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Schiek, D. (2015). Proportionality in Age Discrimination Cases - a Model Suitable for Socially Embedded Rights. In A. Numhauser-Henning, & M. Roennmar (Eds.), *Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and beyond* (pp. 31-92). Wolters/Kluwer.
<http://www.kluwerlaw.com/Catalogue/titleinfo.htm?ProdID=9041149791&sort=author&order=asc>

Published in:

Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and beyond

Document Version:

Peer reviewed version

Queen's University Belfast - Research Portal:

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Proportionality in Age Discrimination Cases – towards a Model Suitable for Socially Embedded Rights

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1. Introduction

Age discrimination case law is one of the most dynamic fields within EU non-discrimination law,¹ due to the complexities of the field, rather than to any heightened social relevance of age discrimination in comparison with, for example, racist discrimination or sex discrimination. The complexity, which results from conflicting values and rationales underlying EU anti-age-discrimination law, is compounded by the partly inconsistent use of the principle of proportionality in age discrimination cases.²

This chapter argues that the principle of proportionality can operate in ways that ease rather than obfuscate the balancing of conflicting rights and values, if adapted to contemporary functions of constitutional rights, labelled elsewhere as “socially embedded constitutionalism”.³ This approach perceives rights protection as an example of balancing potentially conflicting interests of individuals. Ostensibly neutral values and public policy aims, which are often relied upon to justify limitation of human rights, frequently represent interests of persons or groups. Rights litigation is thus ultimately a result of conflicting interests. EU anti-age discrimination law is in-

* This chapter would not have been written but for the editors' kind invitation to contribute to a research seminar in April 2014. The text has profited immensely from the discussion during this seminar, where all participants generously shared their knowledge, and from the editors' thoughtful comments, as well as their patience with missed deadlines. The usual disclaimer applies.

¹ For an expansive overview of case law until 2012, see Elaine Dewhurst, *The Development of EU Case-Law on Age Discrimination in Employment: 'Will You Still Need Me? Will You Still Feed Me? When I'm Sixty-Four'*, 19 ELJ, 517 (2013); on case law until December 2010, see Dagmar Schiek, *Age discrimination before the ECJ – conceptual and theoretical issues*, 48 CMLR, 777 (2011).

² See for example and with further references Elaine Dewhurst, *Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How Can the ECJ Better Support National Courts in Finding a Balance Between the Generations?*, 50 CMLR 1333 (2013), 1349, 1359.

³ Dagmar Schiek, *Re-embedding economic and social constitutionalism: normative perspectives for the EU*, in Dagmar Schiek, Ulrike Liebert & Hildegard Schneider (eds) *European Economic and Social Constitutionalism after the Treaty of Lisbon*, 17-46 (Cambridge University Press, 2011).

formed by conflicting values: on the one hand, the anti-discrimination rationale requires combatting stereotyping as well as accommodating difference, and on the other hand, the social-policy rationale demands abandoning the traditional life-cycle orientation of social policy by promoting flexibility in working lives, while also combatting social exclusion. Thus, there is ample scope for balancing competing aims and conflicting interests. It is argued that adequate use of the principle of proportionality can transform adjudication of EU anti-age-discrimination law by making it more transparent and, ultimately, just.

The chapter will proceed as follows. The next part will develop a concept of the principle of proportionality suitable for a socially embedded rights discourse. Subsequently, the field of EU anti-age discrimination law will be used to demonstrate the practicality of this re-conceptualization of proportionality. To that end, the role of proportionality in relation to equal treatment and non-discrimination in EU law will be briefly introduced, followed by an analysis of conflicting aims of EU anti-discrimination law. It is argued that EU anti-age discrimination law is informed by genuine aims of non-discrimination law as well as by social policy aims that are unrelated to discrimination law. Against this background, the CJEU's use of proportionality in age discrimination cases will be analysed critically, with the goal of offering some approaches to improve the quality of judicial argumentation in this field. The analysis is limited to discrimination against older employees in order not to exceed allocated space.⁴

2. A revised conception of the principle of proportionality

2.1 The traditional principle of proportionality

2.1.1 Origins: rights versus states

The principle of proportionality has its origin in Prussian administrative law of the 19th century.⁵ This was the high season of European liberal constitutionalism, which emerged when the newly established bourgeoisie sought protection from state intervention into their property and liberty through constitutional rights.⁶ Against this background, the principle of proportionality aimed to limit “regulatory intervention”⁷ into those rights which were recognized as the only genuine ones by authors such as

⁴ There is also a limited amount of CJEU case law yet concerning younger workers. Obviously, the *Küçükdeveci* (C-555/07 [2010] ECR I-365) case on disregarding seniority accrued by workers younger than 25 for the calculation of the statutory notice period falls into that category, as does the *Hütter* case (C-88/08 [2009] ECR I-5325), on disregarding periods of employment before the 18th birthday for salary increments based on seniority in the Austrian public service. A follow-up case on the latter is pending before the Court (C-417/13 *Starjakob*, Opinion Bot of 3 July 2014 [ECLI:EU:C2014:2048]).

⁵ Wolf Sauter, *Proportionality in EU Law: A Balancing Act?* 2012-2013 Cambridge yearbook of European legal studies, 439 (2013); for more sources on the history of the principle, see Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Columbia Journal of Transnational Law, 72, 97-111 (2008).

⁶ For a very short overview, see Dagmar Schiek, *Economic and Social Integration: the Challenge for EU Constitutional Law* 54-56 (Edward Elgar, 2012).

⁷ Takis Tridimas, *The General Principles of EU Law*, 136 (Oxford University Press, 2006).

Carl Schmitt and Ernst Forsthoff.⁸ These were defensive rights against the state, first and foremost the rights to property and liberty, but also rights to privacy and freedom of expression for those who can rely on their wealth to exercise those rights (subsequently summarized as libertarian human rights).

In a nutshell, the principle of proportionality subjects any restriction of libertarian human rights to a strict justification test. In this conception, the public interest is systematically put on the back foot. Any activity in the public interest must be justified against the general suspicion that individual liberty or property is unduly impinged upon. Conversely, the prevalence of libertarian human rights over any public interest does not have to be justified.

2.1.2 Critique

This bias, which is inherent in any proportionality analysis, triggers two strands of critique.

First, the prerogative of (state) authorities to assess the public interest is criticized as being too weak in comparison with the authority for judges in applying the proportionality test, in particular where state authority is underpinned by democratic legitimacy. The discussion often alludes to the difference between common law-style reasonableness and (potentially Germanic) Continental-style proportionality⁹ – after all, the English Supreme Court still relies on variations of the *Wednesbury* reasonableness test¹⁰ and the US Supreme Court is the last remaining constitutional court not using proportionality. Since the *Wednesbury* test originates from a parliamentary democracy, and proportionality is closely linked to constitutional review of legislation, it is at times suggested that the reasonableness test is more adequate in leaving room for manoeuvre for democratically elected parliaments,¹¹ while also awarding public-policy aims a higher priority than the proportionality principle.¹²

It is suggested that this critique only convinces in so far as the principle of proportionality favours individual rights to property and liberty over the rights of those who

⁸ On this legacy, see Robert Alexy, *Discourse Theory and Fundamental Rights*, 16, in Antonin J Menéndez & Erik O. Eriksen (eds) *Arguing Fundamental Rights* (Springer, 2006).

