explained that art. 7(1) of the Directive is meant to allow Member States "to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems."

Such derogations are meant to be only temporary; however, there is no specific provision as to the time limit for their maintenance. It is for that reasons that, under art. 7(2), Member States are required to periodically re-examine whether the measure in question are still called for, "in the light of social developments in the matter concerned." [319]

In addition, art. 8(2) imposes a duty of information on Member States, thereby providing for a mechanism through which the Commission can review the measures adopted pursuant to this provision.[320]

In respect of the time limit, however, it is possible to argue that, in view of the principle laid down in *Association Belge des Consommateurs Test-Achats ASBL et al. v Conseil des ministres*[321], the ECJ may in future decide that this provision is no longer valid, because an appropriate transitional period has passed. In this case, concerning the 2004 Goods and Services Directive, the Court held that EU law may permit temporary derogations from the principle of equal treatment, clarifying, however, that a provision allowing Member States to maintain such a derogation without any temporal limitations would be incompatible with the Charter of Fundamental Rights of the European Union.

Nonetheless, since the *Test-Achats* judgment, the Court has applied the provision in question without declaring it invalid.[322]

Furthermore, the Court has repeatedly maintained that since art. 7(1) provides for an exception to the principle of equal treatment, it must be interpreted strictly.

So, in *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority*[323], the Court concluded that the provision in question could only cover "the determination of

[318] [2006] C-423/04. See also *The Queen v Secretary of State for Social Security, ex parte Equal Opportunities Commission*, [1992] C-9/91

[319] *The Queen v Secretary of State for Social Security, ex parte Equal Opportunities Commission*, [1992] C-9/91

[320] Under art. 8(2), Member States must "communicate to the Commission the text of laws, regulations and administrative provisions which they adopt in the field covered by this Directive, including measures adopted pursuant to Article 7(2)".

[321] [2011] C-236/09 on which see below.

[322] See, for instance, *MB v Secretary of State for Work and Pensions*, [2018] C-451/16

[323] [1986 C-152/84. Identical conclusion was reached in *Vera Mia Beets-Proper v F. Van Lanschot Bankiers NV.*, [1986] C-262/84. See also *Helga Kutz-Bauer v Freie und Hansestadt Hamburg*, [2003] C-187/00

pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits." As a result, the Court struck down as incompatible with Directive 76/207[324] a general policy that allowed an employer to terminate the employment contract of a woman as soon as she attained retirement age, set at 60 years of age for women and at 65 for men.
Similarly, in *Secretary of State for Social Security v Evelyn Thomas et al.*[325], the ECJ declared that a UK act that only granted invalidity benefits to people who had not reached retirement age, which was 65 years for men and 60 for women, breached EU law, because

> *where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State prescribes different retirement ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words possible consequences thereof for other benefits , contained in Article 7(1)(a) is limited to the forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in retirement age.*

And, finally, in *The Queen v Secretary of State for Social Security, ex parte John Henry Taylor*[326], the ECJ ruled that art. 7(1) did not apply to the winter fuel allowance paid by the UK government.

3.3.3. The Pregnancy Directive

The Pregnancy Directive pursues the aim of preserving the safety, health, and welfare of workers who are pregnant, who have recently given birth, and who are breastfeeding, for they are considered particularly vulnerable.[327] Consequently, the Directive is intended to protect their well-being, as well as that of their children. Under art. 2(1)(a), the Directive operates from the moment the pregnant worker has informed her employer of the pregnancy. However, in the aforementioned *Sabine Mayr* case, the ECJ held that the Directive does not apply to a worker, who is undergoing an *in vitro* fertilisation treatment, until the fertilised ova have been transferred into her uterus.
Under the Directive, pregnant workers may not be exposed to certain dangerous substances and materials. A non-exhaustive list of such substances and materials is given in the annexes; however, pursuant to art. 3(1),

> *[i]n consultation with the Member States and assisted by the Advisory Committee on Safety, Hygiene and Health Protection at Work, the Commission shall draw up guidelines on the assessment*

[324] Now replaced by the Recast Directive
[325] [1993] C-328/91
[326] [1999] C-382/98
[327] In *Dita Danosa v LKB Līzings SIA*, [2010] C□232/09, the ECJ clarified that "the concept of 'worker' for the purposes of Directive 92/85 may not be interpreted differently according to each national law and must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned." Specifically, the Court observed that "[t]he essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration." In that case, the Court concluded that "[a] member of a capital company's Board of Directors who provides services to that company and is an integral part of [qualifies as a 'worker'] if that activity is carried out, for some time, under the direction or supervision of another body of that company and if, in return for those activities, the Board Member receives remuneration." Regardless of that, "the removal, on account of pregnancy or essentially on account of pregnancy, of a member of a Board of Directors who performs duties such as those described in the main proceedings can affect only women and therefore constitutes direct discrimination on grounds of sex" and, consequently, is prohibited.

> *of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of workers.*

Under art. 4, when a pregnant worker is engaged in activities involving the risk of exposure to dangerous substances, materials, or working conditions, her employer must assess any risks they may pose to the woman's "safety or health and any possible effect on the pregnancy or breastfeeding".

On the basis of the assessment, under art. 5, the employer must adopt any and all necessary measures to ensure that "such risks are avoided". This can be done in different manner.

The employer may temporarily adjust "the working conditions and/or the working hours of the worker concerned"[328], or, if that is not possible, "the employer shall take the necessary measures to move the worker concerned to another job."[329] Finally, when no other alternative measure is available, the worker may "be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health."[330]

Similarly, under art. 6, women who have recently given birth and women who are breastfeeding are protected from exposure to dangerous substances, materials, or working conditions.

Furthermore, under art. 7, workers who are pregnant, have recently given birth, or are breastfeeding may not be obliged to perform night work. Such employees are, therefore, entitled to be transferred to daytime work or, if that is not possible, to "leave from work or extension of maternity leave".[331]

In these cases, under art. 11(1), "the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance [...] must be ensured."

Art. 8, then, deals with maternity leave, mandating that

> *1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.*
>
> *2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.*

In this case, the worker, under art. 11(2), the worker is entitled to "the rights connected with the employment contract" and to "maintenance of a payment, and/or [...] an adequate allowance". The third paragraph of the article then defines what it is meant by "adequate allowance", indicating that the worker in question must be guaranteed an income that is "at least equivalent" to the one which would be received "in the event of a break in her activities on grounds connected with her state of health."

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[328] Art. 5(1)
[329] Art. 5(2)
[330] Art. 5(3)
[331] See *Handels- og Kontorfunktionærernes Forbund i Danmark v Fællesforeningen for Danmarks Brugsforeninger*, [1998] C-66/96, where it was held that a Member State could not adopt legislation providing "that an employer may send home a woman who is pregnant, although not unfit for work, without paying her salary in full when he considers that he cannot provide work for her."

In *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung*[332], the European Court of Justice clarified that articles 11(1) to (3) of the Directive has direct effect, adding that

> *[t]hat provision imposes on Member States, in unequivocal terms, a precise obligation as to the result to be achieved which consists in ensuring, following the adjustment of the working conditions, a temporary transfer to another job and, during the periods of absence from work during pregnancy referred to in Articles 5 to 7 thereof and maternity leave referred to in Article 8, the employment rights of pregnant workers and workers who have recently given birth or are breastfeeding and the maintenance of payment and/or entitlement to an adequate allowance*.

In that case, the ECJ also held that the income that a worker receives in accordance with art. 11(1) must include "that worker's basic monthly salary and the pay components or supplements relating to her occupational status, [...] such as allowances relating to the seniority of the worker concerned, her length of service and her professional qualifications."

However, when a worker has been temporarily granted leave from work, the Directive does not require that the person in question "continue to receive full pay or the payment of the on-call duty allowance."[333]

Nonetheless, according to the Court, the Directive "provides only for minimum protection with respect to the entitlement to income of pregnant workers", so that Member State are free to adopt rules that are more favourable to pregnant workers.

Furthermore, to ensure that women can fully exercise the rights that the Directive recognises them, Member States must prohibit the dismissal of workers that are pregnant, have recently given birth, or are breastfeeding "during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1)".[334] An employer may terminate an employment contract only "in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent".[335] However, in this case, "the employer must cite duly substantiated grounds for her dismissal in writing."[336]

According to the ECJ, this principle precludes "national legislation which does not prohibit, in principle, [such dismissals], as a preventative measure, but which provides, by way of reparation, only for such a dismissal to be declared void when it is unlawful."[337]

In *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios*[338], the Court maintained that this provision has direct effect, also clarifying that while the Directive applies to both indefinite and fixed-term contracts, as far as the latter are concerned, "non-renewal of such a contract, when it comes to an end as stipulated, cannot be regarded as a dismissal

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[332] [2010] C-194/08. See also *Sanna Maria Parviainen v Finnair Oyj*, [2010] C-471/08

[333] See also, *Susanne Lewen v Lothar Denda*, [1999] C-333/97, and *Elisabeth Mayer v Versorgungsanstalt des Bundes und der Länder*, [2005] C-356/03

[334] Art. 10(1)

[335] *Ibid*.

[336] Art. 10(2)

[337] *Jessica Porras Guisado v Bankia SA et al.*, [2018] C-103/16

[338] [2001] C-438/99. In *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*, [2001] C-109/00, the Court added that art. 10 of the Directive also applied in respect of a woman who had been hired for a fixed period, failing, however, "to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded", so that "because of her pregnancy she was unable to work during a substantial part of the term of that contract."

prohibited by that provision", adding, nonetheless, that "where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex", so that it would violate the Recast Directive.
In addition, according to the ECJ, art. 10

> *must be interpreted as prohibiting not only the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection set down in paragraph 1 of that article but also the taking of preparatory steps for such a decision before the end of that period.*[339]

The prohibition in question, however, does not apply to collective redundancies within the meaning of Directive 98/59[340], even when the employer does not give "any grounds other than those justifying the collective redundancy, provided that the objective criteria chosen to identify the workers to be made redundant are cited."[341] Moreover, in the context of collective redundancies, the principle at hand does not require Member States to make provisions "for pregnant workers and workers who have recently given birth or who are breastfeeding to be afforded, prior to that dismissal, priority status in relation to either being retained or redeployed."[342]
Furthermore, under art. 12, Member States are bound to ensure that women, who deem that their rights arising under this Directive have been violated, are enabled to "pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities."
Finally, it is important to recall that art. 19 of the Recast Directive, concerning the burden of proof also applies to "the situations covered [...], insofar as discrimination based on sex is concerned," by this Directive. Therefore, in these cases, the plaintiff only has to show "facts from which it may be presumed that there has been direct or indirect discrimination" for the respondent to have to "prove that there has been no breach of the principle of equal treatment".
For instance, in *Elda Otero Ramos v Servicio Galego de Saúde et al.*[343], the European Court of Justice found that art. 19 applies to "a situation [...] in which a breastfeeding worker challenges [...] the risk assessment of her work in so far as she claims that the assessment was not conducted in accordance with Article 4(1)."

3.3.4. The Goods and Services Directive

The Goods and Services Directive does not deal with gender discrimination in the workplace; under art. 1, the Directive clarifies that its purpose "is to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women."

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[339] *Nadine Paquay v Société d'architectes Hoet + Minne SPRL*, [2007] C-460/06. In that judgment, the Court held that "[a] decision to dismiss on the grounds of pregnancy and/or child birth is contrary to [the Recast Directive] irrespective of the moment when that decision to dismiss is notified and even if it is notified after the end of the period of protection set down in Article 10 of Directive 92/85. Since such a decision to dismiss is contrary to both Article 10 of Directive 92/85 and [the Recast Directive], the measure chosen by a Member State under Article 6 of that latter directive to sanction the infringement of those provisions must be at least equivalent to the sanction set down in national law implementing Articles 10 and 12 of Directive 92/85."
[340] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies
[341] *Jessica Porras Guisado v Bankia SA et al.*, [2018] C-103/16
[342] *Ibid.*
[343] [2017] C-531/15

Under art. 3(4), the Directive explicitly does not apply "to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts."
For the purposes of this Report, the Directive is significant because of the principle laid down by the ECJ in *Association Belge des Consommateurs Test-Achats ASBL et al. v Conseil des ministres*[344]. In that case, the Court struck down art. 5(2) of the Directive, because it was incompatible with the principle of equal treatment.
The article in question allowed Member States "to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data."
In its judgment, the European Court of Justice very clearly stated that "it was permissible for the EU legislature to implement the principle of equality for men and women [...] gradually, with appropriate transitional periods." However, a provision allowing a Member State "to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter." Consequently, such a provision "must therefore be considered to be invalid upon the expiry of an appropriate transitional period."
The principle that a derogation to the principle of equal treatment can only be temporary and that it must be considered invalid after an "appropriate transitional period" has passed can probably be extended to all other directives dealing with discrimination.

3.3.5. The Parental Leave Directive

The Directive is aimed at implementing the revised *Framework Agreement on Parental Leave* concluded on 18 June 2009.
Under it, workers of either gender are entitled to "an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners."[345]
Such leave is to be granted for a period of no less than four months; furthermore, "to promote equal opportunities and equal treatment between men and women",[346] the leave in question ought to be "provided on a non-transferable basis"[347], adding that, in any event, "[t]o encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis."[348]
In terms of scope of application, this Directive applies to all workers, regardless of their gender and type of employment contract.
Clause 3(1) concerns the application of the previous clauses, mandating that

> *[t]he conditions of access and detailed rules for applying parental leave shall be defined by law and/or collective agreements in the Member States, as long as the minimum requirements of this agreement are respected. Member States and/or social partners may, in particular:*

[344] [2011] C-236/09 on which see below.
[345] Clause 2(1) of the agreement
[346] Clause 2(2) of the agreement
[347] *Ibid*.
[348] *Ibid*.

a. *decide whether parental leave is granted on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system, taking into account the needs of both employers and workers;*
b. *make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification which shall not exceed one year; Member States and/or social partners shall ensure, when making use of this provision, that in case of successive fixed term contracts, as defined in Council Directive 1999/70/EC on fixed-term work, with the same employer the sum of these contracts shall be taken into account for the purpose of calculating the qualifying period;*
c. *define the circumstances in which an employer, following consultation in accordance with national law, collective agreements and/or practice, is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the organisation. Any problem arising from the application of this provision should be dealt with in accordance with national law, collective agreements and/or practice;*
d. *in addition to (c), authorise special arrangements to meet the operational and organisational requirements of small undertakings.*

Furthermore, under clause 3(2) "Member States and/or social partners shall establish notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the beginning and the end of the period of leave."
Clause 5 entitles workers to return, at the end of their leave, to their job or to an equivalent one "consistent with their employment contract or employment relationship".[349]
Furthermore, under clause 5(2), "[r]ights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements and/or practice, shall apply."[350]
In addition, under clause 5(3), Member State must include measures to protect from discrimination and dismissals those who have applied for, or taken parental leave.
Moreover, under clause 6(1) returning workers "may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers' and workers' needs."
Lastly, measures should be adopted to allow workers to take time off "on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable."
Art. 3 of the Directive binds Member State to ensure that legislation or collective agreements are adopted or, if necessary, amended so that workers can actually enjoy the rights recognised in the agreement.

[349] Clause 5(1) of the agreement
[350] In respect of these principles, see *H. v Land Berlin*, [2017] C-174/16, where the ECJ held that they precluded legislation "which subject definitive promotion to a managerial post in the civil service to the condition that the candidate selected successfully carries out a prior two-year probationary period in that post, and by virtue of which, in a situation where such a candidate was on parental leave for most of that period and still is, that probationary period ends by operation of law after two years with no possibility of extending it and the person concerned is consequently, on return from parental leave, reinstated in the post, at a lower level both in status and in terms of remuneration, occupied before that probationary period."

In addition, under art. 2, "Member States shall determine what penalties are applicable when national provisions enacted pursuant to this Directive are infringed. The penalties shall be effective, proportionate and dissuasive."
Lastly, it should be remembered that art. 19 of the Recast Directive, concerning the burden of proof also applies to "the situations covered [...], insofar as discrimination based on sex is concerned," by this Directive. Therefore, in these cases, the plaintiff only has to show "facts from which it may be presumed that there has been direct or indirect discrimination" for the respondent to have to "prove that there has been no breach of the principle of equal treatment".

3.3.6. The Equal Treatment for the Self-Employed Directive

Art. 1 of the Equal Treatment for the Self-Employed Directive clarifies that it aims at laying down "a framework for putting into effect in the Member States the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity" in respect of the aspects not covered by the Recast and the Equal Treatment in Social Security Directives.
In keeping with the other directives dealing with gender discrimination, this Directive prohibits direct discrimination, indirect discrimination, and harassment, including sexual harassment in regard to self-employed workers, "namely all persons pursuing a gainful activity for their own account"[351], and their partners.[352]
Under art. 4(1), the Directive clarifies that the principle of equal treatment entails that no gender discrimination is admissible "in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity", although under art. 5 positive action measures are permissible.
Furthermore, under art. 6, Member States must ensure that "the conditions for the establishment of a company between spouses, or between life partners [...] are not more restrictive" than the rules that apply to other people.
Under art. 7, spouses and life partners are entitled to benefit from national social protection schemes.
Moreover, under art. 8(1), Member States must ensure that "female self-employed workers and female spouses and life partners [...] be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks."
Art. 8(3) clarifies that, in order for it to be deemed sufficient, the maternity allowance must guarantee an income that is, at least, equivalent to

a. *the allowance which the person concerned would receive in the event of a break in her activities on grounds connected with her state of health and/or;*
b. *the average loss of income or profit in relation to a comparable preceding period subject to any ceiling laid down under national law and/or;*
c. *any other family related allowance established by national law, subject to any ceiling laid down under national law.*

[351] Art. 2(1)(a)
[352] Art. 2(1)(b)

In addition, under art. 9, Member states must make judicial or administrative remedies available to anyone claiming suffered discrimination; furthermore, these remedies must also made available to "associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied," if the victim consents to their support or representation.
Finally, under art. 10, Member States are required to adopt all measures that "are necessary to ensure real and effective compensation or reparation [...] for the loss or damage sustained" as a result of gender discrimination. Such compensation or reparation, in addition, must be "dissuasive and proportionate" and may not "be limited by the fixing of a prior upper limit."

3.4. Further Evolutions of the Non-Discrimination Principle

A few weeks after the enactment of the Equality Framework Directive, The European Parliament, the Council and the Commission proclaimed the Charter of fundamental rights of the European Union. The purpose of the Charter, according to its preamble, is the reaffirmation of

> *the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights*.

Title III of the Charter contains various provisions enshrining the principle of equality and the prohibition of discrimination. Building on that, the Treaty of Lisbon, entered into force in 2009, amended Article 6 EU[353] and introduced art. 6(2), under which "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." Then again, in an opinion, the European Court of Justice concluded that the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms was incompatible with the EU and FEU Treaties. [354]

3.5. Concluding remarks

In the light of the foregoing, the first thing that can be highlighted is the fact that EU law tackles the issues of discrimination in a rather piecemeal fashion. Some aspects do not

[353] Now art. 6 TFEU
[354] Opinion 2/13 of the Court (Full Court) 18 December 2014. Nonetheless, in that opinion, the Court clarified that "[a]ccording to well-established case-law of the Court of Justice, fundamental rights form an integral part of the general principles of EU law. For that purpose, the Court of Justice draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that context, the Court of Justice has stated that the ECHR has special significance."

vary; for instance, all Directives prohibit direct and indirect discrimination, allow for positive action measures, and bind Member States to introduce measure aimed at ensuring that employers are complying with the principle of equal treatment.
However, as it has been correctly pointed out by some commentators, "[i]n other respects the directives differ, leading to a fragmentation in the application of the principle of equal treatment regarded by some as regrettable and unnecessary"[355]. However, the Commission has responded to such criticism by emphasising that "[t]he various grounds of discrimination differ substantively, and each demands a tailored response. This is not a question of creating a hierarchy between the various grounds, but of delivering the most appropriate form of protection for each of them."[356]
That said, the European Court of Justice has, generally, adopted a consistent approach, extending its own precedents from one area to the others, although, sometimes, the Court has adopted a more lenient approach in respect of certain forms of discrimination as opposed to others, giving, for instance, more leeway to Member States when they deal with age discrimination, compared to discrimination on grounds of race or gender.
Regardless, nowadays, the principle of equality is proclaimed in the Charter of Fundamental Rights and in the treaties, and various pieces of legislation have supported the fight against discrimination.
In addition to that, the European Court of Justice, through its case law, has contributed to the increase of protection afforded to vulnerable categories of citizens. In relation to this, it has been observed that

> *This case law has created a corpus of equality rights, influencing both treaty and legislative developments, which has had a profound impact upon the lives of the people of Europe. For all the rhetoric – and considerable this rhetoric has been – emanating from politicians and lawmakers, it is not from them that equality has come. It has come essentially from citizens themselves, insisting on their rights and bringing legal proceedings to enforce them the length and breadth of Europe, and from a Court willing to assume the responsibility of putting flesh on skeletal legal provisions to bring them to life in a manner that will achieve their declared objectives.*[357]

After all, the various Directives left the various Member States a margin of appreciation to adapt the European rules to their own internal situation, by permitting them to invoke specific exceptions and derogations. In this respect, the ECJ has acted as a safety valve, ensuring that all such exceptions and derogations were indeed proportionate and appropriate, so that the principle of equality should not be unnecessarily or arbitrarily weakened.
Nonetheless, a sort of 'hierarchy of discrimination grounds' seems to have appeared.[358] As a result, while employment-related discrimination is always prohibited, the exceptions to

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[355] Philippa WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012, p. 1446
[356] COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Non-Discrimination and Equal Opportunities: A Renewed Commitment*, Brussels, 2008, p. 5.
[357] P. WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012, p. 1477
[358] On which, see *ex multis* E. HOWARD, *The Case for a Considered Hierarchy of Discrimination Grounds in EU Law*, vol. 13, no 4, 2006, pp. 445-470; E. HOWARD, *The EU Race Directive: Time for Change?*, International Journal of Discrimination and the Law, vol. 8, 2007, pp. 237-261; S. BENEDI LAHUERTA, *Taking EU Equality Law to the Next Level: In Search of Coherence*, European Labour Law Journal, vol. 7, no 3, 2016, pp. 348-367

the principle of equality may be interpreted more or less leniently depending on the form of discrimination the person is enduring[359]. So, for instance, when it comes to age-related discrimination, the ECJ has adopted a more tolerant approach; similarly, in respect of disability-related discrimination, the definition of 'disability' that the Court has adopted in *Chacón Navas* appears to be too restrictive and, consequently, ends up being somewhat in conflict with the spirit and purpose of the Equality Framework Directive.
And even in areas where instances of discrimination are policed less loosely, such as gender discrimination, prejudicial disparities of treatment can still be seen, for instance as far as indirect forms of discrimination of women in social security are concerned.
The fact that forms of discrimination may still be tolerated and, even more, the very existence of the aforementioned hierarchy of discrimination grounds is not deliberate. As a matter of fact, anti-discrimination law is still a work in progress and its flaws are the accidental by-product of the progressive way in which it has proceeded so far.
Consequently, further evolution is required, to ensure that this field of law grows and develops into a coherent, unified system that replaces the present one, based on a plurality of legislative instruments, each containing different exceptions, derogations, and scope of application. Through that, it would be possible to achieve uniformity in the legal treatment of the various forms of discrimination.

4. Italy
4.1. Introduction

Italy, officially the Italian Republic, is a Southern European country comprising 20 regions; according to ISTAT's latest survey, the Italian National Institute for Statistics,

> *out of the population of 60 665 551,1 there are about 2 600 000 people with disabilities, which represents 4.3 % of total population.2 Pupils with disability number 156 000, or 3 % of total students. One million people identify themselves as homosexual or bisexual.3 There are 5 026 153 foreign nationals, but no data are available on the racial or ethnic origin of the population. With regard to religion, 76.5 % of the total population have been baptised into the Catholic Church, although only around 25 % declare themselves to be practising Catholics. Muslims represent around 2 % of the population, the same percentage as Orthodox Christians. The Jewish community has a historical presence in Italy and has about 35 000 members.*[360]

Anti-discrimination law in Italy is still not considered a fully fledged branch of law and, as such, it tends to be "ignored even in databases commonly used by judges and lawyers"[361].
In addition to that, decisions upholding its principles are frequently criticised by public figures and politicians, for, they argue, such judgments violate freedom of speech or freedom of choice.
Nonetheless, over the last few years, an ever increasing body of decisions dealing with discrimination have been handed down, contributing to the evolution of this sector of law, especially insofar as discrimination on the grounds of nationality is concerned.

[359] And that does not take into account discrimination that is not related to employment, where the difference is even more noticeable.
[360] Chiara FAVILLI, *Country Report – Non-discrimination – Italy*. Luxembourg, Publications Office of the European Union, 2017, p. 5
[361] *Ibid*.

Still,

> *[b]oth on political platforms and in the social sciences, discrimination is still a low-priority issue. The marginalisation of the activity of UNAR, an office of the Government that is supposed to be the equality body, is both a cause and an effect of this lack of awareness, at least among politicians.*[362]

In surveys about perceptions, generally respondents show hostile attitudes against Roma people and Muslims, with the migrant crisis and terrorism having had an adverse effect on opinions. However, domestic minorities, such as Jews, Waldenses, and others, do not report serious instances of discrimination or hostility.

Age- and disability-related issues, while often discussed, are seldom brought to court. Furthermore, in respect of discrimination on the grounds of age, it has proved difficult to enforce the European directives prohibiting disparities of treatment, especially since the 2008 economic crisis, which has been accompanied by erosion of legal protections in favour of young employees and "the intensive use by employers of short-term contracts, which are linked to tax benefits and are limited to younger workers."[363]

4.2. Relevant Legislation

Art. 3 of the Italian Constitution prohibits all forms of discrimination, and binds the Republic to adopt positive measures aimed at removing all obstacles that may hinder the achievement of "substantive equality".

Art. 3 proclaims

> *All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.*
> *It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country*

Art. 3 outlaws discriminatory legislation; however, it is dubious whether it may be invoked horizontally, namely whether "if it is sufficient ground for action by an individual who has faced discrimination."[364] On this issue, there are no specific precedents.

Furthermore, in 1970, Parliament enacted the so-called Workers' Act, Act no 300/1970, which bans workplace discrimination and which can be directly invoked by those who have been targeted by discrimination.

Subsequently, "[t]he first enactment of advanced anti-discrimination regulations took place with the 1998 Immigration Decree."[365]

In that Decree, Parliament prohibited

> *direct and indirect discrimination by individuals and public authorities, with definitions roughly corresponding to those of the directives but with an open-ended list of fields of application. Protection extends to*

[362] *Id*, p. 6
[363] *Ibid*.
[364] *Ibid*.
[365] *Ibid*.

