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# The Importance of Studying Global Issues in Employment Discrimination Law

Brian K. Landsberg  
*Pacific McGeorge School of Law*

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The Importance of Studying Global Issues in Employment Discrimination Law  
By Brian K. Landsberg  
Distinguished Professor and Scholar, Pacific McGeorge School of Law

Recently Professor Samuel Estreicher and I compiled a course supplement for use in courses on Employment Discrimination Law. The book, entitled *Global Issues in Employment Discrimination Law*, is published by Thomson West. I want to explain why it is important for teachers of Employment Discrimination Law to consider global issues in their classes. Much of the following comes from the introduction to the book and from the teacher manual jointly authored by Professor Estreicher and me.

The idea of enacting laws to forbid various forms of discrimination in employment is often thought of as American in origin. And it is true that laws against race discrimination began with U.S. executive orders banning employment discrimination by federal contractors and became full-blown with the adoption of the Civil Rights Act of 1964 and the later interpretation of Reconstruction legislation to forbid private racial discrimination by employers. However, the Treaty of Rome in 1957, establishing the principle that women employed in the European Union must receive equal pay for equal work, preceded the U.S. Equal Pay Act by six years. The years since have seen a vast expansion of the employment discrimination laws, both in the United States and in other countries. Laws forbidding employment discrimination based on disability, age, national origin, religion, alien status, and sexual identity have in many countries been added to the laws against race and sex discrimination. This growing body of law merits attention of students of American fair employment law.

Recently, General Motors of Canada fired 172 workers because they held dual citizenship C Canadian and other countries. The firings were prompted by United States Department of State rules governing who can work on U.S. military projects. As reported by the New York Times, Anext month, General Motors will face an Ontario Human Rights Tribunal hearing over some of the London plant layoffs. That is a reminder for G.M. that to meet State Department rules, foreign-based military contractors often have to break, or at least challenge, local human rights and employment laws.@ The story quotes a spokeswoman for Canada=s Department of National Defense: ACanada regards discrimination against workers based on citizenship or country of origin as a violation of the country=s charter of rights and freedoms..... Ms. Hodges said Canada=s defense department would never discriminate against a worker to meet the United States rules.@ Ian Austin, *Strict U.S. Rules Disqualify Some Canadian Arms Workers*, New York Times, Dec. 12, 2006, Sec. C, p. 1.

Some 4,060 U.S. firms now operate over 63,200 branches, subsidiaries and affiliates in 191 countries, with sales of over \$10 trillion. 1 *Directory of American Firms Operating in Foreign Countries*, introduction (unnumbered) (New York 19<sup>th</sup> ed., 2007). We can expect more employment discrimination issues as U.S. employers increasingly operate abroad, as foreign employers increasingly operate in the U.S., and as workers from within and outside the U.S. increasingly cross national lines to pursue employment. Most countries now have adopted laws forbidding various forms of employment discrimination. Often the laws of more than one country will apply to the employment relationship. While the overall thrust of the laws may be

similar, their details differ. Moreover, in cases by U.S. employees working abroad for U.S. employers, the employment discrimination law of the United States applies only if compliance with U.S. law would not violate the law of the other country. Employment lawyers must often become familiar with the laws of other countries in order to provide sound advice to their clients.

Not only is some basic familiarity with the laws of other countries important to practitioners representing multinational employers or their employees, it also helps lawyers and scholars better understand the employment discrimination laws of the United States. Differences in the ways that other nations treat such issues as burdens of proof, comparable worth, sexual harassment, and relief can help us to evaluate the policies underlying our own laws, as well as the pragmatic arguments regarding the impact of various rules.