⁹ See for example Stone Sweet & Mathews, *supra* n. 5, 147, juxtaposing "German style" proportionality analysis" and "UK style reasonableness"

¹⁰ The *Wednesbury* test, developed when adjudicating about limitations for a concession to run a cinema [*Associated Provincial Picture Hoses v Wednesbury Corporation* [1948] 1 KB 223], established that a public authority could not rely on a statutory empowerment if the action taken could not be reasonably justified under any circumstances. The English judiciary now tends to require positively a reasonable justification [*R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418, at 453 (Lord Cooke)]. However, this is not equivalent to proportionality in that the Less Restrictive Measure test is not applied, and hence does not meet with approval of the European Court of Human Rights, for example [e.g. *Smith and Grady v UK* (2000) 29 EHRR 493]

¹¹ Stone Sweet & Mathews, *supra* n. 5, 161, concerned that applying the principle of proportionality "casts a deep shadow on law-making of non-judicial actors, while providing judges with flexibility in order to manage potentially explosive political questions." Mosche Cohen-Eliya and Iddo Porat, *Proportionality and the Culture of Justification*, 59 *The American Journal of Comparative Law*, 463, 480-81 (2011), see also Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 *European Law Journal*, 158. 169 (2010).

¹² Harbo, *supra* n. 11, 161 fn. 10.

are less prosperous: it is then that juristocracy¹³ becomes a problematic replacement of democracy, securing the rights of the few over those of the many.

This leads over to the second strand of critique, which is related to conceptions of human rights adequate for modern democracy. At the time when the principle of proportionality focused on defending rights against state authorities, democracy included only those whose wealth enabled them to lead an independent life. Tenants on a landlord's soil and labourers who depended on the daily sale of their labour were not part of the (voting) citizenry. With the reform of democracy to include voters of all social stratospheres, those who depended on the use of others' land or capital to earn a living were accepted as full citizens.

In order to adapt human-rights protection to this expansion of democracy, merely defensive rights of the *status negativus*¹⁴ were complemented by rights of the *status positivus*, informed by the state's obligation to promote and support rights and their realization in the world.¹⁵ Secondly, rights also need to become relevant in relations between citizens, rather than only in relation between citizens and the state or its agents and conglomerates. Human rights are thus guaranteed in horizontal relations,¹⁶ and the state, and conglomerates of states such as the EU, are under an obligation to create conditions in which those who have few possessions can enjoy the substance of human rights in fact.¹⁷

In short, human rights need to be socially embedded in modern democracies, as well as in the world of interlinked societies and economies.¹⁸ In employment law, the sole field of application for EU anti-age discrimination law,¹⁹ the social embedding of rights is additionally supported by the fact that rights are ultimately enforced by em-

¹³ To use the term coined by Ran Hirschl, *Towards juristocracy. The origins and consequences of the new constitutionalism* (Harvard: Harvard University Press, 2004).

¹⁴ This refers back to the writings of Georg Jellinek's system of rights, which was written in pre-constitutional Germany (*System der subjektiven öffentlichen Rechte* (Akademische Verlagsbuchhandlung Mohr, 1892). The concepts of liberal, political and social citizenship as developed by T.H. Marshall (*Citizenship and Social Class* (Pluto Press, 1950)) can be viewed as another way of expressing similar conceptual approaches to rights, as can the establishment of three types of EU constitutional law by Kaarlo Tuori (*The Many Constitutions of Europe*¹, in Kaarlo Tuori and Suvi Sankari (eds) *The Many Constitutions of Europe*, 3, (Ashgate, 2010).

¹⁵ Furthermore, Jellinek's *status activus*, which referred to political or citizens' rights such as the right to vote, profess one's opinion and to a free press, also needs further development to include a *status social activus*. This status empowers citizens to combine in realms that are not considered public in a market economy, but where the power of property should be mitigated to enable actual use of basic rights to work, education, living space and cultural activity for all. This is beyond the scope of this article, though – see Dagmar Schiek, *Fundamental Rights Jurisprudence between Member States' Prerogatives and Citizens' Autonomy*, in Hans Micklitz & Bruno de Witte (eds) *The European Court of Justice and the Autonomy of Member States*, 219, 222, 236-241 (Antwerp: Intersentia, 2012).

¹⁶ Schiek, supra n. 15, 222-23 with further references.

¹⁷ For more detail with expansive references see Schiek, supra n. 6, 54-59; *ibid*, supra n. 3, 37-45.

¹⁸ For more detail on socially embedded constitutionalism see Schiek, supra n. 6; *id*, supra n. 3, 17-46.

¹⁹ A Commission proposal for a directive expanding its scope of application to provision of goods and services as well as the education and health sector is pending since 2008, when the EU Commission launched its initial proposal (COM (2008) 426 endg = 2008/140/APP). The proposal was last debated in the Council in December 2013, when no agreement could be reached.

(<http://www.europarl.europa.eu/oel/popups/summary.do?id=1327879&t=e&l=en>)

employees against employers, i.e. one private party against another. This makes this an ideal field for developing the application of the principle of proportionality adapted to socially embedded constitutionalism.

2.2 Proportionality under a socially embedded rights regime

2.2.1 Janus-faced proportionality for protecting rights adequately

This view changes the role of the principle of proportionality. What appears as a conflict of an individual right (to property, for example) and the public interest, may well constitute a conflict of an individual right on the one hand and on the other a public measure creating preconditions to enjoy human rights.

For example, the insatiable hunger of employers for information about future and present employees, based on the alleged need to protect employers' property, should be limited in order to protect the personality sphere of employees beyond strictly public spheres. Data protection legislation which prevents employers from spying on their employees is not just an invasion of employers' rights to property and liberty driven by the public interest, but also constitutes protection for employees' rights to privacy. Accordingly, while the legislation should be proportionate in limiting employers' property rights, limiting the data protection legislation for this purpose should also be proportionate to the employees' rights to privacy.²⁰

The question is thus not whether rights are still "trumps", as no one less than Dworkin demanded.²¹ Instead, under socially embedded constitutionalism it is no longer legitimate for rights of the *status negativus*, i.e. the rights of the *beati potentati*, to trump the rights of those who cannot rely on their wealth for bolstering their autonomy. Accordingly, proportionality should be employed in a "double-faced" way, if and when there is a human rights conflict. On the one hand, the measure safeguarding that human rights are not made into hollow formulas under market conditions should be proportionate to the general right to property and liberty. On the other hand, the limitations on the protection of the competing rights should also be proportionate.

The Charter of Fundamental Rights for the European Union (CFREU) acknowledges the possibility of competing fundamental rights in its Article 52 (1) on limitations of rights and freedoms recognized by the Charter. Such limitations, which must also be subject to the principle of proportionality, may be made either in relation to the general interest or in relation to the need to protect the rights of others.²² While the Charter text suggests that it is immaterial whether individual rights are limited in the

²⁰ More detail on using the principle of proportionality in relation to privacy in the workplace, Pnina Alon-Shenker & Guy Davidov, *Applying the Principle of Proportionality in Employment and Labour Contexts*, 59 McGill Law Journal, 375, 386-94 (2013).

²¹ Ronald Dworkin, *Rights as Trumps*, in Jeremy Waldron (ed) *Theories of Rights*, 153, (Oxford University Press, 1984).

