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Sociological perspective on the European anti-discrimination legislation

ABSTRACT

In the year 2000 a new regulation was enacted by the European Council, namely the Framework Employment Directive (2000/78/EC) prohibiting discrimination on various grounds, including the age. The Directive is the first so specific and accurate tool in the fight against discrimination on the European level. The Directive is not only a legal tool, but it also includes various provisions pertaining to social and political aspects of the fight with discrimination. They include, i.e. the obligation of the Member States of the EU to launch informative and awareness campaigns about the rights of the individuals and the acts of breach of these rights.

In the paper, I examine the basic provisions of the Directive in order to present the scope of the protection guaranteed by the law, as well as the deficits of this legal act. Moreover, I give insight into the meaning of the Directive for the growing number of seniors in Europe, and also the possible social and cultural consequences of this legal act for the European societies. The rise of social awareness of the problem of discrimination of older people can certainly be perceived as one of the most significant potential results of the new law.

Key words: discrimination, older workers, European law.

1. Introduction

The function of law as a social development agent in the contemporary societies is a recognized phenomenon and as such it is also a subject of sociological reflection and research (Kojder 2001). In the context of combating age discrimination and safeguarding the principle of equality in Europe it is necessary to gain an insight into the present legislative solutions adopted by the European Communities. The commitment of the

European Union to fight with discrimination is included in a range of strategic documents, and primarily in the European Treaty. Recently, the significance of this approach was reiterated by adopting the now legally binding[1] Charter of Fundamental Rights of the European Union[2] along with the Lisbon Treaty in December 2007.

Since the inception of the European Union in the half of the 20th century, the European institutions were concerned with the issues of equality of certain social groups. In the early stage of the existence of the European Communities, the main target was focused on the equal treatment of individuals regardless of their nationality, as well as equal treatment of men and women (de Burca 1997). With the development and transformation of the European Communities also other social groups gained more attention on the political and social agenda, one of them being the seniors.

It is frequently said that the principle of equal treatment or non-discrimination occupies a central role in the EC law; according to some commentators, equality is "one of the fundamental principles of the Community law" (de Burca 1997). The very first provisions concerning the issues of equality date back to the Rome Treaty, where the notion of gender equality in regard to enumeration[3] was incorporated into the body of the Treaty already in 1957. The subsequent legal documents safeguarding the equal treatment principle were introduced in 1975[4], in 1976[5], and in 1979[6] and concerned issues such as: equal pay, equal access to employment, vocational training and promotion, and equal treatment in matters of social security. These regulations are being amended, and new regulations come into force, however, these legal instruments form the central body of anti-discrimination legislation in relation to sex.

Moreover, they paved the way for introduction of more specific acts, such as *inter alia* the Framework Employment Directive discussed in this article (Wandzel 2003; de Schutter 2005). The importance of these instruments does not relate only to their political or social dimension, but was as well supported by plethora of decision of the European Court of Justice in Luxembourg shaping the European anti-discrimination case law and putting principles of equality into practice.

Following the Amsterdam Treaty from 1997, a new provision was laid down in the Treaty, namely article 13, which reads as follows: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based

[1] The Charter of Fundamental Rights was already proclaimed in Nice in 2000, however without the legally binding force of its provisions.

[2] However, two countries have withdrawn from ratification of the Charter – the UK and Poland.

[3] The text of the Article 119 of the Treaty establishing European Economic Community (1957) reads as follows: "Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers".

[4] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

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

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

on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (EC Treaty). It gives the Community the competence to take action to address discrimination on the grounds mentioned above (Bell and Waddington 2001).

The incorporation of such an article into the body of the European *acquis communautaire* meant that Europe has taken a step forward in approaching the issues of discrimination; for the first time in the history of Union the grounds of anti-discrimination laws were widened to such an extent. Until that point in time, there were only two legitimate grounds on which discrimination was prohibited: nationality and sex. The Amsterdam Treaty introduced broader perspective by adding other specifications, and what is the key element in our discussion – age.

In consequence, new legal tools were introduced by the Council, namely Framework Employment Directive (2000/78) and Race Directive (2000/43). They were passed by the European Council in 2000, with an implementation period of three years and possibility of extension to six years in covering some areas of the Directive. The aim of these Directives was to ensure that all the people who consider they were discriminated against could enjoy an effective access to justice and cold execute their rights (Makkonen 2007).

