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**LEGAL PROVISIONS FOR DIVERSITY AT A WORKPLACE IN ESTONIA AND THE
EU**

Bachelor's thesis

Programme HAJB, specialisation European Union and International Law

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Tallinn 2020

I declare that I have compiled the paper independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously been presented for grading.

The document length is 9,713 words from the introduction to the end of the summary.

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ABSTRACT

Legislation to ensure diversity and prohibit discrimination in the work environment on the basis of such factors as: race, age and gender has been in place for a long time, however, the rules continue to be broken across Europe. Looking at the issue with Estonia deeper, it can be noted that, according to European Commission, Estonia has also joined and ratified a vast majority of international anti-discrimination treaties, and its constitution also places priority of these provisions above domestic laws. Thus, Estonia should have put the necessary legislation into force, in regard to non-discriminatory procedures and practices. Judicial procedures are in place within Estonia, in the form of the Equal Treatment Act, which entitles a victim of discrimination to demand an end to discrimination and seek compensation, according to European Commission.

The aim of the thesis to be achieved with the research is to investigate legal provisions for diversity at a workplace in Estonia and the EU. As it is still a relevant and important issue for the country. This research applies qualitative and quantitative methods to analyze and answer the research question. Qualitative method is focused on Overview and analysis of Estonian and EU legislation regarding non-discrimination at a workplace; and Analysis of international and EU legal cases. Quantitative method is orientated on Statistical analysis of EU and Estonian courts. Analysis of legal cases clearly presents the difficulty of the problem.

By summarizing all the fact shown above author illustrates particular ways to eliminate

The problem, and concludes that all national laws in Estonia must be fully aligned with their Constitution.

INTRODUCTION

Research topicality

Legislation to ensure diversity and prohibit discrimination in the work environment on the basis of such factors as: race, age, and gender has been in place for a long time, however, the rules continue to be broken across Europe. This is despite companies being prohibited from judging potential or existing employees on anything other than their professional abilities. There is also evidence of veiled questions during job interviews, aimed at finding out, for example, the age of a candidate. This is particularly prevalent in Estonia, where candidates are being explicitly asked their date of birth, even though age or any other form of discrimination is prohibited by the European Council Directive 2000/78/EC, dated 27 November 2000.¹ According to Landman, however, this kind of practice violates the basic human rights and should be forbidden.² Moyn highlights the growing social inequality and stresses that the current human rights legislation is not being followed sufficiently enough.³ Bobbi explains that the observation of human rights is vital for the achievement of the real democracy and internationalization. This explains the importance of the research topic.⁴

Looking at the issue with Estonia deeper, it can be noted that, according to European Commission, Estonia has also joined and ratified a vast majority of international anti-discrimination treaties, and its constitution also places priority of these provisions above domestic laws.⁵ Thus, Estonia should have put the necessary legislation into force, in regards to non-discriminatory procedures and practices.

Judicial procedures are in place within Estonia, in the form of the Equal Treatment Act, which entitles a victim of discrimination to demand an end to discrimination and seek compensation, according to European Commission. Non-judicial procedures are also available, in the form of quasi judicial, conciliation and ombudsman-like procedures, often chaired by the Chancellor of Justice, or local Labour Inspectorates.⁶

¹ Osha (2020); Directive 2000/78/EC – equal treatment. Available at: <https://osha.europa.eu/en/legislation/directives/council-directive-2000-78-ec> [accessed 8 Feb 2020]

² Landman, T. (2006). *Studying human rights*. Psychology Press.

³ Moyn, S. (2018). *Not enough: human rights in an unequal world*. Harvard University Press.

⁴ Bobbio, N. (2017). *The age of rights*. John Wiley & Sons.

⁵ EC (2019); European Commission: Estonia Non-discrimination Report. Available at: <https://www.equalitylaw.eu/downloads/4961-estonia-country-report-non-discrimination-2019-pdf-933-kb> [accessed 6 Feb 2020]

⁶ *ibid*

Additionally, Estonia also has an oversight body, responsible for the promotion of equal treatment – the Commissioner for Gender Quality and Equal Treatment (The Commissioner). They began with the reduction of workplace sex discrimination, but since 2009, now deal with all forms of discrimination, and promote its removal from Estonian society.⁷

The Commissioner's portfolio of anti-discrimination matters, qualify this body as being pro-diversity, as their remit covers ethnicity, religion, identification and belief systems, plus sexual orientation. Commonly known diversity forms are also just as important to The Commissioner, such as gender, age, disability, skin color, appearance and racial origin.⁸

Estonia's anti-discrimination credentials, in terms of legislation and the variety of bodies established nationally and locally, suggest a thorough and comprehensive approach to non-discrimination in their society. Furthermore, according to EC, Estonia's laws closely follow European Council Directive 2000/78/EC and it can be concluded that this country has all legislation in place to apply effective reduction and removal of discrimination.⁹

But how diverse is Estonia? According to an empirical study by Garlick (2017) during the Opinion Festival, the diversity found in real Estonian life for those who are non-Estonian, can be described as relatively poor. Surveyed immigrants including an African-American, a Latin-American and most Russians who live there (25% of the population), experienced daily discrimination at work and socially. A positive aspect found however, was that Estonians, especially in the capital city Tallinn, readily conversed in English with non-Estonians.¹⁰

Conversation in a common language, ensures accurate communication of meaning, which is an essential element for applying diversity (at the very least) in the workplace, according to J. Lauring¹¹. According to J. Lauring, the New Phadk organization in Denmark have pioneered and developed a global diversity knowledge base, to optimise corporate diversity and provide significant competitive advantage. Their primary corporate directive, is that everything in the workplace must be conducted in the English language, so that diversity is fully understood – even informal ethnic language conversations are banned within the company grounds.¹²

⁷ *ibid*

⁸ EC (2019); European Commission: Estonia Non-discrimination Report. Available at: <https://www.equalitylaw.eu/downloads/4961-estonia-country-report-non-discrimination-2019-pdf-933-kb> [accessed 6 Feb 2020]

⁹ *ibid*

¹⁰ Garlick, S. (2017); How Diverse is Estonia? Available at: <https://www.arvamusfestival.ee/en/how-diverse-is-estonia/> [accessed 6 Feb 2020]

¹¹ Lauring, J. (2009); Managing cultural diversity and the process of knowledge sharing: A case from Denmark. *Scandinavian Journal of Management*, 25(4), 385-394.

¹² *ibid*

What is diversity? According to GGSC Berkley, diversity refers to human life itself, which includes many unique individuals - who are what they are and should not be disadvantaged because of those differences.¹³ Embracing diversity can drive culture, social and economic vitality, innovation, understanding and competitiveness in positive directions. The concept of diversity was derived from years of study that social intolerance erodes the above benefits whenever it arises. Diversity therefore, became an important and developing science, which when applied properly, improves society and business performance.¹⁴

Research problem

Therefore, the problem of this research is insufficient assurance of workplace diversity in Estonian and EU enterprises.

The aim to be achieved with the research is to investigate legal provisions for diversity at a workplace in Estonia and the EU.

Research question:

- What can be implemented in Estonia in order to improve diversity at the workplace in Estonia?