²² On the contradictory text of Article 52 (1) and in particular the explanatory notes, see Steve Peers & Sacha Prechal, *Article 52*, in Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward (eds) *The EU Charter of Fundamental Rights - A Commentary*, 52.14-52.86 (Hart Publishing, 2014).

name of the general interest or in order to protect rights of others, this chapter argues that it should make a difference what exactly is protected. In contrast to the differentiations applied by the Court,²³ it is argued that the protection of libertarian rights should be stricter if the general interest which is relied upon to support the restriction is not related to promoting human rights of others. If the general interest consists in promoting actual uses of human rights, a more lenient application of the proportionality principle might be adequate. If libertarian rights of corporations, rather than of human beings, are relied upon to quash measures taken in order to promote rights of human beings, the most lenient level of proportionality analysis should be applied.

2.2.2 Revised proportionality, democracy and judge power

As mentioned, the use of proportionality analysis is associated with increasing power of courts over legislators, including democratically legitimized ones such as parliaments. In the context of employment law, where the EU anti-age discrimination principle applies, law-making through collective bargaining processes has to be considered as well – highlighting that parliamentary legislation is not the only democratic way of rule-making.

The question whether employment law is made by judges, collective bargaining or parliaments underpins the adequate application of proportionality. Without exhausting the philosophical depth of the debate,²⁴ it is suggested that judicial proceedings, parliamentary legislation and collective bargaining offer distinctive fora for practical reasoning.²⁵ An adequate structure of the principle of proportionality can safeguard the quality of practical reasoning before courts. Ultimately, such practical reasoning is not categorically different from reasoning in parliaments and collective bargaining processes in that the questions decided are political in nature.

The case for allocating a prerogative for rulemaking to courts, the parties engaged in collective bargaining, or parliaments can (and has) been made in relation to the capacity of interest representation. For example, parliamentary rule as majority rule is not best suited to cater for the rights of structural minorities.²⁶ Similarly, there is a limit to which parties in collective bargaining are able to cater for rights not to be discriminated against. In that process, trade unions are the party which may represent the interests of those susceptible to being discriminated against – employers have a

²³ The analyses by Tridimas, *supra* n. 7, and Harbo, *supra* n. 11 suggest that the Court applies a strict proportionality test if it assesses measures by Member States against the demands of EU fundamental freedoms, while it reverts to a *Wednesbury*-like reasonableness test when assessing the legitimacy of EU measures in relation to that same economic freedoms. Harbo adds that the collective action by groups of individuals does not fare better than regulation by Member States. My own analysis confirms that the Court is stricter in controlling Member States and private actors if it perceives a restriction of EU economic freedoms; Schiek, *supra* n. 6, 116-214; *supra* n. 15, 219.

²⁴ E.g. Antonin J Menéndez and Erik O. Eriksen (eds) *Arguing Fundamental Rights* (Springer, 2006); Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013).

²⁵ Erik O Eriksen, *Democratic or Judge-Made Law?*, in Antonin J Menéndez and Erik O Eriksen (eds), *supra* note 24, 93-94, for judicial and parliamentary rule-making.

²⁶ Eriksen, *supra* n. 25, 92.

structural interest in “*divide et impera*”-style discrimination. Trade unions, however, have to rally their members behind a common goal. Trade union representation thus tends to favour those interests shared by all employees over interests of fractions of employees.²⁷

While there is thus a case for judicial rights protection, there are certainly instances when the fourth level of reasoning is not adequate for the judicial forum. The use of proportionality in adjudicating collective disputes or the legitimacy of collective action is a good example. Those engaged in the action need to maintain a margin of appreciation if the human right to engage in collective bargaining underpinned by collective industrial action is not to be compromised.²⁸

2.2.3. Structure of proportionality analysis

In order to achieve all this, the formal structure of the proportionality test can be maintained in principle. As is well known, this formal structure consists of a four-stage test: the restriction has to serve a legitimate public interest (1), it has to be suitable to achieve the aim pursued (2), it should not go over and above what is necessary to achieve the aim (3) and the limitation of liberty should not be out of proportion with the gain achieved by the rule in the public interest (4).²⁹ In the traditional structure, all these steps are dedicated to balancing individual liberties against public-policy aims.

To adapt the proportionality analysis to the demands of socially embedded constitutionalism, it is above all necessary to expose the competing aims and conflicting rights that are balanced. The first step is thus to establish which public interest is relied upon for limiting a libertarian right, and whether this alleged public interest aims at protecting or promoting human rights of other human beings. This will certainly not always be the case. If there is a conflict between rights of human beings, the subsequent three steps should be conducted in both directions: the limitation of each right should only go as far as necessary to achieve the realization of the other right.

The structure allows the introduction of more or less lenient standards. As developed above, the most lenient standard is adequate if rights of corporations, i.e. of dead capital, are mobilized in order to quash legislation that protects or promotes rights of human beings. In these cases, it should be sufficient that the policy protecting human rights – a comprehensive anti-age-discrimination regime – is suitable to achieve better protection or promotion of human rights of workers. If rights of human beings

²⁷ For more detail see Dagmar Schiek, *Tarifvertrag und anders legitimiertes Recht (Collective agreements and law from other sources)*, in Wolfgang Däubler (ed) *Tarifvertragsgesetz. Kommentar* (commentary on Collective Agreement Act [Germany]), 100-103 (3rd edn Nomos, 2012). It is possible that trade unions genuinely promote equality law, as is demonstrated by the fact that British equal-pay rules were first established by collective agreement – see Kay Gilbert, *Promises and practices: job evaluation and equal pay forty years on!*, 43 *ILJ* 137 (2012).

²⁸ Alon-Shenker & Davidov, *supra* n. 20, 399-404 for the Canadian Constitution); Wolfgang Däubler, *Verfassungsrechtliche und völkerrechtliche Garantien der Tarifautonomie*, in Wolfgang Däubler (ed) *Tarifvertragsgesetz. Kommentar*, 70-72 for the German Constitution, (3rd edn Nomos, 2012); both with ample references to the respective constitutional court's case law.

²⁹ See with numerous references from EU case law Sauter, *supra* n. 5, 448.

compete, the medium level of scrutiny is adequate. The measure should be suitable to improve protection or promotion of human rights, and there should be no less invasive but equally effective alternative measure available. Finally, the invalidation of a policy promoting human rights should be proportionate in relation to the protection of rights of others. In employment cases, the promotion of the rights of many employees will frequently compete with the protection of libertarian rights of an individual employer, which will make proportionality of quashing employment rights difficult to sustain. The most intense scrutiny will be adequate if a libertarian right is restricted in favour of a policy which does not promote rights of others, for example in favour of administrative convenience. In this case, the fourth element of proportionality analysis will be used: personal liberty should not be restricted to make the administration's life easier.

Proportionality analysis can thus be infused with substantive protection of human rights, and at the same time safeguard transparency of judicial reasoning. By contrast, under the common-law-type reasonableness test, the judge's discretion determines whether a rule is seen as reasonable or not, without any structured argument or transparency. For employment law cases, a scolding critique of this style of arguing has been submitted by Patterson et al,³⁰ and accordingly, proportionality is today perceived as a better option for judicial review of employment discrimination than a mere reasonableness test.³¹

2.3 Summary

If the principle of proportionality as a structure for practical reasoning by judges should serve a modern human-rights regime, its bias in favour of libertarian human rights must be overcome. If libertarian rights are restricted in order to enable the actual enjoyment of human rights of others, the principle of proportionality works in a two-way process. It is not sufficient to require justification for restricting libertarian human rights. In addition, the judicial demand to remove the legislation or other rule promoting the factual enjoyment of human rights must be justifiable as well. Is it really proportionate to the surplus of liberty achieved at the other end? In this sense, a true balancing of rights (rather than balancing in name only) can be achieved.