> *discrimination on the ground of national origin, understood as nationality as in citizenship.*[366]

Then, in 2003, Italy adopted two further decrees, transposing into national law Directives 2000/43/EC and 2000/78/EC, namely Legislative Decrees 215/2003 and 216/2003.
The former covers race discrimination and the latter deals with discrimination on the basis of disability, religion or belief, age, and sexual orientation. The two legislative decrees only "aim to transpose the directives into the legal system as they are"[367]. Consequently, there resulted drafting mistakes and discrepancies that had to be subsequently corrected, which was done first by decree and then by passing specific legislation in 2008.
The approach adopted by Italy has been criticised, for it was decided not to repeal and replace previous legislation dealing with discrimination leading to a lack of coordination between the different acts and decrees; such a situation persists to this day, though "a step towards coordination was taken in 2011, with the general fast-track procedure applying expressly to all the grounds covered by the directives, plus national origin, language and colour."[368]
As far as gender discrimination is concerned, on the other hand, Italy enacted Legislative Decree 198/2006, in order to rationalise the legal framework and to transpose Directive 2002/73/EC into Italian law. That Legislative Decree was subsequently amended by Legislative Decree 5/2010, transposing Directive 2006/54/EC, and then modified again by Legislative Decree 151/2015.
In addition, it bears mentioning that the country has also ratified

> *the major international treaties and conventions against discrimination, for example the Convention on the Elimination of All Forms of Racial Discrimination, ILO Convention No. 111 on Discrimination and the Convention on the Rights of Persons with Disabilities, which have all been transposed into domestic law.* [369]

Italy, however, has signed but not ratified Protocol no 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which bans discrimination, proclaiming that

> *The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
> *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

4.3. Scope of Application

Anti-discrimination law covers the same grounds covered in the relevant EU directives; as far as labour law is concerned, the Italian anti-discrimination legislation applies both to the private and public sectors.

[366] *Ibid.*
[367] *Id.*, p. 7.
[368] *Ibid.*
[369] *Ibid.*

Although Legislative Decree 215/2003 does not apply to discrimination on the grounds of nationality, unlike the 1998 Immigration Decree, judges have overcome that oversight by applying

> *the same legal framework, consisting of the 1998 Immigration Decree and Legislative Decree 215/2003, to every case of racial or nationality discrimination. This allows judges to handle cases of discrimination on the ground of nationality as direct discrimination and not as indirect racial discrimination.*[370]

4.4. Overview of the Main Principles

Italy has transposed into national law the various directives and currently prohibits both direct and indirect discrimination, including harassment and instructions to discriminate.

> *Discrimination by association (on presumed grounds or characteristics) is not explicitly covered, but the Decrees can probably be interpreted as covering such discrimination, which could also be considered as an infringement of freedom of expression and of association.*[371]

Disparities of treatment may still be permissible, as long as occupational requirements justify them and within the boundaries of "proportionality and reasonableness". In addition to that, Italy elected to take advantage of the possibility offered by the relevant Directive to introduce an exception in favour of organisations with a specific ethos, such as churches, political parties and trade unions, who may only claim damages and not reinstatement in the event of an unfair dismissal.

However, as far as religion is concerned,

> *a problem exists for faiths (such as Islam) that have not signed an agreement with the State and thus do not enjoy automatic legal recognition of their specific needs (such as holidays and ritual obligations). However, they enjoy freedom of religion and the right to equality of churches under the Italian Constitution. The Court of Appeal of Milan decided an interesting case in 2016, regarding discrimination against a Muslim woman wearing a headscarf. The Court qualified this as direct discrimination and ruled out the application of the 'genuine and determining requirement' exception, ordering the company to pay non-pecuniary damages.*[372]

Another problem concerned the fact that Italian legislation failed to include the duty to provide reasonable accommodation for disabled people; for that reason, in *Commission v Italy*[373], Italy was found not to have correctly transposed Directive 2000/78/EC into national legislation. As a result, Italy adopted new legislation, which, however,

> *does not give a definition of reasonable accommodation nor any sort of guidance to employers on how to respect this duty, but simply compels employers to make provision for reasonable accommodation.*

[370] *Id.*, p. 9
[371] *Id.*, p. 7
[372] *Id.*, p. 8.
[373] [2013] C-312/11.

> *It should be noted that public bodies must respect this duty even without any additional financial or human resources.*[374]

The fact that the law is so generic, however, may end up creating problems, for, under art. 5 of the Equality Framework Directive, employers have to provide reasonable accommodations to disabled employees, as long as such measure do not impose a "disproportionate burden". And, examining the case law on the issue, it emerges that courts have interpreted the provision at hand in keeping with the Equality Framework Directive EC and the UN Convention on the Rights of Persons with Disabilities, holding that failure to provide reasonable accommodation could be construed as a form of discrimination.[375]

Finally, Italian law does not specifically recognise intersectional discrimination; that category, however, has been used in a Report by UNAR, the Italian National Anti-Racial Discrimination Office.[376]

4.5. The Enforcement of the Law

Any person who deem to have suffered discrimination may file a suit in court using "the general fast-track procedure provided by Article 702-bis of the Civil Procedural Code."[377]

Judges may impose interim orders, when appropriate, and may order that a plan be presented to correct the discriminatory practices in question; violating either the interim or the final order is a criminal offence.

Furthermore, all cases concerning discrimination must now go through a mediation phase before the trial actually begins.

As far as standing is concerned, associations and bodies may litigate in support or on behalf of victims. When it comes to discrimination based on race and ethnic origin, associations only have standing if they are included in a list kept by the Department for Equal Opportunities of the Presidency of the Council of Ministers keeps a list, after approval by the Ministries of Labour and Welfare and Equal Opportunities. No such list is present when it comes to discrimination on grounds other than those.

When no victim is identified, associations have standing to bring an *actio popularis*[378]; furthermore, although "class action in discrimination cases is not expressly allowed"[379], it has to be said that

> *it is likely that collective actions could be admitted thanks to a broad interpretation of the same rules on actio popularis and actions in support of or on behalf of victims of discrimination, or of the rules on class action in the consumer protection field included in the Finance Act of 2007.*[380]

In terms of penalties and sanctions, all discriminatory acts are considered null and void and measures may be adopted by judges to remove the effects of said acts. For instance,

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[374] C. FAVILLI, *Country Report – Non-discrimination – Italy*, p. 8.
[375] *Ibid*.
[376] UNAR, "Relazione al Presidente del Consiglio dei Ministri – Anno 2014", 2014, available at http://www.unar.it/wp-content/uploads/2017/12/Relazione-attivita-UNAR-2014.pdf (last accessed November 2018). Originally, UNAR was only created to deal with discrimination on the basis of race and ethnic origin; however, their remit was extended in 2010 and now covers discrimination on the grounds of nationality, ethnic origin, religion or personal belief, gender, disability, sexual orientation, and age.
[377] C. FAVILLI, *Country Report – Non-discrimination – Italy*, p. 9.
[378] *Ibid*.
[379] *Ibid*.
[380] *Ibid*.

in the event of an unlawful dismissal, the employer may be compelled to rehire the employee. In addition to that, judges may order the employer to pay pecuniary and non-pecuniary damages, taking into account the dissuasive effect of such measures, in the light of the provisions of the relevant directives.
Furthermore, in keeping with EU law,

> *[a]rticle 28 of Legislative Decree 150/2011 provides a rule on the burden of proof, which is applicable to all grounds of discrimination. This rule introduces a reversal of the burden once the claimant produces evidence (which may include statistical data) that can precisely and consistently establish a presumption of the existence of discriminatory acts, agreements or behaviours.*[381]

Regardless of the foregoing, Italy still has not clearly committed to an efficient anti-discrimination policy, as is demonstrated by the lack of positive action measures, other than "traditional social inclusion measures for people with disabilities and the linguistic minorities." Also in terms of the duty to provide reasonable accommodations, the law as it stands is lacking, in that it provides no guidelines for employers.
In addition to that, the coexistence of a plurality of acts dealing with discrimination may end up creating uncertainties and disparities of treatment.
For these reasons, Italy ought to first consolidate its legislation on the topic and, then, proceed to a needed review of its principles, to ensure that the principle of equal treatment is not only solemnly recognised but also actually and efficiently enforced.

5. France

The key concept of equality embodied in the Constitutions of 1946 and 1958 taints all the French legal regulations.
The legal charter spreads out from two integrated directions: the censure of inequality based on 'origin', on the one hand, and the rejection to use the standards of 'origin' for policy and administrative purposes.
In a 2007 decision, the Constitutional Council for the time expressly rejected the concept of ethnic origin or race, as legal or administrative or research groups, to evaluate differential treatments.[382]
As the legal literature pointed out, "[e]ven if there is no constitutional text expressly prohibiting discrimination on the basis of age, disability, health or sexual orientation, according to the Constitutional Council the list of prohibited grounds of discrimination in the Constitution is an open one".[383]

5.1. Main legislation

The antidiscrimination discipline is not condensate in a single piece of legislation, rather it is placed in the Labour Code (LC), the Penal Code (PC) and the Civil Code (CC); administrative law also deals with the issue, but it mostly jurisprudential and based on the

[381] Id., p. 10.
[382] Constitutional Council, 2007-557, 15 November 2007. Available at: http://www.conseilconstitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html (accessed 6 September 2018).
[383] S. LATRAVERSE, *Country report Non-discrimination France*, Brussels, 2017, p. 5 (hereinafter, the "Country Report").

enactment of a formal notion of equality.
The Law of 16 November 2001, the Law on Social Modernisation No. 2002-73 of 17 January 2002, and the Law No.2004-1486 of 30 December 2004 establishing the Haute autorité de lutte contre les discriminations et pour l'égalité, HALDE, transposed the Directive 2000/43/EC.
As the Country Report observed, "[g]eneral provisions prohibiting discrimination have always been transversal, providing a uniform legal regime, not only for the grounds covered by Article 19(1) of the Treaty on the Functioning of the European Union, but also physical appearance[384], last name, customs, health, political opinions, trade union activities and involvement in mutual benefit organisations, family situation and genetic characteristics".[385]
On 15 May 2008, the Parliament adopted Law No. 2008-496 of 27 May 2008. By means of

[384] The Cour de Cassation, soc. Jan. 11, 2012, Bull. civ. V, No. 12 (Fr.) (finding a restaurant liable for physical appearance discrimination against a male waiter for wearing earrings at work) and Cour de cassation soc., June 27, 2012, Bull. civ. V, No. 201 (Fr.) (holding that the employer was not liable for physical appearance discrimination based on requiring the employee to wear company and safety accessories at work). *see also* Katell Berthou, *New Hopes for French Anti-Discrimination Law*, 19 INT'L J. COMP. LAB. L. & INDUS. REL. 109, 124 (2003) (noting that Article L.122-45 "also covers discrimination on the ground of physical appearance, i.e. on account of size, weight, etc., in order to fight what is often termed 'lookism'"). See, also, D. L. Rhode, The Injustice of Appearance, 61 Stan. L. Rev. 1033, 2009

[385] Id, p. 6. M. L. HIGGINS, *Not "Fit" for Hire: The United States and France on Weight Discrimination in Employment*, 38 Fordham Int'l L.J. 889, 2015, pp. 894-895 remembers that "n 2001, France prohibited all forms of physical appearance discrimination in the workplace. Such an expansive law encompasses discrimination not just on the basis of weight but also based on a person's height, attire, and/or small stature, to name a few. In fact, as with all of France's anti-discrimination laws, a finding of physical appearance discrimination carries both civil and criminal liability". Then, it is noteworthy that "France is one of the few countries in the world to have adopted both criminal and civil national laws to ensure that individuals do not face discrimination in the workplace on the basis of their physical appearance." Id. p. 923. Accordingly, under Article L.122-45, therefore, all agreements or actions causing prejudice based on physical appearance discrimination are null and void. See, the *Enquête sur la perception des discriminations par les demandeurs d'emploi*, LE DÉFENSEUR DES DROITS 1, 5 (2013), http://www.defenseurdesdroits.fr/sites/default/files/upload/oit-synthese.pdf showing that physical appearance discrimination reported by twenty-nine percent (29%) of job-seekers, thirty-five percent (35%) of which were women and eleven percent (11%) of which were men. See, also *Les Discriminations sur le physique progressent, malgré les apparences*, 20MINUTES.FR (Feb. 3, 2014), http://www.20minutes.fr/societe/1287510-20140202-discriminations-lapparence-progressent (explaining that physical appearance among top three reported types of employment discrimination in France); *see also Baromètre sur la perception des discriminations au travail*, LE DÉFENSEUR DES DROITS 1, 3 (2014) http://www.defenseurdesdroits.fr/sites/default/files/upload/ifopddd-note-de-synthese-2014-02-03.pdf (comparing public sector and private sector reports of discrimination).
Almost one-third of employees who complained for discrimination in the workplace highlighted physical appearance discrimination, making physical appearance the second most discriminated against criterion for employees in the public sector. Specifically, women were more likely to report instances of weight discrimination at work. M. L. HIGGINS, p. 925.
To sum up, the following grounds of discrimination are explicitly prohibited in national law:
mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, nation, race or specific religion, physical appearance, last name, family situation, union activities, political and philosophical opinions, age, health, disability, genetic characteristics, loss of autonomy, place of residence, capacity to express oneself in a language other than French, economic vulnerability.
Precisely, "[t]he ground of 'loss of autonomy' has not yet been interpreted. It has been adopted in order to bring abusive behaviour towards people who are dependant under the scope of discrimination, and confers jurisdiction on the equality body in situations where people in a sheltered environment are abusively treated, whether such environments are old age homes, hospitals or homes for people who are disabled or chronically sick. Given the definition of disability in the International Convention on the Rights of Persons with Disabilities, this definition covers situations relating to disabled people". Id, p. 33. Then, the ground of gender identity was adopted in Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century, in order to settle the debate on the relevance of the term 'sexual identity,' which was meant to cover unequal treatment and harassment related to transgender persons, and other gender identity issues whatever the characteristics of the person – whether he or she be gay, transgender or intersex. Finally, the ground of 'economic vulnerability', created by Law No. 2016-832 of 24 June 2016 to fight discrimination relating to social precariousness, "is intended to cover unequal treatment on the basis of a person's poverty and action that takes advantage of the vulnerability of someone's economic situation. The ground of 'expressing oneself in a language other than French' is intended to extend discrimination to include discrimination against people claiming their regional rights and persons of foreign origin who have an accent when speaking French". Id.

this Act it has been qualified the concept of harassment and discrimination.[386]
In detail, Article 1 offers a definition of discrimination encompassing the notion of direct and indirect discrimination, the hypothesis of harassment[387], covering also the instructions to discriminate.[388]

[386] The notion of sexual harassment was firstly introduced by the 2002 Social Modernization Act, both in the Penal and Labour Code. The provision on sexual harassment, then contained in Art. L. 1153-1 of the French Labour Code, merely provided: Acts of harassment by all persons with the goal of obtaining sexual favours for one's benefit or the benefit of a third party are prohibited. After the Constitutional Court intervention, new provisions on sexual harassment were enacted into both the Penal Code and the Labour Code. Those provisions contain a two-part definition of sexual harassment. The first part of the Penal Code provision indicates that: Sexual harassment is the fact of imposing on a person, in a repeated manner, words or behavior with a sexual connotation, which undermine his or her dignity by reason of their degrading or humiliating nature or create against him or her an intimidating, hostile or offensive situation. The second part of the definition in the Penal Code provides that incorporated into the definition of sexual harassment is "the fact, even if not repeated, of using any form of serious pressure with the real or apparent goal of obtaining an act of a sexual nature, if it is sought for the benefit of the actor or the benefit of a third party." The Labour Code provisions are similar, incorporating the same two parts of the definition of sexual harassment from those Penal Code provisions. The Labour Code provisions on sexual harassment provide that: No employee shall be required to submit to facts
1. of sexual harassment, consisting of repeated words or behavior with a sexual connotation, which undermine his or her dignity by reason of their degrading or humiliating nature or create against him or her an intimidating, hostile or offensive situation;
2. incorporated into sexual harassment, consisting of any form of serious pressure, even if not repeated, exerted with the real or apparent goal of obtaining an act of a sexual nature, if it is sought for the benefit of the actor or the benefit of a third party.
But in the Labour Code there are other specific provisions dealing with the sexual harassment: "[t]he Labor Code provides that employees may not be discriminated against or be subjected to adverse action in connection with employment decisions because the individual submitted to or refused to submit to harassing conduct, even if the harassing conduct did not consist of repeated actions; employees also may not be discriminated against or subject to adverse employment action for having testified about or having reported acts of sexual harassment. Another provision of the Code imposes an obligation on employers to "take all necessary actions with a view of preventing acts of sexual harassment." The new provisions of the Penal and Labor Codes on sexual harassment make clear that some use of coercion is required for actionable harassment, in the form of any type of "serious pressure." The new law also makes clear that harassment occurs whether the harasser is motivated by an actual aim to obtain sexual acts or only appears to be seeking that goal and whether he or she seeks those acts for his or her own benefit or for the benefit of another. And this provision definitively resolves the question left open by the prior versions of the prohibition on sexual harassment: even a single act of serious pressure, when the aim of that pressure is to obtain sexual acts, is expressly stated to be sufficient to constitute a legal claim of sexual harassment". L. C. HEBERT, *Divorcing Sexual Harassment from Sex: Lessons from the French*, 21 Duke J. Gender L. & Pol'y 1, 2013, p. 14.

[387] In addition to the prohibitions of sexual harassment contained in the French Penal and Labour Codes, those codes also contain prohibitions of moral harassment. The provisions on moral harassment are contained in Art. 222-33-2 of the Penal Code and Art. L. 1152-1 to 1152-6 of the Labour Code. This portion of the Penal Code provides that the fact of harassing another by repeated acts having the purpose or effect of deteriorating his or her working conditions and that are likely to violate his or her rights and dignity, impair his or her physical or mental health or jeopardise his or her professional future, is punishable by two years' imprisonment and a fine of 30,000 euros. Similarly, article L. 1152-1 of the French Labour Code provides that "No employee shall be subjected to repeated actions of moral harassment, which have the purpose or effect of deteriorating working conditions and that are likely to violate his or her rights and dignity, impair his or her physical or mental health or jeopardise his or her professional future." The Labour Code contains additional provisions similar to the additional provisions relating to sexual harassment. For example, the provisions on moral harassment prohibit an employee from being discriminated against or subjected to adverse employment action for having submitted to or having refused to submit to repeated acts of moral harassment, or for having reported or having testified about those acts. Code du Travail [C. Trav.] art. L. 1152-2 ("No employee may be sanctioned, dismissed, or subjected to discriminatory measures for having submitted or having refused to submit to acts of repeated moral harassment or for having testified of those acts or having reported them."). Employers are also under an obligation to take "all necessary actions with a view of preventing acts of moral harassment.". C. HÉBERT, *Divorcing Sexual Harassment*, pp. 24-25 The provisions on moral harassment in the Penal and Labour Codes share with the corresponding sexual harassment provisions the concept of the violation of the dignity of the employee subjected to harassment, but contain additional concepts not shared by the definition of sexual harassment. The moral harassment provisions focus on the somewhat more tangible harms of deterioration of working conditions, harm to an employee's mental and physical health, and injury to one's professional future, while the sexual harassment provisions focus on degrading and humiliating conduct and the creation of an intimidating, hostile, or offensive environment. Accordingly, while the underlying basis of the sexual harassment provisions seems to be focused on preventing harm to dignity, the underlying basis of the moral harassment provisions appears to be an interest in protecting an employee from unfavourable workplace conditions and preserving his or her employment opportunities. Id. at 28. A third prohibition on harassment is found in the Labour Code in Article L. 1132-1, prohibiting harassment as a form of discrimination. Id. 28-29.

[388] It is also said that, "[t]he new provisions also introduce a new conception of sexual harassment into the provisions of the Labor and Penal Codes, that of the use of repeated words or actions with a sexual connotation to impair one's dignity, through

Finally, it safeguards from victimisation and foresees non-salaried and independent workers.[389]

In the last amendments, the Law No. 1547 of 18 November 2016 on the modernisation of the justice system in the 21st century, modified Article 2(3) of Law No. 2008-496 to unify the list of grounds offered to activate an anti-discriminatory claim.[390]

The national origin was reintroduced, the ground of belief was abandoned, remaining in force in employment law by the Labour Code and Law No. 83-634 protecting civil servants in employment.

The remedies regarding discrimination before the civil courts are regulated by Law of 16 November 2001, Law of 17 January 2002 and Law No. 2008-496; accordingly, all benefit from the shift in the burden of proof.

Even if some resistance to this exceptional shift in the burden of proof is still observable, there jurisprudence has developed favouring the claimant's access to evidence in matters of discrimination.[391]

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degrading or humiliating conduct, or to create an intimidating, hostile, or offensive situation for the harassed individual. For this type of sexual harassment, repetition of acts is expressly required. There is no requirement that the sexually related acts be motivated by an intent to obtain sexual acts from the target of harassment or, indeed, any express requirement that the acts be motivated by any intent at all. Instead, the provision focuses on conduct that harms the dignity of the target of harassment or subjects him or her to a hostile, intimidating, or offensive situation. There is also no express requirement of coercion, in the form of serious pressure or otherwise, in this part of the definition in either the Penal or Labor Code provisions, although the use of the term "imposing" in the Penal Code, as well as the prohibition on requiring an employee to submit to harassment in the Labor Code, presumably suggest that the words or behavior being inflicted on the target of harassment are unwanted. The same reading is presumably suggested by the notion that the words and behavior undermine dignity because of their "degrading and humiliating" nature, because it is difficult to imagine that the legislators thought that degrading and humiliating conduct would be inflicted with the consent of the employee". Id. pp. 14-15.

[389] An analysis particularly relevant comes from the Louisiana - hybrid legal system sharing US and France traditions - see, T. M. SHIVELY, *Sexual Harassment in the European Union: King Rex Meets Potiphar's Wife*, 55 La. L. Rev. 1087, 1995. For a detailed analysis of the French sexual harassment provisions, as well as the French legal system's separation of the concepts of harassment from discrimination, see L. C. Hébert, *Divorcing Sexual Harassment*, pp. 11-23. The legislative history of the new prohibitions on sexual harassment in the French labour code and penal code indicates that, while sexual harassment is not generally viewed in France as a form of discrimination, a number of participants in the enactment of that legislation expressed the view that the existence of sexual harassment in the workplace "does implicate issues of equality between men and women." *Id*. pp. 18-19. In general, French law appears to view the concepts of harassment and discrimination as analytically distinct, as reflected in the separation of those concepts in different parts of the Penal and Labour Codes. The history behind the original adaptation of the sexual harassment provisions in the Penal Code demonstrates that this separation of the provisions on harassment and discrimination in different parts of the Codes was not accidental. The express provisions of the new statute do not contain any requirement that actionable sexual harassment be based on any discriminatory motive. The definition of sexual harassment contained in that new statute references dignity and the creation of a hostile situation, as well as the concept of coercion of sexual acts, but not discriminatory motive. In fact, as discussed below, even the provision of the Labour Code defining discriminatory sexual harassment does not expressly require a showing of a discriminatory motive, as long as the harassment has a sexual connotation. [...] Tellingly, the provisions on discrimination because of sexual harassment are codified with the Code provisions on sexual harassment, while the provisions on discrimination because of gender identity are codified in the section of the Code that also prohibits discriminatory harassment. This separation further demonstrates that the prohibition on sexual harassment under French law is separate from, and not based upon, any notion of discriminatory motivation. Id. pp. 16-17.

[390] France, Law No. 2016-1547 of 18 November 2016, available at: https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo.

[391] The Minister of Social Affairs explained this: "*S'il me fallait repondre a la question de savoir qui desormais de l'employeur ou de l'employe portera la charge de la preuve je serais tente de dire, sans aucune ironie, c'est le juge*." Assemblee National Debats Parlementaries [National Assembly Parlementary Debates], in Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], May 23, 1973, p. 1445. That is to say, "if it were necessary to answer the question: Who, from now on, is allocated the burden of proof, the employer or the employee? I would be tempted to say, without any irony, it is the judge".

In this respect, the judge only has a duty to order any means of proof at his own discretion, and this duty does not primarily stem from the Law No. 73-680, but from article 10 of the NCPC. See, 1 A. BRUN & H. GALLAND, *Droit Du Travail 882*, 2d ed., 1978 ("A la question ainsi formulee, l'article L. 122-14-3 n'apporte pas de reponse et c'est regrettable. La solution doit donc etre cherchee en dehors du texte.") [Article L. 122-14-3 does not provide any answer to this question and this is regrettable. The solution must therefore be found outside the text of the law] (author's translation); see also Y. LETARTRE, *Note*, Recueil Dalloz, 1978, p. 153-55 (Fr.).

Magistrates, public servants working within Parliament and contractual public servants are generally excluded from all protections against discrimination and are not covered by the transposition of the directives. But, in the Perreux case, the Conseil d'Etat held that Directive 2000/78/EC, was directly applicable in national law and therefore applicable to all public agents.[392]

Law No. 2005-102 of 11 February 2005 renewed the concept of disability, focusing on integration in all areas of life and any decrees to enforce these principles in the workplace, access to schools, urban renovation and public support and creates employment quotas in both the private and public sectors.

It has also been provided a right to reasonable accommodation in the workplace, as well as positive action programmes imposing employment quotas for both the public and private sectors.[393]

These benefits apply to employees (i) who have official been obtained a disabled worker status, (ii) who have suffered an accident at work resulting in a degree of disability greater than 10 %, and (iii) who benefit from compensation in this regard, those in receipt of disability pensions and disabled veterans. This means that the other categories of disabled workers are still not benefitting from the obligations listed in the law. [394]

The 1989 reform redressed the ambiguities establishing that: "Si un doute subsiste, il profite au salarie", standing for "if a doubt remains, it benefits the employee." Law No. 89-549 of Aug. 2, 1989, Journal Offciel de la Republique Francaise [J.O.] [Official Gazette of France], Aug. 8, 1989, art. 28, p. 9957, added to C. DU TRAVAIL [C. TRAV.] art. L 122-14-3 (Petits Codes Dalloz 1974) (Fr.).

The employee gained the benefit of the doubt under the new framework; this means that the risk of losing the case-the burden of persuasion-has been allocated to the employer. The Cour de cassation has interpreted this reform, "le juge, auquel il appartient d'apprecier le caractere reel et serieux du licenciement, forme sa conviction notamment au vu des elements fournis par les parties et que, si un doute subsiste, il profite au salarie." Chambre Sociale [Cass. soc] [Social Law Chamber], June 16, 1993, Bull. civ. V 1993, No. 169, 115 (Fr.).

In other words, the judge, who must ascertain the real and serious reasons for the dismissal, forms its conviction in particular by weighing up the evidence submitted by the parties. And, if a doubt remains, it benefits the employee.