2. The rationale for adoption of anti-discrimination legislation

The reasons for adopting anti-discrimination laws by the European Union might be looked at from various perspectives. Gráinne de Búrca (1997), a renowned European law professor, recognized three functions that the equality principle may play in the social and legal environment of the European Union. Firstly, it may be an instrument in achieving the Community goals, such as for example goals proclaimed in the various strategic documents of EU; secondly, it may be a principle mediating and constraining other Community goals, and thirdly – it can be an autonomous Community goal.

The first function could be understood by reference to the judgement of the European Court of Justice: "Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons" (Article 11 of the Judgement in case C-411/05). Thus, discrimination is perceived as an obstacle to achieving the primary aims set by the European Union, and as such is fuelled by largely utilitarian considerations (de Burca 1997; Fredman 2003).

Nevertheless, also the third role of the equality principle seems to gain much importance in the present debate, since it assumes that equality is a self sustainable value, which should be granted to all people, regardless of their origin, social status or other characteristic (de Burca 1997; Fredman 2003). The comprehension of this paradigm can be drawn from the general concept of equal treatment in the field of human rights protection in international context. The insertion of non-discrimination clauses into the body of the *acquis communautaire* was inspired primarily by the Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms issued by

the Council of Europe in 1950, as well as other fundamental documents for protection of human rights (de Burca 1997; de Schutter 2005).

Against this backdrop, the adoption of the Framework Employment Directive can be viewed from two perspectives. Firstly, it can be seen as a response to the social strategies of the European Communities in the area of employment. In the preamble to the Directive a reference is made to the Employment Guidelines agreed on by the European Council at Helsinki Summit in 1999, where the need to foster labour market and social cohesion were stressed, as well as significance of the increase of participation of older workers in the labour market. Discrimination in the field of employment is viewed as an obstacle for full social integration, for guaranteeing equal opportunities for all, and for full realizing of the potential of the European citizens (Framework Directive, recital 8 of the Preamble).

Moreover, the demographic changes taking place in the European countries, which can generally be described as population ageing, were also a stimulus for the European institutions to look more closely at the situation of the older employees. The labour force shortages which are endangering the European labour market pose a great challenge to policy makers and the need for radical and effective remedies for this situation is evident (Bell 2002; Fredman 2003; Hepple 2003; Danson 2007).

Secondly, the adoption of the Directive can be viewed as recognition of importance of the equality principle in every day life of millions of European citizens, including the older people. What comes forward here is the acknowledgement of the fact that discrimination of older people is a widespread phenomenon in Europe and touches many employees and job seekers (Bass and Ahson 2002; O'Cinneide 2005). Evidence can be provided by surveys performed by various national institutions, as well as European ones. The data gathered by the Third Age Employment Network show the results of different surveys on age discrimination in employment carried out in the United Kingdom. For instance, study done by the National Opinion Poll in June 2000 found that 85 percent of employees of over 50 years old believe that there is discrimination against older workers; Continental Research for the Department of Education and Enterprise showed that 50 percent of the unemployed over age of 50 said that they had been discriminated against on grounds of age (TAEN 2004). Report undertaken for the Third Age Foundation, where the qualitative method of research was used, showed that the age barrier in labour market starts already with forty – "fifty-year-olds – and now even 40-year-olds – are considered to be 'over the hill', 'past it', not fitting into the new 'cool' Britannia of the 21st century" (Bass and Ahson 2002).

These data could be supplemented, by the Eurobarometer Survey from 2003, according to which, age was most often[7] reported as the ground of faced discrimination by the European citizens (European Commission 2003). Today, after the adoption of the Employment Framework Directive, research in the field of age discrimination has gained even more impetus.[8] The Member States are not only obliged to implement the legal

[7] In the European survey 5% of the respondents answered they were discriminated against on the ground of their age, whereas the discrimination on grounds of: ethnic or racial origin was reported by 3%; religion or belief, disability by 2%, and on grounds of sexual orientation by 1% (Eurobarometer 57, Executive Summary *Discrimination in Europe*).

[8] Report on age discrimination and the situation of older workers in the labour market was recently finalized by the Polish NGO – Academy of Philanthropy, and provided the first consistent and thorough description of these issues in Poland.

provisions, but are also encouraged to carry out social campaigns and studies within the framework of the social programs: Community Action Programme to combat discrimination (2001–2006), and PROGRESS: Community Programme for Employment and Social Solidarity for the period of 2007–2013.

The novelty of prohibition of discrimination on ground of age is a widely recognized fact (Bell 2002; Fredman 2003; Hepple 2003). De Schutter (2005) points out that the prohibition of discrimination based on grounds such as: disability, health, age or sexual orientation forms part of second generation rights to equal treatment. The first generation of the rights included grounds such as: sex, race, ethnic origin, religion and belief, political opinion and nationality. According to Mark Bell (2002), the adoption of the Racial Directive, and the subsequent Framework Directive, as well as the amendment of the Equal treatment directive suggest a new era in the field of anti-discrimination law.

