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Gender equality and access to employment

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INTRODUCTION

The aim of this paper is to examine the status of the equality principle under International law and European Human rights law as well as Icelandic law regarding equal access of men and women to employment.

The content of this principle on these levels was accounted for in the original draft paper submitted for a seminar held by the Institution for Human Rights September 24th – 25th 1999 on the equality principle with reference to human rights. The draft focused on the basics of the equality principle as it appears in each instrument, the obligations involved and its application as regards the right to access to employment. The means provided for each instrument's implementation were also discussed and some comments made on their weakness or strength with respect to the protection of equal access to employment. Some attention was also paid to possible changes for the improvement of each system. This approach had the advantage that it gave a more holistic view of each instrument, which was necessary for the understanding of the actual protection provided by each organ. In this final paper the discussion will be less detailed. The basic principles and the means provided for their implementation will be accounted for and the common elements and differences ¹be identified.

The relevant UN documents will be discussed in chapter one. The second chapter examines the protection provided by the Council of Europe and the third chapter studies the equality principle as regards access to employment as it appears in European law. Chapter four discusses the status and development on the international and European level and the impact of those on the national level. Then Chapter five accounts for Icelandic law and the fulfilment of the obligations imposed by the other levels.

¹ The original paper is dated February 2001. It was last revised in May 2005 mainly as regards developments in EU law and Protocol 12 to the ECHR.

I. UN DOCUMENTS

1. The principle of equality and non discrimination

The principle of equality is addressed in the Charter of The United Nations (UN Charter) and in The Universal Declaration of Human Rights (UDHR). The latter provides for a rule of equality with respect to the rights and freedoms set forth in the Declaration as well as an equality principle of a more general character.

In the two international Covenants from 1966, The International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR), the States Parties undertake to “respect and ensure the rights recognised”² and “guarantee that the rights enunciated will be exercised”³ without distinction or discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Equality between men and women is of special concern as both instruments state a determination to ensure the equal right of men and women to the enjoyment of all the rights set forth in each Covenant.⁴ This is also the central issue of The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the major international instrument concentrating on women. In this chapter the focus will be on the equality principle in these three conventions and the relevant convention within the system provided by the International Labour Organisation.

The term discrimination is not defined in the two 1966 Covenants. In its general comment on non-discrimination⁵, the Human Rights Committee (HRC) however, refers to the definition provided by CEDAW⁶. The definition is founded on three elements, i.e. the existence of a behaviour that constitutes a difference in treatment, a ground upon which the difference in treatment is based and the objective result of this

² ICCPR Art 2(1).

³ ICESCR Art 2(2).

⁴ Both Covenants Art 3.

⁵ General Comment 18 on non-discrimination, para 7 (UN doc. A/45/40).

⁶ Discrimination against women is defined as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedom in the political, economic, social or cultural, civil or any other field.”

difference in treatment. The prohibited behaviour is distinction, exclusion, restriction and, with the exception of CEDAW, preference. The mentioned behaviour is prohibited if it has the effect or purpose of nullifying or impairing the recognition, enjoyment or exercise of persons, or women in the context of this project, of human rights and freedoms. Although indirect discrimination has not been defined in the same manner, the emphasis on the effect of the prohibited behaviour indicates that the concept is recognised. Facially neutral policies or practices that have disparate impact on women can therefore not be used as a pretext for discrimination. The Committee on Economic, Social and Cultural rights, which is responsible for the implementation of ICESCR, has not established a definition in a General Comment. Its approach in its Reporting Guidelines⁷ on the subject of Article 6 is however in conformity with the main elements of the above definition.

While Articles 2(1) and 3 of the ICCPR and 2(2) of the ICESCR concern the rights declared in each instrument they do not lay down a general prohibition of discrimination. Discrimination in respect of any of these rights will be a violation of the instrument concerned, whereas discrimination in the application of a right that it does not represent would not be considered a violation. The applicability of this principle as regards employment opportunity, therefore depends on whether such rights are included in their provisions on the substantive rights protected.

Article 26 of ICCPR⁸ on the other hand provides for equality before the law and non-discrimination in its application. There has been some academic disagreement on the scope of this Article and its relation to Article 2(1) of ICCPR, which, as mentioned above, is restricted to the rights set forth in the Convention. In its comments on non-discrimination, the HRC makes the following remarks on the interpretation of Article 26:

"In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on State Parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State Party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not

⁷ Revised Reporting Guidelines regarding the form and control of reports were adopted by the committee at its fifth session. Report on the Fifth Session, E/1991/23/23, Annex IV.

⁸ "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... sex, ... or other status."

limited to those rights which are provided for in the Covenant."⁹

The jurisprudence of the HRC had already given an example of this interpretation of Article 26.¹⁰ The HRC however notes that, although this article requires legislation to prohibit discrimination, it does not of itself contain any obligation with respect to matters that may be provided for by legislation. A state is for example not required by article 26 to enact legislation to provide for social security. "However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with" it.¹¹ HRC decisions have furthermore established that the non-discrimination clause in ICCPR Article 26 still applies even if a particular subject matter is referred to in other international instruments, including the ICESCR and CEDAW.¹²

Article 26 thus constitutes an independent principle of equal protection of all rights protected by law. Such protection is not limited to civil and political rights. If a state has made discrimination in the field of employment unlawful, which is generally considered of an economic and social nature, the right not to be discriminated against in this field, will be protected by Article 26.

2. The substantive rights protected

Article 25 of the ICCPR guarantees every citizen the right and the opportunity to have access, on general terms of equality, to public service in his country. The term public service is not defined in Article 25. Public offices have however been considered to be all government appointed positions in the legislature, executive and judicial branches, in which official powers are exercised.

Access to public service is guaranteed on general terms of equality. This provision thus contains its own equality principle as well as being subject to the prohibition of discrimination in Article 2(1) and Article 3 which, applied in connection to Article 25, specifically ensure men and women equal access to public service.

The rights protected by the ICESCR are stated in Part III of the Covenant. The

⁹ General Comment 18 on non-discrimination, para 12 (UN doc. A/45/40).

¹⁰ PPC V. Netherlands, Doc A/43/40, Broeks v. Netherlands, Doc. A/42/40, Zwaan-de Vries v. Netherlands UN doc. A/42/40.

¹¹ Doc A/42/40, p.139, pr. 8.3.

¹² *ibid.*

right to work, the concern of Article 6, includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. The Committee has furthermore included the right to enter employment and the right not to be unjustly deprived of employment to this term. Article 7, on the other hand, recognises the right of everyone to the enjoyment of just and favourable conditions of work, in particular those listed in paragraphs a-d. Paragraph c states the right to the equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence. The right to access to employment and the right promotion opportunities are thus protected in the ICESCR, in relation to which the principle of Article 2(2) can operate.

The equality principle provided for in CEDAW is not limited to the rights included in its substantive provisions. Employment related rights do however enjoy special protection in Part III of the Convention. Article 11 (1) requires States to take all appropriate measures to eliminate discrimination against women in the field of employment, in order to ensure the same rights in employment on a basis of equality of men and women. The right to equal employment opportunities, including the application of the same selection criteria in such matters.¹³ The right to promotion in this respect is also prescribed.¹⁴

The concept of men and women being subject to the same selection criteria has however been criticised for failing to take account of relevant differences. As pregnancy or maternity status do not, for instance, suit both men and women they can, the argument goes, not be applied as a shared criterion in hiring of men and women. Promotion and job assignment during maternity leave do furthermore not enjoy the protection conferred upon seniority and job security by Article 11(2)(b). In the absence of explicit prohibition of discrimination on these grounds in hiring and promotion, the danger of criteria relating to pregnancy or maternity being used as a pretext for gender discrimination in this field may not be avoided completely.¹⁵

Those shortcomings bring up the question whether the Convention provides adequate protection against an employer's refusal to employ or promote a woman, or

¹³ CEDAW Art. 11 (b).

¹⁴ *ibid* Art 11 (c).

¹⁵ Meron, T., *The Convention on the Elimination of All forms of Discrimination Against Women*, p. 75.

deny her job application or promotion during maternity leave, because she is pregnant or may become pregnant in the future. One must however keep in mind that the aim of Article 11 is to eliminate discrimination in the field of employment. Furthermore, the scope of the Convention is not limited to the rights it explicitly recognises. Paragraphs (a) to (f) state the employment rights particularly protected which clearly does not exclude the protection of related rights. The protection provided by CEDAW in this respect might therefore be stronger than the above criticism suggests, although its strength must in the end depend on the implementation mechanism provided.

3. Obligations

3.1. The immediate, negative and positive nature of obligations

The separation of economic, social and cultural rights from civil and political rights occurred during the drafting of the International Bill of Human Rights. The argument for this division was that the two sets of rights were of a different nature and therefore needed different instruments. The arguments and counter arguments for the division are well known in the Human Rights discourse and will not be repeated here. This had the effect that the wording of the ICESCR is weaker as regards the obligations imposed with respect to the realisation of the rights recognised in the Covenants, cf. articles 2(1) of both Covenants. Whereas States undertake to ensure civil and political rights, they agree to take steps, to the maximum of their available resources with a view to achieving progressively the full realisation of the economic and social rights involved.

Although full realisation of the rights recognised is the aim of Article 2(1) of the ICESCR, it reflects the reluctance of States Parties to commit themselves to the immediate fulfilment of their obligations. A progressive approach is taken to the attainment of the recognised economic, social and cultural rights. Articles 2(2) and 3 on the other hand require states to guarantee and ensure the exercise of the rights without discrimination.

The terms “guarantee” and “ensure” as opposed to the term “recognise” in Article 2(1) imply that Articles 2(2) and 3 should be implemented immediately. Such interpretation of Article 2(2) is stated in the Limburgh Principles on the Implementation of the International Covenant on Economic, Social and Cultural

Rights.¹⁶ This point is also made in the Committee's General Comments No. 3. As examples of obligations of immediate effect, the Committee refers to States' undertaking to guarantee that relevant rights will be exercised without discrimination and to take steps towards the goal of full realisation.¹⁷ The Committee has furthermore named Article 3 as one of the provisions being capable of immediate application by judicial and other organs in many national legal systems.¹⁸

States' obligations as regards equal access of men and women to employment and promotion involves the duty to eliminate barriers and to adopt positive measures for the promotion of equal opportunities of the sexes. As immediate application is required, *de jure* discrimination must be abolished without delay. The explicit guarantee on behalf of the States Parties may furthermore require legislative and administrative action, and that it be made subject to judicial review and other recourse procedures.¹⁹

The immediate nature of States' obligations to eliminate discrimination represents an exception to the progressive nature of article 2(1). Whether this can always be achieved immediately may however be questionable as the roots of discrimination often lie in social and individual attitudes and material inequalities. The Committee seems to acknowledge that some form of discrimination will only be eliminated in a progressive manner but insists upon a process of equalisation as regards the rights in the Covenant.²⁰ This approach, which also reveals the positive nature of the obligations involved, is apparent in the Reporting Guidelines. Those require States to identify disadvantaged sectors of the population, explain the reason for inequalities, and to report what has been done to correct it and the progress made.²¹ The steps taken in this process of equalisation must however be taken without delay.²²

As regards CEDAW, Article 2 directly condemns discrimination against women in all its forms and State Parties agree to pursue by all appropriate means and without delay, a policy of eliminating such discrimination. As is the case in ICESCR these

¹⁶ UN doc. E/CN.4/1987/17, Annex, published in the Human Rights Quarterly 9 (1987) 122-135, para 35.

¹⁷ General Comment no. 3, para 2.

¹⁸ General Comment no. 3, para 5.

¹⁹ Limburgh principles, para 35.

²⁰ Craven, M., p. 159.

²¹ Reporting guidelines, art 6. See general comment no 1, identifying one of the aims of the guidelines.

²² cf. General Comment no. 3.

obligations are of legislative as well as non-legislative nature. The former sphere comprises among other duties the embodiment of the principle of non-discrimination in national constitutions or other legislation, and the assurance of the practical realisation of this principle through law.²³ In short, it requires the abolition or modification of discriminative legislation and regulation as well as the adoption of legal protection of the rights of women on an equal basis with men. The non-legislative sphere also involves both negative and positive obligations. Discriminative practices are denounced and States are required to take measures for their elimination. Article 3 involves further positive actions on behalf of the States as they must take all appropriate measures “to ensure the development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

Although the elimination of discrimination must be defined as an obligation of results, the foreseen result does not have to be achieved for this obligation to be fulfilled. The pursuit of a policy would satisfy this duty. The policy must however be pursued immediately and carried out by all appropriate means. The Convention does not provide guidance whether the word "appropriate" should be interpreted to mean appropriate under the national law of a State Party, or necessary to the achievement of the stated objectives of the Convention. Scholars have adhered to the latter meaning.²⁴

3.2. Affirmative action²⁵

Article 4(1) of CEDAW provides an exemption to the concept of discrimination as defined in Article 1. It sets down a definition of special measures that qualify as being consistent with the main principle. Such measures must be undertaken with the purpose of accelerating de facto equality. They must be temporary, they must cease when equality of opportunity and treatment is achieved and they must not result in the maintenance of unequal or separate standards or rights.

Although ICCPR and ICESCR do not explicitly mention positive actions, the obligation to ensure and guarantee all persons equal and effective protection against discrimination not only involves a prohibition of discrimination but also a positive

²³ CEDAW Art. 2(a)

²⁴ Meron, T., *Human Rights Law Making in the United Nations...*, p. 66.