3. Proportionality in CJEU age discrimination cases – the status quo

In order to assess the potential of the principle of proportionality in age discrimination cases, this section introduces the role of proportionality in discrimination law and summarizes the CJEU's present approach to its application in age discrimination cases.

³⁰ Alan Paterson, *The Law Lords* (Palgrave MacMillan, 1982).

³¹ David Cabrelli, *The Hierarchy of Differing Behavioural Standards of Review in Labour Law*, 40 *ILJ* 146, 167-70 (2011).

3.1 Proportionality, unequal treatment and discrimination

The principle of proportionality plays a role in justifying unequal treatment in different ways. Outside the scope of application of non-discrimination law, public authorities are subject to the principle of equal treatment before and under the law (now: Article 20 CFREU), and in many legal orders, employers are under a similar obligation not to differentiate arbitrarily between employees. This general equal-treatment principle only demands that different treatment is not arbitrary, in that it pursues a legitimate aim and is suitable and appropriate to achieve that aim.³² This threshold is not very high: any different treatment can be justified, as long as it is suitable for achieving a legitimate aim. Accordingly, any search for a less restrictive alternative measure is not deemed necessary.

A ban of discrimination requires a stricter application of the proportionality principle, since discrimination on grounds of one of the specified grounds, such as age, is prohibited. In the absence of an explicit legislative derogation, the only defence against a claim of discrimination is that the difference in treatment is not actually based on the specified ground, but on another reason (causation).³³

Proportionality can enter the stage twice here. First, it can play a role in establishing causation. In direct discrimination cases, proportionality is used to determine whether the more favourable treatment of a comparator is caused by discrimination. If, for example, a person perceived as being of Arabic descent claims that a non-Arabic applicant was employed as a builder on grounds of customers' racial prejudice,³⁴ the employer could defend this choice by stating that the competitor possessed a qualification necessary to achieve a legitimate aim (e.g. providing sufficiently safe services). If the qualification is not necessary, reference to it is not a serious concern, and racist discrimination must be assumed. In indirect discrimination cases, proportionality analysis is always relevant: a prima facie case of indirect discrimination can be established by showing either with statistics or by other means that a neutrally worded measure affects persons of a certain age more negatively than persons of other ages. Only if the neutral measure is justified by an aim not related to discrimination, can the assumption that there is discrimination be rebutted. Proportionality is decisive for that justification: the aim must be legitimate, and the means used to achieve that aim suitable and adequate. They are inadequate if there is a less discriminatory al-

³² See for example C-127/07 *Arcelor Atlantique* [2008] ECR I-9895, paragraphs 23-57. For details from the Court's case law on this see Mark Bell, *Article 20*, in Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward (eds) *The EU Charter of Fundamental Rights - A Commentary*, 20.28-20.32 (Hart Publishing, 2014).

³³ Unfortunately, in some recent cases the Court of Justice has not distinguished between the general equal-treatment principle and the prohibition to discriminate: for example, it accepted different age thresholds for farming mothers and fathers for accessing payments supporting retirement from farming, relying on the low scrutiny level adequate for the general equal-treatment principle (C-401/11 *Soukupová* ECLI:EU:C:2013:223 paragraph 29), building on its erroneous decision in *Test-Achats*, where it is considered to justify different insurance premiums for women and men (Case C-236/09 [2011] ECR I-773, paragraph 28). For a critique see Dagmar Schiek, *Article 23*, in Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward (eds) *The EU Charter of Fundamental Rights - A Commentary*, 23.07-23.08 (Hart Publishing, 2014).

³⁴ Consider the facts of the *FERYN* case (C-54/07 [2008] ECR I-5187).

ternative. This type of justification is only a way of establishing that age (or any other reason) is not the cause of the detriment resulting from a neutrally worded provision.³⁵

Proportionality enters the stage a second time when there is a causal relationship between the discrimination ground and unequal treatment. Positive EU secondary law only allows justifications of explicit differentiation in specified cases, and for those justifications the principle of proportionality again is relevant. Since these cases constitute an exception from the ban of discrimination, the proportionality principle should be applied in its strict form. Whenever a less discriminatory alternative is available to achieve the relevant aim, the justification should fail. Even if there is no such alternative, it needs to be considered whether restricting the right to equal treatment is proportionate in the strict sense, given the importance of the competing policy. In this consideration, it should be considered whether the competing policy in itself promotes the actual enjoyment of human rights or any public policy unrelated to such promotion.

3.2. Age discrimination under EU Directive 2000/78

As an added complication, the EU ban on age discrimination as specified by Directive 2000/78 is accompanied by a specific regime of exceptions, which implies a differentiated role for proportionality analysis. This regime constitutes a statutory limitation (Article 52 (1) CFREU) of the fundamental right not to be discriminated against on grounds of age (Article 21 CFREU).

The general exceptions of Article 2 (5), legitimising national legislation necessary for public security, the maintenance of public order or the prevention of criminal offences, for the protection of health and the rights and freedoms of others, and Article 4 (1), legitimising different treatment if age or any other characteristic constitutes a genuine and determining occupational requirement or a bona fide occupational requirement (BFOR), apply to age discrimination as well as to all other forms of discrimination.

Specific to age, Article 6 (1) authorizes Member States to classify different treatment on grounds of age as non-discriminatory if “objectively and reasonably justified by a legitimate aim, including legitimate employment policy (and) labour market ... objectives”, specifying a number of typical justifications in a non-exhaustive list. This provision thus allows justification of direct discrimination beyond the narrow scope of the exceptions made in Article 2 (5) and 4 (1) of the Directive. The ban of age discrimination in employment is thus less strict than bans on other types of discrimination, in that Article 6 (1) allows a wider discretion in favour of Member States (and, where appropriate, social partners) in relation to social-policy aims which might conflict

³⁵ For more detail see Dagmar Schiek, *Indirect Discrimination*, in Dagmar Schiek, Lisa Waddington & Mark Bell (eds) *Cases, Materials and Text on International, Supranational and National Non-Discrimination Law*, 432-44 (Hart Publishing, 2007); Evelyn Ellis & Philippa Watson, *EU Anti-Discrimination Law*, 171-73 (2nd edn Oxford University Press, 2012)

with the ban on age discrimination.³⁶ The Court has so far specified that the standard required under Article 6 (1) does not differ from that used in Article 2 (2) for indirect discrimination,³⁷ and that the additional justification must not “have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age”.³⁸ Nevertheless, a lower standard of scrutiny under Article 6 (1) than under Articles 2 (5) and 4 (1) seems to be justified on the basis that Article 6 (1) enables Member States to introduce rules that would be discriminatory under Article 2 (2).³⁹

3.3. Proportionality in the Court’s case law

As mentioned before, the Court’s case law in age discrimination cases is criticized as contradictory in its approach to the proportionality test.