However, the recognition of the issue of age discrimination by the European Community is still quite a recent fact; whereas in the United States the problem was identified and tackled much earlier. A short description, as the scope of this article does not allow for a deeper insight, of the American experience might provide a valuable comparison to the European practice. The American anti-discrimination legislation came into force already in 1967 with adoption of the Age Discrimination in Employment Act (ADEA). The ADEA was a response to the phenomenon described as employer's prejudice towards older workers. In the first instance, the law covered workers between 40 and 65 years old, however with the abolition of the mandatory retirement age in 1986, the situation gained new momentum (Friedman 2003; Macnicol 2007). The actions prohibited by the law pertained only to the employment field and were: discriminatory job advertisements, discrimination in pay and in the use of company facilities (Friedman 2003). For over thirty years of its enforcement, the ADEA is definitely not a dead letter. The Employment and Equal Opportunities Commission has a considerable cases dealing with discrimination. Between October 2000 and September 2001 as many as 88 840 charges were filed, 21.5 percent of them concerned age discrimination (Friedman 2003). What is considered to be a successful result if this legislation is the rise in awareness of the existing law by both – employers and employees, as well as becoming more sensitive to injustice towards older people (Friedman 2003; Macnicol 2007).

3. Sociological perspective: law as a tool of social change

The importance of sociological perspective in analyzing law cannot be underestimated. The sociology of law has for a long time formed a significant component in the theoretical and empirical research, and today has firm position in the discipline. Law as an agent has the potential of altering social attitudes, and thus can be perceived as a tool for social change, which could be used in order to achieve certain goals (Kapp 1996; Podgórecki 1998; Kojder 2001). However, single provisions inscribed in the legal acts are not sufficient for a real social change to occur, and need to be supplemented by institutional support, as well as positive social climate.

As presented by Adam Podgórecki (1998), there are two types of law, which should be taken into consideration when analysing the functioning of law in contemporary soci-

eties, especially in the context of human rights. The first type is the intuitive law (or: unwritten, informal, folk law), which essence is its persistence in the society regardless of outside control or sanctions. These are the norms, values and opinions shared by the society and agreed upon throughout the historical process of society formation. The other type of law is the normative law (or: positive, written, formal) laid down by the state in the legal acts. In order for the human rights to be full, complete and effective, the intuitive and normative laws have to be congruent, and moreover, there needs to be an institutional and organizational relation between the two. This concept seems to be significantly linked to the analysis of the functioning of the anti-discrimination clauses in the contemporary European societies. It clearly shows that without the social recognition of the problem and the lack of consent for discriminatory actions towards older people, the effective functioning of the European law is uncertain. Nevertheless, without any legal solutions or only poor ones, no social change can be expected to appear in this area by itself.

One of the proponents of law as a tool for a positive social change was the father of polish sociology of law – Leon Petrażycki. His ideas and arguments, although very optimistic and romantic, may serve as a guideline for discussing whether there is indeed any potential in the European legal instruments which could bring about a qualitative change in the social attitudes and behaviours.

Petrażycki underlined the educative significance of law, which stems from the fact that it continually stimulates certain motives of action, while repressing others. In general, law reinforces and develops certain tendencies of action, characteristics, dispositions and even behavioural inclinations, while at the same time decreasing the occurrence of others or even leading to their disappearance. Kojder exemplifies this educational function of law in the passage:

> [...] in following generations, the repetition of actions imposed by law results in leaving "traces" in the psyche which lead to an "automatization of movements" as law "permeates the body and blood of society" [...] It is as a result of this that the great majority of people follow legal regulations without any "clash of motives" (Kojder 2006 p. 336).

In general, Petrażycki perceives law as a tool for changing people's behavioural patterns, because it "prescribes a common 'pattern of conduct' for all of its addressees" (Kojder 2006 p. 336). In his concept, the situation of gap between the positive and intuitive law will always bring a modification of a legal system in order to adopt it to the social sense of justice. Moreover, the law has a great motivating power, which results in reinforcing behaviours and inclinations, which are socially desirable and beneficial for the common good and eliminating those, which are destructive and dysfunctional for the society. By this mode, the law is the tool not only for a neutral change, but it leads to social and cultural progress beneficial for the development of the whole society. The process of social change in not a revolutionary one, but bears characteristics of a slow but steady movement, based on consensus pertaining to the values and norms shared by the members of the society.