While some Employment Discrimination casebooks in the United States offer occasional references to international law and the law of other countries, such references are the exception, not the rule. Our objective in writing *Global Issues in Employment Discrimination Law* has been to provide a global law supplement that can be used with any of the casebooks. We do not attempt comprehensive coverage. We are unaware of any comprehensive book on global issues in employment discrimination law, though other legal systems have their own books about employment discrimination. A recent book on global employment law does include some material on employment discrimination. See, Roger Blanpain, Susan Bisom-Rapp, William R. Corbett, Hilary K. Josephs, and Michael Zimmer, *The Global Workplace: International and Comparative Employment Law Cases and Materials* (Cambridge 2006).

*Global Issues in Employment Discrimination Law* draws from statutes, treaties, case law, and scholarly sources regarding the fair employment law of other countries, as well as transnational aspects of U.S. fair employment law. Below is a description of the materials in each chapter and how they may be used in teaching a course in employment discrimination law.

#### Chapter One — Covered Employers

With globalization, the growing number of trans-national employers raises threshold issues relating to the coverage of the employment discrimination laws. We explore three types of situation: U.S. employment discrimination law coverage of U.S. employers who employ workers abroad, the extent to which treaties affect U.S. employment discrimination law coverage of foreign companies who employ workers in the U.S., and the extent to which European law applies outside the European Union.

*EEOC v. Arabian American Oil Company*<sup>1</sup> is one of a series of cases interpreting Title VII in a manner favorable to employers, which Congress overruled in the Civil Rights Act of 1991. The majority held that Title VII did not reach alleged employment discrimination by a Delaware corporation and its Delaware subsidiary against an American citizen working in Saudi Arabia. The corporation's main place of business was Saudi Arabia, while the subsidiary's was Texas. The Court held that the jurisdictional provisions of Title VII did not extend outside the U.S. The 1991 amendment<sup>2</sup> raises several questions worth discussing with students. For example, what is the rationale for extending a nation's fair employment laws extraterritorially?

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<sup>1</sup> 499 U.S. 244 (1991).

<sup>2</sup> 42 U.S.C. 2000e-1.

Does the amendment address the Court's concern about the lack of an extraterritorial enforcement mechanism? While the EEOC has issued helpful enforcement guidance,<sup>3</sup> does the statute answer the Court's question about how the EEOC will be able to conduct an investigation abroad? The EEOC guidance does address how to determine the nationality of the employer, control by the American employer, and how to apply the foreign laws defense. In light of the materials above, one might explore with students how they would advise employees and employers facing the following questions: Since discrimination will often violate both American and foreign law, the complaining employee will now have to decide which law to invoke and which forum to use. American employers operating abroad will have to decide whether to apply their non-discrimination policies and procedures to both American and non-American employees equally, or whether to have two sets of employment policies.

*Sumitomo Shoji America, Inc. v. Avagliano*<sup>4</sup> brings up the issue of the role of treaties in exempting foreign employers in the United States from fair employment laws. The employer contended that it was exempted from Title VII by a treaty between the United States and Japan, which gives companies of the two nations the right "to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." The Court held that the employer, a wholly owned subsidiary of a Japanese company, was not protected by the treaty, because it was a company of the United States. The case leaves open several questions: Could Japanese citizenship be a bona fide occupational qualification for any jobs at the American subsidiary of a Japanese company? What protections does the treaty provide to Japanese companies? What employment practices are covered by the treaty? Does it protect only citizenship discrimination or does it extend to other forms of discrimination? To what extent do the fair employment laws override preexisting treaties? Note that the language of the treaties of friendship, commerce and navigation may vary from country to country. The Supreme Court has not answered these questions, though some lower courts and the EEOC have addressed some of them. Lawyers advising foreign companies on the structure of their U.S. operations need to add to their considerations the impact of the FCN treaties and the fair employment laws.