Research methods:

The research will use mixed methods (qualitative and quantitative):

Qualitative methods:

- Overview and analysis of Estonian and EU legislation regarding non-discrimination at a workplace;
- Analysis of international and EU legal cases.

Quantitative methods:

- Statistical analysis of EU and Estonian courts.

Thesis structure

The paper consists of an introduction, two main chapters and conclusions.

The first chapter is dedicated to a review of the literature (peer reviewed academic articles); related to the research topic, as well as a review of opinions of various authors in legal field regarding the diversity at a workplace.

¹³ GGSC Berkley (2020); What is Diversity? Available at: <https://greatergood.berkeley.edu/topic/diversity/definition> [accessed 6 Feb 2020]

¹⁴ GGSC Berkley (2020); What is Diversity? Available at: <https://greatergood.berkeley.edu/topic/diversity/definition> [accessed 6 Feb 2020]

The second chapter is dedicated to the analysis of legal acts that provide for diversity at a workplace in Estonia and in the EU and the analysis of legal cases, related to this field of legal study.

Finally, conclusions are made regarding the problems with application of diversity legislation and recommendations developed for improvement of the situation with diversity at the workplace in Estonia.

1. DIVERSITY AT A WORKPLACE: LEGAL ASPECTS

1.1. The origins and history of diversity legislation

The history of diversity starts in a country that was highly discriminatory for the first 150 years since it is founding, the United States of America (US). With the First World War (WWI) and the 1920s Jazz age, the US could no longer ignore the rising strength of more diverse cultures, such as African- and Latin-Americans.¹⁵

In the absence of specific legislation, the US workforce was almost entirely white-male in the late 19th century, but the rise of women in the workplace and ethnic minorities was increasing rapidly, due to a shortage of able workers.¹⁶ A. Baron concludes that the development of the manufacturing and growing industrialization have forced the “sex-structuring” of the professions to change in order to maintain the supply of the necessary workforce, which resulted in more women working and has set the foundation for acceptance of women at work, performing roles, previously considered “masculine”.¹⁷

Even though women comprised 53% of the workforce by 1930, they were typically engaged in lower employment rolls, e.g. secretaries, clerks, etc. Ethnic minorities fared worse, taking up the lowest forms of employment, e.g. servants, porters, gardeners, etc.¹⁸

WWI gave rise to a massive expansion of female employment, which included advanced engineering, design and analytical skills, to power the war effort, whilst many men were tasked to fight on the front, according to E. K. Rose.¹⁹ After women returned from WWI activities and obtained regular employment, they found that often, their skills surpassed the average male equivalents at the time, according to R. Wagner.²⁰ However, the research of the level and structure of employment before, during and after the WWI, conducted by E. K. Rose provides the evidence that the rise of female employment during the War was influenced by industrial mobilization,

¹⁵ Wagner, R. (2017); The History of Diversity in the Workplace. Available at: <https://bizfluent.com/about-5463620-history-diversity-workplace.html> [accessed 7 Feb 2020]

¹⁶ *ibid*

¹⁷ Baron, A. (1982). Women and the making of the American working class: A study of the proletarianization of printers. *Review of Radical Political Economics*, 14(3), 23-42.

¹⁸ Wagner, R. (2017); The History of Diversity in the Workplace. Available at: <https://bizfluent.com/about-5463620-history-diversity-workplace.html> [accessed 7 Feb 2020]

¹⁹ Rose, E. K. (2018). The rise and fall of female labor force participation during World War II in the United States. *The Journal of Economic History*, 78(3), 673-711.

²⁰ Wagner, R. (2017); The History of Diversity in the Workplace. Available at: <https://bizfluent.com/about-5463620-history-diversity-workplace.html> [accessed 7 Feb 2020]

rather than by the fact, that many men have left to perform their military duties.²¹ When the War was over, E. K. Rose explains, many of working women were replaced by returning men, even when women would have preferred to continue working.²² This combination of rising self-confidence in women and the disagreement with the fact that they are still being forced to stay at home, has empowered the drive for equality for women from 1920 onwards and gave rise to several political groups representing women's interests, described by R. Wagner.²³

In the United Kingdom (UK), S. Haynes explains that the suffragist leader – Emmeline Pankhurst was also demanding change for women's rights in Britain, during the years just before WWI. She protested (and later wrote) that men define the moral code and expect women to follow it.²⁴

So powerful was her conviction to the women's suffragist movement, she killed herself by stepping in front of the British King's horse at the Epsom Derby in 1913, thus elevating her status to that of a martyr. It would take a further five years for the UK government to pass the Representation of the People Act 1918, which allowed women over 30 to vote in UK General Elections.²⁵ Only in 1928, did this amended act give women full and equal voting rights to men, according to C. Burns.²⁶

The first US government body to safeguard women's rights in the workplace was formed in 1920, known as the Women's Bureau of the Department of Labor. For African-Americans however, no such recognition of rights was forthcoming, and so in 1935, The National Council of Negro Women was founded to lobby Congress to fight racism, discrimination and sexism in US society.²⁷ The Second World War (WWII) would provide the next great impetus for women's rights in the US and UK, with large numbers of working age women, filling the roles normally reserved for male citizens at the time. With far more modern technology, early electronics and computing,

²¹ Rose, E. K. (2018). The rise and fall of female labor force participation during World War II in the United States. *The Journal of Economic History*, 78(3), 673-711

²² *ibid*

²³ Wagner, R. (2017); The History of Diversity in the Workplace. Available at: <https://bizfluent.com/about-5463620-history-diversity-workplace.html> [accessed 7 Feb 2020]

²⁴ Haynes, S. (2018); What 100 Years of British Women's Suffrage Says About Women's Rights Today. Available at: <https://time.com/5134820/british-suffragettes-centenary-women-rights-inequality/> [accessed Feb 7 2020]

²⁵ *ibid*

²⁶ Burns, C. MBE (2009); A Brief History of Equalities Law in the UK. Available at: <http://blog.plain-sense.co.uk/2009/02/brief-history-of-equalities-law-in-uk.html> [accessed 7 Feb 2020]

²⁷ Wagner, R. (2017); The History of Diversity in the Workplace. Available at: <https://bizfluent.com/about-5463620-history-diversity-workplace.html> [accessed 7 Feb 2020]

women would again obtain the highest levels of skill, to facilitate the battles largely fought by men.²⁸

Additionally, the enrolment of African-American male soldiers and aviators to fight WWII was a pressing need during WWII America, which resulted in widespread rebuke and discrimination within their ranks.²⁹ The result after WWII was the signing of Executive Order 9981 into law during 1948 by President Harry S. Truman. This order stopped the segregation of armed forces troops and thus discrimination based on color, race, religion or ethnic origin, and marks a milestone in the development of discrimination and diversity legislation, according to R. Showers.³⁰

After widespread African-American protests and riots in the US from 1955, and a well-organized civil rights movement, under the leadership of Martin Luther King and others, the Civil Rights Act 1964 was passed in America.³¹ This marked a defining moment in comprehensive anti-discrimination law, making discrimination illegal across all aspects of US society, especially in employment and public amenities. Segregation of ‘black’ and ‘white’ Americans in society was officially outlawed, but informal discrimination persisted into the 21st century, as discussed in a moment.³²