The last element of Petrażycki's theory of law worth mentioning here is the role of the law as an agent fostering the feeling of citizenship. According to Petrażycki:

> Law, by contrast (to morality) strengthens in human beings a sense of their rights, and creates a citizen aware of his/her own dignity, appreciating liberty, and expecting to be granted that to

> which he or she is rightfully entitled. Law is, then, more important and valuable for social life than morality, for in leading to the development of one's own self as a citizen with rights it can more effectively and surely shape people's attitudes, conduct, habits, traits and even social inclinations (cited in: Kojder 2006 p. 335).

The empowerment of the citizen as an active and conscious actor gains much importance in the debate of the rights of the older people in the contemporary world. Very often, the older persons are being perceived as dependant and lacking ability to stand for themselves due to lack of cognitive and emotional perception of the legal and institutional intricacies of the modern world (Kapp 1996). It is needless to say, that the importance of the awareness of one's own rights is essential for exercising these rights.

Even if Petrażycki's theoretical arguments put forward a century ago are perceived as a sign of an incurable optimism, it is important to emphasize that they have had and continue to be attractive for those craving and working towards a better world (Kojder 2001). However idealistic this may sound, it is the universal truth that in fact we are all striving for better lives, better opportunities. Therefore, the view on the law as an agent facilitating and directing the humankind into a better future should be taken into consideration, even in a scientific context. Shall we consider the position of many historically disadvantaged groups – e.g. the black people, the women – it is needless to say, that the legal changes which appeared at one moment in the history altered the position of these groups dramatically. There was a social consensus – intuitive and moral obligation of the society – to change the *status quo*, since it did no more reflect the reality and was unacceptable.

Such theoretical understanding of the social functions of the law is also shared by the European institutions. According to the European Commission, the law plays a role of a catalyst or stimulus, which triggers a process for social change by altering people's minds and behaviours. In the field of anti-discrimination legislation, which the Commission is particularly concerned with, it aims to promote recognition and acceptance of the equality principle within the European community (EU Internet Portal).

4. Characteristics of the Framework Directive

In order to understand the meaning and functioning of the European law it is necessary to present the basic characteristics and principles which are meaningful to the debate on the equality legislation. As mentioned above, the European Communities in their legislative process have always related to the already existing documents established by the Council of Europe, as well as United Nations. The prohibition of discrimination was enshrined in the Article 14 of the European Convention on Human Rights and Fundamental Freedoms already in 1950; however, the full realization of the principle of non-discrimination was only covered by the Protocol 12 entering into force in 2005. However, the Protocol 12 was not signed by many European countries, such as: Bulgaria, Denmark, France, Lithuania, Malta, Poland, Sweden, Switzerland and the UK (CoE Portal). It means that the citizens of European countries are not equally protected from discrimination and maltreatment by this instrument. On contrary to the laws adopted within the framework of the Council of Europe, the status of the European Union law is always

binding for the Member States, regardless of the state of implementation of the laws since it can be directly invoked in the national courts (Barcz 2003; Wandzel 2005). Other characteristics of the European Union law are the principles of: priority of the Community law over national law, and the principle of direct effect of the legal provisions, which guarantee broad and complex protection of the rights of the individual (Barcz 2003).

In order to fully comprehend the significance of the Framework Employment Directive for the older people, it is necessary to indicate the most important provisions and characteristics of the act. In the following part of the article I would like to present the material scope of the Directive, the basic definitions, the derogatory provisions, the positive duties, the system of effective remedies, and the relation to the mandatory retirement.

The material scope of the act relates in general to the field of employment. However, this can be understood quite broadly. The prohibition of discrimination on ground of *inter alia* age is therefore relevant to the following areas: access to employment, self-employment and occupation, selection criteria, recruitment conditions, vocational training, working conditions (including pay and dismissal), as well as to the membership in workers' associations (Article 3). What is also crucial in this respect is that the Directive's provisions shall apply to both – the private and public sectors, including the public bodies.

The definitions provided in the Directive include: direct and indirect discrimination, harassment, and instruction to discriminate. Direct discrimination has certainly an important role to play in relation to age, as it is often the basis for rejection of a candidate for a job only on the ground of his chronological age (Bass and Ahson 2002; Fredman 2003). However, direct discrimination can only be found legitimate in the situation when "one person is treated less favourably [...] in a comparable situation" (Article 2, paragraph 2a), what means that a "comparator" needs to be found. In the case of age discrimination, this brings several problems, as age is a changing characteristic of an individual, and moreover, a question arises – what age difference is sufficient in order to establish discrimination? The comparative approach is simply not appropriate for cases of age discrimination (Fredman 2003; Hepple 2003; O'Cinneide 2005).