Finally, the *Boukhalfa* and *Lawson* cases approach the issue of extraterritoriality from the vantage point of European and English law. *Ingrid Boukhalfa v. Germany*<sup>5</sup> provides an opportunity to introduce the students to the European Union and to the European Court of Justice. Why would a group of nations agree to forbid discrimination based on nationality? What is the rationale for extending the ban to extraterritorial employment? Note that this ban protects only citizens of member countries, just as the U.S. extraterritorial ban protects only U.S. citizens. Does the rationale for extraterritoriality apply to the other bans on discrimination described in the next chapter? Note the test the court applies: does the employment relationship retain "a sufficiently close link with the Community" or with "the law of a member State?" This can be compared with the U.S. law, which applies no such test. Is this similar to the approach of *Lawson v. Serco Ltd.*?<sup>6</sup> There, the House of Lords distinguished between peripatetic employees

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<sup>3</sup> Available at [www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html](http://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html).

<sup>4</sup> 457 U.S. 176 (1982).

<sup>5</sup> [1996] ECR I-2253.

<sup>6</sup> [2006] UKHL 3, 1 All ER 823 (H.L.).

whose “tours of duty began and ended in London” and expatriate employees, who would generally not be covered by British labor law. Even expatriates might be covered, however, if “the employee is posted abroad by a British employer for the purposes of a business carried on in Great Britain” or to an “extra-territorial British enclave in a foreign country.” *Lawson* is not a discrimination case, so it is necessary also to consider the impact of the 1999 amendments to the sex discrimination law, as well as the Rome Convention, which is incorporated into the U.K. Contracts (Applicable Law) Act of 1990.

## Chapter Two — Protected Classes

This chapter emphasizes E.U. and English law, with some examples from other countries. As in the United States, the first issue is what classifications to forbid. Once it is decided to forbid a classification, such as race or sex or disability, the next issue is how to define it. As to the first question, it is notable that the E.U. forbade pay discrimination based on sex in 1957 and expanded the protection, by Directive, in 1976 and by amending the Treaty in 1997. Yet it did not forbid discrimination based on race, ethnicity, religion, disability, or sexual orientation until 2000. Thus, while race was the paradigm for antidiscrimination legislation in the U.S., sex was the paradigm in the E.U. This is so even though some of the E.U. member countries, such as the U.K., had strong laws against race discrimination. These differences could lead to a rich discussion of the considerations governing which classifications to forbid, as well as the extent to which the paradigm classification may influence the shape of antidiscrimination law.

The *Dekker*<sup>7</sup> case contrasts with the *Gilbert*<sup>8</sup> case in the U.S. *Dekker* holds that refusal to hire a woman because she is pregnant is sex discrimination within the meaning of Directive 76/207. Compare the reasoning in *Dekker* with the reasoning in *Gilbert*. Are the different results driven by differences in the language of the statutes? Do they result from differences in the legal systems — the larger governmental role in regulating the employment relationship in Europe? Supporting the latter theory is the fact that after *Dekker*, Directive 92/85 treats pregnancy as a health and safety issue. Compare Art. 5 of that directive with the result in the U.S. in *UAW v. Johnson Controls, Inc.*<sup>9</sup> Note, too, that the form of Directive 92/85 is to first set up substantive rules and then to require the member states to enact laws to enforce those rules. This differs, of course, from the structure of Title VII and other U.S. fair employment laws.

In its early cases on the subject, the European Court showed some ambivalence regarding discrimination based on sexual orientation. On the one hand, *P v. S and Cornwall County Council* holds that the ban on sex discrimination in employment found in Directive 76/2007 extends to “dismissal of a transsexual for a reason related to his or her gender reassignment.” On the other, the *Grant* case upholds differential treatment of the partners of employees: same sex partners are denied free train tickets while opposite sex partners receive them. Is the reasoning of the two cases consistent? How should a U.S. court treat similar claims under Title VII? The matter has been resolved in the E.U. by adoption of Directive 2000/78, which prohibits discrimination based on sexual orientation.

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<sup>7</sup> Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum Voor Jong Volwassenen (VJV-Centrum) Plus, [1990] ECR I-3941.

<sup>8</sup> General Electric Corp. v. Gilbert, 429 U.S. 125 (1976).

<sup>9</sup> 499 U.S. 187 (1991).