²⁵ The term affirmative action will be used here for special measures undertaken with the purpose of accelerating de facto equality.

duty to protect against discrimination. This understanding is expressly emphasised in the HRC's General Comment on non-discrimination where the Committee recognises that certain circumstances may require affirmative action in order to diminish or eliminate conditions that cause or help to perpetuate discrimination prohibited by the Covenant.²⁶ Although the term "affirmative action" is probably used in the sense of positive action,²⁷ the examples mentioned by the HRC²⁸ demonstrate that such actions are meant to include affirmative action programs. The HRC has been specifically concerned with the obligation to ensure the equal right of men and women to the enjoyment of the Covenant's rights and devoted its General Comment No. 4 to this obligation. It recognises that affirmative action may be needed to ensure the positive enjoyment of rights and it requires States to provide information about which measures, in addition to legislative measures, they have taken to give effect to the positive obligations under Article 3.

The text of the ICESCR does not provide authorisation for special treatment for groups who currently suffer from de facto inequality. It is however clear from the *travaux préparatoires* that such measures were not intended to be discriminatory.²⁹ As the HRC, the Committee of economic, social and cultural rights seems to accept the legitimacy of affirmative action. It has on the other hand not designed a test when such measures may justify an exception to the principle of equality as it appears in Articles 2(2) and 3. Whether the Committee will refer to the purpose of such measures and their proportionality to the objective to be achieved, thus remains to be seen. It has however been submitted that the Committee should follow the examples set by other human rights organs in this regard.³⁰

Although the HRC Comments and case law³¹ suggest that the Committee is prepared to consider affirmative action a legitimate means for establishing de facto equality, it has not explicitly announced that states are obliged to provide for special

²⁶ General Comment No. 18 on non-discrimination, para 10.

²⁷ Bayevski, A, The principle of equality... p. 29, footnote no. 146.

²⁸ "... where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such actions may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population..."

²⁹ Craven M., p. 184-5.

³⁰ Craven M., p. 188 envisages "that the Committee should at least assess the nature and extent of any affirmative action measures by reference to the purpose for which they were instituted. Not only should such action conform to the necessity of promotion equality of opportunity, its extent should also be proportionate to the measure of existing disadvantage."

measures for this purpose.³² Neither has the Committee of Economic, Social and Cultural rights explicitly recognised the obligatory nature of such action. The Committee on the Elimination of Discrimination against Women, on the other hand, devotes its General Recommendation No. 5 to such measures. The Committee notes that “while significant progress has been achieved in regard to repealing or modifying discriminatory laws, there is still a need for action to be taken to fully implement the Convention by introducing measures to promote *de facto* equality between men and women.” Recalling Article 4(1), the Committee therefore recommends that: “States Parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women’s integration into education, the economy, politics and employment.”³³

3.3. Private discrimination

The ICCPR and ICESCR do not express protection of individual rights from violations by third parties. Neither can implication of horizontal effect be drawn from the *travaux préparatoires*. The Covenants do however oblige States Parties to ensure or guarantee everyone the exercise of the rights recognised without discrimination, which suggests an extension to the private sector.

An extension of the right to equal access to employment to the private sector may affect the exercise of individual choice. In spite of this the Committee of Economic Social and Cultural rights has, without much reasoning, established an obligation upon States Parties to protect the rights of the individual against violation by others. Such concern has in particular been shown in the field of employment where the Committee has looked towards the enactment of legislation as a means of regulating the private sector, the effective enforcement of these conditions and the establishment of mechanisms for the settlement of private disputes.³⁴ As regards the ICCPR in general, the obligation of State Parties to provide effective protection against discrimination is not only believed to apply to discrimination by public authorities. They must also take measures against discrimination by private parties.³⁵ The obligation to provide protection on the grounds of Article 2(1) in the field of

³¹ Nowak, M., p. 477, referring to the HRC decision in the Stella Costa case, No. 198/1995.

³² *ibid*, p. 452.

³³ Seventh session 1988. CEDAW General recommendation 5, A/43/38.

³⁴ Craven, M., p. 112-113.

employment is however limited to public office, whereas protection on grounds of Article 26 would implicate other parties as well.

Member States to the CEDAW take responsibility for private acts of discrimination, as discrimination against women by any person, organisation or enterprise is prohibited,³⁶ and customs and practices are to be abolished.³⁷ The aim is the elimination of discrimination against women in all its forms, whether practised by public authorities, institutions or officials or by private individuals, groups or organisations.

4. The International Labour Organisation

The International Labour Organisation is one of the Specialised Agencies brought into relationship with the United Nations under Articles 57 and 63 of the UN Charter. The contribution of the ILO will therefore be discussed here among the UN documents.

The Discrimination (employment and occupation) Convention (No. 111) and Recommendation (No. 111) were adopted in 1958 in order to put the principle of non-discrimination of the ILO Constitution into effect. The Convention is among the most widely ratified conventions and has provided inspiration for the subsequently adopted treaties regarding discrimination. It prohibits direct as well as indirect discrimination and must be applied in both public and private employment. Whereas CEDAW concentrates on discrimination against women in every field, the ILO Convention protects all persons but limits its scope to acts which affect equality of opportunity or treatment in the field of employment or occupation.

The Convention places emphasis on the positive aspect of equal treatment and opportunities and obliges member States to declare and pursue a national policy designed to promote and practice such equality in respect of employment and occupation, with a view to the elimination of any discrimination thereof.³⁸ To this end States are required to seek the co-operation of employers' and workers' organisations in implementing the policy, to enact legislation in support of such policy, to repeal and modify statutory provisions and administrative practices inconsistent with the

³⁵ Nowak, M., p. 477-8.

³⁶ CEDAW, Art. 2(e).

³⁷ *ibid*, Art 2(f).

³⁸ ILO Convention, Art. 2.

policy, and to apply it to employment under the direct control of a national authority.³⁹

The Convention's equality principle must, as noted earlier, be applied in both public and private employment. Although the assurance of immediate application only applies to employment under the direct control of a national authority, positive measures towards the attainment of equality of opportunity and treatment must be taken in both fields. The national policy designed for these purposes is to be pursued by methods appropriate to national conditions and practice. If legislation is among the appropriate methods in a field covered by the convention, legislation should be enacted. Where on the other hand a matter is by law or tradition to be addressed in another manner this would be the suitable form of action.

Distinctions, exclusions or preferences based on the inherent requirements of a particular job are not considered discrimination within the meaning of the convention.⁴⁰ As an exception clause, this provision is interpreted strictly by the ILO supervisory bodies. In the assessment of whether a requirement of a job involving the grounds of discrimination is acknowledged as a valid justification for distinction, each case, the individual person and the individual job involved, is considered and whether the limitation is proportionate to the aim pursued.⁴¹ In spite of this criteria it remains difficult to estimate the exact extent to which limitations of this kind will be considered legitimate, as the standard may depend on the ground of discrimination in question.⁴² Distinctions based on sex have been considered legitimate ground for distinction, especially the kind of employment, which involves high degree of physical effort. With increasing demands for equality of opportunity and freedom of choice of employment such measures, deriving from the incentive to protect women, have been much debated and are declining. This is due to the fact that such measures may result in direct or indirect discrimination against women, as it has made many jobs inaccessible for women. The evolution in this field has been rapid⁴³ and the supervisory organs of the ILO have frequently drawn the attention of countries to the need to review their justifications for many prohibitions in national legislation.

Convention No. 111 and Recommendation No. 111 do not express the matter

³⁹ *ibid*, Art. 3.

⁴⁰ *Ibid*, Art. 1(2).

⁴¹ The interpretation of Article 1(2) has been developed in ILO case law. Most cases have related to political opinion and religion.

⁴² Nielsen H.K., *The concept...*, p. 846.

⁴³ Rossillion C., *ILO standards ...* p. 27

of affirmative action or positive preferences.⁴⁴ The supervisory organs of the ILO have however indicated so they intend to examine the validity of these systems on a case by case basis. In doing that it will identify those which aim to ensure a fair degree of proportional representation in employment and those which aim to promote the advancement of groups previously disadvantaged in certain activities.⁴⁵

5. The Implementation

The responsibility for monitoring the implementation of the ICCPR is assigned to the Human Rights Committee. The supervisory system is exercised through a reporting procedure and a complaint procedure. This system is discussed in the general Chapter on the equality principle⁴⁶ and will not be repeated here. For the purpose of this paper it will only be noted that the Optional Protocol to the ICCPR allows for individual petitions or complaints. The final views of the Committee regarding such complaints are not binding, but rather a statement of compliance or non-compliance to the Covenant.

The implementation mechanism of the ICESCR is based on a reporting system. States Parties are to submit reports on the measures that they have adopted and the progress made in achieving the observance of the rights recognised in the Covenant. The consideration of the reports has since 1987 been entrusted to the Committee on Economic, Social and Cultural Rights.⁴⁷

The Committee has developed its functions under the reporting procedure to something that has been said to constitute a quasi-judicial complaint procedure.⁴⁸ The Committee can receive communications from non-governmental sources. This enables it to make an objective evaluation of the actual situation in a country and may be one of the important factors contributing to the adoption of the quasi-judicial mentioned above.⁴⁹ The Committee's competence to clarify the normative content of

⁴⁴ As opposed to the 1975 Declaration on equality for women workers, which states that "Positive special treatment during a transitional period aimed at effective equality between the sexes shall not be regarded as discriminatory."

⁴⁵ Rossillion C., ILO Standards, p. 32, referring to: Discrimination in respect of employment and occupation, Part Three of the report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 47th session, Geneva, 1963, para 23.

⁴⁶ Gudmundsdottir D., in Chapter xxx: international law, implementation and standard setting (draft p. 1-12). **ATH tilvísun þegar kemur að útgáfu**

⁴⁷ The Committee is established by the Council, ESC Res. 1985/17 of 18 May 1985.

⁴⁸ Craven M., Towards ..., p. 91.

⁴⁹ Craven M., Towards..., p. 99.

the rights recognised through the General Comments is another important factor in this respect. This is a practical point as the Committee may refer to those explanatory clauses as an expression of a treaty obligation when considering a State report.⁵⁰ The committee's practice of making concluding comments or observations on each State's report has further contributed to its quasi-judicial competence.

The responsibility for monitoring States' compliance with CEDAW obligations is assigned to the Committee on the Elimination of Discrimination against Women. The Committee's main function has, until the entry into force of the Optional Protocol to the Convention 22 December 2000, been to consider States' reports. In order to ensure reasonable detail and uniformity of data in received reports, the Committee adopted "General Guidelines Regarding the Form and Contents of Reports Received from States Parties under Article 18 of the Convention".⁵¹ According to the guidelines States should divide their reports into two parts. On the one hand it is to cover measures taken to eliminate discrimination against women, legislation, or other measures taken to implement the Convention, and institutions or organisations charged with its implementation. The second part should list "specific information in relation to each provision of the Convention" and elaborate upon difficulties encountered in their implementation.⁵² The reason for such division of reports is the fact, that what a country provides in its legislation does not necessarily correlate to its application in practice.⁵³ In general the Guidelines are rather vague and in spite of their existence received reports have proven to lack conformity both in style and content.⁵⁴

Besides the shortcomings of the reporting system itself, various practical reasons have proven to cause problems to the execution of the Committee's assignment. These problems have raised voices that call for a consolidation of the commitment to women's equality and the human rights. Those were somewhat soothed by the adoption of the General Assembly an Optional Protocol to the Convention 6 October 1999, which was subsequently opened for signature on 10 December 1999.

⁵⁰This has for instance been the case as regards the nature of States' obligations with respect to Article 2(1) which is clarified in General Comment no. 1, para 1 [UN doc. E/1989/22].

⁵¹ Contained in "General Guidelines Regarding the Form and Contents of Reports Received from States Parties under Article 18 of the Convention", CEDAW/C/7(1983)

⁵² General Guidelines, para 7.

⁵³ See Jacobson R. The Committee..., p. 456, referring to Report of CEDAW in 1983, para 27.

The Optional Protocol introduces a new mechanism to the implementation system of the convention which allows the Committee on the Elimination of Discrimination against Women to consider petitions from individual women or groups of women who have exhausted all national remedies.⁵⁵ The Committee shall bring any communication referred to it to the attention of the State Party concerned. Then State Parties shall submit explanations or statements and the remedy, if any, that may have been afforded by that State.⁵⁶ After examining a communication the Committee shall transmit its views and recommendations, if any, to the parties concerned. Then the State Party has six months to consider the views of the Committee and provide a written response, including remedial steps taken. The Committee may continue discussions with the State Party until it is satisfied that appropriate steps have been taken to remedy any failure by the State in the performance of its obligations.⁵⁷

The ILO Constitution provides for various procedures of implementation of ILO conventions; a reporting procedure, a complaints procedure and a so-called representation procedure.

The ILO system of reporting, “the regular system of supervision” consists of an examination of the Committee of Experts on the Application of Conventions and Recommendations, followed by an examination of the ILO Conference Committee. The Committee of Experts, which undertakes a technical examination of the reports, is appointed by the ILO Governing body, without an involvement from States members. The Conference Committee is on the other hand a committee of government delegates and employers’ and workers’ representatives.

The complaints procedure has been used on several occasions in connection with Convention No. 111. A Member State may file a complaint, claiming that a ratifying State is not effectively observing the Convention. The Governing Body may on the receipt of a complaint, or on its own motion, appoint respected independent persons to a Commission of Inquiry, to investigate the matter. The procedures used by such Commissions normally involve on-the-spot investigations and hearings of

⁵⁴ Jacobson R., *The Committee ...*, p. 455.