Another prohibited action is the establishment of such practices, policies or criteria which are apparently neutral, but put a person of a particular age at a disadvantaged position what constitutes indirect discrimination (Article 2 paragraph 2b). For example, a stress on specific formal qualifications, such as degree in IT or new technologies, may eliminate a large number of older people who tend to lack this kind of education due to the fact that in the period when they attended schools or universities such type of education was not available. Such set of criteria could be indirectly discriminatory; unless it is proven that such formal qualifications are necessary for the post (Fredman 2003). The threat of indirect discrimination might have positive effect on the employers' way of defining the job requirements, since they would have to take into consideration the actual knowledge and skills, rather than only formal qualifications.

The prohibition of harassment and instruction to discriminate is also considered to be a breakthrough in the European legislation, since it was not included in previous equality Directives (Bell and Waddington 2001). Its meaning cannot be underestimated, since it prohibits the variety of actions, such as humiliating treatment, taunting or disrespecting the older people. Such actions are often reported by the older people as highly discouraging in the process of finding a job, as well as already in the workplace (Bass and Ahson 2002).

5. Derogations

The Framework Employment Directive includes special provisions allowing for differential treatment based on specific occupational requirements. Nevertheless, the limitations to the principle of equality have to be proportional, necessary, and legitimate. However, the Directive also provides for specific regulations in relation to age, which are qualitatively different from the other provisions. That is to say, the Directive allows an open-ended possibility for Member States to justify direct age discrimination. Article 6(1) provides that:

> differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

This provision is supplemented by list of situations where age discrimination might be legitimate. Bell and Waddington comment on that provision in the following manner: "[...] it is striking that age limits on recruitment, which might be a classic example of why age discrimination legislation is necessary, is specifically listed as an example of justifiable discrimination" (Bell and Waddington 2001 p. 599). Such interpretation of the derogations from the age discrimination clauses was also sustained in most recent decisions of European Court of Justice in cases pertaining to setting age limits in employment in Spain and Germany.[9]

Moreover, the Directive also permits the Member States to established fixed age limits on entitlement to retirement or invalidity benefits within the framework of the occupational social security schemes (mainly with regard to pensions) without further social policy justification. However, this derogation can only be allowed when it does not infringe on the principle of gender equality (Skidmore 2001). In other words, the Directive does not bring about any considerable change in the respect of setting mandatory retirement ages as acts of age discrimination.

6. Positive duties

The formulation of positive duties in the text of Directive proves that there has been recognition of the fact that discrimination does not only manifest itself in individual acts of prejudice, but can also be incorporated in the wider social and institutional context. Therefore, the positive duties to promote equality were integrated in the body of Framework Directive. The public authorities are in the best position to encourage social changes, support constructive and beneficial behaviours and thus are burdened with several considerable duties and possibilities for actions.

One of such positive duties is the possibility (but not an obligation) for the Member States to introduce active measures (positive actions) in order to ensure the equality in practice, and to "prevent and compensate for disadvantages linked to any of the grounds"

[9] Cases: C-411/05 – Félix Palacios de la Villa v Cortefiel Servicios SA and C-144/04 – Werner Mangold v Rüdiger Helm.

(Article 7 paragraph 1). Another vital provision is the obligation of Member States to disseminate the information regarding the new and already in force regulations in the social environments, especially in the workplace. The compliance with these rules might bring about a genuine alteration in the situation of older people in the labour market and elsewhere. When tailored properly, the social campaigns raising awareness of the problems of the older people might succeed in attempting to tackle the negative image of the older worker and break down some of the negative stereotypes commonly shared by the employers. Furthermore, as envisaged by Petrażycki, the law has also its potential of creating a conscious and active citizen. With the help of social campaigns in area of fostering social participation of the older persons, the European societies might come close to this achieving this aim.

Moreover, the Member States should, in "accordance with national traditions and practice, promote dialogue between the social partners" in order to foster equal treatment (Article 13). This stipulation is especially important form of positive duty, since it has potential to encourage participation of the disadvantaged groups in the decision making process (Fredman 2003). Furthermore, the social dialogue principle should relate to issues such as: monitoring of workplace practices, collective agreements and codes of conduct and the exchange of experience and good practices. The aim of these positive duties is to prevent the discrimination acts from occurring in the first place, and to teach employers to take such measures as to diversify their workforce in respect to age. Positive duties could in fact be considered as being beneficial for the business, as they pre-empt individual litigation of the employees in case of violence of their rights and save the employers from costly and time-consuming trials.

