



INTERNATIONAL HUMAN RIGHTS LAW AND BEST PRACTICE FOR LAWYERS IN KAZAKHSTAN

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PROGRAMME

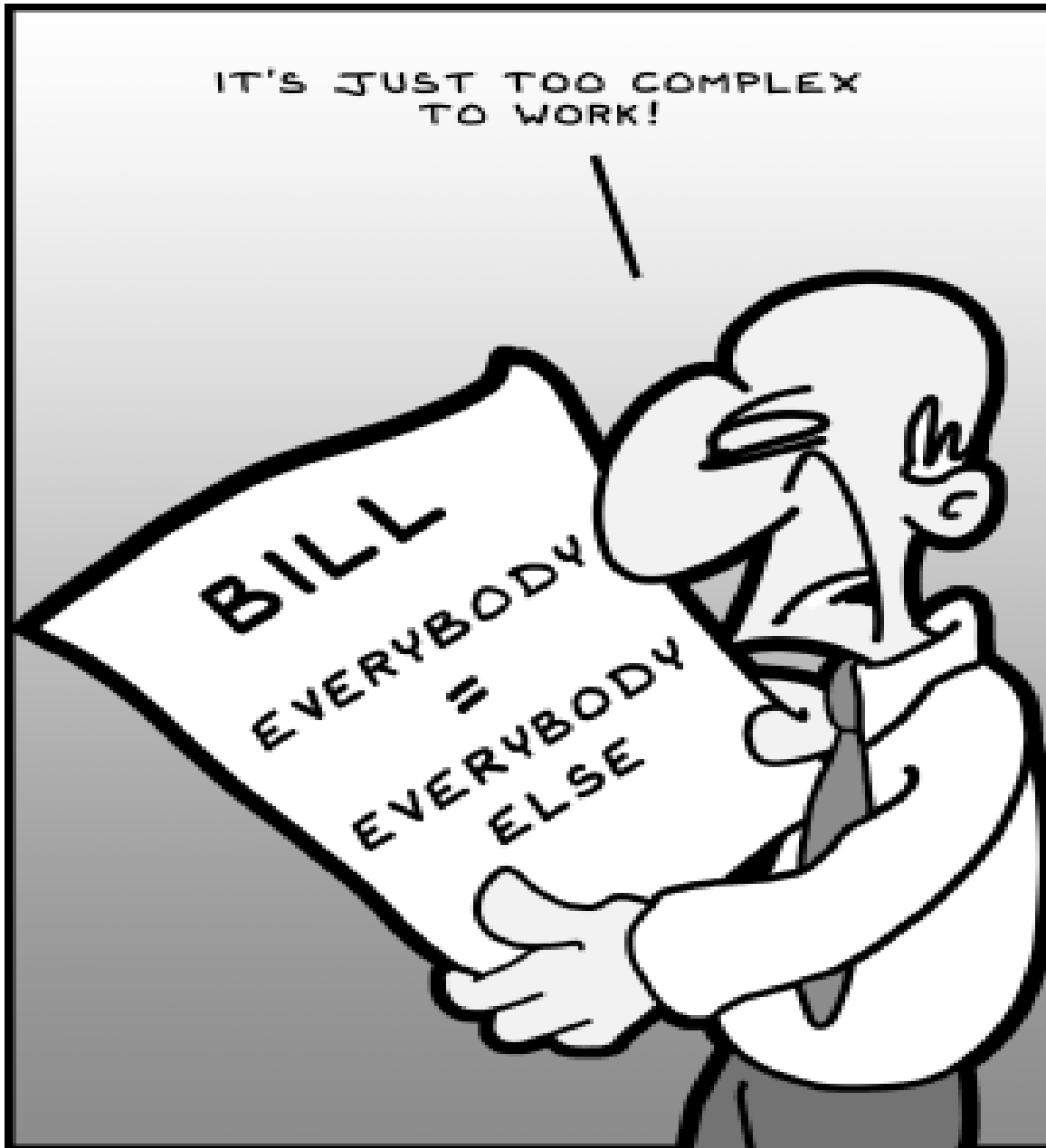
PROGRAMME				
Date	Time	Topic	Speakers	Manual references
Tuesday 9 February	19:00	Derogation from human rights during a pandemic; Right to a fair trial	Jonathan Cooper OBE Grainne Mellon	<ul style="list-style-type: none"> • Chapters I, II, III and IV • Chapter V, Section B • Chapter IX
	20:00	Implementation of fair trial standards in the COVID-19 environment in Kazakhstan.	Inara Massanova	
Wednesday 10 February	19:00	Freedom of Expression and Assembly	Jonathan Cooper OBE Grainne Mellon	<ul style="list-style-type: none"> • Chapter XI
	20:00	The realisation of freedom of peaceful assembly in Kazakhstan. How has the law and practice changed in the COVID-19 environment?	Tatyana Chernobil	
Tuesday 16 February	19:00	Detention	Jonathan Cooper OBE Kate Stone	<ul style="list-style-type: none"> • Chapter VI • Chapter VII • Chapter VIII
	20:00	Health care access and denial for pre-trial and custodial detainees in Kazakhstan during the COVID-19 period	Elvira Bokhanova	
Wednesday 16 February	19:00	Discrimination	Jonathan Cooper OBE Kate Stone	<ul style="list-style-type: none"> • Chapter V, Section A
	20:00	Migrants and asylum seekers. Protection issues in the Covid-19 period in Kazakhstan.	Ayna Shormanbayeva	
Tuesday 23 February	19:00	Privacy	Jonathan Cooper OBE Professor Bill Bowring	<ul style="list-style-type: none"> • Chapter X
	20:00	Protecting workers' rights and modern slavery in Kazakhstan	Ayna Shormanbayeva	