⁵⁵ Optional Protocol, Art. 1 and 2. The Optional Protocol also entitles the Committee to conduct inquiries into grave or systematic violations of the Convention (Art. 8). States which ratify may opt out of this procedure, but no other reservations are permitted to its terms.

⁵⁶ *ibid*, Art. 6.

⁵⁷ *ibid*, Art. 7.

witnesses, followed by the Commission's recommendations on how certain difficulties may be overcome. Because of the quasi-judicial and non-political nature of these Commissions, this method has been referred to as the best guarantee of impartiality and objectivity among the various ILO implementation procedures.⁵⁸

The representations procedure allows industrial associations of employers or workers to make "representations" on a State's failure to observe the Convention. Such representations are examined and may be published along with the respective government's reply. The ILO has furthermore developed a special form of measures called Direct Contacts. Those involve personal visits by ILO officials or an independent person to member States with the purpose of assisting them in overcoming difficulties or fulfilling their conventional responsibilities. Such visits have proven to be useful in the following up of recommendations.

6. Concluding notes

6.1. The ICCPR and ICESCR

The examination of the principle of equality and non-discrimination provided for in the UN documents has shed light onto the different scope of this principle, depending on whether it must be viewed in connection with the rights protected in those instruments or as an independent principle.

Article 25 of ICCPR concerns access to public service. In combination with the Covenant's equality provisions it provides a strong protection against discrimination in this particular field, as States are required to respect and guarantee the enjoyment of this right, with the corollary duty to take positive measures for its promotion. Outside the scope of this article the ICCPR does not provide direct protection of the right to equal access to employment. Here, the importance of Article 26 becomes apparent, as its equality principle is applicable to employment related rights protected by other instruments or in national legislation. The fact that Article 26 may be applied to rights not protected by the ICCPR, combined with the positive obligations involved, brings up the question whether it requires states to enact legislation which provides for equal access to employment for men and women. By reference to the interpretation of the HRC in the case *P.P.C v. Netherlands*, cited above in Chapter 1,

⁵⁸ Leary V.A., *Lessons from...* p. 611.

this must be answered in the negative. However, when such legislation is adopted in the exercise of a State's sovereign power, such legislation must comply with Article 26 of the Covenant. Comments regarding the positive duties of States and horizontal effects of Article 26 must be viewed in this light. It must therefore be concluded that when a state has chosen to enact law on employment, it must comply with Article 26. Violation of the right to equal access to employment outside the scope of Article 25 may therefore be subject to the complaint procedure provided for in the Covenant. As a consequence, it is submitted, equal access to employment and promotion requires a status as a justiciable right in spite of its common classification as an economic and social right.

The examination of the ICESCR has revealed a weakness as regards States' obligations. It is also clear that its implementation mechanism is less effective than provided in its counterpart the ICCPR. It furthermore requires a progressive rather than immediate realisation of the recognised rights. Articles 2(2) and 3, however, provide an immediate guarantee of the exercise of those rights without discrimination. Read together with those, Articles 6 and 7(c) require States to ensure equal access of men and women to employment and promotion opportunities. In this respect these rights are afforded better protection than the Covenant in general provides and seems to give them the status ordinarily given to civil and political rights. This again provides for a strong argument for a review of the supervisory mechanism afforded to its protection.

A reporting system may have the advantage of encouraging states to review and evaluate its own performance, promote public scrutiny of governmental policy and bring to light difficulties and shortcomings in existing institutional arrangements.⁵⁹ It has however the disadvantage that states have widely failed to report or provide unsatisfactory answers in the reports submitted. It also lacks the ability of a petition system to deal with individual situations in a contentious manner. The establishment of a petition system is therefore important for further protection of the protected rights. The Committee is now considering whether this may be done by an optional protocol. This could also be achieved by reconsidering earlier proposals, which suggested an extension of the competence of the Human Rights Committee to

⁵⁹ Craven, M., *Towards ...* p. 94.

include the supervision of selected economic, social and cultural rights.⁶⁰ The advantage of the latter method is that the Committee on Economic, Social and Cultural Rights could continue to concentrate on the supervision of other economic, social and cultural rights which may not be as appropriate for such a procedure. The right to equal access to employment would on the other hand fall into the established procedure of the HRC.

6.2. CEDAW

The CEDAW has been criticised for having the effect of marginalising women's rights and confining them to the "ghetto of a specialised treaty",⁶¹ as it suggests that these rights are something different or in opposition to human rights in general.

The Convention's substantive rights reiterate substantially other mainstream human rights instruments. Those have however been accused of failing to deal adequately with human rights violations against women. The Convention's very existence may indicate this failure and therefore fill in a gap left by traditional human rights law.⁶² This again must be considered a reason enough to continue to work within the Convention. This work has however proven difficult, as discussed earlier. As the reason for those limitations have been claimed to be principally due to the subject matter addressed, namely women,⁶³ continuing debate is foreseen on whether women's rights should be emphasised as part of human rights or as a separate issue and be addressed in separate organs. The latter view has especially called for measures for the strengthening of CEDAW.

Before the adoption of the Optional Protocol, CEDAW did place all the emphasis on a reports procedure for its implementation. As mentioned earlier the importance of a reporting procedure should not be underrated. A well planned supervisory system, which gives firm guidelines to States as to what information is required, can be an effective mechanism and give a good picture of the status of women and development in each country and open a dialogue between the Committee and the countries. After ratifying the Convention, States are under pressure to look at

⁶⁰ Such a proposal was rejected because of the programmatic nature of such rights, Craven, *Towards...*, p. 94, referring to UN doc. E/CN.4/L.338(1954), 18 ESCOR, Supt. UN doc. 2573,(1954), para 216.

⁶¹ Wright S., *Human Rights and Women's Rights...*, p. 87.

⁶² *ibid*, p. 79.

⁶³ Onyango, O and Tamale, S, *The Personal is Political ...*,p. 716.

this matter and give a report, a work which without this incentive would presumably not take place. This can lead to a realisation of the prevailing status of women in their countries. The system provided has, as discussed above, not fulfilled the requirements needed for this mechanism to be fully efficient. The CEDAW's effectiveness in this respect could be enhanced by giving the Committee the resources it needs to carry out the functions attributed to it and by further use of the mechanisms already available to the Committee. General recommendations on the specific field, such as the application of the principle of equal job opportunities, could for instance greatly contribute to the interpretation of the Convention in the respective matter.⁶⁴

The new Optional Protocol is however the most promising tool for the advancement of State performance as regards equality between men and women in employment and other fields. Under a complaint procedure the Committee will be able to say what is required from States in individual circumstances and develop a body of jurisprudence where it may elaborate upon the scope and content of the various treaty provisions. This may provide clarification and guidance for States and individuals about the obligations involved.⁶⁵ Other advances resulting from the Optional Protocol may be foreseen. It may encourage States to implement CEDAW to avoid complaints being made against them and stimulate changes in discriminatory laws and practices. The duty to publicise the Optional Protocol may furthermore create greater public awareness of human rights standards relating to discrimination of women. The complaints referred to the Committee and its views on the matter will also receive publicity, as has been the case with communications submitted under the first Optional Protocol to the ICCPR.⁶⁶ Last, but not least, it answers the call for a stronger enforcement mechanism and thereby puts CEDAW on an equal footing with other human rights treaties that provide for a complaint procedure. This, it is submitted, completely changes its status, gives it a new "life" and a chance to give effect to this gender specific international instrument, including a stronger protection in the field of employment. Whether it lives up to these expectations remains to be seen.

⁶⁴ The Committee has used this method in the field of equal remuneration work of equal value, Article 11(1)(d).

⁶⁵ This has been the experience of the HRC.

⁶⁶ Why an Optional Protocol? ; <http://www.un.org/womenwatch/daw/cedaw/why.htm>.

6.3. The ILO

The ILO Convention and Recommendation No. 111 are devoted to rights in employment and directly protect the right to hiring and promotion. The various methods used by the International Labour Organisation to encourage States to comply with ratified Conventions have been portrayed above. The same supervisory system is used for the implementation of all ILO conventions, whether they deal with clearly economic matters or rights that have been defined as civil and political rights. The integrated approach of the ILO to human rights has not hindered an effective enforcement of its conventions. It is thus the experience of the ILO that economic and social rights may be monitored by international organs, which is interesting in light of the classical debate on categories of rights and the different implementation mechanism afforded to them in the UN system.

Since the founding of the ILO a major emphasis has been put on the compliance of ILO members with its standards. The system has been evolving over the years with periodic re-examinations, and is today generally considered to be relatively effective.⁶⁷ Important factors have contributed to each model, but the variety of the methods and their combination have without doubt played a role in the overall success of the system. The objective selection of specialists to the Committee of Experts, which has a reputation for objectivity and competence, has given it the credibility needed for the respect necessary for its acceptance as a supervisory organ. The participation of non-governmental representatives has also proven to be important for the independence of the Conference Committee and enabled it to identify failures in States' implementation. The appointment of reliable and experienced persons to handle representations and to undertake "Direct Contacts", has added to the impartial and objective image of this system. Those factors along with the active support of the ILO staff have been emphasised as being the main reasons for the superiority of this system over the UN system of enforcement mechanism.⁶⁸

⁶⁷ Leary V.A., p. 595.

⁶⁸ The positive features of the ILO system and the lack of those in the UN system are studied in Leary V.A.

II. THE COUNCIL OF EUROPE

1. The European Convention of Human Rights

Article 14 of the European Convention on Human Rights (ECHR) prohibits discrimination on any grounds with regard to the enjoyment of the rights and freedoms set forth in the Convention. As such it does not contain an independent right, but complements the Convention's other provisions. There does not, however, have to be a breach of the right or freedom in question for Article 14 to be applied. Its application is thus not limited to cases in which there is an accompanying violation of another Article. If the right in question is covered, no discriminatory measures within the meaning of Article 14 may be taken.⁶⁹ In this sense Article 14 has been awarded autonomy to some degree, although it does not lessen the requirement of a connection with a right or freedom guaranteed in the Convention or its protocols. The right to work, more precisely the access to employment and promotion, is not protected in the substantive provisions of the ECHR or its Protocols. Article 14 is thus not applicable in this respect.⁷⁰

The limited scope of Article 14 has been a matter of concern, as it inevitably raised the question whether the ECHR was falling behind other instruments in the area of equality and non-discrimination. It has for instance been maintained that its potential impact is narrowed by excluding the economic and social rights that raise some of the most pervasive discrimination questions.⁷¹ The various methods usable for the purpose of expanding the scope of the Convention, either by way of amending Article 14 or by adding new substantive rights, have been proposed and studied over the years. It has for instance been suggested that a protocol or protocols be added, guaranteeing social, economic and cultural rights. Torkel Opsahl has discussed the possibility of widening the scope of the Convention by this method. He refers to a memorandum by Professor Jacobs, which suggests a certain criteria for the selection of such rights: "That they be fundamental, universal, and capable of a sufficiently

⁶⁹ The Belgian Linguistic Case, Judgement of 23 July 1968 (Series A no. 6).

⁷⁰ Some case law seem to indicate that the Commission of Human Rights has qualified to some extent the requirement of a substantive link to a protected right (Appl. 5935/72, X. Federal Republic of Germany, Yearbook XIX (1976), p. 276(288)). Therefore, the Original Draft referred to in the introduction to this paper, examined whether the right to equal access to employment could enjoy the protection of ECHR through interpretation of its provision or by use of other international instruments for the protection of Human Rights. This question was answered in the negative.

⁷¹ Harris D.J, O'Boyle M, Warbrick C., Law of the..., p. 486.

precise formulation to give rise to a legal obligation rather than merely setting a standard. Certain rights connected with employment, health, social security and social welfare possibly meet these criteria.”⁷² The right to equal access to employment, as an individual right, would, according to these criteria, be a candidate for attaining full status in the Convention.

The long lasting discourse on the matter of further guarantees in the field of equality and non-discrimination, led to the adoption of an additional protocol to the ECHR, Protocol No. 12, on 26 June 2000 in order to remove the present limitations.⁷³ The protocol provides a general prohibition of discrimination, stating that the enjoyment of any right set forth by law shall be secured without discrimination on any grounds and that no one shall be discriminated against by any public authority.

Although the text of Article 1 of the Protocol does not explicitly refer to the equality principle it is clear from the Preamble that the Protocol is meant to provide this principle corresponding to the one established in international human rights law. The non-exhaustive list of non-discrimination grounds is identical to that in Article 14 of the Convention and the meaning of the term “discrimination” is intended to be in conformity to the term as interpreted by the European Court of Human Rights concerning Article 14. The justification test still applies.⁷⁴

Article 1 provides a general non-discrimination clause. As such, its scope of protection extends beyond the enjoyment of rights protected by the substantive provisions of the Convention. It does not amend or invalidate Article 14, which therefore continues to apply. However, as mentioned above, Article 14 can not be relied on as regards the right to access to employment and promotion. Therefore this right only enjoys protection through application of the Protocol.

The particularities of the additional scope of protection provided by Article 1 of the Protocol are identified in the Commentary on the provisions of the Protocol as concerning cases where a person is discriminated against:

- “i. in the enjoyment of any right specifically granted to an individual under national law;

⁷² Opsahl T., Substantive Rights, p. 154, referring to: The extension of the European Convention on Human Rights to include economic, social and cultural rights, Memorandum submitted by Professor F. Jacobs, consultant expert, 2. May 1978, restricted AS/Jur (30)7.

⁷³ The Protocol was open for signature on 4 November 2000 and entered into force on 1 April 2005.