In addition, the Directive requires the Member States to encourage dialogue with non-governmental organizations, which by nature of their character and function have legitimate interest in combating discrimination and promoting the principle of equal treatment (Article 14). The collaboration with civil society actors is certainly indispensable in fostering democratic processes, increasing civil participation and building the social capacity of the European citizens. Thus, the insertion of this provision is the text of the Directive seems to have a positive potential for change, however, the non-obligatory wording of Article 14 leaves the topic to the discretion of the Member States, and its real effect is still vague.

The information and awareness campaigns as a central part of the practical implementation of the act were also stressed by various social organizations. They are considered to be the first and inalienable step in the successful functioning of the Directive. The European Older People's Platform – AGE – stated that:

> Beyond the formal transposition and the introduction of legislation, it is essential that the European Commission and Members States undertake a range of activities to promote awareness of age discrimination and secure cultural and attitudinal change amongst employers, mass media and the wider community (AGE 2004).

AGE Platform, being one of the European Union's social partners, recommends the following actions: public information campaigns, advice to employers and employees, trainings to employers and legal professions to improve the awareness and understanding of the problems faced by older people in employment, the removal of negative stereotypes and promotion of positive images in education and media (AGE 2004).

7. Effective enforcement

According to legal experts, the Framework Directive pays much more attention to the effective enforcement of the regulations than was the case in the earlier equality instruments of the European Communities (Bell and Waddington 2001; Bell 2002). In order to attain full and successful functioning of the provisions laid down in the document, several important solutions were introduced, which aim is to facilitate the process of litigation, as well as diminish its negative side-effects for an individual (Bell 2002; O'Cinneide 2005).

First of all, the most important provision allowing for easier litigation procedure for a victim is Article 10 stipulating the shift of burden of proof in discrimination cases. Such solution has already been present since 1997 in the gender equality legislation, but it has for the first time appeared in such a wide context, as in Framework Directive (O'Cinneide 2005). The proviso allows for the shift of the burden of proof from the plaintiff to the respondent when

> the persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish before a court [...] facts from which it may be presumed that there has been direct or indirect discrimination... (Article 10 paragraph 1).

This stipulation is also underlined in the preamble to the Framework Directive as a significant step towards attracting more people to report the cases of breach of their rights to the courts or other authorities.

The Directive has also presented another solution to the difficulty of bringing case before the court by an individual. The financial and emotional costs involved in the litigation are a natural hindrance for many people to start a legal proceeding, and thus Article 9(2) allows associations, social organizations or other legal entities to support the individual litigation and stand in the court on behalf of the victim and to participate in any other administrative or judicial proceedings. This solution was recognized as novelty in the up to date European legislation.

One of the reasons why victims of discrimination or maltreatment do not report the incidents to the appropriate authorities is the fact they are afraid of the negative consequences it may bring for them in due course. Hence the protection from victimisation was introduced in the Framework Directive, which shall prevent the victims from unfair dismissal or other adverse treatment by the employer or the fellow workers (Article 11).

Another instance where the Directive attempts to ensure better enforcement of the regulations is the area of sanctions. The sanctions are to be "effective, proportionate and dissuasive" (Article 17) what according to Bell (2002) means that the character of this Directive goes much further than the traditional international law instruments, which system of sanctions is less convincing.

This innovative approach to the system of effective remedies was identified as a sign of wider recognition in the international law of the importance of such legal instruments in order to provide that the states' obligations are efficiently implemented (Bell 2002). In case of older people, such facilitation seems to be especially crucial, since it allows them for easier reporting of the cases of discrimination and seeking support from the social organizations and associations dealing with protection of older people from abuse. However, a large responsibility for effective and practical implementation of these regulations lies on the national authorities, as well as legal cultures present in given societies.

8. The defects of the anti-discrimination directive

The introduction of the Framework Directive was welcomed by various social environments with mixed feelings. On the one hand, there was a wide consensus that such regulations are needed for ensuring greater generational equality, but on the other hand, there were many voices recognizing the shortcomings of the Directive in its application in every day life.

The adoption of the Directive has been recognized by the European Trade Union Confederation (ETUC) as "an indispensable first step and an important tool in the fight against discrimination" (ETUC Portal). In particular, ETUC considered the following solutions as authentic steps forward: the inclusion of harassment in the scope of the Directive; the distinction between direct and indirect discrimination; the fact that associations can institute legal proceedings; and the shifting of the burden of proof onto the defendant.