However, this kind of burden has two aspects: one positive and one negative. The positive aspect means that the plaintiff is required to substantiate those contested facts that he avers. In this respect, the Cour de cassation has stated that the burden of proving the existence, for example, of a contract, falls on that party who asserts its existence. Troisieme chambre civile [Cass. 3e civ.] [Court of Cassation, 3rd Civil Law Chamber], Feb. 18, 1981, Bull. civ. III 1981, No. 36 (Fr.) the one who re-proclaims the execution of an obligation must prove it. The negative aspect refers to the risk of nonpersuasion. Its effect is to allocate the risk of losing the case on the litigant making a claim, should the claimant fail to adduce evidence to support the claim: "cette charge [de la preuve] lui incombant, le doute, releve expressement par la cour, devait necessairement lui prejudicier." Chambre sociale [Cass. soc.] [Social Law Chamber], Oct. 15, 1964, Bull. civ. II 1964, No. 678 (Fr.) therefore, the doubt plays against those who bear the burden of proof. As a mindful doctrine highlights "[h]owever, following the procedural reform of the 1970s, the distinction was made clearer: the burden of persuasion allocated to the plaintiff derived from article 1315 of the Civil Code and the new charge de l'adminsitration de la preuve derived from article 9 of the NCPC is allocated to both litigants. This second and new burden seems to be the functional equivalent for the common law burden of adducing evidence, although some subtle differences are worth mentioning. The French version has a broader scope, as it forces both litigants to come forward with factual allegations and the evidence to support them, otherwise the factual allegation will not be considered. Furthermore, the judge may trace negative inferences from the lack of cooperation." L. J. RAZNOVICH, *A Comparative Review of the Socio-Legal Implications of Burden of Proof and Presumptions to Deal With Factual Uncertainty*, 32 Am. J. Trial Advoc. 57, 2008, pp. 79-80.

[392] Conseil d'Etat (Council of State), No. 298348, 30 October 2009.

[393] According to a scholarly classification, France (and Denmark) belongs to the so-called "Anti-discrimination law regimes" featured by the absence of experimentation with positive action as a means to combat discrimination. See, M. BELL, *Antidiscrimination law and the European Union*, Oxford- NewYork, 2002, p. 168. Indeed, according to this scholar, in France it is important to note that positive action is not allowed, since "[t]he fundamental principles that underpin the French approach ... focus on equality for citizens and assimilation, rather than the recognition of specific minority groups. Positive action is perceived as reinforcing the separation of ... groups, even leading to ghettoization. In particular, measures such as race-specific training schemes, such as exist in the UK, would be a breach of anti-discrimination law in France". Id., p. 172.

[394] For a detailed history of the legislation in force for the disabled workers in France see, E. A. BESNER, *Employment Legislation for Disabled Individuals: What Can France Learn From the Americans With Disabilities Act*?, 16 Comp. Lab. L. 399, 1995.

5.2. Main principles and definitions

All anti-discriminatory regulation list the forbidden grounds without defining them.
Article 1 of the Law No. 2008/496 provides a definition of direct and indirect discrimination. The notion of indirect discrimination[395] resembles the one of the EU Directives, while that of direct discrimination does not. Precisely, it excludes the possibility of proceeding by way of hypothetical comparison: the expression 'would have been' has been replaced by 'will have been'.[396]
France has a long-standing tradition of legislating in favour of gender equality in the domain of employment and professional life.[397]

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[395] In 2009, relating to unequal treatment of part-time workers in taking holidays, the Court of Cassation decided that where "there is a presumption of indirect discrimination based on statistical evidence, the judge must take positive steps to question the reasons that behind the contested measure and to question the employer in relation to acceptable justifications, being specific and asking precise questions about the impact of taking holidays on the organisation and efficiency of the service". Court of Cassation, Social Chamber, No. 07-42801, 01 December 2009, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021389648&fastReqId=205231441&fastPos=1 (accessed 6 July 2017).
In 2012, the Conseil d'Etat first used the concept of indirect discrimination in a landmark case concerning discrimination on the ground of disability and a reduction in the variable portion of the salary of a magistrate with the public prosecution office who had become deaf and whose pleading duties had been replaced by administrative functions.100 The Conseil d'Etat decided that "the rule applicable to variable salaries was not proportionate and had to be redefined to counter the adverse impact, so as to prevent salary loss in relation to the variable portion and only take into consideration the claimant's performance in carrying out his redefined duties". Conseil d'Etat, Volot-Pfiser v. Ministry of Justice, No. 347703, 11 July 2012.
[396] Country Report, 7.
[397] M. DESPAX, J-P. LABORDE, J. ROJOT, *France*, in R. BLANPAIN (ed.), *International Encyclopedia of Laws: Labour Law and Industrial Relations*, Alphen aan den Rjin, 2017, p. 196 said: "French legislative is profoundly aware of the relevance of gender discrimination, though "in practice, the fight remains very difficult too. Statistics on remuneration of employees according to their gender showing that the gap between the remuneration and of male and female workers is still significant. Indeed, this gap is less founded on direct or even indirect discrimination than on the differences of professional career between men and women, especially for the women who have spent part of their adult life rearing children". In Case C-366/99, Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie, 2001 E.C.R. I-09383, PP 5, 12, 13, 67.
the French Conseil d'État (Council of State) raises questions as to the compatibility with Community law of a national rule whereby women are credited with an added year of pensionable service in respect of each of their children. The plaintiff in the main proceedings is the father of three children and claims he is therefore entitled to three years' added service under the rule in question, which, in his view, by restricting the credited service to women, constitutes a breach of the principle of equal pay for men and women. Mr Griesmar argues that his status as father derives from the existence of children within the first category and that his situation is in this regard comparable to that of a female civil servant who has children in that category. He points out in particular that, in contrast to the credit defined by reference to Article L. 18, paragraph II, of the Code, the credit for children within the first category is granted to a female civil servant exclusively by reason of her status as mother, and there is thus no need for her to prove that she has brought up those children. Id. at 49. Mr Griesmar specifies that, so far as those children are concerned, the credit is not designed to offset occupational disadvantages attaching to the circumstance of being a mother because its grant is not linked to absence from the service as a result of maternity leave. Id. at 50. For its part, the French Government explains that the credit at issue in the main proceedings has been reserved for female civil servants who have had children, in order to address a social reality, namely the disadvantages which they incur in the course of their professional career by virtue of the predominant role assigned to them in bringing up children. The purpose of that credit is thus to offset the disadvantages which female civil servants who have had children encounter in their professional life, even though they have not ceased working in order to bring up their children. Id. at 51. The grant of that credit is not linked to maternity leave or to the disadvantages which a female civil servant incurs in her career as a result of being absent from work during the period following the birth of a child. First, there is nothing in Article L. 12(b) of the Code which establishes a link between the credit provided for and any career disadvantages resulting from maternity leave. It does not even require that children through whom a credit entitlement arises must have been born at a time when their mother had the status of civil servant. Second, the credit under consideration is also granted in respect of adopted children without being linked to a prior grant of adoption leave to the mother. Id. at 52. The explanations provided by the French Government in regard to the purpose served by Article L. 12(b) of the Code not only confirm that there is no link between the credit at issue in the main proceedings and the period following childbirth, during which the mother benefits from maternity leave and is absent from work, but also, on the contrary, emphasise that this credit is linked to a separate period, namely that devoted to bringing up the children. Id at 53. So, the situations of a male civil servant and a female civil servant may be comparable as regard the bringing-up of children. In particular, the fact that female civil servants are more affected by the occupational disadvantages entailed in bringing up children, because this is a task generally carried out by

In fact, the principle of equality between men and women was first recognised in 1946 in the Preamble to the French Constitution, then, the law of 11 February 1950 for the first time regulated the principle of equal pay between men and women, mandating that it has to be part of collective agreements.[398] Then again, in 1972, with the intent to transplant the ILO Convention into the French system, the Labour Code was amended to include the principle of equal pay for work of equal value for men and women. This trend followed with no resistance, favoured also by the decisions of the Courts.[399]
Notwithstanding this significant legislative framework, "the implementation of the European Directives on (gender) equality has had a very deep influence in pushing the French legislature to address new issues and to adopt new measures, sometimes with some important delay. For example, until May 2008, the main concepts of EU gender discrimination law had not been properly implemented in France, as French legislation included no legal definition of the concepts of direct and indirect discrimination, although

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women, does not prevent their situation from being comparable to that of a male civil servant who has assumed the task of bringing up his children and has thereby been exposed to the same career-related disadvantages. Id. at 56. The ECJ stated that pensions provided under a scheme such as the French retirement scheme for civil servants fall within the scope of Article 119 of the EC Treaty. Notwithstanding what is provided in Article 6(3) of the Agreement on Social Policy, a provision such as Article L. 12(b) of the French Civil and Military Retirement Pensions Code infringes the principle of equal pay inasmuch as it excludes male civil servants who are able to prove that they assumed the task of bringing up their children from entitlement to the credit which it introduces for the calculation of retirement pensions. In a later case, Case C-173/13, Leone v. Garde des Sceaux, 2014 E.C.R. 00000, PP 80-82 ("Grounds"), the ECJ was asked to comment on whether a French law that provided for early retirement and an immediate pension for a civil servant with (1) either three children or a (2) child older than one year old, with a disability of 80% or greater, so long as the civil servant/parent was able to show that he or she took a career break of at least two continuous months in the form of (1) maternity leave, (2) adoption leave, (3) paternity leave, (4) parental care leave, or (5) parental leave violated Article 157 (ex 141, 119). Furthermore, the child must have been raised by the civil servant for at least nine years with these breaks taking place before the child's sixteenth birthday or before the age at which they ceased to be dependent. In Leone, the plaintiff was a male civil servant/parent with three children who did not take career breaks during the periods surrounding the birth of his children and was, thus, denied an early retirement with an immediate pension by the French government. The ECJ acknowledged that the provisions of French law were neutral in relation to the gender of the civil servant, yet, also acknowledged that the impact of the French legislation would benefit a much higher proportion of women than men. Specifically, the ECJ found three problems with the French government's social policy that would purportedly meet its aim. First, the ECJ seemed unsure as to why the early retirement with an immediate pension should be associated with having both a career break of two months and the fact that the children must be raised by the civil servant for at least nine years. Second, it was unclear why there would be a difference in eligibility based on whether the civil servant had a child with a disability of 80%. Third, the ECJ believed there is no difference in the disadvantages associated with a career break based on whether the civil servant had one or several children. Id. P 92-04. In an interesting twist, however, the ECJ stated that Article 157 (ex 141, 119) did not prohibit a member-state from creating a social policy that creates specific advantages to make it easier for the underrepresented gender to participate in a vocational activity or to prevent or compensate for disadvantages that the underrepresented gender may face in his or her professional career. The ECJ saw the French law in question, which created a right to early retirement with an immediate pension and service credit granted for the career breaks that a civil servant/parent takes, as a means to craft full equality between men and women in the workplace.

[398] It is interesting that, for example, the French government defended a statute granting privileges to mothers on the grounds that some special rights for women were motivated by a concern to protect women and to ensure their actual equality with men. *See Commission v. France*, [1988] E.C.R. 6332, P 7.The French Government understood the French statutory amendment to exempt a range of collective bargaining agreement provisions from legal nullification by the EU equal treatment implementation. Many collective agreements provided for maternity leaves longer than the statutorily required period, the shortening of working hours for women over 59 years of age, a younger retirement age than that available to men, entitlement to leave to care for an ill child, additional days of annual leave calculated based on the number of children, a one-day leave at the beginning of the school year, time off work on Mother's Day, daily breaks for women working on keyboard equipment or employed as typists or switchboard operators, the granting of extra points for pension rights in respect of second and subsequent children, and the payment of an allowance to mothers to cover the costs of childcare centers or babysitters. Collective agreements accorded special entitlements to mothers because they were "designed to take account of the situation existing in the majority of French households." The Court concluded, however, that the special rights preserved in these agreements "relate to the protection of women in their capacity as older workers or parents -- categories to which both men and women may equally belong." Commission v. France, [1988] E.C.R. 6332, P 11.

[399] And, for the Cour de cassation, "the existence of discrimination does not necessarily imply a comparison with other workers". Cass. Soc. 12 June 2013, no. 12-14153, http://www.legifrance.gouv.fr/ accessed 19 October 2015.

the courts have applied the European definitions in some gender case law".[400]
Going further, incitement and instruction to discriminate match the concept of complicity in Articles 121-6 and 121-7 of the Penal Code and are covered by general principles of liability in civil law.
The Law of 28 May 2008 establishes the right for employers to appeal to occupational requirements on all grounds, if this aims at legitimate objectives and it is proportionate (Articles 2(3) and 8(3)).
Article L1133-3 of the Labour Code provides the option to be exempted by prohibition of discrimination on the ground of age. [401]
Theoretically, therefore, the Law of 27 May 2008 outspreads the defense in the Labour Code to direct and indirect discrimination based on age, by designing a general objections, nonspecific and allowing any employer in any situation to try to justify differential treatment (Article 6(4)).[402]
French laws do not explicitly cover discrimination by association, if not it is not recognised by the law (e.g. parents caring for disabled children); to remedy to this gap, the courts extended the legal protection to associated persons in matters of discrimination related to

[400] S. LAULOM, *Country report, Gender equality, How are EU rules transposed into national law?*, France, Brussels, 2017, p. 6. Nor did the French law guarantee gender equality in employment by other means. The preamble to the French Constitution of 1946 - the constitution of the Fourth Republic that lasted until 1958 - addressed the situation of women. It specifically provided that "*the law guarantees women equal rights to those of men in all spheres*." 1946 Const. pmbl., reprinted in Genevieve Koubi et al., Le Preambule de la Constitution de 1946 - Antinomies juridiques et contradictions politiques 291-92 (1996).
However, at the time, that preamble was not thought to be legally binding (George Ripert, Le declin du droit 17 (1949) (Fr.). Real steps toward imposing a principle of equal treatment came some time later and were distinctly labor-oriented in nature. In 1950, France enacted a new statute on collective bargaining. Loi 50-205 du 11 fevrier 1950 [Law No. 50-205 of Feb. 11, 1950], Journal Officiel de la Republique [J.O.] [Official Gazette of France], Feb. 12, 1950, at 1688 (Fr.). That statute explicitly required collective bargaining agreements to contain provisions on the principle of equal pay for equal work. Id. at 1689.
In effect, the statute entrusted the implementation of equal pay to organised labor. More importantly, equal pay was guaranteed only in the presence of collective bargaining agreements. Due to the weakness of the labor unions in the post-war era, however, collective bargaining agreements failed to become widely accepted until later years. Cf. Arthur M. Ross, Western Europe: Italy and France, 16 Indus. & Lab. Rel. Rev. 63, 82 (1962). On the relative weakness of the French labor unions, see also Arnold R. Weber, The Structure of Collective Bargaining and Bargaining Power: Foreign Experiences, 6 J.L. & Econ. 79, 80 (1963), for a comparison of ten countries, noting that "only in France and Japan are unions relatively less prominent than in the United States."
The 1950 statute called on the French government to prescribe, via governmental decree, a minimum wage for all French workers. Loi 50-205 11 fevrier 1950 [Law No. 50-205 of Feb. 11, 1950], Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], Feb. 12, 1950, art. 31x, at 1690 (Fr.).
This minimum wage did not distinguish between male and female workers. Thus, it guaranteed equal wages to men and women at the bottom of the pay scale. Decret du 8 Sept. 1951 portant fixation du salaire national minimum interprofessionnel garanti [Decree of Sept. 8, 1951 on the Setting of the National Universal Minimum Wage], Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], Sept. 20, 1951, at 9476 (Fr.) (setting the minimum hourly wage for both men and women at 86.5 Francs and - for those working in the region of Paris - at 100 Francs). But of course, this legislation on minimum wages did nothing to help upper-level employees.
[401] See P. BLOCH, *Diversity and Labor Law in France*, VT. L. REV. 717, 720, 2006 (providing bases of discrimination Article L.122-45 prohibited prior to 2001); M. SARGEANT, *The Law on Age Discrimination in the EU*, 55-56, 2008, p. 55 (explaining development of Article L 122-45). Article L.122-45 provides that:
[N]o person may be excluded from a recruitment procedure or an internship or a training program; no employee may be sanctioned, dismissed or be subject to a direct or indirect discriminatory measure, in particular as regards compensation, training, relocation, assignment, qualification, classification, professional promotion, transfer or contract renewal, as well as measures of profit-sharing and allocation of shares based on his origin, sex, practices, sexual orientation, age, family situation, genetic characteristics, or based on his/her actual or presumed belonging to an ethnic group, a nation or a race, or based on his/her political opinions, his/her union or labor activities, his/her religious convictions, his/her *physical appearance*, his/her family name or based on his/her state of health or his/her handicap.
[402] Justifications based on requirements of human resources management have been deemed too general and not proportionate. Court of Cassation Social Chamber, No. 10-10465, 16 February 2011. In a 2014 decision, the Court of Cassation decided that overtly denying pilots access to training on a new plane because of imminent retirement constitutes age discrimination, since retirement age can be postponed in France and younger workers can also leave the company. Court of Cassation Social Chamber, No. 13-10294, 18 February 2014

trade union activities.[403]
The same is the case for multiple grounds of discrimination issue: once again, the courts addressed the case and acknowledged discrimination when it is proven an unequal treatment deriving from more than one grounds.[404]
Law No. 2005-102 of 11 February 2005 on disability outlines the prohibition of discrimination in employment on the ground of disability covering the employer's awareness of the state of the employee and the limits consequential from the environment. As it is stated in the Country Report: "[i]t can thus be considered to include assumed characteristics as well. It provides a definition of disability that is broader than that of the CJEU in case C-13/05, Chacón Navas, that is not limited to access to professional life and encompasses limitations in all areas of life, related or not to consequences of health problems".[405] Moreover, Article L1132-1 of the Labour Code and the Law on public servants no. 83-643 protects discrimination deriving from both health and disability, admitting reasonable accommodation in both cases by means of adapting the workplace, if the measure required to satisfy occupation medicine is not disproportionate in terms of costs.[406]

5.3. Material scope

The 2016 represents a turning point for the antidiscrimination labour law in France.
The Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century unified regime that affords civil, administrative and penal reparation for all sheltered basis and sectors of discrimination.
As it has been clearly reported, "[a]n extended material scope covering social protection, social advantages, education, access to health services and goods and services, applies to all protected grounds of discrimination. The Labour Code and Penal Code cover national origin and there is still no provision for reasonable accommodation of public servants benefiting from specific statuses and non-salaried and independent workers. The general protection against discrimination is enforceable against both private and public persons. Regarding employment, implementation applies to both the public and private sectors. The principle of equality is applicable to non-nationals, unless the legislator can justify a difference in treatment on the basis of conditions of public interest. Such is the case for access to some professions and the law imposes a time delay before affording a number of social protections. Furthermore, the law makes access to certain rights, such as the right to work and some social benefits, conditional on the individual having the status

[403] Caen Appeals Court, Enault v. SAS ED, 17 September 2010 where it is held that differential treatment of an employee by reason of her relationship with an individual protected by the prohibition of discrimination on the ground of trade union activities is protected by the prohibition of discrimination.
[404] Court of Appeal of Poitiers, No. 08/00461, 17 February 2009. Then, in another case, HALDE held that the erroneous refusal to admit the claimant into an adult education programme on the ground of her origin was influenced by a subjective discrimination on the ground of her age (over 30) and the fact that she had young children. Deliberation No. 2006-03, available at: www.defenseurdesdroits.fr (accessed 6 July 2017). However, it seems that "there is scarce research and no specific policy targeting women who face multiple discrimination and their access to employment and economic independence. France seems to be lagging behind with respect to the analysis of intersectional discrimination that has been developed at the European level"- (E. LÉPINARD & E. LIEBER, *The Policy on Gender Equality in France, in depth analysis*, European Parliament, Directorate General for Internal Policies department, 2015, C PE 510.024).
[405] Country Report, at 8.
[406] So, the safeguards posed by the internal legislation matches the definitions of disability and reasonable accommodation given by the CJEU in joined cases C-335/11 and C-337/11 Ring and Skouboe Werge.

of a legally resident foreign national".[407]
Therefore, the latitude of the safeguard against discrimination ranges further than that delimited in the directives since it provides attention of all grounds with regard to housing, access to goods and services and, further, after the approval of the Law of 11 February 2005, it is provided a coverage for access to education, social protection, social advantages regarding to handicap.

5 .4. Enforcing the law

"In France, since the law is transversal for a great part of its protection, cases are referred to as precedents whether or not they discuss issues related to the same ground of discrimination. Procedural means of access to evidence remain difficult to enforce".[408]
In this regard, the use of statistics become common and data coming from a comparative situation of employees of a common employer are more often employed and accepted by the Court of Cassation.[409]
On the same direction, it should be read the introduction of situation testing as evidence of discrimination in criminal courts by the jurisprudence of the Court of Cassation and before the civil courts.[410]
Civil courts are competent for the discrimination claims against a private party (employer, service provider, landlord etc.); labour courts, instead, have the competence to rule on salaried employees (in the private sector or contractual agents of an industrial or commercial public service).
The Country Report underlined that there is not a systematic system for the publication of decisions that is mostly guaranteed by media and scholarly writing.[411]
Employees enjoy a side system of aids thanks to the assistance provided by the NGO's, the trade unions and equality bodies. In detail, the Law of 16 November 2001 allows the representative trade unions and NGOs that have been in existence for over five years to act on behalf of a discriminated worker.
Then, the equality body (Defender of Rights) has the opportunity to submit observations as *amicus curiae* before the competent judges and to file elements of its examination in the tribunal ledger.
Generally, French civil law contemplates to redress the impairment by granting monetary indemnification and compensating either the patrimonial either the non-material damages; pecuniary sanction or punitive damages are not available.

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[407] Country Report, 9-10.
[408] Id. p. 10.
[409] Court of Cassation, Social Chamber, No. K 10-15873, Airbus, 15 December 2011. The Airbus case is the leading case that established the admissibility of statistics gathered in the workplace to provide a ground for discrimination in origin cases. It was held that people of North African origin were hired for short-term contracts. The statistical evidence was enough to trigger a presumption of discrimination. In another case, the Court of Cassation decided that, in matters related to discrimination on the ground of trade union activities, the offense of discrimination could be grounded on comparative evidence. Employers are oblige to cooperate and produce the information required. Court of Cassation, Criminal Chamber, CFDT Interco, No. 2792, 99-108, 14 June 2000. The use of a quantitative data analysis of the results of recruitment procedures excluding candidates on the grounds of origin and age was expressly recognised by the courts as a valid tool to proving a presumptive discrimination. Court of Appeal of Paris, L'Oreal v. SOS Racism, No. 06/07900, 06 July 2007; Court of Appeal of Poitiers, Mont-Louis Bonnaire v. Crédit Agricole, No. 08.00461, 17 February 2009.
[410] Respectively, they were introduced into the Penal Code at Article 225-3-1 PC by the Law of 9 March 2006 as evidence of discrimination in criminal courts and by Article 42 of the Law No. 2017- 86 of 27 January 2017 on equality and citizenship, enacted on 27 January 2017, for their admissibility before the civil courts. It has not yet been used as evidence in civil cases. Originally developed by anti-racist NGOs, now, it is for the most used by them, but also by individual actors.
[411] Country Report, p. 10.

Furthermore, Article L1134-4 LC establishes the chance of obtaining the annulment of the discriminatory act; in that way, it is possible, for instance, to gain the reintegration in the previous employers' company if it occurred a dismissal.[412]
Articles 62 to 88 of Law No. 2016-1547, in addition, introduce the institute of class action to put an end to a discriminatory conduct (*action en manquement*) or for responsibility in relation to discriminatory measures (*action en responsabilité*), that can be brought before the regional or administrative court.[413]
Form a political standpoint, in autumn 2014, the Minister of Employment started an all-encompassing working group, combining civil society and social partners in order to achieve effectiveness of policies and procedures to face discriminatory issues
On 13 May 2015, it was issued the Sciberras Report endorsing a mandatory Report system on discrimination disclosing the diversity and non-financial information.[414]
Then, on 2016, the working group implemented the survey underlining the positive outcome of awareness-raising campaigns on the promotion of ability-based practices in hiring and management.[415]
However, it stresses also the absence of an ad hoc body within the workplace with the task to stimulate equal opportunities through social dialogue.[416]
The employment of over 50-year age workers is fostered by positive action scheme drafted by the Decree No. 2009-560 of 20 May 2009.
Finally, the Law of 11 February 2005 imposed the quota obligations for 6 % of disabled employees, extending it to the public sector, setting out both simplified procedure for accessing to the public sector to benefit of early retirement conditions.

5.5. Equality bodies

The institute has been moderinsed by means on 2008, by the passing of a Constitutional

[412] M. DESPAX, J-P. LABORDE, J. ROJOT, *France*, p. 195 clearly summarised the safeguard provided to the workers, saying that: "[a] discriminatory dismissal is radically void and the employee has the right to rejoin the firm". Clearly, the scholarly writings pointed out the difference: "it is possible that a situation which can be related to a discriminatory dismissal is in reality the indirect cause of a legal and perfectly valuable dismissal. For instance, if the dismissal for sickness is void, the dismissal for the necessity of replacing an employee who has been absent for too long a time because of a serious illness may be licit. In other terms, there is a discrimination when the dismissal is decided for the only reason of belonging to a category, for instance, the category of sick people, but there is no discrimination if work performance is deeply affected by the consequences of this situation". pp. 195-196.
[413] France, Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century (Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle) https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo (accessed 10 March 2017).
[414] J. C. SCIBERRAS, *Rapport de synthèse des travaux du groupe de dialogue interpartenaires sur le lutte contre les discriminations en entreprise*, 2015, http://www.ville.gouv.fr/IMG/pdf/rapport_sciberras.pdf (accessed 6 September 2016).
[415] P. BARBEZIUEX, *Rapport du 16 novembre 2016 sur le suivi de la mise en œuvre des propositions du groupe de dialogue sur la lutte contre les discriminations en entreprise*, 2016 (Report on the follow-up to the implementation of the proposals of the working group on the fight against discrimination in business); http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/164000702.pdf.
[416] In this regards, it is worth remembering that in its 2004 report, the Commission endorses the introduction by France of a new sanction that forces discriminators to attend a "citizenship course" (stage de citoyennete) inculcating in them the importance of diversity, tolerance of others, and respect for human rights; the sending of those found guilty of discrimination to correctional facilities; the adoption of codes of practice against racism and other forms of discrimination at the inter-and supra-firm level; the encouragement of people to report cases of discrimination they happen to observe via a telephone hotline (which smacks of snitching, to be sure); and the organization of a competition for students aged ten to nineteen to come up with creative ideas for combating discrimination. European Commission, DG for Employment and Social Affairs, Equality and Non-Discrimination: Annual Report 23 (2004), at 19, available at http://europa.eu.int.pros.lib.unimi.it/comm/employment_social/news/2004/jul/annualrep.en.pdf. See, also Id. P. 25, 30-31. For a philosophical approach see, A. SOMEK, *Antidiscrimination Law in the European Union: Concordantia Catholica: Exploring the Context of European Antidiscrimination Law and Policy*, 14 Transnat'l L. & Contemp. Probs. 959, 2005, pp. 1001-1002.