⁷⁴ Judgement of 28 May 1985, Series A, No. 94, paragraph 72. This test is discussed further in the general Chapter on the principle of equality. (Gudmundsdottir) **ATH**

- ii. in the enjoyment of any right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- iii. by the public authority in the exercise of discretionary power [...]
- iv. by any other act or omission by a public authority [...]"⁷⁵

Article 1 must thus be read as prohibiting any discrimination in the application of the right to access to employment where this right is granted protection to an individual under national law. The question is the extent to which States are obliged to ensure such protection. While State obligations are primarily stated in the negative, that is not to discriminate against individuals, positive obligations can not be totally excluded. The duty to secure the enjoyment of rights might imply obligations to take measures to prevent discrimination and remedy instances of discrimination in the field of employment.⁷⁶

The wording of Article 1 and the emphasis on public discrimination in the Commentary make it clear however, that the Article is not intended to impose a general positive obligation that measures be taken to prevent or remedy all instances of discrimination in relations between private persons.⁷⁷ Such application is however not precluded. This is in conformity with the position of the Court and the European Commission of Human Rights on states being responsible to some extent for not affording protection against private violations of the Convention. In this respect it is remarked in the Commentary that a failure to provide protection in private relations may involve such clear-cut and grave discrimination that it evokes the responsibility of the State.⁷⁸

These instructions certainly make it clear that any positive obligation as regards relations between private persons is to be limited. Again the Commentary gives a guidance as to which situations could justify such an application. Purely private acts are definitely not included. Relations in the public sphere normally regulated by law, for which the state has a certain responsibility, may on the other hand require consideration in this respect. Arbitrary denial of access to work is mentioned as an example of such State responsibility.⁷⁹

The labour market characteristically belongs to the public sphere and is to a

⁷⁵ Commentary on the provisions of the Protocol, para 22. (<http://www.humanrights.coe.int/Prot12>).

⁷⁶ Commentary, para 24.

⁷⁷ Commentary, para 25.

⁷⁸ Commentary, para 26.

⁷⁹ Commentary, para 28.

considerable degree regulated by law. Access to employment could therefore, if it is submitted, fall into the above category of rights that enjoy protection against private discrimination. As mentioned in Chapter I.3.3 above an extension of this right to private employment may affect the exercise of individual choice on the labour market. Some decisions of the European Court of Human Rights show that it has to some extent acknowledged indirect horizontal effect of Human Rights in legal relationships between private individuals. Whether the Court follows the position of the Committee on Economic, Social and Cultural rights and establishes an obligation upon States to protect against discrimination in the relation of private parties, only the future can bring to light.

Special reference is made to affirmative action in the Preamble of the Protocol. It reaffirms that a measure, which has an objective and reasonable justification and is taken in order to promote full and effective equality, shall not be prohibited by the principle of non-discrimination. The Protocol thus acknowledges the fact that such measures may be needed and allows for their application. It is however very clear that it does not impose any obligation to adopt such measures.⁸⁰

2. The European Social Charter

The European Social Charter (ESC) consists of the original European Social Charter of 1961 (the Charter) and its three Additional Protocols of 1988, 1991 and 1995. A new revised ESC entered into force 1 July 1999 and will progressively replace the original Charter. The Revised Charter takes account of developments in labour law and social policies since the Charter was drawn up in 1961.⁸¹

Article 1 of the Revised Charter concerns the right to work and is concordant with Article 1 of the Charter. The Committee of Independent Experts has been responsible for defining the content and scope of the rights set forth in the Charter. It has regarded this right as covering two basic elements, i.e. the prohibition of forced labour and the elimination of all forms of discrimination in relation to employment,⁸² private as well as public.⁸³ The latter is based on the non-discrimination clause in the preamble to the Charter, which states that the enjoyment of social rights should be

⁸⁰ Commentary, para 16.

⁸¹ Preamble to the Revised Charter, para 8

⁸² Council of Europe, Social Charter, monographs no 2, p. 12.

⁸³ Fundamental Social Rights, Case law of the European Social Charter, 1996, p. 29, referring to

secured without discrimination on the grounds listed therein. Article E in Part V of the Revised Charter confirms the case law of the Committee of Independent Experts in this respect. It contains a non-discrimination clause based on Article 14 of the ECHR, prohibiting discrimination on any of the grounds listed in the Article in respect of any of the rights contained in the instrument. The appendix to this new Article provides that differential treatment based on an objective and reasonable justification shall not be deemed to be discriminatory.

The right of all workers to equal opportunity and treatment in matters of employment, without discrimination on the grounds of sex, acquired special protection with the 1988 Protocol, cf. Article 20 of the Revised Charter. States' obligation in this respect involves recognition of this right and a responsibility to take appropriate measures to ensure or promote its application.

The application of the principle of non-discrimination to the access of women to employment has been of special interest to the Committee of Independent Experts. It has made clear that reports on this provision should provide particulars on the admission of women to certain posts. Not only has it required the removal of all legal obstacles to admission to certain types of employment, but also the taking of positive, practical steps to create a situation which completely ensured equal treatment in this respect.⁸⁴ The Committee has thus been concerned with *de facto* inequality, which indicates a prohibition of indirect as well as direct discrimination. With Article 1(3) of the 1988 Protocol, cf. appendix to Article 20 to the Revised Charter, special measures aimed at removing *de facto* inequalities were not to be precluded by the general principle of equality. They do however not seem to be obligatory.

The supervision system provided for in the Charter, is based on a reporting system. The Revised Charter does not introduce any changes in this respect.⁸⁵ The supervisory process involves no less than four bodies. Contracting Parties are required to submit two kinds of reports for the route of supervision. They must detail the manner in which they have applied those provisions of the Charter that they have specifically accepted.⁸⁶ They must also give a report regarding the obligations not

Conclusions (IX-1, p. 25).

⁸⁴ *ibid*, Fundamental ... p. 29-30, referring to Conclusions I, p. 15.

⁸⁵ The Revised Charter, Part IV, Article C.

⁸⁶ ESC, Article 21.

accepted and give reasons for not accepting them.⁸⁷ The Committee of Experts examines the reports from a legal standpoint and draws up a report of the compliance of domestic law and practices with the obligations arising from the Charter. The examination is closed by the Committee of Ministers, which adopts a resolution containing individual recommendations to the Contracting Parties concerned.⁸⁸

The 1995 Protocol provides for a system of collective complaints, which allows employers' and employees' organisations, as well as certain non-governmental organisations, to submit complaints to the supervisory bodies. A breach of Charter obligations may result in a recommendation addressed to the State concerned. In its next report the State shall provide information on the measures it has taken to give effect to the recommendation.⁸⁹ This system applies to the undertakings given in the Revised Charter for the States that have ratified the 1995 Protocol.⁹⁰

3. Conclusions.

The European Social Charter is concerned with the promotion and protection of fundamental economic and social rights to the citizens of its Contracting Parties. The separation of these rights from the civil and political rights, which enjoy the protection of the ECHR, is based on the same assumptions as regards their nature, as is the case within the UN system. The outcome, as within the UN, is an instrument providing for a much weaker protection than the ECHR, both as regards the recognition of the rights involved and the monitoring mechanism. The adoption of the procedure of collective complaints does however acknowledge their justiciability. This may be compared to the quasi-judicial role of the Committee of economic, social and cultural rights and affect the attitude towards those rights in the years to come and afford them better protection in the future.

The lack of involvement of Non Governmental Organisations (NGO) has been considered one of the most severe shortcomings of the ESC supervisory system. The restrictive interpretation of State obligations by the Governmental Committee, which performs the second phase of the mechanism, also adds to its deficiency. These faults were addressed in the 1991 Protocol, which made the reporting system more open to

⁸⁷ ESC, Article 22.

⁸⁸ 1991 Protocol Amending the ESC, Article 2(1), (2) and 5 (amending Art. 24 and 28 of the Charter)

⁸⁹ 1995 Protocol, Art 8-10.

⁹⁰ The Revised Charter, Part IV, Article D.

NGO involvement and strengthened the role of the Committee of Independent Experts, in the juridical assessment of compliance with treaty obligations. This along with the 1995 Protocol, which allows an active involvement of trade unions, employer's organisations and other relevant NGOs, may give the ESC a new meaning as regards the promotion of the economic and social rights recognised in the Charter. The complaint procedure must also contribute to the development of legal interpretation of those rights. The Committee of Independent Experts has for instance already applied the justification test established in the Revised Charter, based on the ECHR model, with respect to what constitutes discrimination in breach of the ESC.⁹¹ As regards access to employment the use of the complaint procedure may provide a more clear interpretation as of whether the term discrimination includes indirect discrimination, and the extent to which special measures are applicable. The complaint procedure will undoubtedly also increase the pressure on States to comply with the Charter's obligations. The renovation of the European Social Charter will without doubt increase its credibility and strengthen the protection of the right to equal opportunity in matters of employment in the fields of access to employment and career development, including promotion, the extent to which remains yet to be seen.

The ECHR system of supervision, in the hands of the European Court of Human Rights, offers a strong protection of the rights covered by the Convention. Its practice is, contrary to the new mechanism assigned to the Committee of Independent Experts, well established and has created substantial jurisprudence. This system has however not been applicable to the right to equal treatment in employment. Protocol No. 12 to the ECHR now opens the door for individuals to be granted remedies for violations of their right to equal access to employment and to promotion. The protocol has however, when this is written just recently entered into force and its scope as regards this right has not been clarified by the ECHR. The HRC has established that Article 26 of the ICCPR is applicable to legally protected rights covered in the ICESCR. It will be interesting to follow the development within in the system of the European Council in this respect, the extent of the obligations involved, and the Court's involvement. As mentioned above the Committee of Independent Experts has adopted the justification test established by the Court. Future interpretation of Article 1 may be of further guidance to the Committee in its application of the ESC equality

⁹¹ See for instance Complaint no. 6, para 25 (www.humanrights.coe.int).

principle. The standards set by the Court may also be helpful to national courts concerning alleged violations of national equality and employment law.

The first paragraph of Article 1 of Protocol No. 12 also raises an interesting subject concerning the role of national courts. Its reference to “any right set forth by law” may also cover international law. As noted in the Commentary this does not mean that this provision entails jurisdiction for the ECHR to examine compliance with rules of law in other international instruments.⁹² Those are however binding for their contracting parties. State abidance involves a guarantee of the rights covered by those instruments and interpretation of national law in conformity to their causes. Compliance to such rules must therefore be within the jurisdiction of national courts. Article 1 may thus strengthen the confidence of national courts to refer to rules of international treaties in their examination of cases which involve an alleged discrimination in a field protected by law.

The above discussion reveals that Protocol No. 12 provides rights of economic and social nature protection they did not have under system of the European Council. The development of this matter will certainly have effect on the promotion of the right to access to employment and promotion. The success of this method, which is intended to support the equality principle within the European Council, will presumably either end or revive earlier discussion on whether new rights should be added to the ECHR

III. EUROPEAN LAW

1. General principle

The equality principle and the prohibition of discrimination play an important role in European Community law.⁹³ The main Treaty provision regarding equality is Article 6 EC (previously Article 7 EEC), which prohibits discrimination based on

⁹² Commentary, para 29.

⁹³ As in the General Chapter on the equality principle (Gudmundsdottir) reference in the following is made to the European Community (EC), as renamed in the Treaty of Maastricht. The discussion focuses on the European Community, but not European Union law (EU), following the Treaties of Maastricht (1993) and Amsterdam (1997), unless otherwise specified.

nationality. Before the Amsterdam Treaty⁹⁴ Article 141 (ex Article 119), was the only Treaty provision addressing equality between men and women. It concerned the principle of equal pay for equal work or work of equal value and as such did not directly address sex discrimination in other fields of employment. The elimination of sexual discrimination was however stressed within the Community. The European Court of Justice (ECJ) established, on a case by case basis, Community principles in the field of employment, which have in many ways had influence on European labour law.⁹⁵ Its conclusions are based on the presumption that equality between men and women and the prohibition of discrimination on the grounds of sex is a fundamental human right and as such a fundamental principle of Community law.⁹⁶

With the Amsterdam Treaty gender equality, outside the scope of equal pay, became treaty based Community Law. It added equality between men and women as a new point under Community tasks (Article 2). This provision is complimented by Article 3 which imposes on the Community the obligation aimed at eliminating inequalities and to promote equality between men and women in all its activities. Modifications have also been made to Article 141 (ex Article 119), which now addresses equal opportunities and equal treatment of men and women in matters of employment and occupation.

The equality principle as it appears in the law of the European Community is discussed in the General Chapter.⁹⁷ Reference is made to that discussion regarding the question of equality as a human rights principle in EC law, the integration of human rights into the EC legal order and the implementation of the equality principle.

The above mentioned General Chapter is also referred to with regard to the Agreement of the European Economic Area (EEA) of 2 May 1992, i.e. the status of the agreement, application of EC law and the binding effects of the Case law of the ECJ. In brief, the Agreement and the Institutional structure established under it is meant to be parallel to the EC. Article 6 of the EEA regards the binding effects of the Case law of the ECJ up to the date of the signature of the Agreement and an obligation to take into due account relevant case law after that date. Article 3 of the

⁹⁴ The Treaty of Amsterdam was signed 1 October 1997 and entered into force 1 May 1999. It brought about some changes of the Treaty of Rome and the EU treaties, one of which was the confirmation of equality between men and women as a core element of Union Policy.

⁹⁵ Nielsen R., EF-arbejdsret, 1992, p. 205.

⁹⁶ Defrenne v. Sabina Airlines III, Case 149/77.