The UK further matched the US with new equality and civil rights laws, with the 1965 Race Relations Act (to address race discrimination), and a further Equal Pay Act 1970 (to promote equal pay for men and women doing similar jobs within an organization), according to C. Burns.³³

R. Showers asserted that US technology corporations in the 21st century continue to hide their diversity credentials, by legally and successfully limiting their disclosures to the US Department of Labor. Half of Silicon Valley technology giants claimed that diversity disclosure would create competitive harm, citing US trade secret protection law.³⁴

²⁸ Wagner, R. (2017); The History of Diversity in the Workplace. Available at: <https://bizfluent.com/about-5463620-history-diversity-workplace.html> [accessed 7 Feb 2020]

²⁹ Showers, R. (2016); A Brief History of Diversity in the Workplace. Available at: <https://www.brazen.com/blog/recruiting-hr/a-brief-history-of-diversity-in-the-workplace-infographic/> [accessed 7 Feb 2020]

³⁰ *ibid*

³¹ Jenkins, J. C., Jacobs, D., & Agnone, J. (2003). Political opportunities and African-American protest, 1948–1997. *American Journal of Sociology*, 109(2), 277-303

³² Showers, R. (2016); A Brief History of Diversity in the Workplace. Available at: <https://www.brazen.com/blog/recruiting-hr/a-brief-history-of-diversity-in-the-workplace-infographic/> [accessed 7 Feb 2020]

³³ Burns, C. MBE (2009); A Brief History of Equalities Law in the UK. Available at: <http://blog.plain-sense.co.uk/2009/02/brief-history-of-equalities-law-in-uk.html> [accessed 7 Feb 2020]

³⁴ Showers, R. (2016); A Brief History of Diversity in the Workplace. Available at: <https://www.brazen.com/blog/recruiting-hr/a-brief-history-of-diversity-in-the-workplace-infographic/> [accessed 7 Feb 2020]

Unlike the US however, the UK advanced their diversity laws, with the Disability Discrimination Act of 1995, and accepted the social provisions of European Union (EU) law after the UK's New Labor party won the 1997 general election.³⁵

The EU then overhauled and created new directives from the year 2000, with comprehensive regulations to protect diversity, including: sexual orientation and religious belief, whilst directives against discrimination on the grounds of age, disability, ethnicity and gender were all toughened and realigned.³⁶

Another aspect of diversity that should be mentioned is “cultural diversity”, which has not yet been clearly defined by researchers, as M. Burri notes.³⁷ M. Burri notes that the definition of the term “cultural diversity” is sometimes focused on “biological diversity”, whilst on other occasions is correlated to “exception culturally” or simply as a loosely defined phenomenon that is used to improve the negative effects of continuous globalization of the modern economies, political and legal environments.

1.2. Main definitions of diversity legislation in Estonia and the EU

Estonia's Language Act 2011 states that the Estonian language is to be used in all aspects of public life, but allows a national minority language to be used by local authorities, if at least half of residents use the minority language.³⁸ Furthermore, there are no specific provisions in the act for adopting a second common diversity language, such as Russian or English. According to J. Soler-Carbonell, this policy, designed to preserve the Estonian language in times of internalization, may face some issues because of internalization.³⁹ According to Estonia, the composition of the Estonian population in 2010 was: Estonian 68%, Russian 25%, Ukrainian 2%, Belarusian 1% and Finnish 1% and other nationalities 3% (described as Jewish, Tartar, German, Latvian, Polish and Lithuanian).⁴⁰ Estonia also states that six towns in Estonia are mostly Russian speakers, with

³⁵ Burns, C. MBE (2009); A Brief History of Equalities Law in the UK. Available at: <http://blog.plainsense.co.uk/2009/02/brief-history-of-equalities-law-in-uk.html> [accessed 7 Feb 2020]

³⁶ *ibid*

³⁷ Burri, M. (2010). Cultural diversity as a concept of global law: Origins, evolution and prospects. *Diversity*, 2(8), 1059-1084.

³⁸ RT (2020a); Riigi Teataja: Language Act. Available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/504122019002/consolide> [accessed 7 Feb 2020]

³⁹ Soler-Carbonell, J. (2015). Language policy in Estonian higher education: internationalisation and the tension over English. *The English language in teaching in European higher education*, 247-268.

⁴⁰ Estonica (2020a); Composition of the population. Available at: http://www.estonica.org/en/Society/Population/Composition_of_the_population/ [accessed 8 Feb 2020]

Estonian language in the minority.⁴¹ Furthermore, Estonians are described as being a long-standing multilingual people, often having good levels of fluency in Russian, English, German or Finnish.⁴² It can be concluded that Estonia and its people are quite protective of their Estonian language, but are predominantly open to speak the language of other visitors and residents where possible. Estonians are said to often proactively stop the use of Estonian in conversation, in favor of e.g. Russian, English or German.⁴³ In terms of diversity fundamentals, it is clear that the Estonian authorities are using English translations as a common second language, visible especially on their government and national websites, with Russian versions also featuring highly and other languages. The studies by J. Lauring suggest that the official selection of an appropriate common language, based on applicable circumstances, is key to the successful implementation of comprehensive diversity.⁴⁴ In the J. Lauring New Phadk study in Denmark that selected most common, language happened to be English (since they are a global corporation).⁴⁵ In the case of Estonia, the widespread use of English is obvious, but perhaps in some circumstances, Russian language may be more helpful as a second language, for better diversity understanding in e.g. the six Russian majority towns in Estonia.

Using the English version RT Estonia legislation database, the search terms: diversity, discrimination, race, minority and ethic were used.⁴⁶ These terms provided no laws with those words in the title. The term equality however, returned the Gender Equality Act 2004. The main provisions of this act state that men and women should be treated equally in all aspects of Estonian life, but the law excludes religious practice, family and private life.

After searching RT using the term diversity within the body of text, 20 current laws were returned. Since diversity is about tolerance in society of human differences – in particular, cultural heritage. One returned item was Estonia's Heritage Conservation Act 2019, which could perhaps have presented problems for diversity. However, the main aims are the preservation of cultural diversity in general. Since there is no specific mention of Estonian cultural heritage, this appears to be fully in line with diversity fundamentals.

⁴¹ Estonica (2020b); Other languages in Estonia. Available at: http://www.estonica.org/en/Society/The_Estonian_Language/Other_languages_in_Estonia/ [accessed 8 Feb 2020]

⁴² *ibid*

⁴³ *ibid*

⁴⁴ Lauring, J. (2009); Managing cultural diversity and the process of knowledge sharing: A case from Denmark. *Scandinavian Journal of Management*, 25(4), 385-394

⁴⁵ *ibid*

⁴⁶ RT (2020); Riigi Teataja: Search. Available at: <https://www.riigiteataja.ee/en/search> [accessed 7 Feb 2020]

Similarly, the Private Schools Act amended 1998, also provides for the diversity of education, so that schools operated privately, outside the state education system, are free to provide a diverse range of lessons. These schools are also afforded financial support from local authorities, which effectively subsidizes the necessary private fees to be charged by these schools.⁴⁷

Additionally, the Basic Schools and Upper Secondary Schools Act 2010, specifically supports comprehensive diversity in curriculum and teaching practice, without any preconditions about what is to be learned or how material is presented.⁴⁸ Again, this is fully aligned with comprehensive diversity principles in education, where it can define societal attitudes from an early age - in basic schools.⁴⁹

It should be noted that diversity, by implication, often refers to minority groups or individuals. Estonians themselves also have equal rights to express their diverse culture and not reduce in any way their culture. Diversity works in all ways and Estonians are entitled, like all others, to express themselves and not change their identity.