Law that established, through Article 41, the "Defender of Rights".[417]
Organic Law No. 2016-1690 of 9 December 2016 on the Defender of Rights competence has extended its functions to include the supervision and safety of whistleblowers. But its role is wide and depth ranging from the proposing of legislative reform, the promotion of rights and the carrying carry out of researches, to the competence to investigate complaints and to request explanations from any public or private person. The Public Defender intervenes also for the resolution of claims, to mediate, to issue advises to the State or private parties, to act as amicus curiae and file its investigative complaint before all jurisdictions.[418] Finally, the Law provide the Public Defender also with the power to propose a transaction in case of discrimination of a penal nature covered by the Penal Code called 'la transaction pénale' (penal transaction).
The cases he managed has increased of more than 25 % since the last full year of activity of the HALDE in 2010 meaning the high level of social acceptance of the institution.

5.6. Key issues

Nowadays, Anti-discrimination law keeps on facing a resistance due to its perception of a community-based analysis of social tensions.
And "[t]his constitutes the core of very strong ideological objections to anti-discrimination law within the French institutions"[419]. If, on theoretical side, "[t]he traditional formal theory of equality, the concept of fault in civil matters and the supremacy of Parliament remain the ultimate reference", when we descend "[a]t trial level, the shift in the burden of proof and the concept of indirect discrimination are perceived as means to condemn liability without fault and to confer special rights to members of certain groups"[420].
Going further, it seen that, the role played by the higher courts in depicting an effective, functioning, and up-to-date anti-discrimination law, lawyers in daily practice (as well as the

[417] Its powers and jurisdiction were precisely defined by the Institutional Act (loi organique) No. 2011-333 of 29 March 2011, which came into force on 1 May 2011. It integrates the French Ombudsman (Médiateur de la République), the Children's Defender, the National Commission on Security Ethics and, finally, the former equality body – the Equal Rights and Anti-Discrimination Commission (Haute autorité de lutte contre les discriminations et pour l'égalité, HALDE).
[418] Two cases have been widely discussed by the French media.
As Higgins, says: "[i]n 2013, for example, "Belle, Ronde, Sexy et je m'assume" (*Beautiful, Round, Sexy, and Okay with it*), a French plus-size women's group that hosts the Miss Round France beauty pageant, filed a complaint against Chanel designer Karl Lagerfeld for "defamation and discrimination" based on his televised comments blaming France's failing healthcare system on "diseases caught by people who are too fat" and stating that "[n]obody wants to see round women on the catwalk." Higgins, cit., p. 938. " … The group's petition against Lagerfeld's comments generated five hundred signatures and inspired a number of girls to write messages about their experiences with weight discrimination in school. [n212] This case demonstrates how France's physical appearance anti-discrimination laws, at least through cases of high visibility such as this, have opened the door to positive social influence on weight discrimination issues" id. p. 939.
In another 2013 case, the retailer Abercrombie & Fitch received considerable media attention when the company came under investigation the Defender of Rights who thought that"Abercrombie & Fitch was discriminating against its sales staff based on weight and other physical appearances under the guise that the staff members were models. If sales staff were in fact classified as models, discriminatory practices based on the physical appearance of those staff members would likely be permissible as a BFOQ under France's anti-discrimination laws. Id. pp. 939-940.
As the literature points out, "[t]his case highlights the difficulty in some instances of determining the circumstances under which weight or physical appearance discrimination should be legally permissible, even when there are anti-discrimination laws in place to protect against most forms of weight or physical appearance discrimination. The Abercrombie investigation, though admittedly one of the few instances found in which weight discrimination was the subject of an investigation, points to how France's law prohibiting physical appearance discrimination has spurred the public into thinking about these issues. Through these types of complaints and investigations, French media has begun shining the spotlight on the ways in which weight, and looks more generally, should not be a determinant factor in employment decisions". Id., pp. 940-941.
[419] Country Report, p. 11.
[420] Id.

first instance judges) often are not adequately trained to govern (i) its rules of evidence, (ii) the latest jurisprudential achievements, and (iii) the essentials and the details of its rhetoric.

The Country Report sketches a legal environment in which "[c]laimants still have to be ready to face multiple appeals before winning their cases. Discrimination cases are much more favourably heard at the appellate level and the rate of success before the courts has been significantly improved by the contribution of observations presented by the HALDE and the Defender of Rights".[421]

In addition, the concept of indirect discrimination is still a misconstrued notion that is rarely claimed by attorneys, frequently raised by the court itself unilaterally,[422] also in cases relating to discrimination on the ground of origin.[423]

While the political debate on the duty of neutrality is entangled with the legal development in the fields of employment and education, it is under discussion the ability of employers to adopt restrictions on wearing or displaying religious symbols.[424] In this respect, Law No. 2016-1088 of 8 August 2016 on employment, the modernisation of social dialogue and the protection of professional careers amended the Labor Code and introduced the Article L 1321-2-1 empowering the employers to lay down their own in-house regulations to adopt limitations to the principle of religious freedom for employees, if these constraints are reasonable in comparison to the exercise of other fundamental rights and liberties or to guarantee the efficient functioning of the service, as long as they are proportionate to the

[421] Id, p. 12.

[422] The first case concluding indirect discrimination, where it was raised by the Court of Cassation, Social Chamber, No. 05-04962, 9 January 2007, available at: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017624898&fastReqId=1576422841&fastPos=1 (accessed 6 September 2016).

[423] Court of Cassation, Social Chamber, No. 10-20765, 3 November 2011, available at: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1975217984&fastPos=1 (accessed 6 September 2016).

[424] *In Bougnaoui v. Micropole SA,* the French Court of Appeal reached the conclusion that the employee's wearing of the Muslim headscarf constituted a genuine and serious reason for the employee's termination. Bougnaoui v. Micropole SA, Case C-188/15, 2017, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0188. The case pattern is linear: the employee claimed that a dismissal for failure to remove the Muslim headscarf in the workplace constituted discrimination on grounds of religious belief. Article 1 of Directive 2000/78 identifies its purpose as "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation" and, in that vein, prohibits both direct and indirect discrimination by employers on any of those grounds. Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. L 303/16, art. 1. The decision turned on the construction of Article 4(1) of the directive, which permits differences of treatment "where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate." Id. Art. 4. In the *Bougnaoui* case, the employee worked as a design engineer for a company specializing in advice, engineering and specialised training for the development and integration of decision-making solutions. A client of the firm had requested that Ms. Bougnaoui's headscarf was upsetting to its employees, which then motivated the company's requirement that Ms. Bougnaoui stop wearing the headscarf. *See Bougnaoui*, C-188/15, P 14. According to the literature, in "the *Bougnaoui* case, it does not appear that the employer Micropole made any effort to frame its action as a policy of religious and ideological neutrality. Rather, Micropole required the complainant to remove her headscarf during client meetings simply because the client experienced embarrassment due to the veil. Although Micropole had not presented its policy as one consciously pursuing religious neutrality or other values related to a democratic society, Sharpston refutes any potential effort to invoke such a justification. She notes at many points in the opinion that the French constitutional value of laïcité does not in general apply to employment relationships in the private sector (as recognised by the Cour de cassation itself)." J. C. SUK, *Equality After Brexit: Evaluating British Contributions to EU Antidiscrimination Law*, 40 Fordham Int'l L.J. 1535, 2017, p. 1551. She says outright, "I reject the idea that a prohibition on employees wearing religious attire when in contact with customers of their employer's business may be necessary for the protection of individual rights and freedoms which are necessary for the functioning of a democratic society." Opinion of Advocate General Sharpston, *Bougnaoui*, C-188/15, P 105. CJEU concludes that "the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement" within the meaning of the Directive 2000/78/EC.

objective pursued.[425]
The literature explains the last development since "[t]he significant increases in hate speech and violent manifestations of Islamophobia and anti-Semitism continue. The French authorities have made considerable efforts to organise a proportionate and democratic response to xenophobic reactions to terrorist violence and the geopolitical context, which is exploited by extreme right populist politicians. This context has a significant impact on the number of discriminatory responses in relation to access to employment and access to goods and services experienced by people of North African and Middle Eastern origin".[426]
In conclusion, however, even if some distinguishes exist at a national level, the French courts directly apply the EU Directives on antidiscrimination policies.[427]
France developed a strict model of race-blindness and, as a related consequence, expansionive anti-discrimination laws to protect individuals from arbitrary unequal treatment as individuals, rather than solely on the basis of membership in racial or other groups. Under this view, France's broad anti-discrimination doctrine is grounded in the nation's historical experience of discrimination at its worst and the resulting goal of eliminating discrimination in its many forms.[428]

6. Germany

Germany is based on a pluralistic social environment. The autochthonous minorities are not relevant, while, the most significant ethnic minority groups are immigrants, including the so-called "guest workers" (Gastarbeiter) and their descendants.
If before the nazi period, Polish was the most represented group, nowadays it is the Turks to prevail in number.
As the Country Report observes, "*in recent decades, in particular because of asylum seekers and refugees, a heterogeneous ethnic community has formed in Germany. Due to Germany's efforts in the refugee crisis, the number of foreigners in Germany has risen by 1.1 million in 2015 to 9.1 million foreigners in Germany (population around 80 million). In*

[425] In Ebrahimian v. France, a public hospital refused to renew the short-term contract of the claimant on the ground that she refused to remove her Islamic veil. The ECtHR validated the doctrine that a rule resulting from the constant jurisprudence of the Conseil d'Etat and imposing an obligation of religious neutrality on civil servants and public agents met the requirements of Article 9 of the ECHR, as it was held to have a sufficient legal basis and remain within the margin of appreciation of the State to give priority to the principle of secularity and neutrality of public service over the right of the claimant to express her religion. ECtHR, No. 64846/11, 26 November 2015, http://hudoc.echr.coe.int/fre?i=001-158878 (accessed 6 July 2018).
[426] Country Report, p. 12.
[427] In any case, to sum up, the definition of direct discrimination still does not expressly include the possibility of proceeding by means of hypothetical comparison and the definition of the burden of proof only requires in defense that the defendant establish that the decision was objective and non-discriminatory, and does not require that defendant establish appropriateness and necessity, which seems to be in breach of the EU rules.
[428] See C. BERSON, *Private vs. Public Sector: Discrimination Against Second-Generation Immigrants in France*, Centre d'Economie de la Sorbonne, Working Paper No. 59, 2009, *available at* ftp://mse.univ-paris1.fr/pub/mse/CES2009/09059.pdf (arguing that France's public sector is reputed to integrate minorities better than private sector because of entrance exams and pay-scales); D. GRIMSHAW, J. RUBERY, and S. MARINO, *Public Sector Pay and Procurement in Europe During the Crisis the Challenges Facing Local Government and the Prospects for Segmentation, Inequalities and Social Dialogue*, 50, 2012 (arguing that the public sector in EU is more likely than the private sector to adopt gender equality policies and noting that France's public sector has taken steps towards gender equality that private sector has not, such as introducing general requirement for gender parity in recruitment committees and adopting charter for gender equality); S. LATRAVERSE, *Migration Policy Group, Annual Survey of the Defender of Rights and ILO for 2013*, 1, 2 (Feb. 4, 2014), http://www.non-discrimination.net/content/media/FR-116-DDD%20ILO%202013%20Barometer.pdf (reporting that thirty-two percent (32%) of individuals surveyed thought that public employees were less likely to be discriminated against than private employees in France; and thirty-six percent (36%) of private sector employees and only thirty-one percent (31%) of public sector employees thought that they would likely face discrimination at some point in future).

2016, 280000 refugees entered the country. Statistical data show that about 21% of all German residents today have a background of immigration."[429]
From a religious belonging perspective, the Catholic and Protestant Churches, with about 25 million members each represent the widely spread; Around 1.7 million Muslims were German citizens 2015, meaning around the 2% of the population, while, the total number of Muslims (regardless the citizenship) it is over 4.5 million due to the aforementioned immigration process.[430]
Germany's past influenced the is of particular relevance for the principle of equal treatment and antidiscrimination, with particular regard to race and ethnic origin issues but also as far as religion (and belief), sexual orientation, and disability are concerned.
In line with this premise, positive action schemes are available to provide accommodation to disabled persons and ad hoc institution was created to offer same-sex partnerships a secure legal framework beside to marriage for heterosexual partners.
Notwithstanding, Germany has to deal with serious issues of discrimination: "[r]acism and xenophobia continue to be manifested in many forms, even violence … ".[431]

6.1. Main legislation

The 2006 Act Implementing European Directives Putting into Effect the Principle of Equal Treatment encompasses the General Act on Equal Treatment (AGG), the Law on Equal Treatment of Soldiers (SoldGG) and amendments to various legal regulations, establishing a new anti-discrimination regulatory model in Germany, innovating extensively. [432]
The general purpose of the law is the fight towards discrimination based on the grounds of race, ethnic origin, sex[433], religion or philosophical belief, disability, age or sexual

[429] M. MAHLMANN, *Country report Non-discrimination Germany*, Brussels, 2017, p. 6 (hereinafter, the "Country Report").
[430] Id.
[431] Id.
[432] BGBl. 2006, 1897.
[433] U. LEMBKE, *Country report, Gender equality How are EU rules transposed into national law?*, Germany, Brussels, 2017, p. 6 says that "European gender equality and anti-discrimination directives were explicitly implemented by the 2006 General Equal Treatment Act and the 2006 Law on Equal Treatment of Soldiers, both federal statutes. Since then, no further explicit implementation by German legislation has taken place. But nearly all of the issues, concepts, prohibitions, rights and measures covered by the European directives are subject to legal regulation in one way or another under German law [...]. Concerning discrimination in the field of employment, the labour courts are competent except for discrimination within the civil service (which falls under the ambit of the administrative courts). The civil courts decide on claims concerning the provision of goods and services under civil law, while the administrative courts are competent for claims against public authorities. Moreover, there are specialised courts for social and tax law. Court decisions in violation of the principle of constitutional equality can be subject to an annulment by the Federal Constitutional Court. Without taking non-statutory agreements and regulations as well as court decisions into consideration, the legal framework on gender equality can neither be presented nor evaluated". Although facially neutral in regard to gender, the ECJ found that once the German law made a distinction between two categories of workers, those working more than ten hours per week and those working less than ten hours per week, under Article 157 (ex 141, 119), the German law would have to face scrutiny because the sick leave benefit was considered a form of pay. Case C-171/88, Rinner-Kuhn v. FWW Spezial-Gebaeudereinigung GmbH & Co., 1989 E.C.R. 2743, P 16.
Although the German law did not expressly separate men from women in regard to the sick leave compensation benefit, the ECJ held so long as the percentage of women that fall into the category of workers not receiving the benefit is greater than the percentage of men who would benefit, the spirit of Article 157 (ex 141, 119) is violated. J. TUDOR, *Closer the Gender Pay Gap in the European Union: Equal Pay Guarantee Across the member-States*, 92 N.D. L. Rev. 415, 2017, p. 449.
In Germany, 19 of the Working Hours Regulation excluded women factory workers from gainful employment between 8 p.m. and 6 a.m., or between 10 p.m. and 6 a.m. or 11 p.m. and 7 a.m. if they were employed in shifts. Arbeitszeitordnung (AZO), replaced by the Working Hours Law (Arbeitszeitgesetz (ArbZ)) in 1994. Working Hours Law of 6 July 1994, BGBl (Germany) I, at 1170. This regulation was upheld after World War II in an early decision by the Constitutional Court. Constitutional Court decision of 25 May 1956, 1 BvR 53/53, 5 Entscheidungen des Bundesverfassungsgerichts (official compilation of Constitutional Court decisions) 9 (12).

identity.[434]
The legislation refers to labour, civil, and parts of public law.[435]
Compared to the EU Directive, the Law goes beyond for some aspects, but it could be in breach for others. As the Country Report maintained, "*[w]ith regard to general civil law, philosophical belief is not part of the prohibited grounds. In principle, the law therefore goes beyond what is demanded by European law. However, there are various parts of the law which might be found to be in breach of European law. Problems of discrimination in the context of migration can be covered by these grounds, in particular race, ethnic origin or religion and belief*".[436]
The German framework about anti-discrimination law is comprises other sources.
For example, the Constitution, or Basic Law (Grundgesetz), is crucial to have a proper understanding of how it works the anti-discriminatory system in Germany. In fact, differently from other Constitutions, the German one is directly binding on all public authorities. Therefore, fundamental rights are part of this directly effective constitutional order, they are compulsory on the three powers of the State as immediately enforceable legal provisions.[437]

See, on the subject, D. SCHIEK, *Women's Rights in Germany Since Unification: Article: Lifting the Ban on Women's Night Work in Europe - A Straight Road to Equality in Employment?*, 3 Cardozo Women's L.J. 309, 1996.
In addition, according to the court, Art. 3 (3) referred only to differential treatment, whereas 3 (2) embodied an equal rights principle that is to be instilled into social reality. Constitutional Court decision of 28 Jan. 1992, 1 BvR 1625/82 u.a., 85 BVerfGE 191 (209). Thus the Court held that Art. 3 (2) could justify differential treatment of women and men when the legislature believes such treatment is necessary "to balance factual detriments which arise only for women in the majority of cases.". Id 207.

[434] The national law explicitly prohibits discrimination on the following grounds: Sex, parentage, race, language, homeland and origin, faith, religion, political opinion and disability are explicitly covered by the constitutional guarantee of equality as formulated in Article 3.1 GG. As the guarantee includes an open-textured general principle, other grounds are potentially included as well. The Federal Constitutional Court regards sexual orientation and identity as part of the human personality as protected by the guarantee of human dignity and the general right to personality. The guarantees in the Länder constitutions differ in their details from this list although this is of no great significance in practice. The AGG covers all grounds from the Directives. Sexual orientation is substituted by the term sexual identity, without this having any discernible legal relevance in practice. Country Report, p. 35.

[435] "In Germany, statutory social security is the traditional means of ensuring against the risks associated with dependent labor. Social security schemes began more than a hundred years ago in the German Reich, with statutory health insurance in 1883, statutory accident insurance in 1884, and statutory invalidity and old age insurance in 1891. Unemployment insurance began in 1927 in the Weimar Republic. The fifth branch of social security law, called "home and nursing care insurance," was not anchored in law until 1994.
Statutory social security in Germany is organised as obligatory insurance; that is, the insurees are required by law to be members of the various insurance schemes:
(i) Under the statutory health insurance scheme, the insurees include workers, their children and spouses who are capable of work but are not working, and retirees. Ninety percent of the population is insured by statutory health insurance in this way. The remainder are privately insured or covered by other systems.
(ii) Under the accident insurance scheme, every employed person is insured at the expense of his or her employer, making it possible to pay civil-law damage claims for work-related accidents by way of no-fault payments from public accident insurance funds.
(iii) Under the mandatory pension and unemployment insurance schemes, every employed person must be insured. For pension insurance - though not unemployment insurance - it is also possible to be voluntarily insured - that is, at one's own wish". Rust, cit., p. 432.

[436] Country Report, p. 7.

[437] In other words, "[s]ince the founding of the Federal Republic of Germany, Constitutional Court decisions have moved in the direction of a strict interpretation of the prohibition on discrimination, though constitutional norms have remained unchanged. In 1953, the Court ruled that Art. 3 (2) of the Basic Law was not a non-binding statement of intent, but a "true legal norm" directly binding the legislature, judiciary and executive branch. It developed the principle that distinguishing between women and men could be permissible if - and only if - objective biological or functional (division of labor) differences were present.
However, the Court's acceptance of such objective biological or functional differences has changed significantly.
It may be assumed that functional differences can no longer justify differential treatment of the sexes. Thus the result of nearly fifty years of constitutional jurisprudence in Germany surrounding equal rights has been that, today, only objective biological differences can justify differing treatment of the sexes". Rust, cit., 438-439. Most recently in Constitutional Court decision of 24 Jan. 1995, 1 BvL 18/93 (the duty to serve as a firefighter and the accompanying duty of contributions violates Art. 3 (2) of the Basic

In other words, according to the Basic Law effect, the fundamental rights became relevant in the domain of public law, but also pervade other legal domains as well, such as criminal and private law.
Therefore, it is the effect of the constitutional provisions directed to safeguard human equality and dignity translated in the respect for any human being as a person, regardless of other features. And, so, it also guaranteed that individuals are defended against degrading or humiliating treatment.
From the sum of these principles derives that "*[t]he guarantee of human dignity is the central value decision of German law, its most important and supreme norm. In consequence, it is an important reference point for anti-discrimination law in Germany, especially as it guides interpretation of the constitutional guarantee of equality and provides normative yardsticks for other areas of law. It is important to note that, through the guarantee of human dignity, German law authoritatively states that no distinctions are to be made as to the worth of a human being, irrespective of any characteristic*".[438]
Therefore, the spirit of social state in which Germany is embedded drives to an ample variety of measures and initiatives fostering the inclusion of categories facing discrimination.[439]
The Länder division of Germany carries out to different regulations where the central government delegated its power: namely, education and cultural matters or certain aspects of the law regulating civil servants employed by them, even if the most important matters in public and private law remain within the competence of the Federation, either as exclusive legislative power or concurrent legislative power.
Anti-discrimination is governed by specific regulations all of them enacting the fundamental

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Law), DVBl 613 (1995).
In 1963, in a case now known as the "First Widower's Pension Decision," the conditional widower's pension was upheld; according to the prevailing view at the time, it was compatible with Art. 3 (2) of the Basic Law. Constitutional Court decision of 24 July 1963, 1 BvL 30/57, 11/61, 17 BVerfGE 1, 23 ff.
In this judgment, the Court used the division of roles - promoted under family law and also common in reality - as a justification for direct unequal treatment of widows and widowers. The traditional division of labor thus became the standard for constitutional evaluation. In its decision, the Court considered only the disadvantage to widowers.
"The "Second Widower's Pension Decision" of 1975 was based on an interpretation under which functional differences between the sexes justified direct discrimination. Still, the Court ordered the legislature to reform widow's and widower's pension laws, as social conditions were clearly changing as a result of increasing employment of women. Constitutional Court decision of 12 Mar. 1975, 1 BvL 15, 19/71, 39 BVerfGE 169, 185 ff.
This legislative mandate was fulfilled in 1985. Since that time, a claim to a widow's or widower's pension arises at the death of either insured spouse. Whether this is actually paid out or not depends on the current income of the surviving spouse; the practical [*440] result is that, in general, a widower continues to receive no survivor's pension.
Even after equalization of the prerequisites for widows' and widowers' pensions, social security continues generally to be mediated through the husband. The opportunity to create a completely different form of security for survivors that would give women independent claims to old-age insurance was not utilised. In addition, non-marital relationships continue to be excluded from pension law". Rust, cit., 439-440.
With its 1987 decision on old-age pensions for women, the Constitutional Court took a very new tack. Constitutional Court decision of 28 Feb. 1987, 1 BvR 455/82, 74 BVerfGE 163, 178 ff. For the first time, the Court found a case of direct discrimination against men to be justified because it compensated for professional disadvantages experienced by women. On positive action in favour of women, see W. VAN GERVEN et al., *Current Issues of Community Law Concerning Equality of Treatment Between Women and Men in Social Security*, in: *Equality of Treatment Between Men and Women in Social Security,* 42 f., C. MCCRUDDEN ed., 1994.
[438] Country Report, p. 7.
[439] A. SEIFERT and E. FUNKEN-HOTZEL, *Developments in Workplace Dispute Resolution: A Five Country Study: Germany: Wrongful Dismissal in the Federal Republic of Germany*, 25 Comp. Lab. L. & Pol'y J. 487, 2004, p. 487. The concept of social justification is - as we have seen - the core element in the German model of dismissal protection. Anti-discrimination law, on the contrary, traditionally possesses only a less relevant place in this system. Of course, there are several statutory provisions in German labor law forbidding discriminatory dismissals. The constitutionally-guaranteed freedom of association, for example, excludes dismissals on the ground of union membership of employees. GG art. 9, P 3. See M. LOWISCH and V. RIEBLE, *Koalitionsfreiheit des Einzelnen*, in *Munchener Handbuch des Arbeitsrechts* 245 n.67, 2d ed., 2000; see also A. SEIFERT, *Koalitionsfreiheit*, in *Handbuch des Arbeits-und Sozialrechts* 28 n.112, M. WEISS & A. GAGEL eds., 2002.

guarantee of equality.[440]
A general anti-discrimination clause is present in the Works Constitution Act and the courts constantly endorse the principle of equal treatment of employees.[441]
As it has already been mentioned, various legal instruments have been created in order to provide some safeguards against discrimination conducts and to favour the social inclusion of handicapped workers.
With regard to religion, special legal regulations and case law, in addition to the nondiscrimination clauses in public law and labour law, deal with the reasonable accommodation of various religious beliefs, including exceptions from general laws.
To sum up, the Country Report endorses "*a widely held opinion in legal doctrine (which has resulted in some case law) that the general clauses of civil law provide remedies in private contract law and tort law against discrimination on any ground that infringes basic personality rights. These general clauses must be interpreted in the light of the constitutional order (especially in the light of fundamental rights and, most importantly, of human dignity) which prohibits discrimination*".[442]

6.2. Main principles and definitions

The anti-discrimination law determines what amounts to a direct[443] and indirect

[440] Cases have arisen where it was argued that the less favourable treatment of part-time workers, as compared to full-time workers, is based on sex. For example, Bilka-Kaufhaus GmbH v. Karin Weber von Hartz, involved a challenge by part-time workers to the employer's private occupational pension plan that supplemented the German state pension scheme and was financed solely by employer contributions. Case 170/84, Bilka-Kaufhaus GmbH v. Karin Weber von Hartz 1986 E.C.R. I-1607 (1986) PP19-20. The plan's rules on eligibility required significantly more seniority for part-time workers than for full-time workers. The ECJ held that a long service requirement for part-time workers could amount to indirect discrimination against women. Id. Similarly, in Ingrid Rinner-Kuhn v. FWW Spezial-Gebaudereingung GmbH & Co KG. (1989), the ECJ held that there may be indirect discrimination in a case where any employer-financed sick pay plan excluded part time workers and where national legislation sanctioned such exclusions. Case 171/88, Rinner-Kuhn v. FWW Spezial-Gebaudereingung GmbH & Co KG., 1989 E.C.R. I-2743 (1987). The most influential decision of the ECJ was in Edith Freers and Hannelore Speckmann v. Deutsche Bundespost (1996). Case C-278/93, Freers v. Deutsche Bundespost, 1996 E.C.R. I-1165 (1996). The Court stated that "the exclusion of part-time workers from certain benefits is in principle contrary to Article 119 of the Treaty if it is the case that a much higher proportion of women than men work part-time." Id. at 122. "The egalitarian scope of Article 119 was sufficient for the ECJ to rule in favour of equal pro-rated treatment for part-time workers. The Directive on Part-Time Work thus reinforced existing rulings by the ECJ, a Court that assumed a leading role for a social change". A. LICHTASH, *Earning Dignity: Indirect Discrimination Against Women at Part-time Jobs*, Comparative View, 26 Women's Rights L. Rep. 13, 2005. In Kruger, the ECJ held that the exclusion of part-time workers from the collective agreement, which provided for special annual bonuses, constituted "a treatment which is different from that of full-time workers;" in other words, it discriminates against part-time workers. in Kruger. Case C-317/93, Nolte v. Landesversicherungsanstalt Hannover, 1995 E.C.R. I-4624, Kruger, C-281/97, 1999 E.C.R. 5127, at P 21. The case serves as a good example of the authority exercised by the ECJ and its wide discretion in applying non-discrimination law, prior to the effective date of the Directive on Part-Time Work.