⁹⁷ Gudmundsdottir, p. **ATH**

Agreement regards the Establishment of a Surveillance Authority and a Court of Justice. Reference to EC law in Chapter V below, which discusses Icelandic law, should be read in this context.

Here the emphasis will be on secondary legislation, case-law and the development in this field. The discussion will start with a discussion on the original Directive 76/207/EEC, 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.⁹⁸ Special attention will be given to Article 2(4) of the Directive, its interpretation through case-law and the development that has brought about the amendments now appearing in Directive 2002/73/EC.

2. Directive 76/207/EEC

As mentioned above the Treaty did not address equality between men and women in other fields of employment than equal pay. In the Council Resolution of January 21 1974, Concerning Social Action Programme,⁹⁹ the Council concluded that the principle of harmonisation of living and working conditions while maintaining their improvement, as agreed upon in Article 117, (now Art. 136) entails the principle that male and female workers receive equal treatment in access to employment, vocational training, and promotion, and with respect to working conditions. Equality between men and women in this field was thus considered to be one of the main Community objectives, and was included in a list of measures with priority. With reference to this Resolution and Article 235 (now Art. 308) of the Treaty, which allows the Council in the absence of the necessary powers, to take appropriate measures in order attain one of the objectives of the Community, the Council adopted the Directive 76/207/EEC of 9 February 1976.

Since the entry into force of the Treaty of Amsterdam the Community has been conferred powers by Article 13 to take appropriate action to combat discrimination on a number of different grounds, including sex. The third paragraph of Article 141 furthermore prescribes the adoption of measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. The legal base has thus changed, Article 141 being a

⁹⁸ OJ, 1976, L39/40

⁹⁹ OJ 1974, C1 3/1

specific legal base as regards all aspects covered by the Directive 76/207/EEC.

Amendments to the Directive was proposed in November 2000 and adopted by the European Parliament and the Council of the European Union as Directive 2000/73/EC of 23 September 2002. Member States shall have brought into force the laws, regulations and administrative provisions necessary to comply with the Directive by 5 October 2005.¹⁰⁰ In order to account for the developments in this field it is useful to realize the situation before the amendments. The matter will therefore be approached through Directive 76/207/EEC in this and the following Chapters. The relevant amendments to the Directive will then be accounted for in Chapter 5.

The Directive 76/207/EEC¹⁰¹, 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, has the purpose to put in effect in the Member States, the principle of equal treatment for men and women in this field. Application of this principle means that there shall be no discrimination on the grounds of sex in relation to access to employment, including selection criteria, regardless of the sector or branch of activity, For the fulfilment of their obligations in this respect, Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished. When distinction is allowed on the grounds of a need for some special protection, such provisions shall be revised as soon as the concern is no longer well founded. States have also positive obligations as regards other forms of rules both in the public and private sector of employment.

The Directive refers to both direct and indirect discrimination. The original Directive did not define these terms¹⁰² but they were further developed through the ECJ. Direct discrimination in the field of access to employment occurs when an employer's decision not to employ an applicant is based on sex. The discrimination does not have to be intentional to fall within this category¹⁰³ and it does not matter

¹⁰⁰ Article 2(1).

¹⁰¹ This Directive is part of the EEA Agreement, by virtue of Annex XVIII to the Agreement and has been fully implemented into to the national law of the EFTA States parties to the EEA. The former also applies to the Amendments by Directive 2002/73 (EEA supplement No 65, 23.12. 2004, p. 32, e.i.f. 1.5. 1.5. 2005. Implementation into national law has however not yet taken place (May 2005).

¹⁰² Definitions are given in Directive 2002/73/EC, see Chapter 4.

¹⁰³ Case 177/88 (1990) ECR I-3941; Dekker v. Stichting Vormingscentrum Voor Jonge Volwassen Plus. (See also Evelyn Ellis, *The Definition ...*, p. 567) As pregnancy was the reason for not giving Ms. Dekker a job, which constitutes direct discrimination based on sex, there was no need to prove any subjective consideration of her sex on the part of the employers.

whether the employer admits his motive or tries to conceal it. The most obvious case of direct discrimination would be where the employer specifically mentions his preference for a man or woman for the job. It would also be a violation to create sexually discriminative conditions, which are obviously irrelevant for the job, in question. Every applicant has to be judged by his or her own merit, not by a general or stereotypical reasoning.¹⁰⁴ Indirect discrimination occurs on the other hand when an employer's decision not to employ an applicant is based on a rule or criteria which does not involve the prospective applicant's sex, but because of the way society is ordered, adversely affects applicants depending on their sex.

These definitions do not differ from the understanding of these terms in the human rights instruments discussed in the previous chapters. The difference between direct and indirect discrimination is however emphasised here because these concepts have acquired different status in the ECJ jurisprudence. Once direct discrimination has been established, there can be no legal justification for discriminatory action. A decision, which has detrimental effect, may on the other hand be objectively justified, that is if it pursues a legitimate aim and means of achieving that aim are appropriate and necessary. The concept of indirect discrimination as defined by the Court was later set out in Directive 97/80 on the burden of proof in cases of discrimination based on sex.¹⁰⁵

The *Bilka-Kaufhaus Case*¹⁰⁶ is an example of this thinking. The employer claimed that it was necessary for his business to recruit predominantly full-time work force. Firstly, the Court decided that the requirement at hand constituted indirect discrimination. It held that if a considerably smaller number of women worked full-time, and therefore the majority of women were excluded from the benefit in question, there was a case of discrimination. In order for the employer to avoid a claim of discrimination he/she would have to prove that there were objectively justifiable factors unrelated to discrimination based on sex. Then, the Court handled

¹⁰⁴ Nielsen R., *EF-arbejdsret*, p. 215. It would therefore be direct discrimination to limit access to a job requiring great physical strength to male applicants because men are generally stronger than women.

¹⁰⁵ "[...]where an apparently neutral provision, criterion or practice disproportionately disadvantages the members of one sex, by reference in particular to marital or family status, unless the aim pursued by the application of this provision, criterion or practice is objectively justified and the means of achieving it are appropriate and necessary."

¹⁰⁶ Case 170/84, *Bilka-Kaufhaus GmbH v. Weber Von Hartz* (1986) E.C.R 1607. Case 167/97, *Seymour-Smith*, is a more recent example of the establishment of objective justifications for the purposes of indirect discrimination.

the question as to how such justification could be established, and concluded with a proportionality test. Measures chosen by Bilka, in order to meet their objective, must be to employ as few part-time workers as possible and to “correspond to a real need on the part of the undertaking, [which] are appropriate with a view to achieving the objectives pursued, and are necessary to that end”.¹⁰⁷

3. Exceptions to the Principle of Equal Treatment

The Equal Treatment Directive¹⁰⁸ lists three exemptions to its principle of equal treatment. Firstly, Article 2(2) provides an exception where the sex of the worker constitutes a determining factor. Then, Article 2(3) allows for an exception where women need to be protected, particularly as regards pregnancy and maternity. Finally Article 2(4), deals with the so-called “positive action” programmes. As derogation from the general principle of the directive, they must be interpreted strictly, and be reviewed regularly.¹⁰⁹ For the purposes of this paper further discussion will be limited to Article 2(4).

Article 2(4) provides that the Directive does not prejudice measures to promote equal opportunity for men and women, in particular by removing existing inequalities, which affect women’s opportunities in the area referred to in Article 1(1). This exception is designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequalities which may exist in the reality of social life.¹¹⁰ As such it does not allow positive discrimination in favour of women in employment. Neither does it oblige employers to engage in positive action programs. The Community does however in its 1984 Recommendation on the Promotion of Positive Action for Women,¹¹¹ recommend that Member States 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.” The object of such policy is to:

“a) Eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of

¹⁰⁷ Bilka, *ibid*, at p.1628.

¹⁰⁸ In this Chapter the discussion will be focused on the situation before the amendments made by Directive 2002/73.

¹⁰⁹ See Article 9(2).

¹¹⁰ Commission v. France, 318/86 (1989) GMLR 663.

¹¹¹ Recommendation 84/635, OJ 1984, L331/34.

a traditional division of roles in society between men and women;
b) To encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources."¹¹²

The ECJ's interpretation of Articles 2(1) and (4) in the Kalanke Case¹¹³ evoked controversy and discussion in Europe on the subject of affirmative action. In this case the Court dealt with the question whether a provision of a German Law on Equal Treatment for Men and Women, which required affirmative action programs for the benefit of women, was beyond the limit of Article 2(4). The law provided that women, who had the same qualifications as men, applying for the same post, were to be given priority if women were under-represented. Women were considered to be under-represented if they did not make up at least half of the staff. The Court said that as derogation from an individual right laid down in the directive, such a rule should be interpreted strictly. As this rule guaranteed women absolute and unconditional priority for appointment or promotion it went beyond the main purpose of Article 2(1), i.e. promoting equal opportunities, and overstepped the limits of the exception in Article 2(4) of the Directive. Furthermore, the law was considered to aim at equality of results and thereby substitute measures that are designed to promote equal opportunities as envisaged in Article 2(4). The Court thus ruled that article 2(1) and (4) of the Directive preclude national rules that provide absolute and unconditional priority. The remaining question was what type of law would fall under the scope of Article 2(4).

In wake of Kalanke the Commission, anxious to end the controversy caused by this case, proposed an amendment to the Directive,¹¹⁴ which clearly demonstrated its understanding of the case. In the Explanatory Memorandum the Commission emphasised its favourable attitude towards positive action and its belief that it was necessary to amend the wording of Article 2(4) of the Directive "[...] so that the text of the provision specifically permit[ted] the kinds of positive action which remain[ed] untouched by Kalanke."¹¹⁵ It was thus its opinion that all kinds of positive action would continue to be permitted, provided they allowed for the assessment of the

¹¹² *ibid.*

¹¹³ Kalanke v. Freie Hansestadt Bremen, Case C-450/93 (1995) ECR I-3051.

¹¹⁴ Proposal for a Council Directive amending Directive 76/207, (1996) O.J. C179/8.

¹¹⁵ Introduction to the explanatory memorandum.

particular circumstances of the individual case. The Kalanke decision should therefore be limited to cases where the preference for women was rigid and failed to take into consideration those individuals concerned.¹¹⁶

This understanding of the Kalanke decision was tested in the Marschall case of 11 November 1997.¹¹⁷ The contested law, like the law in Kalanke, required that a position be granted to a woman if there were fewer women than men in the particular higher grade post in the career bracket, and provided she was equally qualified. This law also included a saving clause, which required the employer to take notice of reasons specific to an individual male candidate, should they tilt the balance in his favour.

The Court noted in its arguments, that although equally qualified, women may not, due to social factors, have the same opportunities as men in working life.¹¹⁸ Therefore, national rules, which counteract the prejudicial effects of certain social attitude on female candidates, may fall within the scope of Article 2(4). Such rules cannot however guarantee absolute and unconditional priority for women without going beyond the limits of the exceptions laid down in Kalanke. Rules that contain a saving clause do not exceed those limits if every candidate is subject to an objective assessment that takes account of all criteria specific to him. If the result of such assessment at any point tilts the balance in favour of the male candidate, the priority rule may not be put into effect. In this respect it should however be remembered that those criteria must not be such as to discriminate against female candidates.¹¹⁹ If the law in question provides this, such a rule does not include absolute and unconditional priority and Articles 2(1) and (4) of the Directive would not preclude it.

The compatibility of national legislation with Article 2(1) and (4) of the Directive was again tested Badeck case of 28 March 2000.¹²⁰ The contested national law included a rule which gave female candidates priority in sectors of the public service if women were under-represented and provided that male and female candidates had equal qualifications. Such priority also depended upon its necessity for ensuring compliance with the objectives of the women's advancement plan and that no reasons of greater legal weight were opposed. Also provided that the rule in

¹¹⁶ This proposal was replaced by the proposal (2000) which became the Directive 2002/73/EC.

¹¹⁷ Helmut Marschall and Land Nordrhein-Westfalen, Case C-409/95.

¹¹⁸ *ibid*, para 29.

¹¹⁹ *ibid*, para 33.

question guaranteed that candidates were subject to an objective assessment which took account of their specific personal situations. For the purposes of assessing the candidates' qualifications certain criteria were to be taken into account. These criteria intended to lead to substantive rather than formal equality by reducing the inequalities which may occur in practice in social life. If, after an objective assessment with due respect to these criteria, candidates could not be distinguished on their qualifications the priority rule should be applied where that proves necessary for complying with the objectives of the advancement plan in question and no reasons of greater legal weight are opposed.

At the time of the ruling of the Badeck case Article 141(4) had entered the picture, stating that Member States are entitled to adopt positive action measures to promote equality for men and women. The Court applied the rule of Marschall and concluded that the national law in question was not absolute and unconditional in the sense of Kalanke. It also concluded that the Directive did not preclude a national rule which gives priority to women where women are under-represented and female and male candidates have, based on an objective assessment, been found equally qualified for the job in question and when the application of such a rule proves necessary for ensuring compliance with the objectives of the women' advancement plan.¹²¹

The Marschall ruling was mainly concerned with the compatibility of a measure which is intended to give priority in promotion to women in sectors of the public service where they are under- represented. Based on this ruling such measures must be regarded as compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates. As mentioned above the Badeck court relies on these rules in its conclusion. Interestingly, the Badeck court also seems to admit the application of criteria that is intended to lead to substantive equality in the assessment of qualifications. The objective assessment thus includes criteria which is intended to eliminate or reduce instances of inequality that may exist in the reality of social life. When candidates are equally qualified based on such assessment women may be given priority based on special measures that are deemed necessary

¹²⁰ Georg Badeck and des Landes Hessen, Germany, Case C-158/97.