*Sonia Chacon Navas v. Eurest Colectivades SA*<sup>10</sup> holds that sickness is not a disability, within the meaning of Directive 2000/78. Unlike the Americans with Disabilities Act, the Directive does not define the term “disability,” so that job falls to the court. Compare its definition [“a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life .... over a long period of time”] with the ADA definition. How do they differ? Which definition seems most suitable to an employment discrimination law?

Great Britain, like the U.S., began with laws against race discrimination and later expanded to other classifications. As in the U.S., the English courts inevitably confronted the difficult question of the definition of race, within the meaning of the laws against discrimination based on race. Unlike the U.S. law, English law did define race, but the definition [“colour, race, nationality or ethnic or national origins”] uses otherwise undefined terms. *Mandla v. Lee*<sup>11</sup> is the English counterpart to the *Al Khazraji*<sup>12</sup> and *Shaare Tefilla*<sup>13</sup> cases in the U.S. In *Mandla* the House of Lords held that Sikhs were a racial group within the meaning of the Race Relations Act. We have reproduced the opinions of Lords Fraser and Templeman. Are their tests the same or do they differ? How do they compare with the test in the U.S. cases? Both the U.S. and Great Britain seem to use historical tests, but they seem to be different from one another. Why do none of the cases use a “scientific” test? Would an Anglo-Saxon who converts to the Sikh religion be a member of the Sikh racial group? Would a Sikh who converts to the Anglican religion be a member of the Sikh racial group? The opinions proffer dicta addressing those last two questions. What would the answer be in the U.S.?

Reading the brief explanation of the U.K. Equality Act 2006 helps the student understand the relation between E.U. law and the laws of member states, as does a brief explanation of French and German law.

We turn next to Asia, specifically Japan and China. Prof. Nakakubo’s article<sup>14</sup> describes the gradual evolution of Japan’s sex discrimination laws, from narrow prohibition of discrimination against women, to much broader prohibitions on sex discrimination generally. Japan recognizes disparate impact cases, but only where the Ministry of Health, Labor and Welfare specifies that the selection device “may cause a discrimination in effect by reason of sex ... except in cases where there is a legitimate reason to take such measures....” The language of the law seems not to cover sexual harassment. Japan also bans some age discrimination, again relying on the Ministry of Health, Labor and Welfare to decide which occupations are “difficult for older persons to fulfill.” Japan also has a disability law, which requires the government to subsidize the costs of accommodation by private employers. However, despite [or perhaps because of] its long history of employment discrimination against non-Japanese, Japan still has no law forbidding race or national origin discrimination in employment. One reason for enacting the sex discrimination laws was Japan’s ratification of the United Nations Convention on the

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<sup>10</sup> [2006] ECR I-6467.

<sup>11</sup> [1983] 2 A.C. 548 (H.L.).

<sup>12</sup> *Saint Francis College v. Al Khazraji*, 481 U.S. 604 (1987).

<sup>13</sup> *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

<sup>14</sup> Hiroya Nakakubo, “Phase III” of the Japanese Equal Employment Opportunity Act, 4 *Japan Labor Rev.* 9 (No. 3, Summer 2007).

Elimination of All Forms of Discrimination against Women, but it has ignored the similar requirements of the International Convention on the Elimination of All Forms of Racial Discrimination, although it is also a party to that Convention. This disjunction may trigger discussion of the uses and limits of international law in governing domestic activity.

China includes a non-discrimination provision in its general labor law, but that same law also includes protective legislation for women workers. Most important, the law is either under-enforced or not enforced at all. Discrimination against women, minorities, and migrants from rural areas has been the norm, and the law even provides different mandatory retirement ages for men and women. Possible explanations include the nature of the legal system in China, cultural beliefs that transcend official nods toward equal treatment, the wide gap between supply of labor [enormous] and demand for labor [easily met], and the related belief that discrimination does not hamper productivity.