[441] For a very long period of time, the constitutional principle of equal treatment (article 3 GG) has only possessed a shadowy existence. There has not been considerable case law of the Courts on the constitutional prohibition of discriminations on the ground of religious belief under article 3, paragraph 3 GG although the Federal Labor Court has recognised that a dismissal violating the principle of equal treatment under article 3, paragraph 3 GG is contrary to public policy and is therefore void (section 134 BGB). Also the already-mentioned equal access to all public offices independent of religious belief (article 33, paragraph 3 GG) has not left its traces in the case law. The reasons for this insignificance of the constitutional principle of equal treatment for the protection of religious expression in the workplace are two-fold. As far as the scope of article 3 GG is concerned, the Federal Constitutional Court has always considered that the provision exclusively covers direct, but not indirect, discriminations; only recently - and apparently under the influence of the EC anti-discrimination law that had to be transposed into German law - the Federal Constitutional Court seemed to abandon this restrictive interpretation of article 3 GG. Another reason for the missing relevance of the constitutional principle of equal treatment in labor law might be that, contrary to the anti-discrimination law of the EC (e.g., article 10 of the Directive 2000/78/EC) the Courts have not accepted a shift of the burden of proof in anti-discrimination cases. A. SEIFERT, *Country Studies: Germany*, pp. 550-551.

[442] Country Report, p. 8.

[443] It is said that on the direct discriminatory issue points out that this "exists when one sex is directly preferred or disadvantaged. It is present, for example, if a widow, but not a widower, receives survivor's benefits at the death of the spouse. It is direct

discrimination[444], harassment[445] and instruction to discriminate, applying strictly[446] the

discrimination if married women receive lower unemployment benefits than married men or single men and women". U. RUST, *Women's Rights in Germany Since Unification: Reach and Substance of the Principle of Equal Treatment in Social Security Law Under European Community and German Constitutional Law*, 3 Cardozo Women's L.J. 427, 1996, p. 429. Then, "[e]xamples of indirect discrimination in social security law are minimum benefit levels from which only part-time workers are excluded. As the majority of part-time workers are women, they are the main ones affected by this apparently gender-neutral distinction, causing a problem of indirect discrimination. A further example is the payment of wages to employees in the event of illness, invalidity, old age and the like only if they are "principle breadwinners." Because that role in the family is traditionally held by the husband, who usually earns a higher income than the wife, limiting the benefit to so-called principle breadwinners excludes mainly women and may be indirect discrimination." Id, p. 430.

R. AYES, *Importing Foreign Statutory Regimes to America: Modernizing Title VII of the Civil Rights Acts*, 38 Women's Rights L. Rep. 105, 2016, p. 121 analyses a case in which in application for a call for an accountant with commercial experience, the plaintiff "received a rejection letter back from the radio station, which contained plaintiff's curriculum vitae in the envelope. On the curriculum vitae, the defendant radio station wrote, "married, one child." Underneath that the curriculum vitae also had scrawled on it "a child 7 years old!" It was emphatically underlined many times". Then, "[a]fter seeing the letter, on June 6, 2012, plaintiff filed a complaint alleging employment discrimination based on sex, which is a violation of the AAG. The court did not hear the argument and dismissed her .claim on June 21, 2012. Plaintiff appealed to the Landesarbeitsgericht. The Landesarbeitsgericht heard the case and found that the claim should be analyzed under an indirect discrimination analysis only. The court reasoned that the defendant had not shut out the prospect of hiring women to the position. In fact, the person who ended up with the position was a young woman. [...]. The Federal Labor Court easily found that plaintiff qualified as an employee because the AGG covers those applying for employment with a company. The Court after looking at the evidence was confused why the intermediate court analyzed the case as indirect discrimination". Id., at 122. The direct words of the AAG state "direct discrimination on grounds of sex shall also be taken to occur ... in the event of the less favourable treatment of a woman on account of pregnancy or maternity." The plaintiff's discrimination claim was based on the fact the radio station rejected her application due to her being a mother. Bundesarbeitsgericht [BAG] [Federal Labor Court] Sept. 18, 2014, 8 Entscheidungen Des Bundesarbeitsgerichts [BAGE] 1, 2014 (Ger.). This case was brought "by the people" as opposed to by an individual. For this note's purposes plaintiff is assumed to be female because the court refers to motherhood and the feminine tense throughout the opinion. In conclusion, "[t]he Court believed direct discrimination was the more appropriate analysis because two people were treated differently based on the same characteristics. The plaintiff was objectively qualified for the position because she was trained as an accountant. Motherhood is inseparable from the sex of a person. The plaintiff needed to show that her sex was the cause of the discrimination, but the Court declined to decide whether the note saying she was a mother created an adequate causal connection. The discrimination does not need to be the primary motive for rejection of the job". R. AYES, *Importing Foreign Statutory*, p. 123.

[444] Section 3.2 AGG provides that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put people with one of the characteristics within the scope of the AGG at a particular disadvantage compared with other people unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The criterion must affect a group of people protected by the AGG significantly more than others. Federal Labour Court (Bundesarbeitsgericht, BAG), 18.08.2009, 1 ABR 47/08; Saarland Land Labour Court (Landesarbeitsgericht Saarland, LAG), 11.02.2009, 1 TaBV 73/08. This can be determined by statistical comparison, (BAG, 24.09.2008, 10 AZR 639/07) although recourse to statistics is not mandatory. BAG, 18.08.2009, 1 ABR 47/08. Instead it is sufficient if the criterion is typically likely to have these consequences. BAG, 18.08. 2009, 1 ABR 47/08; thus, a job announcement limiting the list of applicants to those 'in their first year in post' constitutes an indirect discrimination on the ground of age. The case law on predecessors of this norm gives some further indications of its possible interpretation. Below the constitutional level, the concept of indirect discrimination has been elaborated in particular by the labour courts and legal science in the context of the application of sex discrimination legislation, cf. former Sections 611a and 612.3 BGB, repealed by the Law transposing European anti-discrimination directives. This formed the basis for solving problems connected with discrimination in other areas, e.g. on the grounds of disability. Although indirect discrimination was not defined in Section 611a BGB on sex discrimination, it has been assumed that it was nevertheless covered by this regulation as only this interpretation brings it in line with Directive 76/207/EC, where this concept was explicitly stated in Article 2.1. As is shown in other examples from the case law, referred to in the text, indirect discrimination is not a new concept in German law. Courts have ruled that discrimination on the ground of sex is not only assumed to have taken place if one sex is always disadvantaged with respect to working conditions but also if there are significant differences (wesentliche Unterschiede) between the number of men and women among privileged and disadvantaged employees. See BAG, Neue Juristische Wochenschrift 1992, 1125; BAG, Neue Juristische Wochenschrift 1993, 3091, 3093. According to this ruling, discrimination may be based on a regulation, a contract or the actual behaviour of the employer. The latter clarifies that indirect discrimination can result from factors other than just regulations, as now explicitly stated in Section 3.2 AGG. The question of what difference in number establishes a "significant difference" (potentially relevant for the interpretation of "particular disadvantage") has not been clarified by the courts and is the subject of debate. A ratio of one woman to 10 men enjoying better working conditions has been regarded as a significant difference. BAG, Neue Juristische Wochenschrift 1993, 3091, 3094. In another decision, a ratio of about 80% women to 20% men was deemed sufficient to establish a significant difference. BAG, Neue Juristische Wochenschrift 1992, 1125, 1126f. Indirect discrimination does not presuppose the intention to discriminate. It is regarded as sufficient to establish a significantly greater (wesentlich stärker) negative impact of the regulation, contract or actual behaviour of the employer on one sex. BAG, Neue Juristische Wochenschrift 1993, 3091, 3094. This case law is based on ECJ

case law. ECJ, ECR Cs. 170/84, 1986 I-1607 (Bilka). The Federal Labour Court has clearly restricted the usability of statistical data as prima facie evidence. Federal Labour Court, judgment of 22 July 2010, 8 AZR 1012/08, overruling the State Labour Court of Berlin and Brandenburg, judgment of 26 November 2008, 15 Sa 517/08. In contrast to the State Labour Court of Berlin and Brandenburg in the same anti-discrimination law suit, the Federal Labour Court remained unimpressed by the fact that 69 % of the employees of the defendant party were female, while all executive board members, the highest managers and the district managers were male. It stated that a discriminatory 'glass ceiling' could only be assumed when there is proof of the existence of a sufficient pool of female employees eligible for the promotion in question and, moreover, when the exclusive maleness of leading positions is not the sole result of societal reconciliation problems for which the employer cannot be held accountable. Combined with the lack of a right of access to the employer's files or an employer's obligation to publish employees' salaries and fringe benefits, claimants may very rarely enjoy the advantages of a statutory shift of the burden of proof. The Labour Court of Stuttgart, on the other hand, decided without further consideration that there is prima facie evidence indicating gender discrimination when the percentage of men among all applicants is significantly higher than the percentage of men among the applicants subsequently hired. Access to service in the police force was denied for a Female to Male transgender person by the Administrative Court of Frankfurt and for women who are under 163 cm tall by the Administrative Court of Düsseldorf, both invoking the efficiency of police forces and public safety. See, for the first example, Administrative Court of Frankfurt, judgment of 3 December 2007, 9 E 5697/06, and for the second case, Administrative Court of Düsseldorf, judgment of 2 October 2007, 2 K 2070/07. As explained by the report on gender equality, "[t]he first case raises questions of discrimination on the grounds of disability because the rationale of the denial was the fact that the claimant cannot produce endogenous hormones. In the second case, the court failed to explain why public safety is at risk by employing a female police officer who is 161 cm tall, especially when considering that in other German states the minimum height for female police staff is 160 cm. Meanwhile, the Administrative Court of Schleswig-Holstein generally considered minimum body height requirements for federal police officers to constitute unjustified indirect sex discrimination". U. Lembke, Country report, Gender equality. How are EU rules transposed into national law? Germany, Brussels, 2017, at 11-12.

[445] Another reason there has been minimal case law in Germany regarding sexual harassment is related to the limited sanctions employers face if they do not comply with sexual harassment laws. Zippel has noted that even though the U.S. state capacity to address sexual harassment is considered weak, the EEOC has pursued civil rights litigation and has slowly extended its institutional capacity to address the issue, with employers risking costs from complaints and punitive damages for failure to take action. K. S. ZIPPEL, *The Politics of Sexual Harassment: A Comparative Study of the United States, the European Union, and Germany*, 2006, p. 38. This is not the case in Germany, where there is no German agent that has a responsibility similar to that of the EEOC, compensatory damages are insignificant, the concept of punitive damages does not exist, and many employers ignore the law. Id. "Furthermore, the AGG places weak requirements on employers. According to the AGG, the employer must take appropriate measures to put a stop to discriminatory harassment by employees or third parties. These appropriate measures include disciplinary actions such as suspension of work, transfer, reduction in salary, demotion or discharge as consequences for employees in the civil service, and warning, transfer, or dismissal of employees in private enterprises. Appropriate training can be understood as a disclaimer of responsibility according to Section 12, subsection 2 of the AGG ("training defense"). Generally, it is sufficient if the employer informs its staff through notices, letters, etc. about sanctions for discriminatory behavior". E. ALBIN, *Customer Domination at Work: A New Paradigm for the Sexual Harassment of Employees by Customers*, 24 Mich. J. Gender & L. 167, 2017, p. 187. Due to the weakness of the law, its application, and its enforcement, the feminist movement in Germany has generally not used the labor courts as a vehicle for promoting change in this area. Zippel, at 125. "The weakness in implementing the AGG might also be attributed to the fact that the AGG continues to emphasize the infringement of dignity in assessing whether an act is sexual harassment. The language of dignity has continued to be used and embedded in the definition of sexual harassment. According to that definition, the act of harassment has to take place "with the purpose or effect of violating the dignity of the person concerned." In determining whether dignity has been violated, weight is given to the seriousness of the harassment". See Albin, pp. 187-188. The analysis of the situation is conducted in reference to the notion of dignity, with a lesser emphasis on equality. A good example is a decision by the German Federal Labour Court in 2014. There, the court stressed - as it had before - that a violation of another person's dignity would be found particularly in cases where the perpetrator establishes a certain environment of intimidation, hostility, humiliation or insult. See Fed. Lab. Ct. Judgment, 2 AZR 651/13 at para. 14 (Nov. 20, 2014). The judges decided that the comment of a male worker addressed to a female colleague that she had nice breasts was not a compliment but rather an "inappropriate comment of a sexual nature." Id. Touching the woman's breasts following the comment was analyzed as being a "sexually intended infringement of an intimate sphere of privacy." Id. The woman's dignity was seen as infringed upon by these actions, as they could objectively be defined as "unwanted treatment," which could further be understood as a degradation of the woman as being solely seen and treated as a sexual object. Id. Hence, a violation of her dignity had occurred. As the court had already decided before, a single action can qualify as a form of sexual harassment - actions need not be repeated. See Fed. Lab. Ct. Judgment, 2 AZR 323/10 (Jun. 9, 2011). "Although anti-discrimination directives are clear that discriminatory harassment is not limited to intentional behavior, most German commentaries on the law do not address unintentional discrimination, including sexual harassment. Indeed, seeing sexual harassment as a form of discrimination has great potential, but this has yet to be fully realized and implemented in Germany". Albin, p. 188.
See S. BAER, *Dignity or Equality? Responses to Workplace Harassment in European, German and U.S. Law*, in *Directions in Sexual Harassment Law 582*, C. A. MACKINNON & R. B. SIEGEL eds., 2003, and for a discussion of those topics.

[446] S. PAGER, *Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice*, 26 B.C. Int'l & Comp. L. Rev. 35, 2003, p. 40. Article 2(1) of the Equal Treatment Directive's "peremptory" mandate "that there shall be no discrimination whatsoever on grounds of sex." In the Advocate General's mind, the gender-conscious basis on which the Bremen

delineations set out in the Directives.[447]
However, discrimination by association is not overtly enclosed and multiple discrimination on various grounds is mentioned in one case only.
From an ontological point of view, any instance of discrimination must be vindicated autonomously. Then, positive action is allowed when the discrimination serves to overcome current minuses built on any of the grounds enumerated.
As it is stated in the Country Report, "[t]here is an exception from the application of anti-discrimination law of dismissal, but this has been rendered without effect through case law".[448]
In labour law, justification of unequal treatment is possible if the choice made by the employer constitutes an actual and influential occupational constraint.[449]

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law operated clearly involved sex discrimination, favouring women over men. In making these arguments, Tesauro implicitly adopted a process view of equality. Throughout his opinion, he emphasised that Article 2(4) of the Directive addressed equality of opportunities, not outcomes. Equality was to be regulated only as to process, not result. "Tesauro argued that employment preferences were ill-suited to the task of equalizing opportunities because he saw the main structural obstacles hindering women's advancement as lying outside the workplace. He believed that what women needed foremost in order to compete in the labor force was vocational counseling and training to upgrade their qualifications as well as progressive social policies, such as subsidised child-care, to reduce the burden of home life. By contrast, Tesauro viewed employment preferences as "taking on a compensatory nature" linked to "historical discrimination." Such 'paybacks,' the Advocate General contended, did nothing to address the obstacles which women face today. Instead of tackling the root causes of gender inequality, preferences merely papered over defects in the process by imposing a predetermined result. As such, they offered only "illusory" progress and were "irrelevant" to the goal of enhancing opportunities in the long-run". Id. at 42. Based on these objections, the ECJ declared that gender preferences of the kind used in Bremen contravened the Equal Treatment Directive. The case then returned to the national (German) judiciary for further proceedings in which the *Bundesarbeitsgericht* annulled the promotion decision in favour of Ms. Glissmann and ordered that the candidates be judged anew. Case 450/93, Kalanke v. Frei Hansestadt Bremen, 1995 E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1995). Note: this article will follow the European convention of pin citing ECJ opinions by paragraph number, when available.

[447] Direct discrimination shall be taken to occur where a person is treated less favourably than another is, has been or would be treated in a comparable situation on the basis of any of the prohibited grounds. Section 3.1 sentence1 AGG. The guarantee of equality establishes the principle of equal treatment as a fundamental right at the constitutional level. Article 3 GG. However, this provision contains no explicit legal definition of direct discrimination. The definitions in use have been developed by the Federal Constitutional Court. At the constitutional level, most doctrinal developments have been initiated by cases involving discrimination on the ground of sex. Article 3.2 and 3.3 GG. This case law forms the blueprint for the concept of discrimination as used in other areas of the law as well. According to settled case law, unequal treatment presupposes the unequal treatment of essentially equal matters. In the case of direct discrimination (although this term is not necessarily used), the unequal treatment must be based on a particular characteristic. The German Federal Constitutional Court has emphasised in some early decisions the need for intent on the part of the discriminator. BVerfGE 75, 40 (70). This precondition has been weakened in a more recent decision. Discrimination is held to have taken place even if the act concerned was not deliberately discriminatory but had other aims or if discrimination is only one factor in a "bundle of motives" (Motivbündel). BVerfGE 89, 276 (289). Consequently, no decisive causal link between the characteristic and the discrimination is needed. It suffices that the characteristic is part of the (negative) criteria that lead to the discriminatory behaviour. Cf. Federal Labour Court, 19.05.2016, 8 AZR 470/14, para 53. The Federal Labour Court regarded the objective qualification of a job candidate as a condition for possible discrimination, (BAG, 19.08.2010, 8 AZR 370/09) but has abandoned this jurisprudence: Any applicant, irrespective of objective suitability can be the victim of discrimination, according to this interpretation of the prohibition of discrimination. Cf. BAG, 19.05.2016, 8 AZR 470/14, para 24ff. The Federal Labour court underlined that filing suit for discrimination may form abuse of rights, ruling out a violation of the prohibition of discrimination. Cf. BAG, 19.05.2016, 8 AZR 470/14. This is in line with CJEU, C-423/15, (Kratzer), 28. July 2016. Section 11 AGG states that discriminatory job vacancy announcements are prohibited. Such an advertisement, e.g. expressing a preference for applicants of a certain age (Cf. for example: Schleswig-Holstein Land Labour Court (Landesarbeitsgericht Schleswig-Holstein, LAG Schleswig-Holstein)), 09.12.2008, 5 Sa 286/08117 may constitute direct discrimination. See W. Däubler, in: Däubler/Bertzbach (eds.), AGG, § 3 para. 16a. With regard to other discriminatory statements, there is no explicit regulation beyond the norms of harassment. The prohibition of discrimination in the AGG is, however, open to interpretation in relation to such cases.

[448] Country Report, at 8.

[449] The objective reason for the discrimination must be weighed against the consequences of the unequal treatment to establish whether or not the unequal treatment is justified. Any rule established by the employer must be suitable for its purpose and necessary to achieve it. The reason must not be disproportionate as to the principle of equal treatment, for example non-discriminatory requirements set out in employment policies. Beyond these clarifications, there are no clear contours of the reasons accepted to justify indirect discrimination. Schlachter, Erfurter Kommentar zum Arbeitsrecht, 16th ed. 2016, § 3 AGG,

Beside this general rule, there are further grounds of validation when for the ethos and duty of loyalty as defined by a religious or philosophical belief. Some recent case law has emphasised the wide-ranging freedom of choice that religious communities are allowed to in applying the duties of loyalty that can permit unequal treatment.[450]
In particular, this precedents deal with an extremely debated domain with relevant social impact given the influence of the Christian churches and their organisations as employers.
Moreover, some peculiar provisions concerning the unequal treatment due to age are operative for objective reasons and when the unequal measure appears to be suitable and needed[451].

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para. 9ff for an overview, the balance of interests reasoning: para. 13. The statistics used are social statistics, if available. In other cases, the ratio is determined for the individual case. In legal science there are voices which regard any difference which persists for a period of time as sufficient to establish indirect discrimination. If the ratio is small, the justification of this discrimination becomes easier for the employers. Others propose a threshold of about 75 %. Country Report, at 52-53. The groups to be compared are determined by the personal scope of the regulation challenged. For example, for a collective agreement all people bound by this agreement form the relevant group. The group of applicants is relevant for a guideline on the selection of applicants for employment, although it is disputed whether all applicants should be considered or only sufficiently qualified applicants. The case law of the Federal Constitutional Court supports the former interpretation, as it ruled that Section 611a Civil Code (Bürgerliches Gesetzbuch, BGB) (repealed by the AGG) not only forbids a refusal to employ someone on the grounds of a particular characteristic (in this case sex), but that it suffices if the characteristic is one of a "bundle of motives" for not choosing this applicant. It is not far-fetched to assume that these other considerations include the applicant's other qualifications, which precludes the possibility that only qualified applicants are considered. The Federal Labour Court regarded the objective qualification of a job candidate as a condition for possible discrimination, but has abandoned this jurisprudence: Any applicant, irrespective of objective suitability can be the victim of discrimination, according to this interpretation of the prohibition of discrimination. Section 3.3 AGG defines harassment as discrimination when unwanted conduct related to any of the grounds covered by the AGG intend or cause the dignity of a person to be violated and an intimidating, hostile, degrading, humiliating or offensive environment to be created. According to the theoretical analysis of the case law lead in the Country Report, "such an "environment" is generally not created by one-off but only by continuous behaviour, of certain severity, beyond mere onerousness". Country Report, p. 53.

[450] Cf. Federal Labour Court (Bundesarbeitsgericht, BAG), 24 September 2014, 5 AZR 611/12 and related Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), 20 October 2014, 2 BvR 661/12. The general doctrine of justification of unequal treatment is of relevance in this context as well, given the open-textured nature of Article 3 GG, which extends its scope of application to such characteristics as age or sexual identity. Article 3.1 GG has been interpreted in the older case law of the Court as the prohibition of arbitrary treatment within the limits of material justice. More recent decisions have increased the demands for unequal treatment to be justified beyond this position. The Federal Constitutional Court has ruled that, as the principle of equality before the law intends to prevent unjustified unequal treatment, the legislature is regularly subject to strict constraints in cases of unequal treatment. These legal constraints become stricter, depending on the extent to which the personal characteristics that constitute the ground for unequal treatment resemble the characteristics listed in Article 3.3 GG and there is therefore a greater likelihood that this case is intended to cover cases of special advantages to one group, e.g. bonuses for students which would not be extended to everybody.
Unequal treatment based on them will lead to discrimination against a minority. The strict constraint is, however, not limited to discrimination against individuals. It also exists where unequal treatment of subject matters of the law leads to the unequal treatment of groups of people.
The strictness of the constraint depends on the degree to which the people affected are able to change the characteristics which are the ground for unequal treatment through their behaviour. In addition, the limits on the legislature are more narrowly circumscribed, depending on the extent to which the unequal treatment of people or subject matters can disadvantageously affect the enjoyment of basic liberties. As a result, direct discrimination under the guarantee of equality is possible, but only within the limit of differentiated standards of justification. These standards range from a test of arbitrariness to strict scrutiny of proportionality.
Country Report, p. 46-47.

[451] The means of achieving that aim must be appropriate and necessary. Such differences in treatment may include, among others: - the setting of special conditions on access to employment and vocational training, including special employment and work conditions, including remuneration and dismissal conditions, for young people, older workers and people with caring responsibilities, in order to promote their vocational integration or ensure their protection (Section 10 No. 1); - the setting of minimum conditions of age, professional experience or seniority of service for access to employment or to certain advantages linked to employment (Section 10 No. 2); - the setting of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement (Section 10. No. 3); - the setting for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the setting under such schemes of different ages for employees or groups of employees, and the use, in the context of

See Weiss, Schmidt and Goethe, cit., at 94 concluded that if the obligation of equal treatment plays a marginal role in the selection process it spread it force in the working conditions phase and it only applies to specified group-oriented regulation. The principle of equal treatment, on one hand, demands that each member of a group has to be treated equally; on the hand, it limits the autonomy of the employer to divide the work force into different groups with different working conditions. It does not exclude any kind of differentiation, only affecting the arbitrary one.

There is, finally, a duty of care on the employers to safeguard employees from discrimination also recurring to organisational arrangements and vocational training and a proper campaign of information and awareness of legal regulations accompanied with some special rules on reasonable accommodation, especially for severely disabled people and others of equal status.[452]

Courts' decision are fundamental in understanding how the rules on anti-discrimination and equality are perceived.[453]

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such schemes, of age criteria in actuarial calculations (Section 10 No. 4); - an agreement which provides for the termination of an employment relationship without dismissal at the time when the employee is entitled to apply for a pension on the ground of age, notwithstanding the regulations in Section 41 Social Code VI (Sozialgesetzbuch VI, SGB VI) (Section 10 No 5); - differentiations of benefits in compensation plans in the sense of the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG), if the parties have created a settlement graduated according to age and staff membership in a firm, in which labour market opportunities, which are essentially dependent on age, are openly considered, or which exclude from the benefits of the compensation plan employees who are economically secure, as they are entitled to pensions, possibly following receipt of unemployment benefit (Section 10 No 6.). Country Report p. 44.

There are further justifications for general civil law. According to Section 20.1 AGG, differences in treatment on the grounds of religion, disability, age, sexual identity or sex (the latter is not covered in this Report) are not prohibited if there is an objective reason for the treatment. The following are listed as examples.

- the avoidance of dangers, the prevention of damage or other comparable aims (Section 20.1 No. 1); - the protection of privacy or personal security (Section 20.1 No. 2);

- the granting of special advantages when there is no specific interest in enforcing equal treatment (Section 20.1 No. 3);121 - in case of differences in treatment on the ground of religion, if the treatment is justified in the light of freedom of religion or the right to self-determination of religious communities or their institutions, irrespective of their legal form, or of organisations, the aim of which is to practise a religion together, in accordance with their respective ethos (Section 20.1 No 4). Country Report, p. 45.

[452] The works council's participation with respect to the right to dismissal of an employee by an employer provides only minimal protection against genetic discrimination. Under the WCA, the works council must be heard prior to the dismissal of an employee, and the employer must notify the works council of the grounds for the dismissal. In the absence of a hearing, the dismissal is ineffective. Works councils have no right of co-determination with respect to dismissal; they can merely object to the dismissal within one week of the hearing. The objection must be grounded on one of the legally established bases enumerated in section 102(3). Therefore, in practice, the works council's right to object to a dismissal is extremely restricted. See BetrVG 102. "Overall, the WCA provides limited protection against the use of genetic testing by employers. Although it provides works councils with veto power over employer questions regarding genetic traits, it does not proscribe the collection of such data by third parties. Nor does the WCA dictate how the employer may or may not use the personal data once it is acquired. In addition, works councils represent employees as a collective unit, not on an individual basis. Therefore, a works council may agree to employer collection of genetic information, finding it beneficial for the collective unit, despite the adverse effects such data collection may have on some individual workers. This is of particular concern with respect to genetic screening for predisposition to occupational illness. A works council may prefer the exclusion of workers found to be susceptible, if the overall safety of the workplace is ultimately increased by such screening. Standing alone, the Works Constitution Act does not provide employees with complete protection against genetic discrimination". K. A. DEYERLE, *Genetic Testing in the Workplace: Employer Dream, Employee Nightmare - Legislative Regulation in the United States and the Federal Republic of Germany*, 18 Comp. Lab. L. 547, 1997, pp. 590-591.