According to S. Deakin, the goal of the EU is to ensure integration of the member states and to provide a diverse environment for the population, including diverse environment at a workplace⁵⁰. S. Deakin notes that in order to facilitate this integration, an approach of harmonization of labour and corporate law has been taken, which is, nevertheless, widely criticized.⁵¹ Thus, harmonizing labor and corporate law will allow employees to feel they have more rights at a workplace and also provide a ground and a framework for legal disputes should the necessity of such arise.

As a member of the EU, Estonia is required to follow EU directives in terms of diversity. The EU's diversity laws are numerous, and include the previously mentioned European Council Directive 2000/78/EC.⁵² This directive is concerned with applying a framework for equal treatment of people at work, regardless of belief or religion, age, disability and sexual orientation. The directive is applicable to the access rights of employed or self-employed people to gain work opportunity and promotion, training and guidance where available. Also required are equal pay, working conditions

⁴⁷ RT (2020); Riigi Teataja: Search. Available at: <https://www.riigiteataja.ee/en/search> [accessed 7 Feb 2020]

⁴⁸ RT (2020c); Riigi Teataja: Basic Schools and Upper Secondary Schools Act. Available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/503062019007/consolide> [accessed 7 Feb 2020]

⁴⁹ RT (2020b); Riigi Teataja: National curriculum for basic schools. Available at: <https://www.riigiteataja.ee/en/eli/ee/VV/reg/524092014014/consolide> [accessed 7 Feb 2020]

⁵⁰ Deakin, S. (2006). Legal Diversity and Regulatory Competition: Which Model for Europe?. *European Law Journal*, 12(4), 440-454.

⁵¹ *ibid*

⁵² Osha (2020); Directive 2000/78/EC – equal treatment. Available at: <https://osha.europa.eu/en/legislation/directives/council-directive-2000-78-ec> [accessed 8 Feb 2020]

and disciplinary procedures. Membership of groups (e.g. trade unions) are protected, including access to those that require specific membership to engage within a profession.⁵³

Directive 2014/95/EU (amends 2013/34/EU Article 20) is concerned with the disclosure of diversity and non-financial (e.g. environmental, quality, etc.) information, by certain large organizations and groups, within the European Economic Area (EEA).⁵⁴ Specifically mentioned is the term – Corporate Social Responsibility (CSR) and the disclosure of diversity policy within the corporate governance statements, as required by 2013/34/EU.⁵⁵ The most recent directive inserts a paragraph for disclosure into the earlier directive, for provision of a diversity policy or the reasons for its absence. The diversity policy must contain descriptions in regards to e.g. age, gender, educational and professional backgrounds.

Equality Law, who explain that Directive 2006/54 /EC is a recast of early regulations regarding equal opportunities and treatment of women and men at work, summarizes other main diversity related EU directives.⁵⁶ This includes prohibiting sex discrimination, harassment and the restriction of access to various work-related opportunities, provisions similar to 2000/78/EC.

Provisions to prohibit discrimination of member state social security schemes are the subject of an early Directive 79/7/EEC, and for the self-employed – Directive 2010/41/EU. Discrimination in regard to goods and services are also prohibited by Directive 2004/113/EC, whilst pregnancy and part-time working related directives are covered by 92/85/EEC, 2010/18/EU and 97/81/EC. However, none of these relate to most diversity fundamentals and focus on narrow aspects of human life e.g. employment, consumption and social security.

It can be concluded that the EU is well behind Estonia in terms of specific diversity legislation, with the EU apparently unable to pass recent and specific diversity directives. According to Europa, there remains a significant discrimination problem within many other EU member states, having to raise awareness now, given that 20th century US and the UK have been applying solutions for decades to these very issues.⁵⁷

⁵³ Osha (2020); Directive 2000/78/EC – equal treatment. Available at: <https://osha.europa.eu/en/legislation/directives/council-directive-2000-78-ec> [accessed 8 Feb 2020]

⁵⁴ Lex (2020); Directive 2014/95/EU – disclosure of non-financial and diversity information. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095> [accessed 9 Feb 2020]

⁵⁵ Lex (2020a); Directive 2013/34/EU – annual financial statements and related reports. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0034> [accessed 9 Feb 2020]

⁵⁶ Equality Law (2020); Key EU directives in gender equality and non-discrimination. Available at: <https://www.equalitylaw.eu/legal-developments/16-law/76-key-eu-directives-in-gender-equality-and-non-discrimination> [accessed 9 Feb 2020]

⁵⁷ Europa (2020); Tackling discrimination. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination_en [accessed 9 Feb 2020]

1.3. Current issues with workplace inclusion

In 1997, Prasad and Mills noted that whilst many organizations are embracing multiculturalism and diversity at a workplace and whilst the researchers praise these concepts and analyses the benefits they provide to businesses and public sector, there is still considerable dissatisfaction amongst “minorities”.⁵⁸ Prasad and Mills also mention that women at work continue to feel undervalued.⁵⁹ Today, 23 years later, it seems the things have changed at least, to some extent. New dimensions of equality and diversity were embraced, along with an introduction of according regulations. The importance of equality cannot be underestimated, according to L. Dickens, who notes that it allows to achieve a healthy work-life balance.⁶⁰

According to a number of academic studies, conducted within recent years, even today, with seemingly sound legal provisions for ensuring inclusion at a workplace, employees of the EU organizations are facing discrimination on various grounds, such as sexual orientation, age, nationality, religion, etc. Some of these studies are discussed below.

On the matter of non-inclusion and discrimination at work on the basis of sexual orientation, a study, conducted by T. Wright *et al.* concludes that LGBT employees are not comfortable enough with being open about their sexual orientation with their colleagues and often hide it.⁶¹ The study, which was performed after Employment Equality (Sexual Orientation) Regulation 2003 was introduced in the UK and took two years, revealed that in the UK (a member of the EU at a time of the study) only 57.8% of LGBT employees were completely open about their sexual orientation with their colleagues, 33.8% were only open to some closer friends, whilst the rest were hiding their sexual orientation at their workplace.⁶² Considering that this study concerned 16 companies, chosen for claiming “Good practice” with regards to the new Regulation, these results are concerning, since one can only assume what they would have been, if the case organizations were chosen without consideration of compliance with the Regulation. To confirm this conclusion, J.

⁵⁸ Prasad, P., & Mills, A. (1997). Understanding the dilemmas of managing workplace diversity. *Managing the organizational melting pot: Dilemmas of workplace diversity*, 1.

⁵⁹ *ibid*

⁶⁰ Dickens, L. (2006). Equality and work-life balance: what’s happening at the workplace. *Industrial Law Journal*, 35(4), 445-449

⁶¹ Wright, T., Colgan, F., Creegany, C., & McKearney, A. (2006). Lesbian, gay and bisexual workers: equality, diversity and inclusion in the workplace. *Equal opportunities international*, 25(6), 465-470.