So far, there have been only two groups of cases in which the Court has applied medium-level scrutiny, in that it identified an aim pursued by direct age discrimination, and considered whether the direct age discrimination was necessary to achieve this aim.

The first group of cases involved employees who were compulsorily retired before they reached the general retirement age of the relevant country,⁴⁰ or where they were deprived of a social benefit because they could draw an old-age pension, although they had not yet reached the general retirement age.⁴¹ In each of these cases the Court held that the compulsory early retirement or the exclusion from a social benefit cushioning unemployment went over and above what was necessary to achieve the aim pursued.

The other group of cases⁴² concerned pay systems in the German public service which categorized employees in relation to their starting age: an employee who started younger would at any stage of her career achieve higher remuneration, including seniority-related increases. This policy was not suitable for achieving the stated aim of honouring seniority and experience, since the experience of those starting their career with that specific employer later would be rewarded to a lesser degree.

³⁶ See also AG Cruz Villalón in his opinion on Case C-447/09 Prigge [2011] ECR I-8003, paragraphs 39 and 40

³⁷ C-388/07 Age Concern England [2009] ECR I-1569, paragraphs 65, 67, explicitly rejecting the suggestion that a reasonableness test might replace proportionality in the application of Article 6 (1) Directive 2000/78, see also paragraph 51 on the relation between the principle of non-discrimination and employment policy.

³⁸ *Ibidem* paragraph 51

³⁹ Age Concern England paragraph 62, 63

⁴⁰ Cases C-341/08 Petersen [2010] ECR I-47; and C-447/09 Prigge [2011] ECR I-8003

⁴¹ Cases C-499/08 Andersen [2010] ECR I-09343, C-546/11 Toftgaard ECLI:EU:C:2013:603 and C-153/11 Odar [ECLI:EU:C:2012:772].

⁴² These were the only two cases so far, with altogether 10 claimants: cases C -297 & 298/10 Hennings & May [2010] ECR I-7965 and joined cases C-501/12 et al Specht et al, 19 June 2014, ECLI:EU:C:2014:2005 (8 claimants). A further similar case is still pending (C-20/13 Unland).

In all other age discrimination cases, the Court did not even apply medium-level scrutiny. For example, the Court has accepted each and every case of compulsory retirement in which the employee had reached the general pensionable age.⁴³ It held that planning security for employers, the opening of positions for younger recruits and the desire to avoid performance management of older employees were all legitimate aims, and that the long tradition of terminating the employment relationship at a certain age as well as the fact that the relevant rule had been collectively agreed upon added to the legitimacy. However, the question whether compulsory retirement was necessary to achieve these aims was never even asked. In another equal-pay case,⁴⁴ the Court explicitly stated that the employers' policy of paying higher contributions for older employees in its occupational pension scheme did not "appear unreasonable"⁴⁵, thus giving up even the appearance of a proportionality test.

Whether the Court was lenient regarding age discrimination or condemned it, in none of the cases was there any open reasoning relating to the relative weight of the competing interests involved, or the rationale behind the non-discrimination clause as well as countervailing regulatory interests. In short, the case law is less than persuasive.

4. Towards a more reasoned approach

In order to achieve a more convincing argumentation, the Court would have to consider the aims pursued by the ban on age discrimination on the one hand and the countervailing interests supporting the numerous exceptions found in employment practices all over Europe. This section first explores the aims, values and rights-related interests informing the EU ban on age discrimination in employment. It goes on to critically analyse the case law summarized above, and to develop alternative arguments for each group of cases.

4.1. Rationales behind the EU ban on age discrimination

It may well be difficult to find a rationale for the prohibition of age discrimination under Directive 2000/78. Its wording theoretically encompasses the different treatment of a 53-year-old and a 54-year-old person, as well as the different treatment of the employee over 55 and the employee under 30, to name just two examples. This can be explained by the fact that the ban on age discrimination rests not only on the unique rationale for non-discrimination law but also on rationales stemming from socioeconomic policies more generally.

4.1.1 General rationale for non-discrimination law

If we assume that discrimination law and policy has a unifying rationale, this rationale needs to be defined independently of the ever-growing number of "discrimination grounds". I suggest that such a main, common rationale can be developed, from

⁴³ Cases C-411/05, *Palacios de la Villa* [2007] ECR I-8531; C-388/07 *Age Concern* [above fn 37], C-45/09 *Rosenblatt* [2010] ECR I-9391 and C-141/11 *Hörnfeld* [ECLI:EU:C:2012:421].

⁴⁴ Case C- 476/11 *HK Danmark (Kristensen)* [ECLI:EU:C:2013:590]

⁴⁵ *Ibidem*, paragraph 66.

which two underlying rationales can be derived, which are mirrored in different proportions in each of the discrimination grounds.⁴⁶

As the main common rationale for non-discrimination law and policy addressing markets and societies, I propose the aim of overcoming disadvantages related to *ascribed otherness*. Ascribed otherness refers to the process of identifying persons, as a heteronomous act [i.e. from a viewpoint external to them] as differing from whatever is insinuated as the normal or dominant identity-describer. Otherness works against the background of normativity. Ascribing otherness is the specific mark of creating social disadvantage through discrimination.⁴⁷

In providing legal remedies against acts inducing individual disadvantage on the basis of othering and creating positive duties to enable individuals and groups to overcome such disadvantage, non-discrimination law responds to two underlying rationales. First, any positioning on the continuum established by notions such as age should not justify different treatment because human beings should be treated as individuals, and entitled to choose their own destiny outside little boxes designated for the elderly. Individuation, however, should be a choice and not an obligation. Accordingly, any assimilationist pressure to utilize surgery or expensive cosmetics in order to eradicate or mask the signs of ageing, for example, should be avoided. In this regard, one of the aims of non-discrimination law is to preserve diversity, by respecting difference and protecting those strands of identity a person neither wants nor should be expected to lose. Respecting differences also requires accommodation of different (cap)abilities,⁴⁸ partly with a physical basis. Such differences include changing abilities with increasing age. Without accommodating such differences, non-discrimination law remains an empty promise, as is aptly illustrated by the image of granting a stork and a fox equal rights to drink from a very tall cylinder. A mere anti-stereotyping rationale for equality law will thus do little to bring about equality in reality.⁴⁹

It is sometimes suggested that a ban of age discrimination is not related to genuine anti-discrimination aims, because age is subject to constant change and thus does not define a discreet group. It is correct that individual age changes every day and that, in any society, the effect of age on social integration, health, education and em-

⁴⁶ For more detail see Dagmar Schiek, Organising EU Equality Law Around the Nodes of ‘Race’, Gender and Disability, in Dagmar Schiek & Anna Lawson (eds) *EU Non-Discrimination Law and Intersectionality: investigating the triangle of racial, gender and disability discrimination*, 20-22 (Ashgate, 2011), id *Elements of A New Framework for the principle of Equal Treatment of persons in EC Law*, 8 ELJ 290 (2002), id. *Broadening the Scope and the Norms of EU Gender Equality Law*, 12 Maastricht Journal of European and Comparative Law, 427 (2005).

⁴⁷ This proposition shares central ideas with Iris Marion Young’s concept of positional difference, summarized in her contribution post mortem Iris Marion Young, Structural Injustice and the Politics of Difference, in Emily Grabham, Davina Cooper, Jane Krishnadas & Didi Hermann (eds) *Intersectionality and Beyond* (Routledge-Cavendish, 2009).