We turn next to South Africa. While the list of prohibited classifications in the Employment Equity Act, 1998 is probably the most comprehensive of any fair employment law, only “unfair discrimination” is prohibited. That phrase is not defined, except by saying it does not include affirmative action or inherent requirements of the job. Nonetheless, it is worth discussing the scope of the ban; why do most countries allow discrimination based on conscience, belief, political opinion, culture?

Finally, Mexico’s Constitution requires equal pay for equal work, regardless of sex or nationality, and its labor law forbids sex discrimination. However, the labor law requires hiring discrimination against non-Mexicans in some circumstances and includes protective measures for women, especially during and after pregnancy. South Africa, Mexico, and China are all examples of emerging economies, yet their approaches to employment discrimination vary. Perhaps history and culture are the reasons: South Africa only recently overthrew the racially discriminatory regime, and equality was a central concept of the anti-apartheid movement. China’s revolution is sixty years old, and the country’s focus is now on economic progress. For Mexico, fighting corruption, drugs, and poverty may be seen as higher priorities.

### Chapter Three — Definition of Unlawful Discrimination

This chapter begins with the issue of what constitutes facial discrimination. In *Skyrail Oceanic Ltd. v. Coleman*<sup>15</sup> the English Court of Appeals finds facial sex discrimination where the employer’s solution to a nepotism problem was to fire the wife, on the ground that “it would not be fair to your husband in his position to keep you employed in a similar capacity competing in the same business ....” The court concluded that the decision was based on the stereotype that husbands are breadwinners and wives are not. Note that cases such as this are filed first with an industrial tribunal, with appeal initially to the Employment Appeal Tribunal, and thence to a court of general jurisdiction, the Court of Appeals. It is worth comparing the widespread use of specialized employment courts in Europe with the U.S. system of hearing employment discrimination cases in courts of general jurisdiction. *Skyrail* is unusual, because the resolution of the nepotism required agreement of two employers. Was there some resolution of the nepotism problem that could have avoided sex discrimination?

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<sup>15</sup> [1981] ICR 864 (C.A.).

*Roberts v. Tate & Lyle Industries Ltd.*<sup>16</sup> is a good example of the inequities that may occur where different retirement ages are provided for men and for women, both of whom contribute to the pension plan. The employer closed a plant and laid off its workers. Rather than recognize the different retirement ages for men and women, the employer and union agreed that both would receive full pensions at age 55. Roberts, who is 53 [seven years away from normal retirement age] will receive a reduced pension, while men who are 55 [ten years away from normal retirement age] will receive full pensions. The European Court of Justice rejects Roberts' claim that this constitutes sex discrimination. If the employer had granted full retirement to laid off employees five years before their normal retirement age [i.e., granted it at 55 to women and 60 to men], would that have violated Directive 76/207? The case demonstrates that once discrimination is allowed, collateral inequities will often occur.

The next two cases examine the European and English equivalent to the b.f.o.q. exception to Title VII. In both *Commission of the European Communities v. French Republic*<sup>17</sup> and *Tottenham Green Under Five's Centre v. Marshall (No. 2)*<sup>18</sup> the courts showed some deference to the employer's determination. The French case again demonstrates the consequences of allowing inequality: allowing discrimination in selection of prison warders, depending on the sex of the inmates, leads the European Court of Justice to also approve discrimination in selection of head wardens. However, the Court does reject discrimination in police hiring, because France has not demonstrated any objective reason for the discrimination. Note how the European directive creates process requirements for allowing "bfoq's". The first point to notice about the *Marshall* case is that English law, unlike Title VII, allows a "genuine occupational qualification" exemption from the prohibition on race discrimination in employment. Second, is the decision based on racial stereotype or upon "real differences" between Afro-Caribbeans and others?