¹²¹ *ibid*, para 38.

for ensuring compliance with the objectives of an advancement plan for women on the labourmarket.

The Abrahamsson's case of 6 July 2000¹²² was concluded shortly after the Badeck case. In this case the Court found a national legislation (Swedish) that had the legitimate aim to reduce de facto inequalities in employment was precluded by Article 2(1) and (4) of the Directive. This case differed however from the cases discussed above, as the contested law allowed preference to be given to a candidate of the under-represented sex although this candidate did not possess qualifications equal to those of other candidates of the opposite sex. The Court will thus not acknowledge a rule which gives preference to a person of the under-represented sex in a given field of employment if that person is not equally qualified to the eligible candidates. The rulings established in Marschall and Badeck therefore remain untouched.

4. Reflections on Kalanke and Marschall.

In its reasoning in Marschall the Court accepts that national rules, which counteract prejudicial effects on female candidates of certain behaviours and attitudes and thus reduce actual instances of inequality which may exist in the real world, may fall within the scope of Article 2(4).¹²³ The Court notes that female candidates may not have the same opportunities as male candidates who tend to be promoted in preference to female candidates even though they are equally qualified.¹²⁴ This opinion of the Court makes its approach as regards its conclusion noteworthy on two accounts; its emphasis on the individual right not to be discriminated against, and its distinction between equality of opportunity and the equality of results.

Although acknowledging that measures, which give priority to women, with a view to improving their ability to compete equally with men, fall within the scope of Article 2(4), the Court in Kalanke was of the opinion that such measures may not depart from the principle of individual merit. The scope of Article 2(4) in this respect was clarified to some extent in Marschall, which granted priority of the under-represented sex in a given field, provided that the rules in question ensured sufficient flexibility and allowed for latitude to take into account any reasons which may be

¹²² Case 407/98.

¹²³ Marschall case, para 29, which furthermore gives an example of particular presumptions that may have this effect on women.

¹²⁴ *ibid*, para 30.

specific to individual candidates. This saving clause must be viewed as representing the individuals right not to be discriminated against on the grounds of sex. The challenged law must on the other hand be viewed as representing the right of women to substantive equality. This seems to demonstrate the Court's view that the individual rights override the necessity to counteract substantive inequalities.

The conclusions are also interesting, given the fact that the law on both accounts required that the individuals were equally qualified. It must be presumed that an evaluation of the candidate's qualifications must have taken place previous to a finding of their equal status. As such an evaluation must presumably have been based on suitability, competence and professional performance attributed to both candidates, the question is whether reasons specific to the candidates have not already been taken into account. If such an evaluation had resulted in a decision that the male candidate is better qualified, or "that the reasons specific to him tilt the balance in his favour," he would already have been appointed to the position. Then there would have been no reason to consider the priority rule in the first place. The Court thus seems to require that even after the candidates have been deemed as equals, they must be subject to a new evaluation on some abilities specific to them. The reasoning in *Badeck* is more to the point in this respect. It first deals with the assessment of qualifications. When the assessment has been performed and it does allow distinction it deals with the question of applicability of a priority rule.

The point above also coincides with the criticism that the Court's approach fails to provide an answer for cases where both parties competing for the particular job have, by definition, equal merit.¹²⁵ In such cases the choice can only be made on the basis of criteria not related to merit. As neither candidate is more qualified, there can be no violation of an individual right involved. In holding that gender cannot be used to tilt the balance in such circumstances, the Court seems to imply that a random selection would be preferable to the social policy of achieving a balanced representation of the sexes.¹²⁶

With regard to the second point made above, the Court's distinction between equal opportunity and the equality of results has been criticised for not acknowledging the complex interaction between these expressions.¹²⁷ The Court's

¹²⁵ Fredman S., p. 587.

¹²⁶ *ibid* p. 587.

¹²⁷ Fredman S.,p. 586.

decision limits the measures allowed by Article 2(4) to those designed to promote equal opportunities. The equality of results can in its view only be attained as a natural result of equal opportunity. This understanding is in harmony with that set forth in the Opinion of Advocate General Tesouro¹²⁸ who emphasised that positive actions were only authorised to the extent to which they are to promote and achieve equal opportunities for men and women. He then explained the concept of equal opportunity as meaning equality with respect to starting points rather than to points of arrival. People who are given equal opportunities, he reasoned, will be in a position to attain equal results. The fact that the two applicants in *Kalanke* were equally qualified, implied that they had had, and would continue to have, equal opportunities. Therefore they were an equal footing at the starting block. As the national legislation challenged in *Kalanke* aimed to achieve equality as regards result, it was considered to fall outside of the scope or the rationale of Article 2(4).

This reasoning indicates that applicants, who have had equal opportunities, resulting in their equality at the starting block, will continue to have the same opportunities with regard to the point of arrival. People who have had identical education and work-experience must be viewed as equally qualified. As a natural result of their equal opportunities at this point, their opportunity to be employed or promoted would be the same. This thinking seems to presume that the existing inequalities, which affect women's opportunities in the field of employment, have disappeared once the equal starting point is attained. This also seems to contradict the Court's own point in paragraph 29 referred to above.

The law in question in *Kalanke* and *Marschall* required male and female applicants to be equally qualified for the priority rule to come into consideration. The candidates were thus at the same starting point, as noted by Advocate General Tesouro. As the law was intended to counteract the inequality affecting female applicants compared to equally qualified male candidates applying for the same post, women were to be given the opportunity to equality with respect to arrival. Article 2(4) is specifically designed to authorise measures, which are in fact intended to eliminate or reduce actual instances of inequality that may exist in reality of social life. As such instances do in fact not disappear at the starting point, it is here maintained that the expression of equality of opportunity in Article 2(4) must be

¹²⁸ Opinion delivered 6 April 1995, paras 13 and 14.

viewed as meaning the opportunity of results as well as starting points.

This understanding must also be a prerequisite for any law allowing for the priority of equally qualified candidates to have any significant meaning. Such law presupposes the equality of starting points and aims at providing equal opportunity with regard to result. Otherwise it would be a contradiction in itself as it would require the existence of a situation it is aimed at achieving, that is women would be allowed priority if they were equally qualified but even so they would get no priority as they had had equal opportunities.

The development of Community law on equal treatment which now refers expressly to adopting measures at national level for specific advantages in order to make it easier for the under-represented sex in a given field of employment, makes the strict interpretation of the Court even more doubtful, if not inconsistent¹²⁹ with the law. In his Opinion of the Badeck Case, Mr. Advocate General Saggio addresses the question of equal opportunity at the starting point as opposed to equality as regards result. He notes that positive measures may be designed not merely to guarantee women an equal opportunity at the starting-point by creating the conditions to enable them to compete on an equal footing for each particular post, but to have a real effect on their social integration by giving them actual priority in appointment and promotion. He then adds:

"If the need to reconcile the general principle of non-discrimination with positive action for women simply means that any positive action that seeks to achieve an actual result, such as appointment to a post, is unlawful, it would enormously reduce the scope of such action, depriving it of substance and according it the status of an auxiliary measure, which is not always effective in redressing social inequalities."¹³⁰

Having examined Directive 76/207/EEC, the questions being asked in connection with its interpretation, case law and criticism it is time to introduce the amendments made by Directive 2002/73EC.

5. Directive 2002/73/EC

As mentioned in Chapter 1, equal treatment of men and women is now an explicit objective of The Community, cf. Article 2. Furthermore the Community shall aim to eliminate inequalities and to promote equality between men and women in all

¹²⁹ Opinion of Mr. Advocate General Saggio in the Badeck Case, Case C-158/97.

¹³⁰ Opinion delivered on 10 June 1999 Case C-158/97.

its activities, cf. Article 3. By Article 13 the Community has been conferred powers to take appropriate action to combat discrimination on a number of different grounds, including sex. With Article 141(3) a proper legal base has been formed for the adoption of secondary legislation in the area of equal opportunities. It is thus a special legal base as regards all aspects covered by a directive 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. As regards special measures Article 141(4) states that Member States are entitled to adopt positive action measures to promote equality for men and women:

"With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers"

This provision has been the subject of a Declaration annexed to the Final Act, which states that Member States should, in the first instance, aim at improving the situation of women in working life.¹³¹

The 1996 proposal for amending Directive 76/207/EEC¹³² was replaced in 2000 by a new proposal for amending the Directive. This proposal took account of the new Treaty developments and the case law of the Court and was adopted by the European Parliament and of the Council on 23 September 2002 as Directive 2002/73/EC. It also has a wider objective. It has for instance a new provision on sexual harassment and concretely implements the objective of mainstreaming set out in Article 3 of the Treaty by obliging Member States to actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies, etc.¹³³ Article 2 of the Directive 76/207/EEC is replaced by a new Article 2. The New Article 2(1) defines the principle of equal treatment as meaning that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly. This is followed by a definition of the notion of direct and indirect discrimination, coherent with Directive 97/80/EC. Article 3 is replaced by a new Article prohibiting direct and indirect

¹³¹ Declaration No 28 to the Amsterdam Treaty.

¹³² This proposal was submitted in order to put an end to the controversy which the Kalanke decision had given rise and to limit the negative consequences of that ruling, as mentioned in Chapter 3.

¹³³ Directive 2002/73/EC, Article 1.

discrimination on the grounds of sex in the public or private sector.¹³⁴

As regards positive action measures the Directive acknowledges and allows the adoption of measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women, cf. Article 2(8). The Preamble to the Directive clarifies to a certain point the meaning of this obligation:

"Given the current situation [Article 141(4)], and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life. The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between women and men."¹³⁵

The amendments seem to clarify at least to some point the questions being asked in the interpretation of Directive 76/207/EEC. It shows at least that the Community acknowledges that measures may need to be adopted in order to prevent or compensate for present disadvantages of one sex and that such measures are not, unless otherwise flawed, to be considered incompatible with the equality principle of the Directive. Whether the controversy is fully solved remains to be seen.

6. Remarks regarding EC and EEA law

The above study of gender equality in the field of employment is focused on Directive 76/207/EEC, case-law and development as regards the subject matter of this project, i.e. equal treatment of men and women as regards access to employment. The purpose of the Directive is to put into effect the principle of equal treatment for men and women in this field and to that end it requires various positive actions on behalf of the Member States and the EFTA States. Consequently, the States are obliged to make judicial review available to those who claim injustice in this field. This is a clear statement of the judiciability of the right in question. Equal treatment of the sexes in the field of employment is thus supposed to be, and is in practice, enforceable by individuals in national courts and by the ECJ, which jurisprudence has complemented the Directive in many ways.

The equality principle in the law of the European Community has relied on a policy of formal equality, which requires likes to be treated as likes. It has also shown

¹³⁴ Article 3(1).

¹³⁵ OJ L 269, 05/10/2002.

sensitivity to substantive equality, requiring different treatment for non-comparable situations. In the context of access to employment, formal equality principles assume that workers, men and women, are comparable and that they should be judged only by their individual merit with the same opportunities and position on the employment market. The shortcomings of this approach as regards sex equality is its reliance on the male norm being the standard upon which the merit is decided. A substantive equality approach, on the other hand, rejects the male-norm as it not only looks at individual merit but also demands that the real situation of women, which may place them in a weaker position on the employment market, be addressed.¹³⁶

Special attention has been paid to the ECJ's judgements in the matter of special measures allowed by Article 2(4) of Directive 76/207/EEC and the questions they have raised and controversies they have caused. A further examination of the interplay between the general principle of equality and the application of special measures is foreseen. A new factor has however been added to the discourse on gender equality in employment as measures involving specific advantages for one sex acquired a Treaty basis with Article 141 of the Amsterdam Treaty. The amendments of Directive 2002/73/C, also changes the scene to some point. It must therefore be assumed that the development in this field will take place on a new platform,

IV. STATUS AND DEVELOPMENT ON THE INTERNATIONAL AND EUROPEAN LEVEL.

1. The equality principle

The aim of this paper is, as explained in the Introduction above, to examine the status of the equality principle in the field of access to employment in international, European and national law. The study has revealed both similarities and differences between those human rights organs on the international and European level. They more or less share the basic elements of the equality principle, that is an existence of behaviour, which constitutes a difference in treatment, a ground for which the difference is based and the objective results of this difference in treatment. Only the EC Equality Directive mentions indirect discrimination. The other instruments refer to the adverse effect of a given treatment, which indicates a prohibition of indirect

¹³⁶ Fenwich H. and Hervey T.K., *Sex Equality in the Single Market*, p. 445.

discrimination. All apply, at least to some extent, to both public and private discrimination, and the obligations undertaken, although different in nature, involve prohibition of discriminative action. They also allow positive measures for the effective realisation of equality in this field. This would involve protection against all employment discrimination by law, administrative and other authoritative instruction and those seem to be applicable, at least to some extent, to employment relations between private parties.

Neither are there exceptions to the acknowledgement of the legality of special measures for establishing de facto equality. In general, those instruments either include provisions claiming that the adoption of special measures aimed at removing de facto inequalities is not to be considered contrary to their otherwise unconditional principle of equality, or the legitimacy of such measures is clear from the *travaux préparatoires* or practice of their supervisory organs. Only the CEDAW Committee explicitly recommends that States Parties make more use of temporary special measures including preferential treatment or quota systems to advance women's integration into employment.¹³⁷ Protocol no. 12 to the ECHR, on the other hand, does not impose any obligation to adopt such measures.¹³⁸ None of these instruments do however address the question of obligatory special measures in private employment relations. Some have even been very strict and conservative in the approach to special measures, as the study of the Kalanke and Marschall cases above reveals. The new development of the EC Treaty and amendments to Directive 76/207/EEC seem to allow for a more positive approach.

