

AMERICAN UNIVERSITY IN CENTRAL ASIA

Department of “International and Business Law”

SENIOR THESIS

On

“Women’s rights and gender inequality. The case of indirect discrimination in labor relations”

For the Bachelor of International and Business Law degree

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Course: IBL-109

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Bishkek 2013

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ACKNOWLEDGEMENT

To write this senior thesis was one of the most important academic challenges I have faced in getting Bachelors degree at American University in Central Asia. I would like to thank God, without him I would not have been able to complete my senior thesis. Let God be pleased with me.

I would also like to thank my supervisor Saniia Toktogazieva. Without her support, skillful supervision, contribution, guidance of this work would not have been completed. Her knowledge and commitment promoted me to understand the subject of my research.

Thanks a million my mother, Saadat Djuzbaeva, who have always supported, cared, encouraged and believed in me and in all my attempts.

Special thanks to my adviser Kanykei Kasybekova and Kamila Mateeva, head of International and Business Law Department, who understood my position and supported to graduate the university this year. With my academic progress perhaps I would graduate during the five years.

I would like to thank the faculty of the International and Business Law Department. Begaiym Esenkulova, who gave us knowledge of research methods and developed our research and presentation skills. Also, Harvey Wagar, Natalya Alenkina, Steven Lustig and Ravshana in helping me complete the program successfully.

ABSTRACT

The senior thesis focuses on women's rights, particularly on indirect discrimination against women in employment. Analysis of legislation of the Kyrgyz Republic, comparative law analysis of the Republic of South Africa, case study and statistical data were used in this research. As a result of the research the author came to conclusion that the approach to equality under legislation of the Kyrgyz Republic is formal which lead to indirect discrimination against women. Through comparing with the legislation of the Republic of South Africa the author recommended to incorporate prohibition of indirect discrimination to the basic law Constitution and Labor Code of the Kyrgyz Republic in order to protect women against discriminatory practices in employment and provide to employers and employees that government of the Kyrgyz Republic provides substantive equality for all its citizens and prevent discrimination in labor relations.

Introduction

Humanity consists of men and women with equal rights and equal dignity. Human rights appear immediately after the birth of men and women. Every man and woman can be beneficial for society. Kyrgyz Republic has been a democratic republic since 1990. Democracy supposes the full participation of women on basis of equality with men in all sphere of life. The participation of each sex in labor relations must be on an equal basis – it should be a balance of 50% and 50%.

The Constitution of the Kyrgyz Republic and codes have articles on gender equality and it can be considered that the Kyrgyz Republic has a legal basis for the elimination of discrimination against women. From an official point of view, the absence of discrimination based on sex in Kyrgyzstan is guaranteed. Unfortunately, in reality, gender discrimination is still in place in all sphere of life. My research focuses on gender discrimination, particularly on indirect discrimination against women in labor relations.

We see that our legislation provides neutral provisions for both man and woman, namely gender blind provisions. Below we will explore more about these provisions. However, in the case of equality, the legislation provides formal, but not substantively equality. It says that men and women are equal. They all have rights to work equally; 8 working hours; vacation etc. Criteria and provisions for candidates for employment are established by employers. For effective purposes of activity, the employer by himself has the right to solve personnel decisions (selection of cadres, placement, dismissal) and conclude a labor contract with the concrete person. It is a right of employer, not obligation. The employer establishes such criteria as higher education, age, work experience, that the candidate must know many languages, appearance must be attractive and nice. These criteria are same for both men and women. There are no criteria separately for men and for women. Formally these criteria are equal. A large number of women may not comply with particular

criteria. Until woman gives birth, bring up children, she would be 30-40 years old with no work experience. Of course, it is better for employer to employ young man with work experience.

In Kyrgyz society, we still witness stereotypical notions about male and female positions or occupations. Leaning on these stereotypes, the employer sometimes refuses the female candidate in favor of man. Career development of women is lower than men. We will learn more about stereotypes below.

The problem of the present research is in the neutrality of the legislation. As I stated, equality under the Kyrgyz legislation is formal, not substantive. During my research I will give recommendations that the equality should be substantive. Substantive equality in the contrary really leads to not just formal equality, but leads to real equality which is taken into consideration nuances in respect of women.

The methods of the present research are: analysis of legislation of the Kyrgyz Republic, comparative law analysis of the Republic of South Africa, case study (courts' decisions) and statistical data.

This research includes two chapters, which focus on the following:

Chapter I will discuss the historical background and the development of the concept of equality, its models, namely formal equality and substantive equality. Through thousands of year famous ancient scholar as Aristotle, current scholar, Murray Wesson has disputed about equality, which model of equality is better? This chapter will answer to this question. We also explore the concept of equality through the prism of discrimination. Struggle against discrimination is a method of reaching substantive equality. This research focuses on particularly on indirect discrimination against women in employment. In addition, we will also consider positive discrimination, which is good for women in reaching substantive equality.

The second chapter will discuss international standards in the sphere of protection of rights of women in labor relations, particularly Convention on the Elimination of All Forms of Discrimination against Women and the national legislation of the Kyrgyz Republic in the sphere of protection of women in labor relations. The present research will analyze the national legislation, particularly Constitution of Kyrgyz Republic, Labor Code of Kyrgyz Republic, Regulation on Dress Code adopted by Jogorku Kenesh. We will explore how the Kyrgyz Republic fulfills obligations under the Convention on the Elimination of All Forms of Discrimination against Women.

The scope of the present research is limited to the well defined research questions: ***Whether there is a presence of indirect discrimination against women in labor relations in the legislation of the Kyrgyz Republic and whether this indirect discrimination creates barriers in reaching gender equality?***

Throughout the research I will find a clear answer for the stated questions through the deep analysis of international law, national law and doctrinal writings of highly respected scholars.