THE RIGHT TO EQUALITY AND PROTECTION FROM DISCRIMINATION



BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND & WALES



INTERNATIONAL STANDARDS: STARTING POINTS

- UN Charter 1945 Preamble: “the equal rights of men and women”
- Universal Declaration of Human Rights 1948 Preamble: “recognition [that] the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”

THE MAIN INSTRUMENTS - UNIVERSAL

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights

INTERNATIONAL STANDARDS: SPECIFIC

- Convention on the Elimination of All Forms of Racial Discrimination 1966
- Convention on the Elimination of Discrimination Against Women 1979 + Optional Protocol 1999
- Convention on the Rights of the Child 1989
- Convention on the Protection of the Rights of All Migrant Workers & Members of their Families 1990
- Convention on the Rights of Persons with Disabilities + Optional Protocol 2006



ICCPR

- Principle of equality, including prohibition of discrimination, runs like a thread
- Includes all 4 elements of the equality principle:
 1. Equality before the law
 2. Equal protection of the law
 3. Legal prohibition against discrimination
 4. Protection against discrimination through positive measures

ICCPR: GENERAL NON-DISCRIMINATION PROVISIONS

Article 2(1): States parties obligated to ensure all rights of Convention without discrimination

Article 3: equal right of men + women to enjoyment of all rights set out in the Covenant

Article 26: guarantees an independent and comprehensive right to equality and non-discrimination

ICCPR

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR

Specific protections

- children
- public affairs
- race hate
- minority rights

ICESCR

Art. 2(2) forbids discrimination in the enjoyment of the rights of the Covenant

Art. 3: equal right of men + women to enjoyment of all economic, social and cultural rights set out in the Covenant

CERD

“Racial discrimination” “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

CERD

- Prohibits all racial discrimination
- Supports and promotes diversity
- Permits positive action until objectives achieved

CERD

- Eradicate race hate
- Positive obligations; States shall take measures
- Special measures do not constitute discrimination

CERD

- Duty to outlaw discrimination by private bodies, *Yilmaz-Dogan v Netherlands*
- Effective protection and remedies required

CEDAW

- Gender equality: requires States to secure “the principle of equality of men and women in their national constitutions or other appropriate legislation”
- Adopt laws and measures regarding the same including sanctions

CEDAW

- Recognises “intersectional discrimination”
- General Recommendation on multiple and intersectional discrimination: Gen. Rec. No. 25
- Affirmative action/Special measures

DISABILITY

- Convention on the Rights of Persons with Disabilities:
- “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”

DISABILITY

- Fundamental principles; “respect for inherent dignity, individual autonomy including the freedom to make ones own choices, and independence of persons” and the “full and effective participation and inclusion in society” and “respect for difference and acceptance of disability as part of human diversity and humanity.”

DISABILITY

- Prohibition on discrimination
- Reasonable accommodation duty
- Right to life
- Promotion of autonomy

CHILDREN

- Convention on the Rights of the Child; auxiliary and freestanding equality guarantees
- Religious freedom and minority rights

SCENARIO: POSITIVE OBLIGATIONS

The UN Committee on the Elimination of Discrimination Against Women (CEDAW) requires that States ‘take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation’ (General Recommendation).

What do you think this requires States to do in the context of violence against women?



EQUALITY AND NON-DISCRIMINATION IN PRACTICE



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ARTICLE 14, ECHR

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

WHEN DOES PROTECTION FROM DISCRIMINATION APPLY

- It is not a free standing right. It does not have independent status
- Scope is limited to those rights embodied in the Convention and its protocols
- No need for a violation of another Convention right
- The ambit test
- Protocol 12, ECHR

HOW DOES PROTECTION FROM DISCRIMINATION WORK?

- Has there been a difference of treatment?
- Comparing like with like
- Burden of proof
- Can the difference of treatment be justified?
- A distinction will be considered discriminatory if:
 - ❑ it has no objective and reasonable justification;
 - ❑ as such, it does not have a very good reason;
 - ❑ it is disproportionate.

ISSUES ARISING OUT OF PROTECTION FROM DISCRIMINATION

Issues arising out of the protection from discrimination

- Grounds of discrimination
- Suspect groups
- Indirect discrimination
- Positive discrimination
- Discrimination as degrading treatment

SCENARIO

T was a conscientious objector and for religious reasons refused to join the army at a time of general mobilisation. A Court Martial then found T guilty of an offence of insubordination. Two years later T applied to become an accountant after he had passed the relevant qualifying examinations. However, the accountants' executive body refused to appoint T as an accountant because he had a criminal record. T appealed against that decision, but his appeal was rejected.

What rights, if any, can T rely upon?

SUBSTANTIVE MODEL

The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”

Thlimmenos

DE FACTO SEGREGATION/ DISADVANTAGE

DH v Czech Republic

“Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article ...

....The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group...., and that discrimination potentially contrary to the Convention may result from a de facto situation...

....[T]here could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.”

DE FACTO SEGREGATION/ DISADVANTAGE

- Discharging the burden of proof, by inference and by statistics
- Objective and reasonable justification, proportionality between means employed and aim
- Positive duties

ECHR

Protocol No 12

“1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

- “i. in the enjoyment of any right specifically granted to an individual under national law;
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).”

SCENARIO

Following the 11 September 2001, the UK derogated from the right to liberty under its obligations in international human rights law. As a result of this derogation, non-UK nationals who were considered to be a terrorist risk in the UK were detained indefinitely. These people could not be deported. To do so would expose them to a risk of torture.

The detainees argued that they were being discriminated against.

Are they correct?