[453] M. WEISS, M. SCHMIDT, and J. W. GOETHE, *Germany*, in R. BLAINPAIN (ed.), *International Encyclopaedia of Labour Law and Industrial Relations*, Alphen Aan Den Rjin, 2008, pp. 56 said that an employee cannot be treated in less favourable manner of a comparable employee if this not due to objective reasons. Comparable is any employee of the same establishment. Following the wording of Section 3(1) of the General Equal Treatment Act, the claimant in an equal pay case needs to point to another person who is, has been or would be treated more favourably in a comparable situation, i.e. to an actual, historical or hypothetical comparator. But, in practice, equal pay cases are not decided with regard to the sex and income of comparable employees40 but with regard to most sophisticated job classifications set up by collective agreements which are not challenged by the courts. U. LEMBKE, *Country report*, p. 18.

Some 2016 cases are enlightening.[454]
The Federal German Constitutional Court dealt with the tolerability for a teacher in kindergarten employed by a public authority of wearing an Islamic headscarf. The court concluded that, since nowadays this vestment is commonly spread in Germany – that now is a pluralistic society –, the claimant has no right to forbid it.[455] The same conclusion was reached in a case dealing with teachers in public education.[456]
On a similar topic, the Federal German Constitutional Court did not accepted the compliant of a school girl who demanded exemption from swimming teachings in a public school because of prescriptions deriving from her Muslim faith not to show her body forms to men. The claimant does not deem as sufficient that the school allows for the use of so-called burkinis. The court regarded the complaint as inadmissible. But, since the plaintiff did not prove that the burkini is not a suitable tool to comply with religious precepts on the concealment of the body, the court held that the exposure to the sight of male bodies in swimming suits is not sufficient to excuse a weaver from swimming classes.[457]
As it stated by the Country Report, "*[t]hese decisions illustrate the attempt of the court to balance interests in religious freedom and accommodation and public interests, for instance of integration and individual development of pupils in schooling*".[458]

6.3. Material scope

The constitutional safeguards "apply to all state action and, through indirect horizontal effect, to the relations of private individuals. The specialised guarantees apply to their respective field of regulation – public law, labour law, social law, etc."[459]
The scope of the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz (AGG)) encompasses labour law, social security, social benefits, education and general civil law, including insurance contracts, closely following (in part verbatim) the provisions of the Directives in this respect.

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[454] German law respects a general right of "free development of ... personality," which includes rights to express oneself in appearance and dress, subject to employers' demonstration of a countervailing business necessity. D. L. RHODE, *The Injustice of Appearance*, 61 Stan. L. Rev. 1033, 2009, pp. 1093-1094.
Under that standard, a labor court found no reason why a truck driver could not wear shorts in summer. Appearance standards are often set through codetermination between management and elected worker councils, a process subject to bargaining requirements of good faith and fair dealing. see also M. W. FINKIN, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 Comp. Lab. L. & Pol'y J. 577, 578-80, 2002, p. 581. But see M. FORD, *Two Conceptions of Worker Privacy*, 31 Indus. L.J. 135, 146, 2002.
[455] Federal German Constitutional Court, 1 BvR 354/11, 18 October 2016.
[456] Cf. Federal German Constitutional Court, BVerfGE 138, 296.
[457] Federal German Constitutional Court, 1 BvR 3237/13, 8 November 2016.
[458] Country Report, p. 9.
[459] Id. Bavarian Administrative Appeal Court (Bayerischer Verwaltungsgerichtshof), 7 March 2018, Az. 3 BV 16.2040
The court decision concerns a trainee lawyer (Referendar) who wished to wear a headscarf due to her religious faith while conducting judicial functions. Trainee lawyers are in the German system employed by the States (Länder) during their 2-year training. The court authorities denied her this possibility. A first instance decision took this as a violation of her right to freedom of belief (Art. 4 Basic Law), Augsburg Administrative Court (Verwaltungsgericht Augsburg, VG Augsburg), 30 June 2016, Au 2 K 15.457. The claimant appealed against this decision.
The appeal court decided that the complaint was inadmissible. It argued that there had been no sufficiently grave violation of freedom of religion. The claimant had the opportunity to pursue her training. The decision of the court authorities concerned only a small part of her education. In addition, she was not entitled but only allowed to perform the judicial functions in question, depending on the decision of the court she worked for.
The decision reverses the findings of the case Augsburg Administrative Court (Verwaltungsgericht Augsburg, VG Augsburg), 30 June 2016, Au 2 K 15.457 that stirred considerable debate about the presence of religious symbols worn by judges. The appeal court decided on procedural grounds and did not engage with the substantive question of the permissibility of such symbols in the court room.

The expansion power of the anti-discrimination legislation undermined the rules set by the regulations of the laws against unfair dismissal (especially the Law on Protection against Unfair Dismissal (Kündigungsschutzgesetz)) that would be supposed to take precedence over the anti-discrimination law. Indeed, the courts applied the prohibition of discrimination to dismissal when it is at stake.[460]

6.4. Enforcing the law

As the Country Report clearly underlines, the enforcement mechanism "of the anti-discrimination law are the same as for other areas of law, apart from certain special mechanisms, that is through the courts. There is a growing body of case law on various aspects of discrimination. Some aspects have not been settled and some of the case law is contradictory. There are, however, increasingly discernible contours of discrimination law that is in line with the Directives and the case law of the CJEU".[461]
In the event of labour discrimination, the worker is entitled to

(i) damages for material loss if the employer is liable for deliberate or negligent wrongdoing;
(ii) there is a strict liability for damages for non-material loss. The amount shall be proportionate and in case the discrimination did not form the cause for non-employment, the indemnification for nonmaterial damage is limited to three months' salary.

From the procedural point of view, there is a limitation of two months for any such claim, starting with the receipt of the rejection of a job application or promotion and, in other cases, knowledge of the disadvantageous behaviour.
Among the contents of the provisions of the law, it is observable that there is not the prerequisite to have e a contractual relationship, victimisation is prohibited, the chance to appeal to the social responsibility of the social partners to realise the purpose of non-discrimination, the extension of these rules to professional associations that have a obligation to admit the worker to the association.
Following a wide shared trend, "*[s]tatistical evidence has been allowed in the past and can be used, according to the AGG. The former regulation on the burden of proof, now amended by the AGG, has been interpreted along the lines of ECJ (pre-Lisbon) and CJEU jurisprudence. There is no explicit regulation or meaningful legal practice yet as to the use*

[460] L. B. JACKSON, *A Lesson to Germany on How the United States Could Reform Its Law on Dismissal*, 4 Geo. J.L. & Pub. Pol'y 522, 2006, p. 545 says that "EC law has had little impact on German law of dismissal, largely because the enumerated exceptions in the KSchG preclude discriminatory dismissals from being socially justified. Additionally, Germany has had well-advanced anti-discrimination laws that fulfill the EC anti-discrimination directives in all areas except for protection from age discrimination". German law does not yet provide protection against age discrimination. As noted above, the relative age and seniority of an employee are two of the relevant criteria in determining whether an employee should be fired in the event of business redundancies. Under German law, older employees should be fired last. It would thus seem that the German law on dismissal contradicts the EC directive by discriminating against younger employees. Thus, because older people would suffer most from a dismissal because of likely difficulty they face finding a new position, the KSchG protection of older workers is considered to be compatible with the EC directive. See M. SCHMIDT, *The Need for Modernising German Labour Law Arising from the Ban on Age Discrimination,* in Changing Industrial Relations and Modernisation of Labour Law 358, 2003. In 2006, with the enactment of the German Equal Treatment Act, (AGG), employers' obligations to prevent sexual harassment by customers were clearly established. According to Section 15 of the AGG, an employer is liable for breaches of organizational duties, including those of Section 12. Section 12, subsection 4 of the AGG notes that "where employees are discriminated against in the pursuance of their profession by third persons within the meaning of Section 7(1), the employer shall take suitable, necessary and appropriate measures, chosen in a given case, to protect the employee in question." Employers also have a duty of care arising out of the employment relationship.
[461] Country Report, at 10.

of situational testing".[462]
It is also accorded to a victim of discrimination the support in legal proceedings of associations dealing with matters of discrimination if these met the requirement of having at least 75 members or to be an association made of at least seven other associations dealing with anti-discrimination.
There is also the availability of an *actio popularis* in selected fields of anti-discrimination law, in particular in disability law (Equal Opportunities for Disabled People Act (Behindertengleichstellungsgesetz, BGG)[463] who is also the field where the main examples of positive actions stem from.[464]

6.5. Equality bodies

The anti-discrimination law established the Federal Anti-discrimination Agency (Antidiskriminierungsstelle des Bundes) and it started to work in 2007.
Aa the Country Report explains, "*[i]ts mandate covers all the grounds listed in the law, notwithstanding the powers of specialised governmental agencies dealing with related subject matters. The body is organisationally associated with the Ministry of Family Affairs, Senior Citizens, Women and Youth. The head of the agency is appointed by the Minister of Family Affairs, Senior Citizens, Women and Youth, following a proposal by the government, which happened for the first time in spring 2007. […] The head is independent and only subject to the law. The role of the Agency is to support people to protect their rights against discrimination, especially to inform them about legal recourse against discrimination, to arrange legal advice by other agencies, to mediate between the parties, to provide information to the public in general, to take action for the prevention of discrimination, to produce scientific studies and (every four years) to issue a report on the issue of discrimination, together with the Commissioners dealing with related matters*".[465]
The Agency offers recommendations, commands scientific studies, asks for a statement of position in cases of discrimination from the alleged discriminator (with the alleged victim's consent); it operates in connection of other public agencies, which are obliged to support the Agency in its work.

6.6. Key issues

Germany has established, at least, in principle a complete legal structure to fight discrimination continuously evolving.[466]
Some relevant weaknesses, however, have been observed by the Country Report[467]:
a) the exception of dismissal from the application of the prohibition of discrimination, Section 2.4, AGG, although alleviated by case law;

[462] Country Report, p. 11.
[463] Last amended on 23.12.2016 (BGBl. I, 3234 (Nr.66).
[464] See M. WEISS, M. SCHMIDT, and J. W. GOETHE, *Germany*, cit., p. 73 for a detailed summary of the discipline and the rights of disabled persons.
[465] Country Report, p. 11. Moreover, other bodies exist in Germany which deal with issues of discrimination, most importantly the Commissioners for Integration/Foreigners, for Immigrants of German Ethnic Origin (Aussiedler) and National Minorities and for Disabled People.
[466] Law on the improvement of inclusion and self-determination of persons with disabilities (Gesetz zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen, BTHG), BGBl. I, 3234, which will enter into force from 2017 onwards.
[467] Country Report, p. 12.

b) the possible non-application of the AGG to occupational pension schema, Section 2.2, Sentence 2, AGG, depending, however, on the judicial interpretation of the respective norm;
c) the formulation of the justification of unequal treatment for religion and belief, depending on judicial interpretation, Section 9.1, AGG;
d) there is no special prohibition of victimisation in civil law, as foreseen in Article 9, Racial Equality Directive (2000/43/EC);
e) the dependence of compensation for material damage on fault (willful or negligent wrongdoing) or gross negligence respectively, Secs. 15.1; 15.3; 21.2 AGG, is contrary to ECJ jurisprudence in this respect; f) in public law, there is no comprehensive implementation regarding race and ethnic origin in the areas of social protection and social advantages, education and the provision of goods and services with regard to harassment and the instruction to discriminate, depending on judicial interpretation;
g) there is no general regulation of reasonable accommodation.

But the Country Report goes further and put other issues on the ground tainted also by meta-juridical colours. Hence, "[t]e challenge ahead is to interpret and apply the legal framework in a consistent way realising the purposes of anti-discrimination law that are, as indicated above part of fundamental values enshrined in the German constitutional order, foremost human dignity".[468]

At the moment, though, the case law is limited to sketch a uniform and safe legal pattern and indicators that this is due to informal barriers to access to justice and problems of proof are perceived by the legal interpreters and operators. An additional alarm "*is the prevention of attitudes that give rise to discrimination. Recent events, including xenophobic demonstrations of a significant scale, despite a strong reaction of civil society, government and political actors give reasons to believe that persistent efforts may be of great importance in this respect, not the least in the context of the refugee crisis and the xenophobic reactions it sometimes provokes. In addition, one should be mindful of the threat of religiously motivated terror that tragically struck Germany in 2016 and that may augment these problems*".[469]

"In many respects legislation goes beyond the requirements of the directives (e.g. the scope of application, maternity protection, parental allowances). In other fields there are disturbing gaps in implementation, such as the exclusion of dismissals from the scope of application of the General Equal Treatment Act, the lack of a right to return after parental leave, the resistance to implement Directive 2010/41/EU, the restriction of access to the courts and of legal protection in relation to the provision of goods and services to so-called 'mass contracts', thus limiting the protection of selfemployed persons as well, and the restriction of the prohibition of sexual harassment to the area of employment. European Law requires unequivocal transposition of directives. Moreover, although the courts and legal practitioners are aware of EU law, the case law of the CJEU, and the obligation to interpret national law in the light thereof, many provisions lack implementation in practice. Some of the main obstacles are the lack of a definition of 'work of equal value', the lack of access to employers' files and remuneration data, the overemphasis on the freedom of coalition for the social partners and their collective agreements, the requirement of fault in labour-law cases and the problems when dealing with questions of indirect or intersectional discrimination".[470]

[468] Id, p. 12.
[469] Id, p. 13.
[470] U. LEMBKE, *Country report*, p. 48.

7. The United Kingdom
7.1. Introduction

The United Kingdom, officially the United Kingdom of Great Britain and Northern Ireland, comprises four constituent countries, namely England, Wales, Scotland (constituting Great Britain) and Northern Ireland.
Since the late 1940s, the country has seen a large influx of immigrants, which has contributed to its multicultural character. Nonetheless,

> *[c]ertain ethnic minorities, including the native Traveller communities, continue to suffer from high rates of unemployment, social exclusion and poverty. Media campaigns against asylum-seekers and Travellers/Gypsies, including Roma, have contributed to greater hostility towards these particular groups. The events of 11 September 2001 and the London suicide bombings in July 2005 had a similar impact upon British Muslim community. Following the Referendum result in June 2016 in which the UK voted to leave the EU, an increase in hostility towards EU migrants has been reported.*[471]

In addition to that, there are still instances of prejudice against members of the LGBT community, although these are gradually becoming rarer, thanks to their increased social acceptance, stemming also from shifts in the media and from the introduction of legislative changes, such as the Marriage (Same Sex Couples) Act 2013.[472] Furthermore, age- and disability-related discrimination is still present.
As far as Northern Ireland is concerned, it should not be forgotten that sectarian divisions are still there, although their seriousness has greatly diminished since the signing of the Good Friday Agreement.
Finally, it is worth mentioning the Equality Act 2010, that, among other things,

> *significantly extended the ability of employers and others to adopt positive action measures to promote equality, and imposed a single cross-ground general equality duty on all GB public authorities.*[473]

7.2. Relevant Legislation

The United Kingdom is a party to all major treaties dealing with human rights and discrimination, including the European Convention on Human Rights. However, treaties are only applicable in the UK after they have been incorporated into domestic legislation.
In this regard, the "Human Rights Act 1998, which gives effect to the ECHR in UK law, can provide valuable protection in some contexts against discrimination."[474]
In addition to that, provisions concerning human rights, prohibiting discrimination and including specific safeguards against it, are also present in all devolution settlements.

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[471] A. McColgan, L. Vickers, *Country Report – Non-discrimination – United Kingdom*. Luxembourg, Publications Office of the European Union, 2018, p. 5
[472] This act only applies to England and Wales, although Scotland introduced similar legislation in 2014; significant opposition, however, is still present in Northern Ireland
[473] A. McColgan, L. Vickers, *Country Report – Non-discrimination – United Kingdom*, p. 5
[474] *Id.*, p. 6.

As far as domestic legislation is concerned, provisions prohibiting discrimination were first introduced during the 1960s and mainly dealt with discrimination based on race and ethnicity. These provisions

> *mainly consist of civil law provisions but there are in addition some criminal offences such as incitement to racial and religious hatred. In Northern Ireland, a separate legislative framework has been introduced for political and constitutional reasons.*[475]

Today, the aforementioned Equality Act prohibits all kinds of discrimination, both direct and indirect, as well as harassment, victimisation, and instructions to discriminate.

7.3. Scope of Application

The Equality Act applies to discrimination on the grounds of race (which includes ethnicity, nationality, national origin, and colour), sex, marital status (including those who are only civilly partnered), gender reassignment, religion or belief, age, disability, and sexual orientation.
Furthermore, legislation imposes a duty to provide reasonable accommodations to employers.
As far as Northern Ireland is concerned, however,

> *its legislation adopts broadly similar definitions of discrimination though there is no single equality provision and age discrimination is regulated only across the material scope of Directive 2000/78.*[476]

Anti-discrimination law covers both public and private employment and extends to all aspects of labour relations; that said, as a result of *Jivraj v Hashwani*[477], a judgment handed down in 2011 by the Supreme Court, there are now doubts as to "the extent to which the Equality Act covers access to self-employment", which, depending on how this precedent in subsequently interpreted, might result in a violation of EU law.
Furthermore, the Employment Appeal Tribunal has found that the Equality Act also applies to legal persons, meaning that a limited company may "bring a claim that it has been directly discriminated against where it suffers detrimental treatment because of the protected characteristic of someone with whom it is associated."[478]

7.4. Overview of the Main Principles

S. 4 of the Equality Act 2010 contains a list of the protected characteristics; they are the following: "age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation."
S. 5 of the Act deals with certain aspects of the protected characteristic of age but it does not define it in detail.
S. 6 is about disability and defines disability as a "physical or mental impairment" that "has a substantial and long-term adverse effect on [a person's] ability to carry out normal day-

[475] *Ibid.*
[476] *Ibid.*
[477] [2011] UKSC 40.
[478] *EAD Solicitors & Ors v Abrams* (UKEAT/0054/15/DM).

to-day activities" and has lasted, or is likely to last, for at least 12 months or for the rest of the person's life.
S. 7 concerns the protected characteristic of gender reassignment, protecting those who are "proposing to, [are] undergoing, or [have] undergone a process (or part of a process) for the purpose of reassigning [their] sex by changing physiological or other attributes of sex."
S. 8 deals with discrimination on the grounds of marriage and civil partnership, providing that a person has this protected characteristic "if the person is married or is a civil partner".
S. 9 concerns race and racial origin, expressly including colour, nationality, ethnic and national origins. Caste discrimination is not explicitly included; however, after s. 97 of the Enterprise and Regulatory Reform Act 2013, amended s. 9(5)(a) of the Equality Act, the 2010 Act now mandates that "a Minister of the Crown must by order amend this section, so as to provide for caste to be an aspect of race"[479], in line with the General recommendation no 29 on article 1, paragraph of the Convention on the Elimination of All forms of Racial Discrimination (Descent).
Furthermore, in *Tirkey v Chandok*[480], an employment tribunal found that caste discrimination may, depending on the circumstances, be construed as a form of race discrimination. And in *Chandhok & Anor v Tirkey*[481], the President of the Employment Appeal Tribunal held that various precedents had "given a scope to the words 'ethnic origins' sufficient to encompass many aspects of that which separately might come within the heading of 'caste'." Therefore, according to him, even though s. 9 does not explicitly mention caste, "there may be factual circumstances in which the application of the label 'caste' is appropriate, many of which are capable – depending on their facts – of falling within the scope of section 9(1)."
S. 10 deals with the protected characteristic of religion or belief, clarifying that the former "means any religion and a reference to religion includes a reference to a lack of religion" and that the latter "means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."
S. 11 deals with certain aspects of the protected characteristic of sex but it does not define it in detail.
Finally, s. 12 defines sexual orientation as the orientation towards "persons of the same sex, persons of the opposite sex, or persons of either sex."
Ch. 2 of the Act deals with prohibited conduct.
S. 13 bans direct discrimination, defined as the less favourable treatment of a person compared to others on account of a protected characteristic.
However, s. 13(2) adds that, when the characteristic in question is age, a less favourable treatment may be justified, as long as it is proportionate and is aimed at achieving a legitimate aim. And, under s. 13(3),

> *[i]f the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

Furthermore, under s. 13(5), race discrimination includes segregating the person in question from others.
When it comes to discrimination on the basis of disability, under s. 15 it is necessary that two criteria are met: on the one hand, the person in question must have been treated unfavourably "because of something arising in consequence of [his] disability" and such

[479] Before the amendment, the section read "a Minister of the Crown may by order [...]".
[480] (ET/3400174/13)
[481] [2014] UKEAT 0190_14_1912

disparity of treatment is not "a proportionate means of achieving a legitimate aim." Furthermore, under s. 20, employers have a duty to make reasonable adjustments in favour of disabled employees[482]; failure to comply constitutes discrimination on account of disability per s. 21.

S. 18 deals with discrimination on the grounds of pregnancy and maternity in the workplace. Under this article, treating a woman unfavourably constitutes discrimination, when such treatment occurs on account of pregnancy, or an illness arising from it; but it is also prohibited to treat a woman unfavourably for her being on compulsory maternity leave, or for "exercising or seeking to exercise, or [having] exercised or sought to exercise, the right to ordinary or additional maternity leave."

Under s. 18(6), a woman is protected during a period beginning when her pregnancy starts and, subsequently, ends "at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy" or, when she does not have the right to additional leave, "at the end of the period of 2 weeks beginning with the end of the pregnancy."

Furthermore, under s. 18(5), when a woman is treated unfavourably on account of her pregnancy or of an illness arising out of it,

> *if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).*

S. 19 prohibits indirect discrimination, which s. 19(2) defines as

> *a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *a. A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *c. it puts, or would put, B at that disadvantage, and*
>
> *d. A cannot show it to be a proportionate means of achieving a legitimate aim.*

Finally, harassment[483], victimisation[484], and instructions to discriminate[485] are also prohibited.

As far as discriminatory advertisements are concerned,

> *[they] are currently only explicitly prohibited in Northern Ireland, and then only when they relate to the race, religion/ belief or disability. Only the ECNI has the power to bring enforcement action in respect of such advertisements.*[486]

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[482] On which, see schedule 8 of the Act.

[483] Defined in s. 26(1) as "(a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of—(i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B". Section 26(2) further provides that "A also harasses B if: (a) A engages in unwanted conduct of a sexual nature, and (b) the treatment has the purpose or effect referred to in subsection (1)(b)".

[484] Defined in s. 27(1) as "[a] person (A) victimises another person (B) if A subjects B to a detriment because: (a) B does a protected act, or (b)A believes that B has done, or may do, a protected act", which s. 27(2) defines a"(a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act".

[485] S. 111 actually bans instructing, causing or inducing contraventions of the Act.

[486] A. McColgan, L. Vickers, *Country Report – Non-discrimination – United Kingdom*, p. 8.

Those who reside in other parts of the UK, on the other hand,

> *may only bring legal claims in respect of discriminatory advertisements if they are actually subject to less favourable treatment on a prohibited ground, (as, for example, where they apply for the posts in question and are rejected on the relevant ground).*[487]

Disparities of treatment in relation to age are still permitted, for instance as far as minimum wage schemes are concerned or seniority-linked pay differentials; however, in 2011, the default retirement age, previously set at 65, was abolished.
Finally, it is important to also mention that the Armed Forces are, for the most part, exempt from these rules; in addition, further legislative instruments contain exceptions related to public order and national security, as well as more exceptions in fields that are outwith the scope of the various EU regulations.

7.5. The Enforcement of the Law

Those who deem to have suffered discrimination may bring proceedings against the offending party before an employment tribunal, both in the private and in the public sector. However,

> [*t]ribunal claim and hearing fees of up to GBP 1 200 (currently) were introduced in July 2013 resulting in a reduction of around 70-80 % in Tribunal cases. This fee regime was successfully challenged, with the Supreme Court ruling that it was unlawful in July 2017.*[488]

In terms of proof, each and every item of legislation dealing with discrimination provides for a shift of the burden of proof, in keeping with the various EU directives on the matter.
Organisations may offer support to complainants in all cases concerning discrimination; in respect of that

> *[s]ome trade unions, the equality commissions and some specialised NGOs employ qualified lawyers and therefore can and do offer full support to complainants. But such organisations cannot usually initiate a complaint, except that the equality commissions can bring a case where instructions to discriminate or unlawful advertising is concerned.*[489]

Finally, by way of remedy, victims of discrimination are primarily entitled to damages[490], although injunctive relief is available as well.