⁶² *ibid*

C. Pizer *et al.* in their research provide evidence of persistent discrimination against LGBT employees at a workplace.⁶³

P. Urwin raises concerns regarding issues of employee age and differing treatment at work. Whilst P. Urwin recognizes that the reason for such differing treatment from employer's viewpoint would most likely be the consideration of risks involved in employing an older individual and the return of the investment into that employee in terms of training, for example.⁶⁴ It is commonly perceived, according to P. Urwin that younger candidates represent a better investment, since they can be developed into valuable specialists in a long run and, if they remain employed at the company for long enough, the returns they will bring exceed any costs they require.⁶⁵ However, as P. Urwin notes, there are no guarantees that these younger candidates will stay with the company for any considerable or viable period and that; in fact, they are more likely to change employers than older employees, since older employees are more likely to be looking for stability, rather than dynamics, active development and change.⁶⁶ Therefore it should be considered by organizations that it is important to evaluate the potential time an employee is likely to stay with the organization rather than their age, especially so when the tension ages are rising.

Looking at the effects of the legislation regarding age discrimination at work introduced in the UK (now part of Equality Act 2010), E. Parry and S. Tyson have found that this legislation has motivated many organizations not only to comply with it, but to also modify their HR policies accordingly and make it part of the company policy.⁶⁷ These companies make provisions for equality, but it is also important to ensure that diversity is catered for appropriately. For example, K. C. Cash and G. R. Gray note that it is important to provide for religious needs of employees – such as a place to pray and breaks for times of a prayer.⁶⁸

It can be seen that in countries, such as the UK, where multiculturalism is very common, diversity and workplace inclusion are concepts that are quite easily accepted and adopted. However, the research conducted by D. N. Ocholla on South African organizations – a country with less diverse

⁶³ Pizer, J. C., Sears, B., Mallory, C., & Hunter, N. D. (2011). Evidence of persistent and pervasive workplace discrimination against LGBT people: The need for federal legislation prohibiting discrimination and providing for equal employment benefits. *Loy. LAL Rev.*, 45, 715.

⁶⁴ Urwin, P. (2006). Age discrimination: legislation and human capital accumulation. *Employee Relations*, 28(1), 87-97

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ Parry, E., & Tyson, S. (2009). Organizational reactions to UK age discrimination legislation. *Employee Relations*, 31(5), 471-488.

⁶⁸ Cash, K. C., & Gray, G. R. (2000). A framework for accommodating religion and spirituality in the workplace. *Academy of management perspectives*, 14(3), 124-133

workforce, found that there is no particular concern about diversity in the researched organizations and that focusing on these areas may divide people instead of uniting them.⁶⁹

However, the EU in itself is a very diverse formation of countries with differing cultures and mentalities, free movement of people allowed the locals to get used to other nationals, people of different religions, sexual orientations, etc. Therefore, the focus on improving diversity provisions in legislation and also in company policies is beneficial.

It is important to mention that designing and implementing logical and potentially beneficial legislation to promote workplace inclusion and ban discrimination of employees and job candidates is not enough. It is equally important to ensure this legislation will work, as noted by J. Niessen.⁷⁰ To achieve that, J. Niessen suggests ensuring the use of this legislation by all of the stakeholders⁷¹, for example, as noted by E. Parry and S. Tyson – incorporation of legislation into company HR policies.⁷² The use of the legislation is achieved by proactive policies and the use of the law by judicial interventions.⁷³

According to R. M. Blackburn *et al.*, one of the aims of the legislation, designed to counter discrimination is the reduction of division of professional roles by sex.⁷⁴ This relates to issues with equal pay for women and also equal opportunities across the occupations, according to H. C. Jani *et al.*⁷⁵ According to J. Acker, this division of occupational roles still exists through unequal practices – ‘loosely interrelated practices, processes, actions and meanings that result in and maintain class, gender and racial inequalities within particular organizations’⁷⁶. This is confirmed by A. Broadbridge and J. Hearn, who note that many organizations are still unable to provide equal terms of employment and opportunity to men and women.⁷⁷ E. French and G. Strachan have conducted a research on construction industry in Australia and found that, even though there are

⁶⁹ Ocholla, D. N. (2002). Diversity in the library and information workplace: a South African perspective. *Library management*, 23(1/2), 59-67

⁷⁰ Niessen, J. (2003). Making the law work. The enforcement and implementation of anti-discrimination legislation. *European Journal of Migration and Law*, 5(2), 249-257.

⁷¹ *ibid*

⁷² Parry, E., & Tyson, S. (2009). Organizational reactions to UK age discrimination legislation. *Employee Relations*, 31(5), 471-488

⁷³ Niessen, J. (2003). Making the law work. The enforcement and implementation of anti-discrimination legislation. *European Journal of Migration and Law*, 5(2), 249-257.

⁷⁴ Blackburn, R. M., Browne, J., Brooks, B., & Jarman, J. (2002). Explaining gender segregation. *The British journal of sociology*, 53(4), 513-536

⁷⁵ Jain, H.C., Sloane, P.J., and Horwitz, F.M. (2003), *Employment Equity and Affirmative Action: An International Comparison*, M.E. Sharpe, Armonk, NY.

⁷⁶ Acker, J. (2006). Inequality regimes: Gender, class, and race in organizations. *Gender & society*, 20(4), 441-464. p.201

⁷⁷ Broadbridge, A., & Hearn, J. (2008). Gender and management: New directions in research and continuing patterns in practice. *British Journal of Management*, 19, S38-S49.

specific laws, designed to ensure equality at work in this dimension and companies appear to formally comply with them, there is no real inclusion and growth in women in construction industry.⁷⁸

This suggests that the issues of diversity are deeper than legal provisions, they may also lie within the set views and attitudes of so called ‘minorities’ themselves, which suggests that the legislation, introduced to empower women, LGBT, older people and others, is playing a supportive role in real diversification of the labor force, whilst it depends on the development of the society as a whole to embrace individuals of any external characteristic and value what they really are and what they can do. From the business viewpoint this would be – what value can they add to an organization, based on their skills, experiences and qualifications.

⁷⁸ French, E., & Strachan, G. (2015). Women at work! Evaluating equal employment policies and outcomes in construction. *Equality, Diversity and Inclusion: An International Journal*, 34(3), 227-243.