⁴⁸ Schiek, supra n. 46, 310.

⁴⁹ Julie Suk, *From Anti-Discrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 The American Journal of Comparative Law 75 (2012).

ployability is subject to constant change as well.⁵⁰ However, fluidity and change are not unique to age – gender, ethnicity and disability are not fixed categories either.⁵¹

Irrespective of constant change, situations where older persons must enter compulsory retirement or accept exclusion from social benefits designed to combat unemployment attest that there is a discrimination risk connected to old age, figuratively referred to as gerontophobia: the fear of one's own death leads people to avoid older people.⁵² Stereotypes about the individual ageing process result from such desire to avoid contact with the elderly, and include the insinuation that older people are rigid, unproductive, cranky, inflexible and incapable of learning or adapting to new people and circumstances. Such stereotypes do not correspond to the reality of ageing, which is conditioned by intrinsic factors as well as the socioeconomic environment.⁵³ Addressing prejudice against older workers can thus be based on the general case for non-discrimination law and policy.

However, the perception that older people are different from younger ones is not only based on prejudice and stereotyping. Although the ageing process is individual, there are issues such as loss of mobility and diminishing eyesight and hearing which need to be addressed: there is much scope for accommodating difference in age discrimination law. Further, measures need to be taken to prevent over-exhaustion, should people over 65 be able to go on working on a regular basis.⁵⁴

4.1.2 Other rationales for banning age discrimination

The non-discrimination rationale can justify a prohibition of discrimination at the end of the age spectrum, for example on grounds of becoming older.⁵⁵ However, it cannot explain the ban of discrimination on grounds of any age as contained in Directive 2000/78. The Directive itself suggests a different rationale: recital 25 confirms that banning age discrimination is also related to aims set out in the employment guidelines, which include increasing the employment rate of people aged 65 and over. It is widely acknowledged that the increasing concern with age discrimination is related to two different social-policy concerns.

First, the alleged greying of the population leads to difficulties to comply with expected pension claims.⁵⁶ Delaying the payment of pensions would address this prob-

⁵⁰ John Grimley Evans, *Age Discrimination: Implications of the Ageing Process*, in Sandra Fredman & Sarah Spencer, *supra*, 15-19.

⁵¹ On gender see Silvan Agius & Christa Tobler, *Trans und intersex people. Discrimination on grounds of sex, gender identity and gender expression* (European Commission, 2011); generally see Schiek (2011), *supra* note 46, Sandra Fredman, *Discrimination Law*, 94-97, 156-157 (2nd edn, Oxford University Press, 2011).

⁵² Uladzislau Belavusau, *On age discrimination and beating dead dogs: Commission v Hungary*, 50 CMLR, 1145, 1156-57 (2013).

⁵³ Grimley Evans, *supra* n. 50, 11-15.

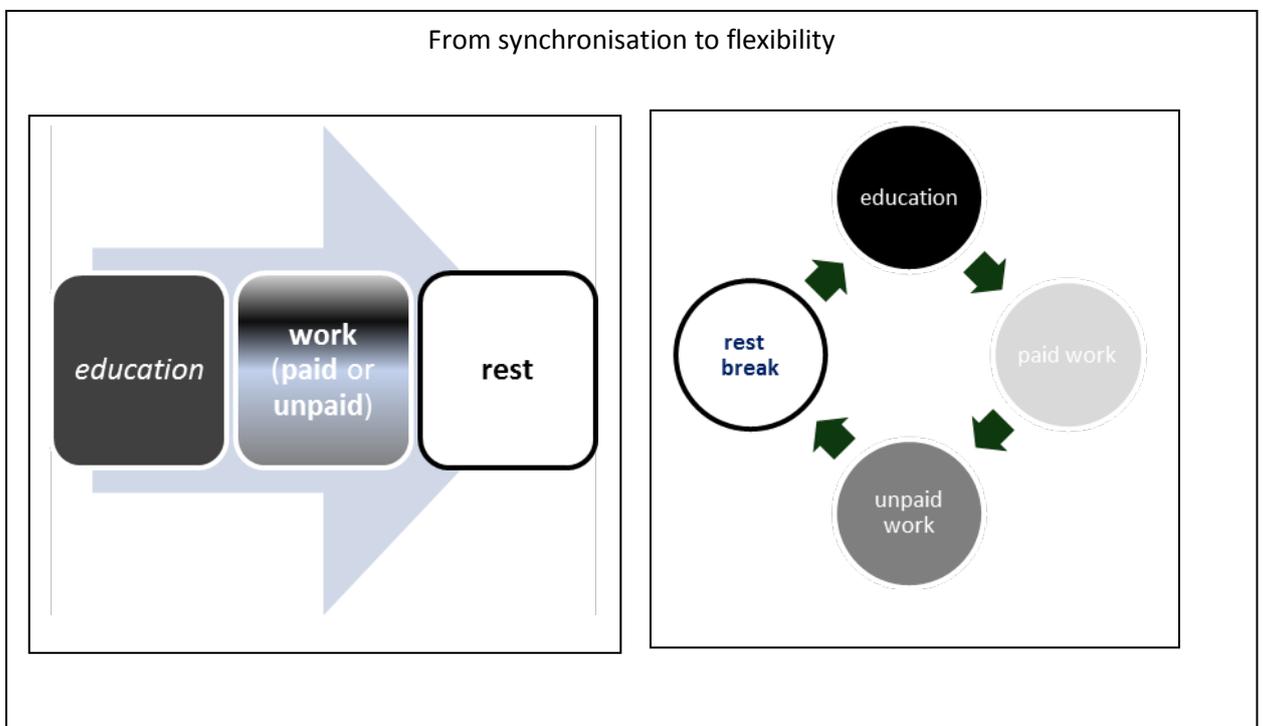
⁵⁴ Ann Numhauser-Henning, *The EU Ban on Age-Discrimination and Older Workers: Potentials and Pitfalls*, 29 *International Journal of Comparative Labour Law and Industrial Relations* 391-414 (2013)

⁵⁵ And possibly on grounds of being young, but this aspect is beyond the scope of this chapter.

⁵⁶ Therese MacDermott, *Older workers and extended workforce participation: moving beyond the 'barriers to work' approach*, 14 *International Journal of Discrimination and the Law*, 83, 85 (2014),

lem, and postponing the pensionable age alongside increasing employment rates of would-be pensioners would constitute a short-term solution to this problem. This socioeconomic concern supports the non-discrimination rationale of banning age discrimination in that it underlines the relevance of overcoming discrimination of the elderly in employment: if all those who would prefer to postpone their pension and continue working would be allowed to do so, rather than being presented with a golden handshake, European pension plans would become more sustainable.

Secondly, and possibly more importantly, the manifold age-related rules in employment law and practices could be seen as dysfunctional from a totally different perspective. These rules, which frequently lead to detriment for younger workers, comprise rising wages with age and/or seniority, increased employment protection for older workers, rules encouraging employment flexibility for younger workers while stressing stability and protection for older workers and much more. The common core of these rules is a vision of working life and the employment relationship rooted in the life-cycle concept organized around employed work. This traditional life-cycle comprises three phases: education as a pre-employment phase, the medium age characterised by active work (whether in employment or as unpaid care work in families), and the third age of retirement. As has been expanded upon in more detail elsewhere,⁵⁷ the life-cycle concept is no longer adequate for the service-oriented economy of the knowledge and information society. As also detailed in programmatic Commission documents,⁵⁸ the adaptation to this society requires a more flexible life-course, with frequent movements between phases of gainful employment, education and non-paid work.