8. Denmark

Since 1996, in Denmark there was not a legislation dealing with antidiscrimination issues. This was because, the social partners, i.e. employers' organisations and employees´ organisation in the labour market argued that Denmark had a tradition of collective

[487] *Ibid*.
[488] *Id.*, p. 9
[489] *Id.*, p. 10
[490] As regards damages, "[m]edian and maximum awards made by employment tribunals varied in 2016 to 2017. The maximum discrimination award was in a race discrimination case (GBP 456,464 EUR 522 574) with median awards of GBP 13,141 (EUR 15 044) in race claims and GBP 10,235 (EUR 11 717) for disability." (A. MCCOLGAN, L. VICKERS, *Country Report – Non-discrimination – United Kingdom*, p. 9).

agreements in the labour market instead of legislation and refused a change in this direction. But, as no such collective agreements on anti-discrimination were concluded, victims of discrimination on grounds of race, ethnicity, sexual orientation, and religion were not protected until 1996, when antidiscrimination legislation was finally enacted.[491]
It is noteworthy that the Danish Constitution does not contain a general provision prohibiting discrimination or a general equality clause. In fact, it comprises four articles regarding discrimination and these provisions do not apply to the material areas covered by the Directives. The only discriminatory ground catalogued in the directives is religion.
In the past, Danish population has been extremely homogeneous and the majority were members of the Evangelical-Lutheran Church by conviction, tradition and/or culture (religious minorities were protected by the Danish Constitution of 1849). Nowadays, with new groups of migrant workers and later with the arrival of different groups of refugees, this picture changed. [492]
It is worth mentioning that the kingdom of Denmark is made of Denmark, Greenland and the Faroe Islands. Since the Faroe Islands and Greenland are not members of the European Union, there is not any obligation to implement EU anti-discriminatory legislation in their boundaries.
The Danish attitude towards the EU, indeed, has always been the one of included but distinguished.
So, it is recent the case in which the Danish Supreme Court did not follow the guidance of the Court of Justice of the European Union (CJEU) in the Ajos-case (C-441/14)[493]. This is a violation of EU law and a possible outcome could be for the EU Commission to initiate infringements proceedings against Denmark. As it has been clearly underlined: *"[i]n particular, there has been an emphasis on encouraging immigrants from third countries to explicitly sign up to basic values (e.g. gender equality and upbringing of children) and to actively participate in the labour market. In Denmark, the requirement to adapt and assimilate as understood by officials and the general public seems stronger than in some of our neighbouring countries*".[494]

8.1. Main legislation

Denmark has not a comprehensive Anti-discrimination legislation but instead it consists of a combination of many acts, which have been introduced or amended when public debate or when international and EU-obligations have focused on a specific field of application or a specific vulnerable group.
Thus, "protection against discrimination is ensured by a web of civil and criminal legislation ranging from the Constitution to specific acts covering areas outside and inside the labour market, making it a challenge to explain and for the public to understand".[495]
The main legislation in any case is the Act on "Prohibition against discrimination in respect

[491] The Danish labour market is built on the so-called "Danish model"; this means that the labour market is amply governed by means of collective agreements between the labour market social partners. Then, a specialised Labour Court rules on conflicts between the social partners regarding breaches of collective agreements. See generally, O. HASSELBALCH, *Labour Law in Denmark*, Alphen Aan Den Rjin, 2010 and of the same Author, O. HASSELBALCH, *Denmark*, in R. Blanpain (ed.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, Alphen Aan Den Rjin, 2018 (hereinafter, the "Denmark").
[492] It is in line with this approach the fact that Denmark has signed and ratified all major human rights Conventions except the UN Convention on Migrant Workers and Protocol 12 to the European Convention on Human Rights (ECHR).
[493] Supreme Court, judgment in case No. HR-15/2014 of 6 December 2016.
[494] P. JUSTESEN, *Country report, Non-discrimination*, Denmark, Brussel, 2017, p. 5. Hereinafter referred to as "Country Report".
[495] Id. at 7

of employment and occupation, etc" adopted in 1996 (hereinafter "the Act"). [496]
According to the Part 1, determining the scope of the Act, Section 1, 1, the purpose of the Act is to prohibit "discrimination", meant to be any direct or indirect discrimination on the basis of race, colour, religion, political opinion, sexual orientation or national, social or ethnic origin.
But, the second paragraph, given the aforementioned premise, specifies that the provisions of the Act shall not be applicable to the extent that similar protection against discrimination exists under a collective agreement. (Part 1, Section 1, 2).
The provisions related to the hiring process and equal pay are clear and up-to-date to the guidelines provided by the international organizations.
Therefore, the Part 2, dealing with the prohibitions against discriminations, Section 2 establishes that an employer may not discriminate against employees or applicants for vacancies in connection with recruitment, dismissal, transfer, promotion or with regard to pay and working conditions (Part 2, Section 2, 1).
The Act is clear in stating that discrimination, as regards pay conditions, takes place in the case of failure to give equal pay for equal work or work of the same value (Part 2, Section 2, 2) and that an employee whose pay is lower than that of other employees shall be entitled to the difference. (Part 2, Section 2, 3).
From a procedural standpoint, then, in the case of pay discrimination the burden is upon the employer to prove that the work concerned is not of the same value (Part 2, Section 2, 4).[497]
The link with the active measures in the job market, an employer may not discriminate against employees with regard to access to vocational guidance, vocational training, continued training and retraining (Part 2, Section 3, 1).[498]
Then, an employer may not in connection with recruitment or employment of an employee request, collect, obtain or make use of information concerning the race, colour, religion, political opinion, sexual orientation or national, social or ethnic origin of the employee (Part 2, Section 4).[499]
Particularly, attentive to the ILO observations, advertisements regarding vacant positions may not indicate that a person of a particular race, colour, religion, political opinion, sexual orientation or national, social or ethnic origin is sought or preferred. Nor must it be indicated that a person with the just mentioned characteristics is not wanted (Part 2, Section 5).[500]

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[496] The Section 11 expressly states that the Act shall not extend to the Faroe Islands and Greenland.
[497] According to the Par. 1 and 2 of the Act on Equal Pay for Men and Women, if a worker is dismissed since he/she is claiming to have the same pay of other workers doing the same job, he is entitled for compensation or/and reinstatement.
[498] The Part 2, Section 3 of the Act specifies also that:
(2) Such prohibition against discrimination also applies to any person engaged in vocational guidance and vocational training activities as mentioned in Subsection (1) above and any person engaged in placement activities;
(3) The prohibition against discrimination also applies to any person establishing rules on and making decisions concerning access to take up a profession.
[499] Part 5 - Commencement and relation to other legislation, etc. – Section 9 specifies that:
(1) Section 4 shall not apply to the extent that other provisions are applicable under special legislation.
(2) This Act shall be without prejudice to measures being introduced by virtue of other legislation, by virtue of provisions having their legal basis in other legislation or otherwise by means of public initiatives, with a view to promoting employment opportunities for persons of a particular race, colour, religion, political opinion, sexual orientation or national, social or ethnic origin.
[500] Part 4 (Compensation), Section 7 imposes that persons whose rights have been violated because of failure to comply with Sections 2 to 4 may be awarded compensation and Part 4, Section 8, 1 adds that failure to comply with Section 5 shall be punishable by a fine and that if the violation is committed by a company, an association, an independent institution, a fund or similar body, the fine may be imposed upon the legal person as such; if the violation is committed by the state, a municipal/county

The Part 3 of the Act establishes some exceptions. For instance, the limitation on race, colour, religion, political opinion, sexual orientation or national, social or ethnic origin of the employee shall not apply to an employer whose enterprise has the express object of promoting a particular political or religious opinion, unless this is in conflict with European Community law. (Part 3, Section 6, 1).
If it is of decisive importance in connection with the exercise of certain types of occupational activities or training activities that the person concerned is of a particular race, political opinion, sexual orientation, national, social or ethnic origin or has a particular colour or belongs to a particular religion, the appropriate Minister may, after having obtained the opinion of the Minister of Labour, make exceptions to the provisions laid down in this Act, unless such an exception would be in conflict with European Community law. (Part 3, Section 6, 2).
The newest amendments regarding the anti-discrimination legislation nullified the 70-year rule was nullified on 1 January 2016.[501]
In other words, section 5a (4) of the Act on Prohibition of Discrimination on the Labour Market etc. was repealed and neither individual employment contracts nor collective agreements on automatic termination of employment by the age of 70 can be entered into in the future. Previous individual contracts on automatic termination also cannot be enforced.
Furthermore Section 2a (3) of the Salaried Employees Act regarding severance allowance was revoked in 2015.[502]
Hence, the most important 2016 case law on anti-discrimination regarded the disability and age discrimination.[503]
It is interesting that Danish civil law does not protect discrimination of age, sexual orientation, disability and religion or belief outside the labour market; it is hence necessary looking to criminal law that protects from direct differential treatment with regard to access to public places and services on the grounds of race, colour, national or ethnic origin, religious belief or sexual orientation outside the labour market, but not age or disability. Moreover, criminal law does not cover indirect discrimination, harassment or victimisation.[504]
The disabled persons' reasonable accommodation is ruled by the Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market.[505] Here it recognised that the employer needs to adapt the workplace in order to accommodate persons with disabilities,

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authority or an association of local authorities falling under Section 60 of the Act on Local Government, the fine may be imposed upon the State, the municipal/county authority or the association of local authorities as such. (Part 4, Section 8, 2).

[501] Act No. 1489 of 23 December 2014.

[502] Act No. 52 of 27 January 2015.

[503] Consolidated Act No. 1349 of 16 December 2008 with later amendments.

[504] The Danish system provides definition for the main terminology of the labour discrimination law. So, direct discrimination is defined as a situation 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 (cf. Section 1(2) of the Act on the Prohibition of Discrimination in the Labour Market and Section 3 (2) of the Act on Ethnic Equal Treatment); indirect discrimination is deemed to occur where an apparently neutral provision, criterion or practice would put persons of e.g. a particular racial or ethnic origin at a 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 (cf. the main Section 1(3) of the Act on the Prohibition of Discrimination in the Labour Market and Section 3(3) of the Act on Ethnic Equal Treatment). Harassment, instruction to discriminate and victimisation are also prohibited by the Act on the Prohibition of Discrimination in the Labour Market according to Section 1(4), 1(5) and Section 7(2) as well as by the Act on Ethnic Equal Treatment according to Section 3(4), 3(5) and Section 8.

[505] The Act on the Prohibition of Discrimination due to Race etc. makes it a criminal offense to refuse, in connection with a commercial or non-profit business, to serve or allow entrance to a person on the basis of race, colour, national or ethnic origin, religious belief or sexual orientation. Consolidated Act No. 626 of 29 September 1987 with later amendments

unless this will place a disproportionate burden on the employer.[506]
The jurisprudence of the Supreme Court, detailed this exception. It was stated that the employer is not obliged to guarantee a part-time position of 20 hours a week (needed by the disabled worker), since the burden would have been split into two part workers instead of a single full-time worker. Since the department consists of three workers, this would have amounted to a disproportionate organisational change.[507]
The legal literature underlines that "[t]he Danish acts on discrimination distinguish between natural persons and legal persons, and state that only natural persons are protected against direct or indirect discrimination".[508]
Discrimination based on association with an individual is explicitly covered by the Act on Ethnic Equal Treatment[509].
The Country Report mentioned that even if "[d]iscrimination based on association is not mentioned in the wording of the Act on the Prohibition of Discrimination in the Labour Market […] it is covered according to case law"[510].
Therefore, the Supreme Court decided that the son of a claimant "suffered from Asperger's syndrome to such a degree that he was encompassed by the concept of disability" in the Act on Prohibition of Discrimination in the Labour Market etc.[511]
Indeed, the outcome of case was severe in determining that the claimant had not been dismissed because of the disability of her son but because of her long absence from her job. Thus, the dismissal did not constitute direct discrimination because of disability.
Furthermore, the complainant had not experienced indirect discrimination since it did not need to discuss whether the prohibition of indirect discrimination encompass a situation where an employee does not have a disability herself but is affected by an action because of a disability of a child or another close relative. The Court also made references to the CJEU case law arguing that the accurate understanding of the Employment Directive in this regard is neither clear nor settled.[512]

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[506] It is not contained in the Act a minimum amount of disabled workers to be hired. Even if this is encouraged by social agreements, everything is left to the voluntary agreement of the parties. Denmark, 195.
[507] Supreme Court judgment in case No. HR-98/2015 of 13 April 2016.
[508] Country Report, at. 8.
[509] Consolidated Act No. 438 of 16 May 2012 with later amendments. It was adopted in May 2003 to ensure protection against discrimination based on race or ethnic origin and to implement the non-employment aspects of the EU Racial Equality Directive. This Act encompasses a prohibition against discrimination on the grounds of racial and ethnic origin as regards access to social protection, including social security and health care, social benefits, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry on a particular profession; it further includes a prohibition against harassment on the grounds of race and ethnic origin.
Harassment within the labour market is deemed to be discrimination when conduct related to race, skin colour, religion or belief, political opinion, sexual orientation, age and disability or national, social or ethnic origin, takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person concerned, cf. Section 1 (4) of the Act on the Prohibition of Discrimination in the Labour Market etc.
Furthermore, according to the Act on Work Environment [Arbejdsmiljøloven] employers are obligated to secure a healthy physical and psychological work environment. According to this act it is a responsibility of the employer to work against harassment in general at the individual workplace. Consolidated Act Nr. 1072 of 7 September 2010 with later amendments
There is very limited case law on harassment. In a recent decision, the Board of Equal Treatment evaluated that use of the word "Negro" by a public social worker did not amount to discrimination or harassment, because there was no evidence to suggest that the social worker's writings in the file influenced the complaint; thus, the Board stated that the complainant was not treated differently because of her own or her child's ethnic origin. On that background the Board concluded that no discrimination or harassment had taken place. Of course the conclusion is questionable since the merit of a harassment case does not lies in the different treatment but in the violation of the worker's dignity at the workplace. Board of Equal Treatment, Decision No. 9506 of 6 May 2016.
[510] Country Report, at 8.
[511] Supreme Court, judgment in case No. HR-151/2015 of 27 April 2016.
[512] In a decision from 6 May 2016, the Board of Equal Treatment evaluated discriminatory to ask for Danish language capabilities to reject an application for a position as an organ player in a church due to lack of Danish language skills, since these could

The Country Report, finally, stresses that "*[m]ultiple discrimination is not directly covered by legislation. In cases of multiple discrimination, the different discrimination grounds are dealt with individually. Discrimination on more grounds does not involve higher amounts of financial compensation*".[513]

Procedurally, setting aside the opportunity to avail themselves of a qualified lawyer, trade unions and other membership organisations have the chance to represent their members in civil court cases dealing with pay and employment conditions. On the other side, it does not exist a provision enabling NGO's to represent victims of discrimination in court.[514]

The evidence of the case is governed by the shared burden of rule according to the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market, that is to say that when there is a prima facie case of discrimination, the burden of proof shifts back to the respondent.[515]

Statistics on the number of complaints are accessible at the Board of Equal Treatment website.[516]

According to the Country Report, "[l]evel of compensation for discrimination on the labour market seems effective, proportionate and dissuasive. Outside the labour market the level of compensation for discrimination is very low".[517]

Judges recur to statistical evidence to decide age and gender discrimination controversies.[518]

Recently, in this respect, the Supreme Court concluded that statistical information - if authentic and sufficiently significant – could by itself establish an assumption for discrimination because of age.[519]

Relevant equalities bodies operate in Denmark.

The Institute for Human Rights – The National Human Rights Institution of Denmark[520] with the aim of promoting equal treatment and effective protection against discrimination on grounds of racial or ethnic origin, assisting victims of discrimination, to conduct surveys concerning discrimination and to publish reports and make recommendations on

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constitute indirect discrimination based on ethnic origin if the requirements were unjustified with reference to the nature of the position in question. The Board did not find that the employer could prove that a language barrier was a hindrance to the woman's handling of the position as an organ player. Thus, the Board decided in favour of the organ player and awarded a compensation of DKK 25.000 (€ 3360) for indirect discrimination because of ethnic origin. Board of Equal Treatment, Decision No. 9505 of 6 May 2016; contra, Board of Equal Treatment, Decision No. 10118 of 12 September 2016.

[513] Country Report, at 8.

[514] In Denmark, national law allows associations / organisations / trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event. See, Chapter 23a of the Danish Administration of Justice Act contains rules on collective action.

[515] In addition, the Equal Treatment Act provides for a reversal of the burden of proof in the case of a dismissal during pregnancy, maternity, paternity or parental leave. Under section 2 of the act no person shall expose another person to direct or indirect discrimination on grounds of sex. An instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination. See, S. JORGENSEN, *Country Report, Gender Equality*, Denmark, 2017.

[516] See http://ast.dk/naevn/ligebehandlingsnaevnet/nyheder-fra-ligebehandlingsnaevnet/publikationer-fraligebehandlingsnaevnet.

[517] S. JORGENSEN, *Country Report*, p. 9.

[518] In court cases statistics have primarily been used in cases of gender and age discrimination. Statistics have not been used in cases of indirect discrimination on account of the other discrimination grounds, except as an argument that a defendant did hire staff with ethnic minority background and thus according to the defendant did not discriminate against ethnic minorities. Statistics on the place of birth of immigrants and their descendants have been used to support arguments of indirect discrimination in media coverage of situations where, for example, people living in certain streets or neighborhoods have been denied access to insurance schemes.

[519] Supreme Court, judgment No. 28/2015 of 14 December 2015. The Country Report, at 9 remembers that: "*[s]ituation testing is not regulated in Danish legislation and is primarily used by journalists or NGOs to confirm their presumption that discrimination exists in a specific sector*".

[520] Consolidated Act No. 553 of 18. June 2012 with later amendments.

discrimination.
In 2015, DIHR was given the authority to bring in complaints to the Board of Equal Treatment in cases that are a matter of principle or of general public interest.[521]
The Board of Equal Treatment is competent to hear individual complaints related to discrimination in the labour market based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin.[522]
Outside employment the Board only deals with complaints related to discrimination based on race, ethnic origin or gender.[523]
In 2015, the Act on the Board of Equal Treatment was amended to establish that the Board might reject a complaint if the complainant does not have an individual and current interest in the case in question. Victims of discrimination can be awarded compensation for non pecuniary damages directly by the Board. The Board is entitled to take the case to court if the discriminating party is not willing to pay.[524]

8.2. Discrimination Grounds
8.2.1. Ethnic origin and religion

There are court cases dealing with clothing requirements for employees including prohibitions of headgear, which have a discriminatory effect on Muslim women wearing headscarves. Such cases have not been adjudicated as possible discrimination cases based on ethnic origin but as cases of possible indirect discrimination because of religion.[525]

8.2.2. Disability

Disability has not been defined by the Danish legislation implementing the Employment Directive, but this notion has been defined by the social security legislation, where "disability" has traditionally been demarcated as an "impairment that generates a need for compensation in order for the person in question to function on an equal level with other citizens in a similar situation".
This broad notion has been furtherly refined by the judgement of the Supreme Court of 13 June 2013[526] that affirmed that the concept of "disability" does not require for compensation or a need for special accommodation.
The jurisprudence of the Supreme Court stated that employee had to prove that she had an illness causing a disability encompassed by the Act on Prohibition of Discrimination on the Labour Market etc.[527], and that a latent disorder does not constitute a disability if its manifestation can be prevented by the reasonable ergonomic design of a workplace[528].

[521] Act No. 1570 of 15 December 2015.
[522] Consolidated Act No. 1230 of 2 October 2016
[523] It is interesting that the Work Environment Act does not contain any special provisions applying to women. Since this Act has been adopted to guarantee the safety during the execution of a working performance, it applies also to women without discrimination. Denmark, 194.
[524] Act No. 1570 of 15 December 2015.
[525] See for example Supreme Court ruling in UfR 2005.1265 H.
[526] Judgment printed in U2013.2575H.
[527] The Supreme Court, Case 25/2014, judgment delivered on 23 June 2015. Judgment printed in U2015.3301H. This was an appeal of the judgment delivered by The Maritime and Commercial Court, F-1306 and F-19-06, judgments delivered on 31 January 2014. Judgment in F-19-06 was printed in U2014.1223S and the Supreme Court, Case 104/2014, judgment delivered on 11 August. Judgment printed in U2015.3827H.
[528] The Maritime and Commercial Court, F-7-10, judgment delivered on 1 December 2014. Judgment printed in U2015.1041S. The Court referred to medical records stating that the woman would be completely healthy again.

The stricter approach towards the qualification of a conduct as discriminatory is evident in a case of dyslexia. The Board stated that the dyslexia of the social worker constituted a disability but, even if some complaints of employer had a relation to the dyslexia, the social worker - in spite of relevant accommodations (including a computer program acquired to assist the social worker with his writing tasks) - was not competent, capable and available to perform the essential functions of the job.[529]
To sum up, Danish courts still focus very much on medical information to establish a disability, with little consideration for the role that environmental factors could play in creating a disability.
The Country Report concludes that "the medical model of disability is still being applied in practice when it comes to cases of disability discrimination in Denmark".[530]

8.2.3. Age

Even if age is not defined in the legislation everybody is protected against discrimination on account of age. In 2016, it was hold that an employee was discriminated against because of her age, since she was dismissed against her will when she was 61.[531]
The Court evaluated that the employer had not carried out an individual evaluation of the vocational skills of the employee in question and the employer had failed to prove that age was not part of the reasoning for dismissing the woman. The employee was awarded a compensation of DKK 223.000 (€ 30.000) constituting 6 months of salary.

8.2.4. Sexual orientation

Sexual orientation is not defined in the legislation, however, the concept is widely understood to include any kinds of lawful sexual orientation such as bisexuals, transsexuals, masochists etc.
The case law is not abundant. The Country Report tells of a case in which the Board of Equal Treatment dealt with a female job applicant who complained about discrimination because of sexual orientation commenting that "[i]n a telephone conversation, the manager had told her, that she had reminded them of an earlier colleague with the same sexual orientation. The manager told the job applicant, "*to be honest with you, we have previously not been lucky with such kind of a person*." The complainant withdrew her application and filed a complaint to the Board. The Board concluded that the employer did not manage to prove that the sexual orientation of the complainant had not been given weight while her job application was processed. Thus, the complainant received a compensation of DKK 25.000 (€ 3.360) for discrimination based on sexual orientation".[532]

Obesity and gaut cannot be seen as disability. See, respectively, Judgment of 31 March 2016 described on the website of the City Court of Kolding. See http://www.domstol.dk/kolding/nyheder/Pressemeddelelser/Pages/Domafsagtden31marts2016.aspx. 89 Board of Equal Treatment, Decision No. 39/2015 of 25 March 2015. In June 2015 the Board of Equal Treatment concluded that the depression was not a disability. The Board argued that the "depression did not have such a scope and nature that for a longer period of time she was limited in fully and effectively carrying out her job as a physiotherapist on an equal footing with her colleagues." Board of Equal Treatment, Decision No. 107/2015 of 24 June 2015.

[529] Board of Equal Treatment, Decision No. 10099 of 24 August 2016. When comparing qualifications of job applicants and evaluating whether a person is competent, capable and available, the person with a disability is to be judged according to his or her capacity to carry out the essential functions of the position after reasonable accommodation is made. Board of Equal Treatment, Decision No. 82/2010.

[530] S. JORGENSEN, *Country Report*, p. 36.

[531] Western High Court, judgment in Case No. B-1149-15 of 1 July 2016. Printed in U.2016.3632V.

[532] Board of Equal Treatment, Decision No. 10307 of 10 October 2012. (Decision was not made public before 2015).

8.2.5. Multiple discrimination

In Denmark, prohibition of multiple discrimination is not included in the law. To enhance the legal protection and raise awareness in this area, it would be preferable that multiple discrimination was encompassed directly by the anti-discrimination legislation. There are no plans, however, for adoption of such amendments.
In Denmark, there is no civil case law dealing with multiple discrimination. There are, however, cases in which the Board of Equal Treatment has dealt with situations of multiple discrimination, mainly dealing with age and disabilities[533] .

Danish society-at-large has a low perception of the fact that discriminatory practices occur in their Country.[534]
According to the Country Report, the public institutions do not see the phenomenon has a priority and initiatives equality and non-discrimination are not on the top of the political agenda.[535]
As a matter of fact, there is a lack of statistics and general research about discrimination (and to the establishment of positive action measures by employers).[536]
This lacuna is more serious since the number of immigrants and foreigners is rapidly increasing.
In this regards, it is awaited the enactment of some guidelines to interpret the notion of indirect discrimination.
Indeed, the headscarf judgment (U.2005.1265H) give the impression to take a wide area of managerial powers in relation to dress code, ending up to have a discriminatory effect on ethnic or religious minorities.
Then, Danish courts and the Board of Equal Treatment pay much attention to the need for a medical deficiency to found a disability. Decisions show that for a condition to be deemed a disability according to the Act on Prohibition of Discrimination in the Labour Market etc. it is crucial that the condition is caused by a medically diagnosed illness.[537]
According to the Country Report, "*the courts and the Board do not seem to sufficiently consider the role that environmental factors can play in creating a disability. It seems that the out-dated medical model of disability is still being applied in practice when it comes to cases of disability discrimination in Denmark*".[538]

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[533] Board of Equal Treatment, Decision No. 222/2014 of 17 December 2014 and Board of Equal Treatment, Decision No. 192/2013 of 11 September 2013.
[534] As stated by S. JORGENSEN, *Country Report*, *supra* note 1312, p. 46 "[w]ith regard to the gap between male and female salaries, and with regard to male and female employment in general, there is still a difference in Denmark. The public sector seems to attract more female than male employees and public sector salaries are generally lower that in the private sector. This is not relevant with regard to the implementation of the EU directives, but is a challenge facing Danish society with regard to gender equality".
[535] S. JORGENSEN, *Country Report*, p. 11.
[536] On the basis of the Act on Equal Treatment of Men and Women in the Labour Market the Ministry of Labour has the right to introduce special rules to foster equal opportunities between the genders (Par. 13). This means that also that the Ministry of Labour could introduces quotas in favours of men or women underemployed or favour their admittance in training school. See, O. HASSELBALCH, *Denmark*, p. 196. Furthermore, Under section 3 (1) in the Gender Equality Act, the competent minister may allow, regardless of the general prohibition of discrimination on grounds of sex, special measures to promote equality when the purpose is to prevent or compensate for discrimination on grounds of gender. Positive action is permitted as temporary measures to overcome the effects of past stereotypes or learning new skills. The positive action must therefore be discontinued after achieving the desired equality in this particular field. One example is the YDUN research programme that targets women scientists and aims to strengthen talent utilization in Danish research by promoting a more equal gender balance in the Danish research environment. S. JORGENSEN, *Country Report*, *supra* note 1312, p. 12.
[537] Eastern High Court, Judgment in case No. B-523-15 of 31 May 2016.
[538] S. JORGENSEN, *Country Report*, p. 11.

The number of complaints brought to the Board decreased in the last two years, for the first time since its establishment in 2009 and also the number of cases managed by the equality bodies. The Danish Institute for Human Rights (DIHR),[539] for example, assisted few victims of discrimination in 2016 (18 inquiries on race/ethnicity, 2 on multiple discrimination, 13 on disability and 2 on age).[540]

9. Conclusion

Anti-discrimination policies and equal treatment in labour relationship have been regulated in Georgia by the Constitution, the Labour Code and, special laws, such as the Law on Gender Equality and the Law of Trade Unions, and Law on Social Protection of Disabled Persons.
The main source is the Labour Code of Georgia able to provide a taxonomy and an institutional system for the labour discrimination, including also definitions and rules on unjustified treatment.
On the other side, some drawbacks were identified.
First of all, notwithstanding the continuous recommendations coming from the ILO, the definition of indirect discrimination is not available; furthermore, the catalogue of discrimination grounds (adequate in this very moment for the Georgian labour market) does not include some peculiar cases widely used in Europe (physical appearance as well as healthy conditions) or in the USA (weight) that could potentially impact on the future labour practices. This gap is more sensitive since the anti-discriminatory ground list is comprehensive – so, it would be advisable to include the phrase "and for other grounds" to this catalogue of specific grounds to the Labour Code. This would create some room for the judges to interpret social need and chances by means of an elastic and general clause (following the tradition of the civil law systems).
The new amendments satisfied the ILO request to have also a pre-contractual safeguard against the discriminative practices, and the fulfilment of the rule according to which employment discrimination covers all stages of labour relationships, even the termination process.
To sum up, the promulgation of the 2013 Labour Code constituted a strenuous, but still partial, step towards the achievement of a modern anti-discriminatory policy in the labour relationship, whose improvement is strictly connected with the adoption and implementation of the ILO Conventions and of the EU Directives/Regulations on the subject.
A crucial role, indeed, is up to jurisprudential format. Even if there are still some lacunae, it is worth mentioning that, until 2006, anti-discriminatory regulation was missing in Georgia and the effective application of discrimination regulation and their accurate and proper reading and rendering by the court is an unavoidable passage for the creation and the implementation of an up-to-date employment discrimination law in Georgia.