2. METHODS OF PROVISION DIVERSITY AT A WORKPLACE IN ESTONIA AND THE EU

2.1. Analysis of legal acts (non-discrimination provisions)

The detailed provisions of Directive 2000/78/EC can be found in Lex website⁷⁹, with Article 1 stating that the directive provides a framework to combat discrimination on the basis of belief or religion, age, disability and sexual orientation in employment or occupation. These are sound diversity fundamentals, but the article does not mention gender, culture, appearance or behavior. Article 2 explains the meaning of discrimination and defined the principle of equal treatment being direct or indirect discrimination on any of the grounds in Article 1. Direct discrimination is defined as one person being treated differently to another in a comparable situation, on the grounds within Article 1.⁸⁰

Indirect discrimination occurs when a neutral practice, provision or criterion (circumstances) places persons at a disadvantage on the grounds of Article 1, unless this can be justified to achieve a legitimate aim that is appropriate and necessary; or the circumstance would require appropriate measures to be taken to remove that disadvantage (specifically mentioned for a person with a disability).⁸¹

As a thought experiment, Article 2 suggests that a disabled person who requires special controls to operate a machine, would not be able to rely on this directive for employment, but would only be covered against discrimination, if the employment role were within their natural capacity. Furthermore, the caveats in Article 2 (and absences, e.g. gender) could easily be used by employers, based on a legitimate, appropriate and necessary aims, or simply, the candidate is not adequate enough to perform the task without additional measures being implemented. It seems obvious that those with gender, disability and age issues would find directive 2000/78/EC rather unsupportive in cases where employers fully understand the scope and application of this directive. Similarly limited, appears to be Directive 2013/34/EU, amended by 2014/95/EU, which only applies to certain large organization and groups, so there is no diversity policy requirement in these directives for the majority of EU employers. The amendment of Article 20, it also non-specific,

⁷⁹ Lex (2020b); Directive 2000/78/EU – framework for equal treatment in employment and occupation. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0078> [accessed 9 Feb 2020]

⁸⁰ *ibid*

⁸¹ *ibid*

vague and non-binding, since the reasons for absence of a diversity policy in regulatory corporate statements could be numerous and creative.

When the EU compiled this amendment, perhaps they were aware of the US legal issues on this matter, highlighted by R. Showers⁸², which allows half of America's technology corporations to withhold diversity disclosures on the grounds of competitive harm and trade secrecy. The EU could have been intentionally helping their corporations to compete on legally level terms with the US; however, this would require further research to confirm.

The recast Directive 2006/54/EC was meant to align and clarify directives in the area of male and female gender equality in employment or occupation. Article 1, outlines the scope of the directive - equal access to employment rolls, promotion and training, equal conditions and pay and unbiased work related social security.

Article 2 definitions include:

- 'direct discrimination' – a person being treated less favorably in similar situations, on the grounds of sex (gender);
- 'indirect discrimination' – follows the wording of 2000/78/EC, but is applied on the grounds of gender, without the caveats of 2000/78/EC;
- 'harassment' – constitutes unwanted conduct in relation to sex (gender), where those behaviors violate dignity, are intimidating, degrading, hostile, offensive or humiliating;
- 'sexual harassment' – is as for 'harassment', but the conduct must be of a sexual nature;
- 'pay' – monetary or other benefit to an employee, with respect to employment;
- 'Occupational social security schemes' – all employment related social security schemes not governed by progressive implementation Directive 79/7/EEC.⁸³

Furthermore, the directive extends the meaning of discrimination to include:

- 'harassment' and 'sexual harassment', including the less favorable treatment because of the rejection of such conduct;
- instruction to discriminate by proxy, against a person on the grounds of sex (gender);

⁸² Showers, R. (2016); A Brief History of Diversity in the Workplace. Available at: <https://www.brazen.com/blog/recruiting-hr/a-brief-history-of-diversity-in-the-workplace-infographic/> [accessed 7 Feb 2020]

⁸³ Lex (2020c); Directive 2006/54/EC – equal opportunities and treatment of men and women in employment and occupation. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054> [accessed 9 Feb 2020]

- Less favorable treatment to pregnant women or thereafter, their maternity leave, within the scope of Directive 92/85/EEC.⁸⁴

Although Directive 2006/54/EC resolves the gender shortcomings of 2000/78/EC and does not allow caveats for employers to possibly exploit, so is diversity positive. The recast 2006/54/EC directive does not improve however, the unsupportive environment that disability and age challenged candidates and workers may face.

Additionally, diversity aspects of culture, appearance or behavior, appear to be absent and suggest the EU has limited ability or desire to address all diversity issues. Modern directives that support comprehensive diversity societies need clear wording, against which employers cannot apply their discretion. Estonia's nation laws related to diversity, appear to be far more inclusive and detailed, with a clear understanding of diversity in most common aspects of human life.

Given the scope of the EU directives outlined above (since at least the year 2000) and their limited scope, alongside the EU's effective call to action as described by Europa⁸⁵, it can be assumed that EU diversity regulations are not going to readily address the shortcomings of some member states. Progressive members such as Estonia, as highlighted by their diversity-related regulations above, do seem to have applied much thought and consideration into writing excellent diversity laws, in particular basic school curricular.⁸⁶

In summary, EU directives do not adequately protect the diversity of citizens, due to widespread variety, room for interpretation and optional nature of certain clauses. Employers with a basic knowledge of EU law will leave many diverse workers challenged to find and keep their employment, especially those with disability, age and identity diversity.

The sidestepping colonel for disability diversity is the avoidance of special provisions for those employees in the workplace, which is highly discriminatory. This is so because many practical provisions are occasionally required, often require one-time capital expense – e.g. in IT, disability software or periphery equipment (keyboards, etc.) for better accessibility. Modification of machine tools can be simple and inexpensive, to allow disabled workers to operate them safely. The EU could resolve this by e.g. compelling companies to show a minimal turnover expenditure on

⁸⁴ Lex (2020c); Directive 2006/54/EC – equal opportunities and treatment of men and women in employment and occupation. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054> [accessed 9 Feb 2020]

⁸⁵ Europa (2020); Tackling discrimination. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination_en [accessed 9 Feb 2020]

⁸⁶ RT (2020b); Riigi Teataja: National curriculum for basic schools. Available at: <https://www.riigiteataja.ee/en/eli/ee/VV/reg/524092014014/consolide> [accessed 7 Feb 2020]

diversity provisions – covering disability, age and identity, with penalties equal to or double the amount not spent.

A particular problem in the EU appears to be ageism, with lip service being paid to job applications for those over 50. A solution for the EU to consider would be to compel companies to publish in annual reports that they employ the same demographics as their host nations, to reflect a workforce that is similar to the local population. Companies may find that with their diversity provisions, the transition is productive and the added worker experience will enlighten the younger workers.

2.2. Analysis of legal cases

In this chapter, the substance and findings of three Estonian legal cases and one EU case will be outlined, analyzed and author opinions given, as to the implications for diversity legal protection for diverse Estonians and EU citizens in general.

H. Insler v Viru Dept. Estonian Health Insurance Fund

Case No. 3-4-1-12-10 (Constitutional Judgement 7 June 2011)⁸⁷

In essence, this judgment found that the Estonian Health Insurance Act (HIA) preclusion in 57(6) that people of 65 years old and older cannot claim sickness benefit for more than 90 day per annum, (250 days per annum for those under 65) was unconstitutional and invalid.

In summary, a 67 year old working pensioner, Heino Insler, was an insured employee for the purposes of the HIA, and was temporarily unable to work due to certified sickness and later had a working accident and was on sickness for a period that extended beyond the 90 day limit in 2009, set by the HIA for those of at least 65 years old. The civil plaintiff (Insler) sued the Estonian (Viru) Health Insurance Fund (VHIF) on 7 September 2009 for annulment of their decision to stop sickness benefits and on 9 October 2009 for the grant the temporary sickness benefits.