⁵⁷ Schiek, supra n. 1, at 781-84, with further references

⁵⁸ European Commission, *White paper: An agenda for adequate, safe and sustainable pensions COM (2012) 55 final* (Brussels: European Union, 2012).

Focusing on the consequences for age discrimination, it is important to realize that the traditional three-phase model is compatible with traditional preferential treatment of older employees, while the new flexible model would require that those privileges are removed. Instead of rewarding employment stability, as is supported by wage schemes honouring long-term employment, the flexibility scheme requires rewards for being prepared to change employers, possibly interrupted by phases of further education. This results in a preference for medium-aged employees, who may have joined the sector later in life, over older employees – notwithstanding a potentially vulnerable position of the young. In retirement cases, the demands of the new flexibility are more contradictory, as will be discussed in the section presenting more considerate application of the proportionality principle. Overall, the prohibition of age discrimination against medium-aged employees, while not supported by a non-discrimination rationale, is necessary for promoting change from a stable life-cycle to the full flexibilization of working life. The change from predictable life cycles to flexible working lives also demands adapting retirement policies to flexibilization that has occurred already: instead of assuming that those reaching retirement age have led a stable employment life leading to a full pension entitlement, interruptions of labour-market participation as well as migration between different national pension systems will need to be factored in.

4.1.3 Summary: countervailing rationales of the age discrimination ban

In summary, the EU ban on age discrimination in employment rests on different rationales, which may even clash at times: the non-discrimination rationale commands protection against discrimination on grounds of becoming older, while the flexibility paradigm commands a preference for middle-aged employees.

Further, there may be other reasons for differentiating on grounds of age, related to stable pension systems, but unrelated to flexibilization and non-discrimination rationales.

4.2. A better reasoned application of proportionality analysis

In order to deliver a better reasoned application of proportionality analysis, these diverse rationales – and their relevance to the individual cases – need to be identified. The argument developed above would provide stronger support for human rights-related reasons, such as those related to the non-discrimination paradigm as opposed to the flexibilization paradigm. Further, any countervailing interests should be weighed in relation to their human-rights relatedness, in order to establish the correct level of scrutiny. Frequently, a transparent argumentation can improve the quality of judicial reasoning.

The last section of this chapter will give some examples of how proportionality can be applied in some groups of age discrimination cases.

4.2.1. Setting a “normal” retirement age

As mentioned, the Court has accepted – without too much scrutiny – policies which include compulsory retirement at a generally agreed age. The question is whether it is justifiable to omit a detailed proportionality analysis in those cases, as the Court

has done. First of all, demanding retirement at a certain age constitutes different treatment on grounds of age.⁵⁹ In the second step, the Court has identified a number of reasons for requiring employees to leave on reaching the general retirement age: planning security for the employer, the increased employment opportunities for employees of other ages, and guarding the employees' dignity by avoiding performance management which would lead to eventual dismissal of older employees.⁶⁰ Further, the Court has relied on the long tradition of general retirement ages in EU Member States⁶¹ as well as, where appropriate, the fact that the social partners had agreed on the retirement age and the automatic dismissal upon reaching retirement age.⁶² Subsequently, the Court did not discuss in much detail whether compulsory retirement was suitable to achieve the alleged aim, and there was certainly no consideration whether a less discriminatory alternative could have achieved the same aim.

Such a low level of scrutiny could be adequate only if the interest pursued by compulsory retirement promotes human rights, while compulsory retirement is based on a public interest not related to human rights. One would thus have to advance the argument that compulsory retirement at a certain age does not constitute age discrimination, or that the ban on age discrimination is based only on the flexibility agenda, and not any human rights agenda at all. As argued above, there is a genuine non-discrimination rationale on which to base a ban of discriminating on grounds of becoming older. This suggests that a justification must be sought for each individual reason, beyond the negligible statement that there is a tradition of enforcing a general retirement age.

As regards planning security for the employer, compulsory retirement relieves the employer from complying with general rules on dismissal, whether these are procedural or substantial; thus, increasing employers' flexibility to use retirement as an opportunity to reconsider staffing levels without the need to disclose the reasons for this. Ultimately, this serves the unconstrained use of property as a libertarian human right, while the right not to be discriminated against in employment is a human right promoted in horizontal relations. Accordingly, finding a less discriminatory alternative to the discriminatory practice of compulsory retirement should have been attempted. Making employment protection law more predictable for employers is an example of such an alternative. The justification of compulsory retirement at the regular pension age would fail.

Similarly, the alleged interest in avoiding the exposure of employees to undignified performance management and dismissal procedures would fail. While the dignity of employees can be related to human rights, it is not at all convincing that the dignity of employees can only be safeguarded by an ultimately discriminatory dismissal on grounds of age. Performance management and dismissal procedures should never

⁵⁹ Case C-411/05 *Palacios de la Villa*, supra fn. 43.

⁶⁰ *Rosenbladt*, supra fn. 43, paragraph 49-60 with reference to former case law

⁶¹ *Rosenbladt*, paragraph 47, *Toftgaard*, supra fn. 41, paragraph 28

⁶² *Rosenbladt*, *ibid.*, Case C-153/11, *Odar*, supra fn. 41, paragraph 53

violate dignity. Accordingly, the less discriminatory alternative to compulsory retirement would be establishing dignified performance management and dismissal procedures.

If compulsory retirement should be justified by employment opportunities for younger workers, the institution setting the retirement age would have to prove that they plan to make the pensioner's old post available for future employment. Frequently, retirement is used to reconsider staffing levels. In other cases, promotion of middle-aged employees will take place regardless of retirements, since the number of posts to be filled is not necessarily limited in a sector governed by markets. Such employers could not rely on "intergenerational justice" as a justification for compulsory retirement. However, in some (formerly public) sectors this may be different. If there is a consistent policy of refilling posts, the interests served by compulsory retirement include the aim of granting other potential employees the opportunity to develop professionally into a senior role, which constitutes an aspect of the right to choose and exercise a profession.

While those employees with sufficient experience to replace those retiring will not be sufficiently young to suffer from youth-based age discrimination, the right to engage in a profession is also worthy of promotion. Accordingly, this is a situation where balancing of competing rights would be adequate. Less discriminatory alternatives might comprise making retirement income available, thus inducing voluntary retirement. However, if this is not feasible, justification could result in endless argumentation. It thus seems that in these cases collective bargaining or democratically legitimated legislation might be good, alternative ways to justify the age discrimination inherent in any retirement scheme.

This type of argumentation might have led to a satisfactory answer in cases such as the one concerning retirement age for university professors⁶³— although in this case there was no proof that the retired professors would be succeeded by younger academics.