There is an obvious difference in the wording as regards the protection provided in these instruments. Those Conventions that primarily deal with civil and political rights undertake to respect and ensure, or secure the recognised rights, whereas those dealing with economic and social rights require the recognition of these rights. This difference does not, however, effect the exercise of economic and social rights when combined with the equality principle, as non-discrimination in the exercise of those rights is guaranteed, cf. ICESCR Art. 2(2). Again, although progressive realisation is normally required for those rights, the connection with the equality principle calls for an immediate application. It is however acknowledged that an immediate realisation

¹³⁷ CEDAW, General recommendation No. 5.

¹³⁸ Commentary, para 16, see note 74.

is not always possible in situations of de facto inequality. Therefore, the pursuit of a policy of eliminating discrimination is believed to satisfy this duty, provided that it is pursued immediately.

As these instruments, that have the right to work on their agenda, have mainly relied on a reporting procedure, they have not developed a clear test with respect to which degree such affirmative measures are allowed. It has however been submitted that the nature and extent of any affirmative action measures should be assessed, by reference to the purpose for which they were instituted. Such action should conform to the necessity of promoting equal opportunity and its extent should also be proportionate to the measure of existing disadvantage.¹³⁹ This matter is now addressed in the Revised European Social Charter in this manner. Affirmative action programs have also been tested within the EC by the ECJ, which has developed a strict test of the applicability of such measures under Articles 2(1) and (4) of the Equal Treatment Directive.

2. The substantive rights

As was to be expected, the instruments are not equally protective of the right to equal access to employment. In some instances this is due to the supervisory system set forth for the protection of this right as an economic or social right, but also to their scope as regards the substantive rights protected. The conventions primarily concerned with civil and political rights, the ICCPR and the ECHR, do not in principle deal with access to employment. However, the ICCPR is important for this discussion in two respects, i.e. Articles 25 and 26.

Article 25 provides that every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without reasonable restrictions, to access on general terms of equality, to public service in his country. The duty imposed by this Article is definite, every citizen shall have this right and states are under Article 2 obliged to ensure its enjoyment. Compared to CEDAW, this wording is much stronger as to obligations undertaken by the Parties. Furthermore Article 25 is subject to the ICCPR supervisory mechanism, which has provided equal access to public service far better protection than was before the recent adoption of a complaint procedure, provided under the CEDAW system of implementation or the

¹³⁹ Craven, M., *The international Covenant...* p. 187, .

ICESCR for that matter.

The second point regarding the importance of the ICCPR for the subject matter of this project, is Article 26, which provides for equal protection of law. The independent nature of this provision, together with HRC's interpretation as regards its applicability to subject matters covered in other international instruments, such as the ICESCR and the CEDAW,¹⁴⁰ make it applicable to the right to work, or more precisely, access to employment. If a state has enacted legislation providing for access to employment, it may not violate the prohibition against discrimination contained in Article 26 and the guarantee given therein to persons regarding equal and effective protection against discrimination. Again the advantage of this conclusion is connected with the meant superiority of the monitoring mechanism of ICCPR to the one provided for in ICESCR. The new equality principle of Article 1 of Protocol No. 12 to the ECHR can, once it has come into effect, presumably be applied in the same manner. Individuals will thereby be afforded a remedy for violations of rights that are now recognised in the ESC.

Complaints about access to employment and promotion can not be brought under the ECHR until Protocol No. 12 enters into force. The same applies to the ESC and the ratification of the procedure provided for in the 1995 Optional Protocol. The provisions of EC law on equal treatment of the sexes in the field of employment are on the other hand enforceable, both at the national level and at the European level by the ECJ. Individuals of those States Members to the Council of Europe, which are also members of the EC, and the EFTA States have therefore been provided with much better protection as regards equal opportunities for access to employment within the EC system than the Council of Europe. Whether this remains to be true in the future depends on the development of the execution of the above Protocols and the Optional Protocol to CEDAW.

3. The Supervisory system

The ICCPR and ICESCR both state in their preambles that they recognise, in accordance with the UDHR, that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political

¹⁴⁰ PPC v. Netherlands and other judgements, see supra note 10.

rights.”¹⁴¹ In spite of the common acceptance that those two sets of rights independently and together form an indivisible set of principles, the outcome of the drafting of the International Bill of Rights was two covenants, each protecting their own category of rights. The obligations undertaken in the ICESCR for the protection of economic, social and cultural rights is weaker than its counterpart, the ICCPR, and its monitoring system does not provide for the same degree of supervision, as it is not intended to afford remedies for violations. The same applies to the human rights treaties of the Council of Europe, i.e. the ECHR and ESC. This division of rights has been subject to loud criticism in the human rights discourse, as economic, social and cultural rights have as a consequence acquired a somewhat second class status. The arguments for and against will not be repeated here. The situation of the right to equal access to employment, as it appears in the above study, does however call for some comment on whether the assumed difficulties of applying the same implementation mechanism have proven to be correct and /or applicable to the right in question.

In this respect it is worth mentioning, that no distinction is made between economic and social rights, and rights defined as civil and political in the implementation of ILO Conventions. They all rely on the same supervisory system, which includes a complaint as well as a reporting procedure. This integrated approach has not hindered effective enforcement of ILO Conventions, neither the ones protecting rights of an economic nature, nor those belonging to the other group.

The status of the right to equal access to employment in the ICESCR, which is granted an immediate guarantee, also seems to associate this right more with civil and political rights than the assumed status of economic and social rights. The quasi-judicial function of the Committee on Economic, Social and Cultural Rights, the new complaints procedure under CEDAW, and the communication procedure under the ESC also suggest that at least some economic and social rights can be examined on the same basis as civil and political rights. This must be seen as a withdrawal from the assumption that this group of rights does not qualify for a petition procedure. This also corresponds to the suggested criteria, referred to in Chapter II.1 on ECHR, for the selection of rights suitable for its monitoring system. Those should be fundamental, universal, and capable of a sufficiently precise formulation to give rise to a legal obligation rather than those that merely set a standard. Rights connected to

¹⁴¹ This is the wording in ISESCR, the order of the two sets of rights is only reversed in the ICCPR.

employment are appointed as rights possibly meeting these criteria¹⁴² and have in fact proven to be capable of immediate application by judicial and other organs in many national legal systems.

Although the above development must be welcomed, the reporting system under those conventions may not be devaluated. A carefully planned supervisory system with firm guidelines to States as to what kind of information is required can give thorough information on the situation in the respective fields. Knowledge of de facto situation in a country must be essential for further development. This can also provide a chance for an open dialogue between the supervisory body and the states. As a result states may find the need go through a self-inspection, which might not occur without this stimulation. Judging from the experience of ILO, a combination of a reporting system and a form of a complaint procedure, has the potential of providing for a strong protection of the principle of equality in the field of employment.

4. Progressive moves.

Although the aim of this project is partly to compare those instruments and evaluate the differences between them, it must be stressed that each human rights organ makes up a separate system for human rights protection. Each has its own objectives and the means provided do, or were supposed to, serve those objectives. It is important to know where the difference between them lies, but it may not serve any purpose to compare them with the view of criticising one in comparison to the other. Attention should rather be paid to possible changes for the improvement within each system.

As regards the ICCPR, the functions of the HRC were not discussed in detail in Chapter I, but as the Committee has extended its competence by its approach to Article 26, its functions become relevant for this project. A need for improvement in its handling of communications may, it has been submitted, be solved by developing the system itself by establishing a Secretariat unit of its own and by granting it the resources and freedom of action required to carry out its function.¹⁴³

Points have been made above with respect to the prospects of widening the scope of the ECHR and the improvements already achieved. The Optional Protocol to

¹⁴² Opsahl, T., *Substantive rights ...*, p. 154.

¹⁴³ Opsahl T, *The Human ...*, p. 442-3.

CEDAW also provides CEDAW with the missing equipment to deal effectively with its tasks, i.e. to combat discrimination of women. This is expected to contribute greatly to the progressive development of the Convention. The CEDAW will also continue to rely on a reporting system for its implementation. If this system is to fulfil the requirements of a well functioning reporting system it needs firmer guidelines, more time and resources for the Committee's work and in general more attention from the UN General Assembly.

As regards other conventions, which focus on economic and social rights, there is a clear trend towards more effective control mechanisms involving some form of complaint procedure. Besides enabling the relevant supervisory committees to afford remedies for violations of the respective conventions, the practice of such procedures would provide a context in which a developmental body of jurisprudence could occur, elaborating upon the scope and content of those conventions. This would thus also strengthen the legal nature of the treaty obligations.

An increased use of information or other contributions from NGOs may be of advantage to all conventions in question. The information they assemble and provide can be of significant use for all types of supervisory systems. As the ILO experience clearly shows, NGO involvement can both strengthen the reporting mechanism and the consideration of complaints. The importance of NGOs for identifying the situation in a country has without doubt added to the success of this system. It has even been maintained that the problem of implementing economic and social rights may no longer be attributed to the lack of procedure, but rather "the absence of competent non-governmental human rights organisations making use of the new opportunities" provided in the respective systems.¹⁴⁴ This opens the door for the argument that combined efforts of NGOs, committing themselves to this field, and all supervisory organs welcoming their contribution, may strengthen considerably the status of the rights in question, within the respective human rights treaties.

5. The role of national implementation

As mentioned above the right to equal access to employment has been practised as a justiciable right by national courts. Such acknowledgement on the national level manifests that at least some economic and social rights are capable of being subject to

¹⁴⁴ Eide A., *Future protection ...*, p. 216.

judicial or quasi-judicial remedies, which may affect the understanding of the assumed nature of this group of rights in regional and international instruments dedicated to such rights. Likewise, the developments on the regional and international level may have effect on the national level. Development of monitoring mechanisms may in particular be effective in this regard, as this would open the possibility for the creation of new case-law or institutionalised interpretations, clarifying treaty provisions, which consequently would be more accessible for application on the national level.

V. ICELAND

The ultimate purpose of international human rights conventions is to affect member states' recognition of those rights, and to promote their protection. One of the aims of this project is to identify the obligations imposed, examine their fulfilment in Iceland and recognise where the right to equal access to employment may further benefit from applying the standards set in International and European human rights law.

1. Equality principle

By adopting the CEDAW, Iceland undertook to embody the principle of equality of men and women in the Constitution and other appropriate legislation if not yet incorporated. The 1985 law on the Equal Status and Equal Rights of Men and Women already fulfilled the latter obligation but the general principle of equality did not formally enjoy constitutional protection until Parliament reviewed the human rights section of the Constitution in 1995. The equality principle had however been applied as constitutional principle before that time.¹⁴⁵ Article 65 of the Constitution now states that everyone shall be equal before the law and enjoy human rights regardless of sex, religion, opinions, national origin, race, colour, property, financial status, birth or other status. In paragraph 2 it specifically states that women and men shall enjoy equal rights in every respect.

Whether the equality principle of the Icelandic constitution entails equal protection under the law, with the positive requirement as understood to be included

¹⁴⁵ cf. for instance Supreme Court Judgement 1992, p. 1962.

in the term, has evoked some discussion in Iceland, which will not be elaborated upon here.¹⁴⁶

The 1985 Act on the equal status and equal rights of men and women was reviewed in 1991. The present Act is no. 96 from 22 May 2000. During the work on the draft special attention was paid to the obligations Iceland had undertaken by the EEA Agreement, the basic UN documents and the Peking declaration of 1995. The purpose of the Act is to establish and maintain the equal rights and opportunities of men and women and thereby equalise the status of the sexes in every sphere. Special attention is given to the status of women in the field of employment. The Act's equality principle and its application to access to employment conforms in general with the core of this right in the human rights instruments involved in this project. All discrimination based on sex, direct as well as indirect, is prohibited and the prohibition applies to public and private employers. As for definition of the term indirect discrimination special reference is made to the definition provided in EC Directive 97/80, on the burden of proof in cases of discrimination based on sex.¹⁴⁷ The Directive is also the model for requiring the employer to show that there are objective reasons for his/her decision in *prima facie* cases of direct or indirect discrimination.

2. Selection Criteria

This Chapter will concentrate on the employer's authority to decide on which grounds he/she makes his selection and to what extent his/her selection criteria may be reviewed by those authorities given the power to examine alleged violations of the Equality Act. As mentioned above, the Equality Act applies to both public and private employment decisions. Stricter rules may however apply to the public sector, as the Equality Act must be reviewed in connection with employee law and special demands on methods of hiring persons to official positions. The focus will be on the public with special remarks as regards the private domain where needed.