In judgment, the Tartu Circuit Court satisfied in part an earlier appeal by VHIF due to incorrect application of substantive law, but annulled the VHIF orders and gave the respondent time to review their earlier decisions. Additionally, the court found that the clause in HIA part 57(6) was

⁸⁷ Riigikohus (2011); Constitutional Judgement 3-4-1-12-10. Available at: <https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-12-10> [accessed 18 February 2020]

unconstitutional and did not apply, giving VHIF new terms of reference for their review of Insler's case.

Having transferred further judgment to the Supreme Court *en banc* (and thus initiating possible constitutional review court proceedings), the case hinged on interpretation of the constitution and if equality in comparable situations was a fundamental right. Their deliberations were indeed assisted by Constitutional Review Chamber, who earlier held that 'other grounds' may be applicable, such that under certain circumstances, people can be treated differently.

The Supreme Court held that in the case of fundamental equality rights, a person cannot be treated differently, in Insler's case, this was HIA age discrimination – sickness benefit entitlement of 90 days per annum, rather than 250 days per annum for those workers under 65 years old. This therefore was a clearly comparable caseworker against worker and their age and in regard to a fundamental right to equality (including age or any other human diversity), the application of proportionality had limited defense against that fundamental equality. Thus, the HIA provision in part 57(6) was ruled to be unconstitutional and invalid.

This was a tortuous case, rising to the Supreme Court on a matter regarding the simple wording of the state law of the HIA and interpretation of the Estonian constitution on matters of fundamental equality and if this right is inviolate. After two years of legal proceedings, this case highlights that Estonia's national law of the HIA and perhaps others, must be aligned with fundamental equality in comparable situations, otherwise they will create a great deal of problems. The Supreme Court highlighted that the objective of the HIA was to use proportionality in age discrimination the save money, as people of 65 years and older could make more claims. This was deemed unconstitutional and invalid, as the primary object of the HIA was to benefit workers as a health insurance whilst sick or injured for maximum periods per annum – 250 days for sickness and 60 days for injury. The Supreme Court stated that saving money by the national health insurance fund with HIA clause 57(6) was outside their primary objectives and thus unreasonable.

This ruling was a direct result of a clear conflict with Estonia's Constitution, which prohibits all forms of discrimination, including age, which is defined as 'on other grounds' (Riigi Teataja, 2013). Article 12 of their Constitution states that "Everyone is equal before the law. No one may be discriminated against on the basis of nationality, race, color, sex, language, origin, religion, political or other views, property or social status, or on other grounds."

The case is an example of the invalidity of national laws that apply any unreasonable age related discretion in regard to their substantive provisions (reasons for existence and purpose) that flow from a particular body or regulation. Age discrimination can only be reasonable when it falls

outside those substantive provisions, where e.g. a sick infant is already given free healthcare and medicines, which would be a reasonable exception. Thus, all citizens who reasonably qualify for HIA assistance and have completed the necessary paperwork and subscriptions (social taxes) should be treated equally under the Constitution and any other conflicts of law are secondary and thus invalid with respect to legal judgement.

E. Klein and M. Linntamm v Citizenship Migration Board

Case No. 3-4-1-14-07 (Constitutional Judgement 1 October 2007)⁸⁸

The judgement in this case held that the age provisions within the Estonian Public Service Act (PSA), namely sections 120, 130(1), 131(3), 133(1 and 3) are unconstitutional and invalid, concerning employee release from service, the levels of compensation for such release and timing restrictions, all based on age.

The plaintiffs, Elli Klein and Mare Linntamm were released from service due to age, by their employer Citizenship and Migration Board (CMB) under section 120(1) of the AS on 23 March 2007, and sued the CMB in the Tallinn Administrative Court (TAC) claiming their release from service was unlawful under articles 12 and 19 of the Estonian Constitution. Joining the claims of the two plaintiffs, the action asked for the grounds of the release to be changed and for compensation in regard to the release of service.

Judgement of the TAC declared the entire 120 section of the PSA unconstitutional and invalid, along with 130(1), 131(3) 133(1 and 3) that the plaintiffs release from service was unlawful and ordered the payment of compensation, since age could not be used as a factor in applying a release of service under the PSA.

The TAC explained that consideration of the age of employees, who may become unsuitable or in congenial to a working environment, is an 'intensive infringement' of self-realization as established by Article 19(1) of the Estonian Constitution and does not serve the interests of democratic social order, according to the TAC (Riigikohus, 2007). The age provisions cited within the PSA are invalid, unless there are clear reasonable and proportional grounds. Such grounds can only be applied to persons of 65 and over, where that person is unable to properly perform their duties due to their advanced age, and as such, these can be grounds for release from service. Furthermore, the TAC noted that the general right to equality under Article 12 of the Estonian

⁸⁸ Riigikohus (2007); Constitutional Judgement 3-4-1-14-07. Available at: <https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-14-07> [accessed 25 February 2020]

Constitution also render even valid legal provisions of Estonian laws invalid, if they cite age or other fundamental equality factors.

Considering the above two case studies, Articles 12 and 19 of the Estonian Constitution provide clearly established provisions to protect equality. About age, these Articles will allow capable people, who can still properly perform their employment duties, to continue working for the same organization well beyond retirement age. This is regardless of any other Estonian state laws that may be applied, even if they clearly cite equality factors (e.g. age), unless the grounds are clearly reasonable and proportionate.

The ruling in this case demonstrates the absolute nature of anti-age discrimination in the Constitution, where it is obvious that an individual continues to be capable of performing their employment duties. Thus, an Estonian citizen can legally and properly work until they cannot, despite their advanced age and an employer cannot force early release or retirement on them, but should be entitled to offer these at any time – e.g. voluntary redundancy. The implications of this ruling suggests that the age of retirement in Estonia is now flexible, and can only be legally determined by an employer at a point if and when the employee cannot perform their duties adequately or the employee asks/opts for early release.

Guisado v Bankia SA and others

(Spanish Social and High Courts, and the European Court of Justice)

Case No. ECJ-C-103/16

In substance, the plaintiff was made redundant with other employees by the Spanish Bankia SA, who cited lower performance score employees in a collective dismissal; however, Porrás Guisado happened to be pregnant at the time. Bankia SA claimed that they did not know, but the plaintiff sued her former employer citing gender and general discrimination. The employer gave special treatment to married couples and disabled employees, yet pregnant women were not included. In themselves, these grounds are related to unequal treatment, outside the grounds of working performance and so Guisado attempted to address these shortcomings through the Spanish courts.⁸⁹

⁸⁹ Court of Justice of the European Union (2018). Pregnant workers may be dismissed on grounds of a collective redundancy. Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-02/cp180015en.pdf> [accessed 12 April 2020]

Guisado's first attempts through the Spanish Social Courts were unsuccessful, with an appeal to the High Court of Catalonia, who referred the matter to the European Court of Justice (ECJ). The Advocate General of the ECJ ruled that the Pregnant Workers Directive (PWD) offers no protection for pregnant women, if the dismissal is part of a collective redundancy, being an 'exceptional case' where member state laws allow it. The PWD requires that a pregnant employee should have been offered reassignment, if available, for the dismissal to be lawful, yet this was stated as not being the case and that the employer need not be told about the pregnancy.