The arguments supporting compulsory retirement are, of course, considerably weakened if retirement is imposed upon employees who are unable to draw a satisfactory pension. These will frequently be employees on fractional contracts, or those who have been employed only for a short period of time after unemployment, or who have had a career interruption owing to migration – in other words those who comply with the new ideal of flexibility. In two cases before the Court of Justice, claimants from Sweden and Germany would have preferred to continue working after the regular retirement age in order to bolster their pension. Mr Hörnfeld⁶⁴ had never been able to obtain the full-time position he desired, and would receive only a small pension on the basis of his earnings as a part-time postal worker. Mrs Rosenblatt⁶⁵ was only able to draw a very marginal pension on the basis of her fractional cleaning

⁶³ Case C-250/09 Georgiev [2010] ECR I-11869

⁶⁴ Case C-141/11, *supra* fn. 43

⁶⁵ Case C-411/05, *supra* fn. 43

post, after having worked on fractional contracts (among other types of contracts) to support her disabled child. In these cases it is not known whether the employer sought to employ another part-time postal worker or cleaner after retiring these claimants. If they wished to discontinue the position, they would have avoided compliance with protective legislation in case of dismissal to the detriment of vulnerable employees. In these cases, justification of discriminatory compulsory retirement would have seemed difficult: the interests to be weighed against each other would be the opportunity of the employees to earn a living, which can be phrased as a property right in a socially informed interpretation of rights and their right not to be discriminated against on the one hand, and on the other hand the employers' interest in flexible use of their property.

The ease with which the Court discharged of these cases – relying on the inherent justice of the relevant collective agreements along with the long tradition of compulsory retirement – does not seem justified at all.

4.2.2 Retiring earlier than the general retirement age

The Court has been less accepting of compulsory retirement before the employees reached the general retirement age. In a case where a dentist was prevented from continuing to treat patients under the public health insurance system, the Court found this not to be justified for reasons of diminishing alertness, because the same dentist would have been allowed to provide privately funded dentistry.⁶⁶ Similarly, early retirement of pilots for health reasons was seen as unjustified because of the less discriminatory alternative of establishing the continuing capacity to securely navigate an airplane.⁶⁷ In both these cases a full proportionality test was conducted. This was a satisfactory solution of balancing the right not to be discriminated against and the health and safety interests of potential clients.

In a number of cases the Court also had to consider rules according to which social benefits were withheld because a person could already draw an old-age pension when they were dismissed, although they had not yet reached the general pensionable age. In contrast to the general retirement cases, the Court did conduct a full proportionality test here. Thus, Mr Andersen⁶⁸ could demand a redundancy payment, and Mr Toftgaard⁶⁹ could require availability pay, a specific form of unemployment payment for public servants in Denmark. In both cases, the dismissal took place before the generally accepted retirement age (67 and 70 respectively). In contrast to the general dismissal cases, the Court did conduct a more extensive proportionality test here, identifying less discriminatory alternatives with ease. For example, in the Toftgaard case the Court stated that Denmark could achieve its aim of avoiding abuse

⁶⁶ Case C-341/08 Petersen, supra fn. 40

⁶⁷ Case C-447/09 Prigge, supra fn. 40

⁶⁸ C-499/08, supra fn. 41

⁶⁹ Case C-546/11, supra fn. 41

of the availability payment by making the claim dependent on waiving the right to draw a pension for the time being, and to being actually available for posts offered.⁷⁰

In these cases a proportionality analysis was conducted in a satisfactory manner, and they demonstrate at the same time that “nudging” employees towards leaving the employment market once they receive a satisfactory pension remains admissible.

4.2.3. Wage differentiation

In cases of age-related wage differentiation, the Court had to deal with two different constellations.

On the one hand, there is the group of cases⁷¹ concerning a wage system which rewards seniority more if someone starts at a relatively young age with the same employer. This system is clearly related to the life-cycle system as well as the idea that an employee should be able to have higher earnings throughout their career, which implicitly is based on one employer – but with some flexibility: those starting later in life are entered in a pay bracket between their “real” age and the age where they started. The beneficiaries of this rule were older employees with uninterrupted employment, and those who raised the claims were employees of medium age, who had joined public employment later in life. The Court struck down the main rules because the age-related differentiation was not necessary to achieve the aim brought forward for justification (honouring seniority and experience). It considered the fact that the rules had been collectively agreed, but found that collective agreements must not discriminate.

In this case, the infringement of the freedom to bargain collectively should have been justified as well. After all, the wage system constitutes a compromise between the social partners, and wage-setting is a primary social-partner activity. While in relation to minorities or women we can rightly assume that collective representation might not guarantee the absence of discrimination, the middle-aged men, whose interests were defended by the Court, are actually a group which typically profits from collective bargaining processes. Thus, it is not apparent why collective bargaining processes needed to be corrected here. Further, there is no non-discrimination reason to protect the middle-aged against discrimination. The invalidation of the policy can be justified by a preference for more flexibility in working life, which is represented by those entering public employment after a few years in another career. However, this is only a general social-policy aim, unrelated to human rights promotion.

Thus, the wage brackets preferred by the Court mirror one social-policy choice, and the wage brackets based on age, as collectively agreed, mirror another policy choice.

⁷⁰ Toftgaard paragraph 69-71. In another case on reducing social benefits on grounds of pension entitlements, the Odar case (C-153/11, *supra* fn. 41), the Court accepted a 50-percent reduction of a redundancy payment under a social contingency plan (while still leaving still more than 308,253 Euro). The social contingency plan was struck down for disability discrimination, which was the main aspect of the case.

⁷¹ Case C-297, 298 Hennings & Mai; C-501/12 et al, Specht et al, *supra* fn. 42, the Unland case (C-20/13) is still pending.

The latter is related to flexibility and the former to stability. Accordingly, it could well be argued that the decision as to which of these social-policy choices prevails in wage-setting is correctly left to the collective bargaining process. In this case, the Court should have accepted a regulatory prerogative of collective bargaining partners.

In the Kristensen case,⁷² the Court had to deal with a preferential rule supporting those who join an employer at a later point in life: the employer paid higher contributions to its occupational pension system in order to enable the employees to build an adequate old-age pension. The Court accepted this as “reasonable”. It could be argued that this preferential treatment could be justified as a form of positive action, and would thus not constitute age discrimination. While the result is similar, the quality of the argument would be more mature.

5. Conclusion

It has been shown that the consequent use of the principle of proportionality would allow for a more rational balance of conflicting aims pursued by a ban on age discrimination. The solutions found by the Court suffer from a weakness in practical reasoning, while these solutions also support an increase in flexibility in employment.

Applying the proportionality principle in order to balance the promotion of non-discrimination rights in horizontal relations with other aims would make the rulings more convincing. The judges should apply a stricter level of scrutiny where the ban on age discrimination in employment clashes with general policy considerations such as promoting flexibility in employment. A medium level of scrutiny should be triggered by the promotion of other human rights in employment, including the right to collective bargaining, and a lower level of scrutiny should come into play where the ban only clashes with libertarian human rights (of employers). Justifying different treatment on grounds of age which is not related to the non-discrimination paradigm – e.g. the different treatment of 40-year-olds as opposed to 30-year-olds – should be the easiest burden to discharge, and balancing interests of different age groups beyond the end spectrums of working lives can often be left to the collective bargaining process.

In this way, the legislative preference for flexibilization in employment, which is mirrored in the open-ended prohibition of discrimination on grounds of age, does not receive the same judiciary protection as the anti-age-discrimination principle based on a human rights-informed, non-discrimination paradigm.

⁷² Case C-476/11, supra fn. 44