Mark Bell and Lisa Waddington (2001) while analysing various equality directives of the European Communities identified a specific "equality hierarchy" visible in the legal texts, despite of the rhetorical commitments made by the European institutions and their leaders. In this hierarchy, the first place of gender equality, which has had its sound historical basis in the European legislation, has been replaced by the racial equality. The ground for discrimination which is being given least attention and it somehow placed at the bottom of the "equality hierarchy" is unfortunately the age. However, as the authors conclude, the creation of such hierarchy is a result of political pragmatism recognizing racism[10] as the primary problem in the European countries to be solved by measures of EU. Even though age discrimination is a widely recognizable phenomenon, there still remains conviction that it is not unlawful, and what more, there still remains much social acceptance for ageist attitudes and behaviours (Hepple 2003).

The very many derogations from the principle of equal treatment concerning the ground of age might also suggest that the commitment of the European institutions to age related issues is still considerably weak in comparison to other discrimination grounds. According to Skidmore (2001), adopting such wide possibility for derogating from the equality norm might also stem from the fact that the European Council was aware of the difficulties in achieving agreement between the Member States concerning the readiness to give age, sexual orientation, disability the same recognition as they have granted to sex and race. Nevertheless, the distinction remains to be quite a worrying sign for the seniors in Europe.

The limitation of the scope of the Directive to a miscellaneous set of grounds, namely: religion or belief, disability, age, sexual orientation was as well perceived as a weakness, since the Council missed the opportunity to agree on one comprehensive approach to equality by adopting a single unified equality Directive. The Article 13 of the Amsterdam Treaty for the first time since year 1957 allowed for wider approach to com-

[10] The adoption of the Race Directive and the following Framework Directive was done in the atmosphere of concern about the future of European democratic governments. The European politicians were especially worried about the extreme right wing political parties gaining power (such as Jorg Heider in Austria), the situation in the Balkans, and the strong discrimination towards the members of Roma minority in the applicant countries of Eastern Europe.

bating discrimination – not only on ground of sex or nationality (as was until Amsterdam), but also on other grounds. There are voices suggesting there should be one single directive covering all the grounds of discrimination as well as all the material scopes (not only employment). This is the solution taken by such states as: New Zealand, Australia, Canada, Ireland, and South Africa (Hepple 2003).

Next defect of the Directive is the limitation of the material scope only to employment and occupation, whereas, by contrast, the Race Directive's material scope covers: social protection, health care, social advantages, education, access to goods and services including housing (Bell 2002). This protection is only guaranteed to individuals on grounds of racial and ethnic origin. Fredman (2003) argues that even if the aim of the Framework Employment Directive is to achieve equality in employment it cannot be done by addressing only the employment field, since all the spheres of social life are intertwined and interact with each other, and thus discrimination in one area might reinforce disadvantages in other areas.

One of the drawbacks of this form of anti-discrimination legislation is also its reliance on individual litigation by putting a heavy burden of the trial on the discriminated person, even in spite of the already mentioned facilitating mechanisms. The decision to launch a case before the court is not easy for older people for various reasons. Very often they lack the self-esteem and confidence to undertake such a radical action as going to the court. Moreover, the victims of discrimination might not always be aware they were treated in a disadvantaged way. This is especially true for the older people, who often perceive wrong treatment or discriminatory acts as a common and prevalent practice, which they experience in their everyday life. They do not feel secure enough to question it, even if they oppose it morally. Therefore, the decision to take a legal action against discriminatory treatment is usually rejected by seniors more often than by other age groups (Bass and Ahson 2002; Makkonen 2007). The American experience with age equality legislation (ADEA) showed that it was mostly the well-off white men who decided to take legal action in situation of discrimination. This undermines the major rationale of the anti-discrimination legislation which is the protection of the most vulnerable social groups (Fredman 2003).

The additional drawback of the Employment Directive, in comparison to the Race Directive, is the lack of obligation of the Member States to establish or designate a special institution with such tasks as: promotion of equality, assistance and legal advice to the persons who wish to file a court case, carrying out independent surveys, and making recommendations for the policy makers. This action is at discretion to the Member States. This deficiency is a clear evidence for the existence of the "equality hierarchy" distinguishing between the various grounds for discrimination as far as accorded protection is concerned. The institutional support is, however, a crucial tool in addressing the discrimination problem and could serve for the benefit of the people who consider themselves wronged (Skidmore 2001; Fredman 2003).