Given that preference was given to Bankia SA employees over other workers and no reassignment appears to have been offered, the ECJ Advocate General offered a vague opinion to the Spanish High Court for them to decide how a pregnant employee should be considered.

This demonstrates a great weakness in the validity of the ECJ and how it can influence cases at a national member state level.

When comparing this case to the above two Estonian cases, the special treatment of married couples and disabled employees by Bankia SA, but not pregnant women, when considering collective redundancy, such a scenario in Estonia would likely breach Articles 12 and 19 of their Constitution. Unless the claimed inadequate performance of Guisado could be shown to be clearly reasonable and proportionate grounds for inclusion into the redundancy collective and that reassignment was also available. Even then, it seems plausible that in Estonia, the fact is that a pregnant woman is being made redundant, would draw the attention of Estonian courts, to see if equality and self-realization of all those being dismissed, are adequately preserved as established by the Estonian Constitution.

The main conclusion therefore, is that strong national Constitutions of member states, as exemplified by Estonia's, show that equality and self-realization are being robustly enforced, even against Estonian national laws that have as yet, not been aligned with the latest constitutional provisions. EU directives and the ECJ appear to be weak and inconsequential to the outcomes in Estonia that far exceed what can be achieved in other EU member states e.g. in *Guisado v Bankia SA* where plaintiffs are seeing case after case being upheld, when equality and self-realization discrimination are clearly demonstrated.

The results of this case and the tortuous nature of proceedings, it would seem apparent that the applicant was not given the same special treatment as married couples and disabled employees, yet clearly, a pregnant woman is amongst a special group under general national custom. The employer claiming the defense of 'not knowing' about the pregnancy is valid, but when confirmed and advised of it after the fact and redundancy, the employer should then have either compensated

her as if the applicant had been retained as a special case or offered return and reassignment, with the usual rights of maternity leave. This is a disgraceful result for a pregnant woman, which implies that saving the costs of maternity leave was the main motive, as the employer made no attempt to later remedy the situation with additional compensation, return/reassignment and maternity leave benefits. The ECJ was equally weak and simply pushed the case back onto the national court. The implication is that Spanish justice may not be strong on employers who repeat this scenario, making the forcing out of pregnant women, more not less likely, despite the risk that some women may take legal action. However, it is also likely that many pregnant women will chose not to fight, in favor of removing the stress of litigation on their unborn baby, yet adding to the distress and hardship of unemployment and without maternity leave.

A. Kulm v Louna police Prefecture

Case No. 3-3-1-41-09 (Constitutional Judgement 20 November 2009)⁹⁰

To avoid repetition and extensive analysis of a third similar Estonian legal case, this one appears to reach the heart of even the deeply traditional Police employment. The complaint of Annela Kulm v Louna Police Prefecture, states that provisions of the Estonian Police Service Act (PoISA) also breach the Constitution. Furthermore, some provisions of the PoISA were immediately repealed by the Supreme Court *en banc*, suggesting that paragraphs 49(3 and 4) were so serious in breach of the Constitution that awaiting official amendments would not be in the public interest. Sixty year-old Kulm's early release of service was deemed unlawful, as other senior Police officers born before her, were not being released so early.

Compensation was also awarded equal to six month's salary and her security provisions were re-established immediately.

This case provided a successful outcome in terms of the legal action, but at sixty years-old, this lady could have been working for several more years, so this was likely a hollow victory of sorts. It shows that even respectable public bodies – in this case the police, are prepared to fight the Constitution, using misaligned national law provisions. The result emboldens Estonian citizens to work for as long as they can and wish to, but until all Estonian laws are aligned, those citizens should expect to have to take legal action when they are discriminated against or forced out of their jobs on unconstitutional grounds.

⁹⁰ Riigikohus (2009); Constitutional Judgement 3-3-1-41-09. Available at: <https://www.riigikohus.ee/en/constitutional-judgment-3-3-1-41-09> [accessed 2 March 2020]

CONCLUSION

The focus on strong national Constitutions appears to be the main path to successful outcomes for plaintiffs who suffer workplace and other-situational discrimination in democratic societies. Throughout this study, the EU Directives and ECJ appear to be subordinate to national member state laws, whom they regularly seem to defer to, rather than actual remedies and judgments for national courts to follow. In the case of Spain, this member state do not themselves appear to benefit from strong legal provisions that prevent diversity discrimination in all its forms – e.g. Bankia SA selecting a pregnant woman for redundancy, without a reassignment offer and whilst the organization continued to operate afterward.

However, some provisions of many Estonian national laws appear to be misaligned with their Constitution, as the three Estonian legal cases above show, highlighting that for example, the mainstream Health Insurance Act, Public Services Act and Police Service Act, are all partially out of touch with the Constitution.

The overriding theme for the Estonian case studies, is that age discrimination in Estonia is common and embedded in national laws that have yet to be Constitutionally aligned, however plaintiffs with a clear equality or self-realization complaint, appear to be succeeding because of this protection, despite having to endure a couple of years of legal action.

Therefore, in answer to the research question – What can be implemented in Estonia in order to improve diversity at the workplace in Estonia? The clear and unequivocal answer is that all national laws in Estonia must be fully aligned with their Constitution. Article 12 protects everyone from all forms of discrimination – including diversity, being classified as ‘on other grounds’, and all national laws are subordinate to the Constitution and must comply with it.

The case of *Guisado v Bankia SA*, also highlights the weakness of EU Directives and ECJ rulings, according to XpertHR.⁹¹ Their analysis concludes that the above findings determined the superiority of EU member state laws, but in their analysis, the laws of the UK were deemed to be stronger.

In the UK, pregnant Ms Guisado would have had to be reassigned and if dismissed outright, a written statement of reasons are required to be provided to the former employee, and this is a mandatory legal provision in the UK. However, the UK does not benefit from a written

⁹¹ XpertHR (2019); The 10 Most Important Employment Law Cases in 2018. Available at: <https://www.personneltoday.com/hr/the-10-most-important-employment-law-cases-in-2018/> [accessed 28 February 2020]

Constitution, and given the above successful plaintiffs in Estonian legal cases, it would appear that Estonia's legal protections for its citizens are strong and far better in fact than even the UK.

A question thus arises in regard to the relevance of the EU Directives and ECJ to safeguard equality rights for its citizens, and if it cannot, as seems to be the case, why are these super-national institutions involved, with this expensive and complex purgative and not focusing on making individual member state laws strong and unified?

Estonia seems to be well on course to reform its national laws and align them with the diversity protection provisions of the Constitution (e.g. equality and self-realization). The Estonian example legal studies suggest that a helpful recommendation would be that a strong Constitution is required for each EU member state, which would completely cover the issues of protecting equality and self-realization, and be worded as effectively as the Estonian Constitution is within its Articles 12 and 19.

If new EU member state Constitutions contained a complete set of strong provisions for diversity protection, then the remainder of the provisions can vary depending on the member states culture and peculiarities. This would strengthen the EU community and negate the need for EU courts, with instead, national member state courts bound by their applicable national Constitutions. Perhaps the EU itself should have its own constitution, to act as a template for all others to follow, or could create a framework Constitution, comprised of the most important diversity and other Articles, which all EU member states would have to follow, with national courts able to act upon breaches of an EU Constitution and a national Constitution, with the latter taking precedence.

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