[539] Section 2(2) of the Act on The Institute for Human Rights – The National Human Rights Institution of Denmark.
[540] In 2015, DIHR was given the power to bring in complaints to the Board of Equal Treatment in cases that are a matter of principle or of general public interest: this happens in one case only. Moreover, DIHR acted as amicus curiae in three civil court cases.

References

A. ADLERCREUTZ, Sweden, in: International Encyclopedia for Labour Law and Industrial Relations, Blanpain R. (General Editor), Vol.13, The Hague/London/Boston, Kluwer Law International, 1998.

J-F. AKANDJI-KOMBE, *Le droit a la non-discrimination vecteur de la garantie des droits sociaux*, in *Le droit a la non-discrimination au sens de la Convention europeenne des droits de l'homme* 183-96 (F. Sudre & H. Surrel eds.) 2008.

E. ALBIN, *Customer Domination at Work: A New Paradigm for the Sexual Harassment of Employees by Customers*, 24 Mich. J. Gender & L. 167, 2017.

R. AYES, *Importing Foreign Statutory Regimes to America: Modernizing Title VII of the Civil Rights Acts*, 38 Women's Rights L. Rep. 105, 2016.

S. BAER, *Dignity or Equality? Responses to Workplace Harassment in European, German and U.S. Law*, in *Directions in Sexual Harassment Law 582*, C. A. MACKINNON & R. B. SIEGEL eds., 2003.

P. BARBEZIUEX, *Rapport du 16 novembre 2016 sur le suivi de la mise en œuvre des propositions du groupe de dialogue sur la lutte contre les discriminations en entreprise*, 2016.

C. BARNARD and S. DEAKIN, *'Negative' and 'Positive' Harmonization of Labor Law in the European Union*, 8 Colum. J. Eur. L. 389, 2002.

M. BELL, *A Patchwork of Protection: The New Anti-Discrimination Law Framework*, Modern Law Review, vol. 67, no 3, 2004.

M. BELL, *Antidiscrimination law and the European Union*, Oxford- NewYork, 2002.

A. BELL, *Employment Law*, Nutcases, 3rd Edition, London, "Thomson, Sweets & Maxwell", 2007.

S. BENEDI LAHUERTA, *Taking EU Equality Law to the Next Level: In Search of Coherence*, European Labour Law Journal, vol. 7, no 3, 2016.

F. BERNNAN, *The Race Directive Recycling Racial Inequality*, "The Cambridge Yearbook of European Legal Studies", Vol. 5, 2004.

C. BERSON, *Private vs. Public Sector: Discrimination Against Second-Generation Immigrants in France*, Centre d'Economie de la Sorbonne, Working Paper No. 59, 2009.

E. A. BESNER, *Employment Legislation for Disabled Individuals: What Can France Learn From the Americans With Disabilities Act*?, 16 Comp. Lab. L. 399, 1995.

S. BESSON, *Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe*, 60 Am. J. Comp. L. 147, 2012.

R. BLANPAIN, *Equality and Prohibition of Discrimination in Employment, in: Comparative Labour Law and Industrial Relations*, Blanpain R. (General Editor), 2nd Revised Edition, Deventer/Antwerp/London/ Frankfurt/Boston/New York, Kluwer Law and Taxation Publishers, 1985.

P. BLOCH, *Diversity and Labor Law in France*, VT. L. REV. 717, 720, 2006.
M. BORZAGA, *Company and Labor Law: Accommodating Differences: Discrimination and Equality at Work in International Labor Law*, 30 Vt. L. Rev. 749, 2006.

P. BREST, *In Defence of the Antidiscrimination Principle*, in: *Foundations of Employment Discrimination Law*, J. Donohue (Ed.), New York, Oxford University Press, 1997.

C. BROWN, *The Race Directive: Towards Equality for All the Peoples of Europe?*, Yearbook of European Law, vol. 21, no 1, 2001.

A. BRUN & H. GALLAND, *Droit Du Travail 882*, 2d ed., 1978.

P. CALLAGHAN, *UK, in: International Labour and Employment Laws*, W. Keller and T. Darby (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, BNA Books, 2009.

D. CARUSO, *Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives*, Harvard International Law Journal, vol. 44, no 2, 2003.

S. CHACHAVA, *Georgian Labour Law gap analyses and recommendations*, Tbilisi, 2011.

S. CHACHAVA and V. ZAALISHVILI (Eds.), *Employment Law III*, Collection of Articles, Tbilisi, 2014.

E. CLARK BROWN, *Fundamental Soviet Labor Legislation*, in *Industrial and Labor Relations Review,* vol. 26, n. 2, 1973.

COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Non-Discrimination and Equal Opportunities: A Renewed Commitment*, Brussels, 2008.

B. DE WITTE, *New Institutions for Promoting Equality in Europe: Legal Transfers*, National Bricolage and European Governance, 60 Am. J. Comp. L. 49, 2012.

M. DESPAX, J-P. LABORDE, J. ROJOT, *France*, in R. BLANPAIN (ed.), *International Encyclopedia of Laws: Labour Law and Industrial Relations*, Alphen aan den Rjin, 2017.

K. A. DEYERLE, *Genetic Testing in the Workplace: Employer Dream, Employee Nightmare - Legislative Regulation in the United States and the Federal Republic of Germany*, 18 Comp. Lab. L. 547, 1997.

E. DUBOUT, *La Cour europeenne des droits de l'homme et la justice sociale - a propos de l'egal acces a l'education des membres d'une minorite*, 84 Revue trimestrielle des droits de l'homme 987-1011, 2010.

E. ELLIS, *EU Anti-discrimination Law*, Oxford, 2005, p. 291, quoted in Philippa WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012.

E. ELLIS, *The Principle of Proportionality in the Laws of Europe 19-20*, 1999.

S. ENGELS, *Problems of the Proof in Employment Discrimination: The Need for a Clearer Definition of Standards in the United States and the United Kingdom*, 15 Comp. Lab. L. 340, 1994.

R. FAHLBECK and B. J. MULDER, *Sweden*, in *International Labour and Employment Laws*, W. Keller and T. Darby (Editors-in-Chief), 3rd Edition, Volume IIA (Covering through 2007), Additional Economies (EU and Other European), Chicago, "BNA Books", 2008.

H. FENWICK & T. HERVEY, *Sex Equality in the Single Market: New Directions for the European Court of Justice*, 32 Comm. Mkt. L. Rev. 443, 1995.

M. W. FINKIN, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 Comp. Lab. L. & Pol'y J. 577, 578-80, 2002.

M. FORD, *Two Conceptions of Worker Privacy*, 31 Indus. L.J. 135, 146, 2002.

S. FRIEDMAN, *Equality: A New Generation?*, Industrial Law Journal, vol. 30, no 2, 2001.

A. GOLDMEN, *United States of America*, in *International Encyclopedia for Labour Law and Industrial Relations*, R. Blanpain (Editor in Chief), Vol.13, The Hague/London/Boston, "Kluwer Law International", 1996.

D. GRIMSHAW, J. RUBERY, and S. MARINO, *Public Sector Pay and Procurement in Europe During the Crisis the Challenges Facing Local Government and the Prospects for Segmentation, Inequalities and Social Dialogue*, 50, 2012.

N. GVELESIANI, *Parity Democracy as a Guiding Principle of Gender Policy (In the Prism of Constitutional Reform)*, sclj, 2017.

O. HASSELBALCH, *Denmark*, in R. Blanpain (ed.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, Alphen Aan Den Rjin, 2018.

O. HASSELBALCH, *Labour Law in Denmark*, Alphen Aan Den Rjin, 2010.

L. C. HEBERT, *Divorcing Sexual Harassment from Sex: Lessons from the French*, 21 Duke J. Gender L. & Pol'y 1, 2013.

B. HEPPLE, *The European Legacy of Brown v. Board of Education 605*, at 609, U. Ill. L.R., 2006.

B. HEPPLE, S. FREDMAN, and G. TRUTER, *Great Britain*, in *International Encyclopedia for Labour Law and Industrial Relations*, Blanpain R. (Editor in Chief), Vol. 6, The Hague/London/Boston, Kluwer Law International, 2002.

C. HERDEGEN, *The Relation Between the Principles of Equality and Proportionality*, 22 Comm. Mkt. L. Rev. 683, 684-85, 1985.

J. HERSCH, *Employment Discrimination, Economists, and the Law*, in K. MOE (ed), *Women, Family and Work: Writings on the Economics of Gender,* 2003.

M. L. HIGGINS, *Not "Fit" for Hire: The United States and France on Weight Discrimination in Employment*, 38 Fordham Int'l L.J. 889, 2015.

E. HOWARD, *The EU race directive: time for change?*, International Journal of Discrimination and the Law, vol. 8, no 4, 2007.

E. HOWARD, *The Case for a Considered Hierarchy of Discrimination Grounds in EU Law*, vol. 13, no 4, 2006.

G. HUSCROFT, *Discrimination, Dignity, and the Limits of Equality*, Otago Law Review, vol. 9, 2000.

ILO, *Application of International Labour Standards 2018*, Geneve, 2018.

ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Geneve, 2012.

P. JACOBSEN, Updated by O. HASSELBALCH, *Denmark*, in *International Encyclopedia for Labour Law and Industrial Relations*, R. Blanpain (Editor in Chief), Vol.5, The Hague/London/Boston, "Kluwer Law International", 1998.

L. JALAGANIA and T. NADAREISHVILI, *Gender Discrimination in Labor Relations*, USAID, Tbilisi, 2014.

V. JIVAN & C. FORSTER, *Challenging Conventions: In Pursuit of Greater Legislative Compliance With CEDAW in the Pacific*, 10 Melbourne J. of Int'l Law 655, 2009.

S. JORGENSEN, *Country Report, Gender Equality*, Denmark, 2017.

P. JUSTESEN, *Country report, Non-discrimination*, Denmark, Brussel, 2017.

J. KENNER, *The European Union, in: International Labour and Employment Laws*, W. Keller and T. Darby (Editors-in-Chief), 3rd Edition, Volume IA (Covering through 2007), Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009.

S. J. KENNEY, *Pregnancy Discrimination: Toward Substantive Equality*, 10 Wis. Women's L.J. 351, 1995.

S. KERASHVILI, *The Meaning of Prohibition of Discrimination for the Freedom of Contract (In the perspective of horizontal effect of human rights)*, Journal of law, 2017.

T. KERESELIDZE, *Analysis of Georgian Labour Legislation - Gender-Based Discrimination in the Workplace and Its Legal Implications*, Tbilisi, 2014.

T. KERESELIDZE, *Legal Outcomes of Discriminatory Question Asked by an Employer to a Candidate Prior to Conclusion of a Labor Contract, Labor Law*, compilation of articles, 2011.

S. LATRAVERSE, *Country report Non-discrimination France*, Brussels, 2017.

S. LATRAVERSE, *Migration Policy Group, Annual Survey of the Defender of Rights and ILO for 2013*, 2014.

S. LAULOM, *Country report, Gender equality, How are EU rules transposed into national law?*, France, Brussels, 2017.

U. LEMBKE, C*ountry report, Gender equality How are EU rules transposed into national law?*, Germany, Brussels, 2017.

E. LÉPINARD & E. LIEBER, *The Policy on Gender Equality in France, in depth analysis*, European Parliament, Directorate General for Internal Policies department, 2015.

Y. LETARTRE, *Note*, Recueil Dalloz, 1978.

A. LICHTASH, *Earning Dignity: Indirect Discrimination Against Women at Part-time Jobs*, Comparative View, 26 Women's Rights L. Rep. 13, 2005.

K. LINOS, *Path-dependence in Discrimination Law: Employment Cases in the US and the EU*, 35 Yale J. Int'l L. 115, 2010.

R. LIPARTELIANI, *PDO Special Report on Discrimination Against Women in the Workplace*, Tbilisi 2014.

M. LOWISCH and V. RIEBLE, *Koalitionsfreiheit des Einzelnen*, in *Munchener Handbuch des Arbeitsrechts* 245 n.67, 2d ed., 2000.

M. P. MADURO, *The European Court of Justice and Anti-Discrimination Law*, European Anti-Discrimination Law Review, vol. 2, 2005.

M. MAHLMANN, *Antidiscrimination Law in the European Union: Prospects of German Antidiscrimination Law*, 14 Transnat'l L. & Contemp. Probs. 1045, 2005.

M. MAHLMANN, *Country report Non-discrimination Germany*, Brussels, 2017.

M. MALIK, *Anti-Discrimination Law in Britain*, in *Gleichbehandlungsrecht*, 135, B. Rudolf & M. Mahlmann eds., 2007.

P. MANDRUZZATO, *Italy*, in *International Labour and Employment Laws*, W. Keller, T. Darby (Eds-inChief), 3rd Edition, Volume IA, Covering through 2007, Major Economies (Non-NAFTA), Chicago, "BNA Books", 2009.

M. MARIANI, *Art. 15*, in M. Grandi, G. Pera, *Commentario breve alle leggi sul lavoro*, R. De Luca Tamajo and O. Mazzotta (eds.), 2013.

J. MCDONALD, F. RAVITCH, P. SUMNERS, *Employment Discrimination Law, Problems, Cases and Critical Perspectives*, New Jersey, Pearson Prentice Hall, 2006.

P. MICKEY, *United States*, in *International Labour and Employment Laws*, W. Keller and T. Darby (Editors-in-Chief), 3rd Edition, Volume IB (Covering through 2007), Major Economies (NAFTA) and International Issues, Chicago, "BNA Books", 2009.

K. MONAGHAN, *Equality and Non-Discrimination*, Judicial Review, vol. 16, no 4, 2011.

L. MONTUSCHI, G. GHEZZI, G. F. MANCINI, L. MONTUSCHI and U. ROMAGNOLI, *Statuto dei diritti dei lavoratori*, in A. Scialoja and G. Branca, Commentario del Codice Civile, 1972.

M. OELZ, S. OLNEY, and M. TOMEI, *Equal Pay – An introductory guide*, ILO, Geneva, 2013.

S. PAGER, *Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality*, 51 Am. J. Comp. L. 553, 2003.

A. PETERS, *The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law - A Conceptual Analysis*, 2 Eur. L.J. 177, 1996.

S. PRECHAL, *Combatting Indirect Discrimination in the Community Law Context*, Leg. Issues of Eur. Integ. 81, 1993.

G. QUINN & E. FLYNN, *Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability*, 60 Am. J. Comp. L. 23, 2012.

L. J. RAZNOVICH, *A Comparative Review of the Socio-Legal Implications of Burden of Proof and Presumptions to Deal With Factual Uncertainty*, 32 Am. J. Trial Advoc. 57, 2008.

D. G. REAUME, *Discrimination and Dignity*, Louisiana Law Review, vol. 63, 2003.

D. L. RHODE, *The Injustice of Appearance*, 61 Stan. L. Rev. 1033, 2009.

R. RUBIO-MARIN, *A New European Parity-Democracy Sex Equality Model and why it won't Fly in the United States*, 60 Am. J. Comp. L. 99, 2012.

U. RUST, *Women's Rights in Germany Since Unification: Reach and Substance of the Principle of Equal Treatment in Social Security Law Under European Community and German Constitutional Law*, 3 Cardozo Women's L.J. 427, 1996.

M. SARGEANT, *Discrimination and the Law*, London, 2013.

M. SARGEANT, *The Law on Age Discrimination in the EU*, 55-56, 2008.

D. SCHIEK, *Women's Rights in Germany Since Unification: Article: Lifting the Ban on Women's Night Work in Europe - A Straight Road to Equality in Employment?*, 3 Cardozo Women's L.J. 309, 1996.

M. SCHMIDT, *The Need for Modernising German Labour Law Arising from the Ban on Age Discrimination,* in Changing Industrial Relations and Modernisation of Labour Law 358, 2003.

J. C. SCIBERRAS, *Rapport de synthèse des travaux du groupe de dialogue interpartenaires sur le lutte contre les discriminations en entreprise*, 2015.

M. SEGHESIO, *Article 4*, in A. BORRONI (ed.), *Commentary on the Labour Code of Geoegia*, Tbilisi, 2014.

A. SEIFERT, *Koalitionsfreiheit*, in *Handbuch des Arbeits-und Sozialrechts* 28 n.112, M. WEISS & A. GAGEL eds., 2002.

A. SEIFERT and E. FUNKEN-HOTZEL, *Developments in Workplace Dispute Resolution: A Five Country Study: Germany: Wrongful Dismissal in the Federal Republic of Germany*, 25 Comp. Lab. L. & Pol'y J. 487, 2004.

J. SHAW, *Gender and the European Court of Justice*, in G. de Burca & J. Weiler, (eds.), *The European Court of Justice,* 2001.

T. M. SHIVELY, *Sexual Harassment in the European Union: King Rex Meets Potiphar's Wife*, 55 La. L. Rev. 1087, 1995.

Z. SHVELIDZE, *Georgia*, in R. Blanpain (ed.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, Alphen aan den Rjjn, 2017.

Z. SHVELIDZE, *Prohibition of Employment Discrimination in Accordance with the Georgian Legislation*, Journal of Law, 2013.

Z. SHVELIDZE, T*he Degree of Europeanization of Labor Regulations in the South Caucasus Region: A Comparative Study of Labor Standards in Armenia, Azerbaijan and Georgia*, South Caucasus Law Journal, 2014.

Z. SHVELIDZE, *Transition from Soviet to Liberal Labour Law: Labour Standards in Georgia*, Tbilisi 2012.

A. SOMEK, *Antidiscrimination Law in the European Union: Concordantia Catholica: Exploring the Context of European Antidiscrimination Law and Policy*, 14 Transnat'l L. & Contemp. Probs. 959, 2005.

S. STEPHENSON, Child Labour in the Russian Federation, University of North London, 2002.

N. STURUA, *Damage Compensation for Violating Pre-Contractual obligations in Labor Law*, 2011.

N. STURA, *Termination of Employment Contract*, Journal of Law, 2015.

J. C. SUK, *Equality After Brexit: Evaluating British Contributions to EU Antidiscrimination Law*, 40 Fordham Int'l L.J. 1535, 2017.

J. SUK, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 Am. J. Comp. L. 75, 2012.

M. TOMEI, *Discrimination and Equality at Work: A Review of the Concepts*, 142 INT'L LAB. REV. 401, 405-06, 2003.

L. B. TREMBLAY, *Promoting Equality and Combating Discrimination Through Affirmative Action: The Same Challenge?*, Questioning the Canadian Substantive Equality Paradigm, 60 Am. J. Comp. L. 181, 2012.

T. TREU, *Italy*, in *International Encyclopedia for Labour Law and Industrial Relations*, Blanpain R. (Ed. in Chief), Vol.8, The Hague/London/ Boston, Kluwer Law International, 1998.

J. TUDOR, *Closer the Gender Pay Gap in the European Union: Equal Pay Guarantee Across the member-States*, 92 N.D. L. Rev. 415, 2017.

W. VAN GERVEN et al., *Current Issues of Community Law Concerning Equality of Treatment Between Women and Men in Social Security*, in: *Equality of Treatment Between Men and Women in Social Security,* 42 f., C. MCCRUDDEN ed., 1994.

L. WADDINGTON and M. BELL, *More Equal than Others: Distinguishing European Union Equality Directives,* Common Market Law Review, vol. 38, no 3, 2001.

P. WATSON, *Equality between Europe's Citizens: Where Does the Union Now Stand*, Fordham International Law Journal, vol. 35, 2012.

M. S. WEISS, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 Chi.-Kent L. Rev. 1427, 1993.

M. WEISS, M. SCHMIDT, and J. W. GOETHE, *Germany*, in R. BLAINPAIN (ed.), *International Encyclopaedia of Labour Law and Industrial Relations*, Alphen Aan Den Rjin, 2008.

R. WHITTLE, *The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective*, European Law Review, vol. 27, no 3, 2002.

K. S. ZIPPEL, *The Politics of Sexual Harassment: A Comparative Study of the United States, the European Union, and Germany*, 2006.

RECOMMENDATIONS

Active labour market policies

1. Set up an inclusive working group tasked with transposing international standards into Georgian legislation, adapting them to the specific context and needs. Such a group should include representatives of the Government, trade unions, employers' associations as well as members of the Georgian civil society, and should also involve people with a specific competence concerning minority rights and anti-discrimination policies.
2. Establish a specialised body in charge of keeping records and compiling statistics concerning the employment reality of Georgia, so that the legislature and the Government can adopt data-based policies and can also verify whether the policies that have been adopted were fit for purpose and achieved the planned results.
3. Set up a system of incentives and facilitations aimed at combating historical and institutional forms of discrimination (e.g., measures to encourage to hire people with disabilities).
4. Set up a system whereby employers are incentivised to hire and train young people.
5. Reform the present system of social security introducing entitlements and pensions in favour of those who cannot work on account of old age, disabilities, or other reasons.
6. Introduce measures to support the unemployed while they are looking for work; such measures should encompass training but also some forms of unemployment benefits.
7. Set up a network of employment centers so that employers and job seekers can get in touch easily and successfully.

Health and safety in the workplace

1. Introduce specific legislation concerning health and safety in the workplace detailing accurately the rights and obligations of employers and employees; such legislation ought to be in line with European and International standards.
2. Introduce a system of sanctions to repress the violations of said standards; make sure that these sanctions are actually dissuasive.
3. Make it a criminal offense for employers to transgress these standards, including as aggravating circumstance, the fact that an employee was hurt or killed in the line of duty because of a lack of health and safety precautions.
4. Empower labour inspectors to ensure that all the labour rights of the employees are respected included but not limited to health and safety in the workplace.
5. Set up a system through which an employee can anonymously report to an inspector any violation that may have occurred, and mandate that upon receiving such a report the inspectors must investigate it.
6. Authorise inspectors to make binding orders whenever they find that an employer has violated the relevant provisions of Georgian legislations. In case the employer spontaneously enact these orders, the sanctions should decreased

7. If the employers is fully compliant with the regulations some fiscal incentives or facilitations for reaching public funding should be established.
8. Set up a system whereby such orders may be appealed before the judiciary.
9. Set up a specialised court dealing with labour disputes.
10. Include preventive measures that make it possible to immediately halt the productive activity carried out by the employer in the event that a serious and imminent danger is present for the health and safety of the employees, providing that no sanctions may be imposed on the worker that should refuse to carry out his/her work when doing so could expose him or her to danger.
11. Introduce legislation whereby inspectors may have access to any workplace without delay, for the purpose of ensuring that no violation is occurring on the premises; employers will be obliged to allow inspectors entry and to assist in good faith in any way they can.
12. Set up a committee to which employers may address any complaint claiming that an inspector has committed an abuse of power including the power to impose possible sanctions.
13. Make provisions also for self-employed people and those employed in non-formal economic sectors.
14. Provide the resources needed to the office of labour inspectors to allow them to perform their duties to the best of their abilities.
15. Define inspectors as public servants so that they can be protected against any sort of intimidation attempt, from any interference from employers, and to give them the possibilities of using public powers to ensure that labour law is correctly enforced.
16. Ensure that labour inspectors are qualified by hiring experts and by training the inspectors that have already been recruited thereby making sure that they are always up-to-date.
17. Set up a system through which labour inspectors may coordinate their action with all other agencies that can potentially with labour issues and create effective system for exchange of information between inspectors and said agencies taking advantage of the latest technological improvement.
18. To oversee the actions of the office of the labour inspectors and to improve the relevant legislation, make provisions for the presentation of periodic reports to be examined by the Parliament of Georgia.
19. Such a stipulation will create legal grounds for supervision of labour safety and labour rights.
20. Paragraph 1 (b) of Article 2 of the Law of Georgia on Control of Entrepreneurial Activities should stipulate that control over entrepreneurial activity should include the activities undertaken for the prevention of forced labour and labour exploitation and for addressing these violation, also the activities aiming at the prevention of and addressing cases of violation of labour legislation and labour protection rules.
21. It is important to adopt a special law in labour safety area, which will transform standards, envisaged by Article 35 into rights and obligations.
22. t is necessary for the Code of Administrative Infringements of Georgia to provide for warnings and other sanctions (suspension of operation, pecuniary fine, etc.) for violation of labour rights and labour safety rules; respectively a special procedure should be incorporated into the Code of Administrative Procedure.
23. To start a discussion on the creation of a social insurance policy run by the State in order to help the workers in case of workplace injury or occupational disease.
24. To create a fast-track procedure to sanction the less serious violations of the

employer who will receive a lesser sanction if he accepts the fine.
25. To coordinate the different agencies in charge of inspecting the workplace.
26. To introduce a self – assessment evaluation form for employers to fill out in case they run for a public bid or in order to have access to public funding.

Anti-discrimination law in the workplace

1. Make the list of the discrimination grounds in the Labour Code open-ended so that the provision may be extended by the judiciary to cover new discrimination forms even though they had not been listed specifically in Article 2.
2. Extend the provisions prohibiting discrimination to the pre-contractual phase, stretching as far back as the publication of the job announcement that must be worded in a neutral way.
3. Include sanctions targeting employers who engage in discriminatory practices; such sanctions must be dissuasive.
4. Raise awareness of the scourged of discrimination and of the possible remedies that victims of discrimination may invoke.
5. Explicitly introduce the principle of equal pay for equal work, making reference to the definition given by the ECJ.
6. Make provisions for the protection of pregnant workers including a period of paid maternity leave equal to, at least, 3 months.
7. Extend the same protection pregnant workers have in the public sector to the private sector.
8. Repress discrimination based on pregnancy status as a form of gender based discrimination.
9. Introduce provisions concerning the burden of proof in discrimination cases, whereby the rules on the burden of proof may be provided in the cases in which there is a prima facie case of discrimination.
10. Introduce positive measures to reduce segregation.
11. Set up an agency tasked with overseeing the implementation of an-discrimination legislation, investigating complaints, and imposing sanctions which can be appealed before the judiciary.
12. Consider all forms of disparity of treatment due to pregnancy, puerperium, and motherhood (and parenthood) as forms of gender discriminations, including a presumption whereby a woman whose employment is terminated less than three years after giving birth is considered to have suffered gender based discrimination, extending this principle from the public sector to the private sector as well.
13. Extend the same protection to single fathers.
14. Develop separate regulations regarding sexual harassment as a form of discrimination in both the Labor Law and the Law on the Elimination of All Forms of Discrimination.
15. Institute campaigns aimed at raising awareness of anti-discrimination provisions and remedies to employees, employers, parties, judges, and all other interested parties.
16. Introduce legislation whereby employers are compelled to provide reasonable accommodation to disabled employees clarifying that denial of reasonable accommodation constitutes a form of prohibited discrimination.
17. Make provisions under which instructions to discriminate are considered a form of discrimination.

18. Revise the general standards of justification of direct and indirect discrimination according to the scope of the Equality Directives.
19. Extend the term within which a party who claims to have suffered discrimination may file a complaint before the aforementioned agency or file suit in court, to at least 2 years.
20. Amend the letter of Code including also the shift of the burden of proof in the pre-contractual stage.

hanno collaborato in questo numero

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Mariam Kaishauri	Safety at work
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Giorgi Shalamberidze	Association Agreement approximation list, dates

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