Another level on which the shortcoming of the Framework Directive should be discusses is its application, or more precisely lack of application, to the issue of mandatory retirement. The Directive, as was presented above, should be without prejudice to the national legislation laying down retirement ages. By this manner, there is a legal gate to avoid prohibiting mandatory retirement age in the national legislation. The discussion on

the need for mandatory retirement ages goes certainly much further than the scope of this article, and thus will not be discussed here in details. The researches show various results of mandatory retirement abolition, and there is no consensus whether it shall influence explicitly negatively or positively the position of older people in the labour market, since there are also some arguments in favour of the mandatory retirement age, which could benefit the worker sometimes. There are, however, few countries, which introduced a ban on mandatory retirement age, such as US, Australia and New Zealand. Such an approach allows for avoiding the stigmatization of people by making them leave the labour market, and depend on more individual circumstances in that respect (Hepple 2003).

9. Conclusions

There is now a wide consensus that age discrimination is a negative phenomenon which needs to be tacked in several ways and on variety of levels, both, national and supranational. However, even in the light of the European legislation which is legally binding for all the Member States, the exact implementation of the provisions into the national legal system is at discretion of the national governments, and therefore it strongly depends on the political climate and will for change in a given country.

The national context for elaborating the effectiveness of the Framework Directive is definitely a very valuable one, since it is the social consensus which is needed for the legal provisions to be effective in practice. As Podgórecki stated, in order for the law to be effective, the norms encapsulated in the legal texts have to be a reflection of the attitudes and values shared in the society. European Union consists nowadays of twenty-seven countries, each one of then having its own traditions, values, culture and history, and what more – certainly a different approach to the issues of equal treatment, which gear the process of implementation of the equality directives. The differences are also palpable in relation to the law itself, namely to the general legal awareness of the society, the readiness to report the cases to courts, the knowledge of the rights of the individual (Marsh and Sahin-Dikmen 2002). Therefore, to be precise on the assessing the effectiveness of the anti-discrimination regulation, one would need to analyse each country separately. However, the truth is that the level of protection of the older workers and work seekers in the European Union differs between various Member States, and is dependant on the specific national solutions.

In order to standardize the approach to the age discrimination, some authors propose the solution in form of age mainstreaming (Szyszczak 1997; Fredman 2003; Hepple 2003). Erika Szyszczak is in favour of introducing a general non-discrimination standard in all the laws and policies within the European Communities. The solution would be to "mainstream" the human rights issues in all spheres of EC law, as well as in relation to all social, political and economic matters. Basing on the European experience with gender mainstreaming, Szyszczak concludes that the sole anti-discrimination legislation would not be enough to ensure practical equality, since it is too limited a mechanism.

Sandra Fredman is also a proponent of a mainstream approach to the age discrimination issues, as she considers it to be a more effective way of promoting equality that the sole reliance on prohibition of discrimination. With a mainstream approach, the age-re-

lated issues could reach wider audience and be more easily recognized and internalized by the members of society. The European Commission has also indicated its inclination to the broader approach to the equality issues, and states that it

> wishes to create tools to promote a mainstreaming approach involving the incorporation into Community policies of the objective of non-discrimination and equal opportunities for all [...] this integrated approach should help to focus especially on situations of multiple discrimination (Portal Europa).

How can the effectiveness of the Directive be estimated in relation to the Community goals set in many strategic documents, such as Lisbon Strategy or European Employment Strategy? As far as increasing the employability of the older workers, the data from recent years might prove optimistic, since one of the most remarkable features of current trends in labour markets in Europe has been the substantial increase in employment of the older people, and this during the period of relatively limited economic and employment growth. Since 2000 the employment rate for people aged 55–64 has risen by 7 percentage points in the EU-25, compared to 2.3 percentage points for the whole working age population (European Commission 2007 p. 53). Naturally, such result is not only due to establishing anti-discrimination legislation, which impact on the labour market has not yet been fully assessed. However, it might suggest a slight turn in approach towards the older workers by the employers. Nevertheless, also these data need to be considered carefully, as they are the average rates for all of the European countries; in fact, the discrepancies between the Member States are extremely large. The example of Poland is especially striking in its relation to the overall European standard, as the employment rates for workers aged 55–64 is the lowest in the whole EU oscillating around 39 percent for men and 20 percent for women. For contrast, these numbers for Sweden – the Europe's best player – are respectively: 70 and 68 (European Commission 2007 p. 61).

However, the anti-discrimination legislation is not solely devoted to increasing the rates of employability of the older workers, but it also seeks to bring about a deeper social change in the minds and hearts of the people. Naturally, as pointed earlier, the law itself will not suffice for a revolution in this respect, but it definitely delivers a good starting point. Whether the implementation of the Framework Directive will significantly lower the level of acts hostile to the older people remains a question. One can only hope that Petrażycki's optimistic view of law as an educative agent bringing progress and changing attitudes and behaviours is still legitimate.

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