When applying for official positions the applicant must fulfil certain general qualification requirements of the Employees Act. The law does not however set general obligatory standards for public employers to follow when choosing between

¹⁴⁶ A thorough examination of this question is provided in Arnardóttir O. M., concluding i.e. that the general principle of Article 65 of the constitution is in its nature a rule of substance which involves a substantive right of the citizen on which the courts may base substantive rights to prevent individuals suffering discrimination.

candidates for a specific post.¹⁴⁸ For some occupations, rules have been specially established on this issue. When this is the case, the employer is bound by the legalised criteria, otherwise he/she decides on which grounds and opinions he/she bases his/her selection. The chosen criteria must however be lawful and objective.¹⁴⁹ As an example of lawful and objective criteria the Parliamentary Ombudsman for Iceland has mentioned education, experience, schooling, competence and other relevant personal abilities.¹⁵⁰ The employer may base his/her decision on various grounds. When those do not result in a definite conclusion they must be evaluated. Under such evaluations all viewpoints may not have the same weight. Where law and other rules do not prescribe the matter the general rule is that the employer decides which criteria are to be emphasised. Then the employer decides which applicant shall be granted the position on grounds of objective criteria and the applicants' personal qualities. It is a general rule in administrative law that the applicant who, based on the chosen criteria, is considered to be the most qualified and the most competent, must be chosen.¹⁵¹ Private employers are, on the other hand, not directly compelled to hire the most qualified candidates. Their power of decision is however limited by the Equality Act as it may not be based on sex. It also presumes an equality evaluation as the employer must show that the chosen candidate has some special qualifications that justify his decision not to employ a presumably more qualified candidate. This discussion thus assumes that these issues affect all public and private employers in the same way in situations concerning gender equality.

In conformity with the employer's discretion in this matter, an examination of judgements of the Supreme Court reveals that the Court generally does not review the employer's grounds and opinions for a lawful and objective decision in this field.¹⁵² The Parliamentary Ombudsman for Iceland has taken the same approach to this

¹⁴⁷ Explanatory statement, Parliament Reports, A-division, p. 2534.

¹⁴⁸ This was suggested with enactment of the Employees Act No. 38/1954, Parliament reports 1953 A-division pp. 941 and 1259.

¹⁴⁹ For instance Supreme Court judgements 1993, p. 2230 and 1997, p. 1544.

¹⁵⁰ Opinion of the Parliamentary Ombudsman, case no. 1134/1994, SUA 1995, p. 300.

¹⁵¹ For the purpose of this project it is not necessary to further examine the basis of the legal framework as regards the decision making and evaluation of qualifications. This summary of the rules is based on the opinions of the Parliamentary Ombudsman for Iceland in SUA 1995, p. 300 and 1996, p. 451.

¹⁵² See for instance Supreme Court Judgement 1996, p. 3760 and 18 December 1998 where the Court based its evaluation of the applicants on the criteria set forth by the employer.

matter as regards his own authority¹⁵³ and the authority of the Complaints Committee, which has handled violations of the Equality Act.¹⁵⁴

Although Courts do not review the employer's criteria, the judgements of the Supreme Court show that the Court is willing to review conclusions as regards the applicant's qualifications. The Court's authority to do so is especially relevant in cases alleging a breach of the Equality Act, as an application of a priority rule (see Chapter 4), inevitably requires an evaluation of the applicant's qualifications. The Court may thus lay an independent evaluation on the competence of the applicants from the selection criteria chosen by the employer and come to a new conclusion as to their qualifications.¹⁵⁵

As regards hiring and promotion the employer's decision must, as discussed above, always be based on lawful and objective criteria. The Equality Act makes decisions based on sex unlawful. Consideration of the applicant's sex is therefore prohibited. Criteria that have adverse impact on one sex are also prohibited, unless they fall under the exception of special measures, discussed in Chapter 4, that are intended to improve the status of women for the purpose of promoting equality and the equal status of the sexes.

Based on these rules of equality law there are three or four steps to be observed by supervisory bodies in cases of alleged discrimination. Firstly, it must be decided whether or not the decision is based on direct or indirect discrimination. If direct discrimination is involved the decision is unlawful. If the decision has detrimental effect on one sex further notice has to be taken of the criteria relied on by the employer. The determination whether the employer's choice of criteria is based on non-discriminatory reasons may be problematic and controversial. The test applied in those circumstances under the ECHR and by the ECJ is clear and acknowledged as being suitable for the review of a given decision for its conformity with the equality principle. Under this test a decision to employ one candidate and not the other must

¹⁵³ See for instance Case No. 1391/1995 in SUA 1996 p. 451.

¹⁵⁴ Opinion of 4 September 1999, case no. 2214/1997. In this case the Complaints Committee had decided that education of the applicants should carry the most weight and rule over experience, which had been the decisive factor in the employer's decision. Based on this the Committee concluded that there had been a breach of the equality act. The ombudsman concluded that the Committee was not authorized to consider the employer's decision on other grounds than those lawful standards chosen by the employer. By basing its conclusion on its own view of which criteria should have formed the basis and carry the most weight it had exceeded its authority.

¹⁵⁵ See for instance Supreme Court Judgement 1996,3760.

have a significant objective. The means being employed to achieve this aim must be objectively justified by the employer, who needs to show a genuine need, which is suitable and necessary for attaining the objective pursued. Pursuant to what is maintained earlier as regards the effect of international standards on the application of national law, the implementation of national equality law may benefit from this test in the process of deciding whether a given decision is in violation of the law.

As discussed above, supervisory bodies do not in general review the selection standard set by an employer. If the employer's decision involves neither direct nor indirect discrimination the review is limited to the employer's evaluation of the applicants' qualifications. This general rule in Icelandic law, it is submitted, is in harmony with the notion prevailing in EC law,¹⁵⁶ which invites the employer to introduce justifications for his decisions in a case of indirect discrimination. The employer is thereby given a chance to set forth his reasons for his/her decision, i.e. which qualifications he deems necessary for the position in question. If the supervisory bodies were authorised to review the employer's decision on other grounds he/she would be deprived of the chance to explain his decision and show that it is not based on the prohibited ground, that is sex.

If the steps above have not already revealed a discriminative decision the last step in this review of the employer's conclusion would be whether he/she should have applied the priority rule discussed below.

3. Obligations

Besides prohibiting discrimination the Equality Act imposes positive obligations with regard to the achievement of the objectives of the Act. As regards public authorities, they should involve legal and administrative measures. The Equal Status Council shall work for the advancement of equal status of men and women in this field and in general provide the administration with consultation in such matters. The government is also required to present a program with a detailed plan of action for specific projects regarding equality matters and to establish the various committees and the appointment of delegates for the work on the promotion of equality. As for private employment, employers and labour unions are commanded to purposefully work for the equalisation of the status of the sexes on the labour market.

¹⁵⁶ which Iceland has implemented into national law by the EEA Agreement.

Employers shall specifically work for this cause within their companies or institutions, endeavouring to prevent jobs from being classified as specifically men's and/or women's jobs.

The positive obligations imposed by the Equality Act seem to satisfy the requirements of those Conventions which lay down the strongest obligations for the promotion of equality on the labour market and even stronger as regards private relations.

The compliance with the standards set in human rights law has been considered by the Committee on the Elimination of Discrimination Against Women. In its remarks,¹⁵⁷ on the occasion of its consideration of Iceland's report under the CEDAW supervisory system in 1996 of relevance to this project, it noted that men and women had unequal representation in the different sectors of the employment market. The Committee expressed its concern of the larger proportion of women than men occupying unskilled jobs, and the by far higher proportion of men occupying managerial positions, in the private as well as the public sector. The Committee suggested that measures should be taken as soon as possible in order to ensure women positions on the decision making level, for instance by agreeing special measures for the advantage of women. It also suggested that the personnel of the Courts attended a special educational program on the Convention and that the Equality Act be amended, so that it would ensure that each sex had at least 40% representation in public committees and councils.

4. Affirmative action.

Article 22 of the Equality Act allows for special measures intended to improve the status and equal opportunities of men or women for the purposes of promoting equality and the equal status of men and women and equal opportunities. Such measures are not to be considered contrary to its general principle of sex equality. The provision does not further describe the allowed measures or express their limits. The wording and its purpose do however conform to such permits on the International and European level.

Special measures may appear in various forms. One type in particular, priority

¹⁵⁷ Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Iceland. 0905/96, A/51/38 paras 67-104.

rules, has caused intensive discussion in the field of employment. They go further than the ordinary positive obligations common in the equality discourse in that they, under certain circumstances, give one sex priority to access to employment in order to reach substantive equality. Priority rules also exist in various forms. Some believe in unconditional priority of one of the sexes regardless of competence, and others use quotas for this purpose. Then there are those rules which state that a representative of one sex should have priority if he or she has equal qualifications as other competing applicants of the other sex and the former is in minority in the field of occupation in question. The discussion here will be limited to this last form of priority rules.

The Equality Act does not exactly prescribe the application of such rules in Iceland. The Icelandic Supreme Court has however established a conditional priority rule by construing the provisions of the Equality Act's as including such a rule. Discrimination, it said¹⁵⁸ was frequently difficult to prove and the law would be insignificant unless the general principles of the Act were, at present, to be interpreted as meaning that a woman should be given an occupation if there were less women than men in the field of occupation concerned.

The rule established by the Supreme Court has been subject to some criticism. Its opponents have referred to the fact that the provision in the draft bill, which required that an applicant of the under-represented sex in a given field should have priority if he/she fulfils the demands for the position, was deleted during the bills discussion in Parliament. The reason for this is not specified in the amendments made by the Social Committee in Parliament. The debate in the Parliament was not detailed on this matter. The sceptic comments claimed however, that such a rule contradicted the general opinion that the most qualified applicant should be granted a position. The difference between being qualified for a job, and being the most qualified applicant in comparison to all the competent ones, should be recognised.¹⁵⁹ This and other comments indicate an opposition to an unconditional priority rule, which only requires that a candidate be qualified for a job for being given priority. No opinion was rendered on whether the draft should be understood as suggesting priority in the case of equal qualifications. Neither does the wording of the provision in question suggest a comparison between individual applicants. Because of this it is submitted,

¹⁵⁸ Supreme Court Judgement 1993, 2230 and following judgements.

¹⁵⁹ Parliament reports, Section B, 1989-1990, p. 4940.

that the omission of the draft provision should not be regarded as an opposition to a conditional priority rule of the kind later established by the Supreme Court.

5. Iceland - Europe.

The priority rule as it appears in Icelandic law is national law, which requires that applicants belonging to the underrepresented sex in a given field of action, be given priority as to appointment to a job. The European Court of Justice has, as discussed in Chapter III.3 above, taken into consideration whether such law went beyond the limit of Article 2 (4) of the Equal Treatment Directive 76/207/EEC which allows for an exception to its equality principle stated in Article 2(1). The question here is whether the Icelandic rule is designed to promote equality of opportunity within the meaning of Article 2(4) of the Directive, that is whether it is in conformity with the Directive as interpreted by the ECJ.

The Icelandic rule is clearly in harmony with the law in question in the Marschall and Badeck cases with respect to the requirement of equal qualifications and under- representation of women in the field of occupation. These cases furthermore require that sufficient flexibility be ensured. Every candidate must be subject to an objective assessment, which will take account of all criteria specific to the individual candidate. If the result of such assessment at any point tilts the balance in favour of the male candidate, the priority rule can not be put into effect. The Icelandic law does not specifically state this prerequisite. However, as mentioned in Chapter 2 above, an employer in the situation of choosing between candidates for a position must consider their particular qualifications against the criteria on which he/she has decided to base his employment decisions. It is therefore open to him/her to take account of qualifications specific to both individual candidates that match his/her chosen criteria. Only when both candidates are equally qualified based on these criteria must priority be given to the candidate of the underrepresented sex. The chosen criteria may however not be based on sex or adversely affect women, direct and indirect discrimination being prohibited in Icelandic law. This also coincides with the note made in Marschall that such criteria may not discriminate against female candidates. It must therefore be concluded that the priority rule in Icelandic law is not precluded by Article 2(1) and (4) of the Directive as interpreted by the Court in Kalanke and Marschall.

VI. FINAL REMARKS ON THE DEVELOPMENT

The study of the protection of the right to equal access to employment in Icelandic law has in general disclosed conformity to the standards set by those International and European treaties and conventions examined for this purpose. The principle of equality between men and women is incorporated in the Icelandic Constitution and the right in question enjoys special protection of the Equality Act, which further prescribes the obligations involved in this respect. No obvious lack of formal equality has revealed itself. This study has however not involved an examination of the degree to which equal status of the sexes in this field has been achieved in practice. According to the comments of the CEDAW committee with respect to Iceland's report 1996 Iceland still has some way to go in this respect. Real life examples and discussion in the society also suggest that substantive equality has not been reached completely in the country. Employment discrimination still exists and social behaviour and attitudes causing prejudicial effects on women have not been completely eliminated. Discourse on this matter is on the other hand alive and well and various measures outside the legal scope have been taken for this purpose. Individual cases of employment discrimination can be brought to supervisory bodies, i.e. a Complaint committee, and the Courts for review and remedies. In such cases the individual can and should include arguments based on those International and European standards for the strengthening of his or her case.¹⁶⁰ National programs should also take advantage of the standard setting and clarifications of this right on those levels, which is developing in all instances. During the time of the work on this paper fundamental changes took place for the promotion of the equality principle. The supervisory system of CEDAW has been improved with the Optional Protocol providing for a communication procedure and the scope of the ECHR has been widened with protocol No 12. The Amsterdam Treaty, which presently also addresses the question of affirmative action, gave gender equality a treaty basis. Developments have also occurred in the European Community after the Amsterdam Treaty and case-law of the Court leading to amendments to the equal treatment Directive. On the

¹⁶⁰ The Supreme Court's Judgement of 19 December 2000 in case no. 125/2000 is an example of such arguments. In the Judgement reference is made to international Human Rights instruments in construing Article 65 and Article 75 of the constitution, which deals with social matters.

national level there is a new Equality Act which is supposed to improve the status of gender equality and take into account the development which had already taken place in this field on the national as well as the International and European level. This affirms what has been said about the interaction between international and national systems in Chapter IV.5. The forenamed development is well suited for further improving the status of the equality principle as regards access to employment which outcome will be interesting to follow in the years to come.

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