The second section of this chapter addresses what U.S. courts call disparate treatment --- cases where the discrimination is not facial but is purposeful. The difficult issue is what constitutes proof of discriminatory purpose. *Barton v. Investec Henderson Crosthwaite Securities Ltd.*<sup>19</sup> involves a glass ceiling allegation by a woman whose compensation was less than that of junior men. The Appeals Tribunal sets out the shifting burdens of proof in employment discrimination cases and holds that the Employment Tribunal did not follow them. Especially troubling to the EAT was the lack of transparency in setting compensation. Note that although the case is decided under English law, the Court relies on decisions of the European Court of Justice, since the English law must be consistent with E.U. law. The facts of *Driskell v. Peninsula Business Services Ltd.*<sup>20</sup> resemble the facts of the United States case, *Harris v. Forklift Systems.*<sup>21</sup> The EAT reverses an Industrial Tribunal ruling that the employee had not proved sexual harassment. The EAT follows a prior case describing the analysis that the Tribunal should have followed. Note that the EAT thought that "sexual vulgarity" directed at heterosexual male employees by a heterosexual male employer would not be sexual harassment,

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<sup>16</sup> [1986] ICR 371 (E.C.J.).

<sup>17</sup> [1988] E.C.R. 3559 (Case 318/86).

<sup>18</sup> [1991] ICR 320 (E.A.T.).

<sup>19</sup> [2003] IRLR 332 (E.A.T.).

<sup>20</sup> [2000] IRLR 151 (E.A.T.).

<sup>21</sup> 510 U.S. 17 (1993).

even though it was sexual harassment of a woman. Although not noted in the text, you may wish to point out that in 2002 the E.U. adopted a definition of sexual harassment, as part of Directive 2002/73.

We next turn to discriminatory effect, which in Europe is commonly called indirect discrimination. The materials trace the EU's treatment of indirect discrimination from the 1987 case of *Bilka Kaufhaus GmbH v. Weber Von Hartz*,<sup>22</sup> through Directive 97/80, 2000/43, 2000/78, and 2002/73. *Bilka Kaufhaus* places a fairly heavy burden of justification on the employer: the selection device must "correspond to a real need on the part of the undertaking, [be] appropriate with a view to achieving the objectives pursued, and [be] necessary to that end." The 1997 Directive uses similar language. It also merges the burdens of proof for direct and indirect discrimination. The 2000 and 2002 Directives substitute the words "legitimate aim" for "real need," while retaining the words "appropriate and necessary." *Regina v. Secretary of State*<sup>23</sup> explains the statistical analysis used in an indirect discrimination case and declines to defer to the United Kingdom's view of justification.

Section D addresses comparable worth. The language of Article 119 [now Art. 141] of the Treaty Establishing the European Community differs from the American Equal Pay Act, by referring not only to equal pay for equal work but also for "work of equal value." See also the English Equal Pay Act 1970, quoted on p. 104. This difference in language has led to a very robust comparable worth regime, which can be contrasted with the approach in the U.S. Ellis, EU Antidiscrimination Law, explains at 198 that the logical effect of the argument of plaintiff in *Rummler v. Dato-Druck GmbH*<sup>24</sup> would be that since "certain types of physical work require more effort from women on average than men... women should be more highly remunerated for such tasks than men...." The ECJ rejected that argument, while agreeing that the employer must adopt a job classification system that takes into account "criteria for which workers of each sex may show particular aptitude." This, in effect, places on the employer the burden to base pay scales on an objective job analysis scheme. In *Pickstone and others v. Freemans plc*<sup>25</sup> the House of Lords, applying both English and EU law, make clear that the fact that some men are also paid less than other men with jobs of equal value does not immunize from attack the payment of lower wages to women. The lower paid men will benefit from the ruling as well as the lower paid women. Finally, *Enderby v. Frenchay Health Authority*<sup>26</sup> — wage disparity between the predominantly female speech therapists and the predominantly male pharmacists — raises the issue of defenses. The ECJ rules that the fact that the disparity arises from a collective bargaining agreement is no defense, but that a showing that the disparity results from market forces may be a defense. As the text suggests, the question remains whether market forces should be a defense if they themselves are the result of sex discrimination.

Turning finally to affirmative action [positive action, in Europe], *Eckhard Kalanke v. Freie Hansestadt Bremen*<sup>27</sup> case is a fairly straightforward rejection of absolute preferences for

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<sup>22</sup> [1987] ICR 110 (E.C.J.).

<sup>23</sup> [1999] ECR I-00623.

<sup>24</sup> [1987] ICR 774 (E.C.J.).

<sup>25</sup> [1988] 2 All ER 803, [1988] 3 WLR 265, [1989] A.C. 66 (H.L.).

<sup>26</sup> [1994] ICR 112 (E.C.J.).

<sup>27</sup> [1995] ECR I-3051.

underrepresented women. The ECJ explicitly contrasts equal opportunity with equal results. Similarly, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*<sup>28</sup> rejects absolute preferences based upon sex that are not clearly designed to “prevent or compensate for disadvantages in the professional career of members of the under-represented sex.” The question is whether Directive 2002/73 has changed these prior rulings. The language of this Directive differs from the race discrimination and framework directives on this point, leaving open whether the three directives have different meanings when it comes to positive action. It is worth comparing the U.S. and European approaches to the South African and Indian approaches to affirmative action. Are these differences rooted in culture? In history? When would Section 9 (5) of the South African Constitution approve discrimination as “fair?”

#### Chapter Four — Remedies and Enforcement Mechanisms

The effectiveness of the non-discrimination guarantee depends upon the remedial regime. What remedies are available and what is the enforcement mechanism. The remedial scheme in other countries usually includes back pay, but other forms of relief common in the United States, such as injunctive relief, class relief, and front pay are often not available. And in some countries, enforcement is minimal.

In *Prestcold Ltd. v. Irvine*<sup>29</sup> the English Court of Appeals holds that front pay is not an available remedy, as a matter of statutory construction. *Marshall v. Southampton and South-West Hampshire Area Health Authority*,<sup>30</sup> however, holds that the English law may not limit the award of actual damages. The ECJ applies a general rule that relief “must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer.” Thus, relief should be both reparative and deterrent. However, in *Nils Draehmpaehly. Urania Immobilienservice OHG*,<sup>31</sup> the court allowed a cap on damages where the employer proves that the plaintiff would not have gotten the job even if there had been no discrimination. The ECJ adhered to the general rule of *Marshall*, but said that a cap of three months’ salary was reasonable in this circumstance. *Schuler-Zraggen v. Switzerland*<sup>32</sup> applies to a violation of the European Convention on Human Rights the principle that “just satisfaction” is to be afforded “if necessary.” Therefore, it adds interest to the award. The 2002 Equal Treatment Directive may be read to impose greater remedial obligations. In addition, Article 8 of the Directive requires, for the first time, that member states allow organizations to sue on behalf of consenting complainants. This could in time lead to class-action type cases.

The book closes with material describing enforcement mechanisms. It begins with an excerpt from Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*,<sup>33</sup> which surveys the unjust dismissal remedies in several countries. In most of those countries reinstatement is not an important feature, and the size of monetary awards tends to be modest. However, the availability of unjust dismissal relief may render it less important to prove a

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<sup>28</sup> [2000] ECR I-5539 (E.C.J.).

<sup>29</sup> [1981] ICR 777 (C.A.).

<sup>30</sup> [1993] ECR I-43

<sup>31</sup> [1987] ECR I-02195 (E.C.J.).

<sup>32</sup> (1996) 21 E.H.R.R. 404 (E.C.H.R.).

<sup>33</sup> 33 Am. J. Comp. L. 310 (1985).

violation of the employment discrimination laws. Note, too, that the U.K. experimented with the use of different agencies for different types of discrimination [sex, race, disability], but has now opted for one unified enforcement agencies. Finally, Chinese law provides some remedies, but does not include public enforcement of the law against employment discrimination.

In conclusion, comparative study of employment discrimination laws rewards one with deeper understanding of one's own legal system, as well as understanding of the application of the law to transnational employers.