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According to the Article 2 of the International Covenant on Civil and Political Rights ((hereinafter referred to as ICCPR) each State Party to the ICCPR undertakes to respect and to ensure to all individuals within its territory, and subject to its jurisdiction, the rights recognized in the ICCPR, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹ This provision calls for specific activities by State parties to enable individuals to enjoy their rights.² In addition, the Constitution of the Kyrgyz Republic states that men and women have an equal right and freedom and equal possibility for their realization.³ In this way, both international and national legislation refer to the idea that all persons are equal and enjoy their rights. The equality is guaranteed by various international and national norms. However, the mere question is what does it mean? Since ancient times the concept of equality had been highly debated and argued.

In order to understand equality we need to take step back: Aristotle's view was that equality consists in treating like cases alike and unlike cases differently.⁴ Aristotle's view does not tell us what should count as like and unlike cases. From his view we can get the concept of formal equality. Formal equality gives content to the Aristotle's view by stipulating that, in judging the similarity or dissimilarity of two cases, group membership should never be taken into account.⁵ Race, religion, sex, age, and other differences should not

¹ U.N. Treaty Collection, Status as at 21-04-2013 05:04:23 EDT, ch.IV, HR, International Covenant on Civil and Political Rights, New York, 16 December 1966, art.14, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

² General comment No.3 of art. 2 of International Covenant on Civil and Political Rights.

³ Konstitutsiia Kyrgyzskoi Respubliki [Constitution of the Kyrgyz Republic], June 27, 2010, art.16.

⁴ Murray Wesson, "Discrimination Law and Social Rights: Intersections and Possibilities," *Juridica International XIII* (2007): 75, <http://www.juridicainternacional.eu>.

⁵ *Ibid.* at 75-76.

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matter. No person is any better than anyone else. In other words, it is a formula which is blind for all existing characteristics.

Formal equality should not be confused with substantive equality. Formally rules of laws and constitutional law guarantee equality, equal position of everyone before the law, equal rights, freedom and obligations. The idea of equality is contained in the Constitution of the Kyrgyz Republic and in other laws. It is expressed by provisions of equal rights, freedoms and obligations; if there are restrictions, they are the same for everyone; the realization of rights and freedoms are also equal. The problem is in the Constitution of the Kyrgyz Republic, and other laws, which give men and women equal rights and freedoms and equal possibility for their realization, but in reality this practice leads to inequality. In order to guarantee equality, we have to protect women through special measures, so that they can aspire to some form of equality with the rest. Hindu author, Neera Chandhoke, in his article about the illusion of formal equality marked that in order to ensure equality, it should be transition from formal to substantive equality.⁶

The aim of this chapter is to explore the distinction between formal equality and substantive equality. In addition to reveal the weaknesses of formal equality in order to suggest which approach to equality should be applied in Kyrgyzstan?

a. Formal Equality

As mentioned, the current approach to equality in the legislation is formal, notably individuals should be treated equal and group membership should never be taken into consideration. Formal equality assumes that equality is achieved if the law treats men and women the same. This is the most widespread understanding of equality today.

⁶ Neera Chandhoke , “The illusions of formal equality,” *The Hindu online edition of India's National Newspaper* (2000), <http://www.hindu.com/2000/05/02/stories/05022523.htm>.

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For purposes of the present research we will consider women's rights in labor relations. Formal equality dictates employers to apply the same hiring criteria to men and women. Sometimes requirements for employment appear neutral, that they relates for men and women in reality may lead to discrimination, or rather to indirect discrimination, for those who cannot meet the requirements. Women's biological differences and reproductive roles will limit their employment. In other words, women have to be at home, care children and fulfill domestic tasks. So employer can think that women are unsuitable for this job. In next chapter we will further discuss indirect discrimination.

In legislation where men and women are equal, its implementation has a disparate impact against women. It does not take into account the realities of men's and women's lives. Article 18 of Constitution of the Kyrgyz Republic says that "Everyone shall have the right to perform any action and activity except for those prohibited by the Constitution and laws." In the sphere of labor relations according to point 1 of Article 9 of Labor Code of Kyrgyz Republic "Each person shall have the equal possibilities to exercise labor rights and freedoms."⁷

We see that from the legislative point of view, the absence of discrimination in labor relations based on sex in Kyrgyzstan is formally guaranteed. The Constitution and Labor Code have articles on gender equality and it can be considered that Kyrgyz Republic has legal basis for the elimination of discrimination against women. The provisions are neutral. Consequently, neutrality which treats all people the same can lead to inequality for women. Because formal equality does not take into account for example, two sexes differ in structure of body, in the functions to be performed by each and barriers to reach the equality. Defenders of formal equality do not take into account the fact and nuances in respect of

⁷ Trudovoi Kodeks Kyrgyzskoi Repsubliki [TK KR][Criminal Code], art. 9-1.

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minority: gender blind, color blind, sex blind. If the approach to equality will be formal, women will not fully enjoy their rights and cannot reach equality without barriers. We will learn more below about barriers in reaching equality.

As mentioned above, in order to ensure equality, we must make the transition from formal to substantive equality⁸, focusing on differences between men and women, their roles and disadvantages. The next subchapter will contrast formal equality with substantive equality.

b. Substantive Equality

The concept of substantive equality means “a withdrawal from the most widespread understanding of formal equality where treating likes alike and unalikes unlike.”⁹ The defenders of substantive equality suggest that laws which appear on their face contain neutral provisions and criteria create a disparate influence for certain people, in their implementation, in our case, for women.¹⁰

Men have a family and children as do women, but their career does not suffer from it as opposed to women. All domestic tasks, bringing up children, taking care of members of the family are responsibility of woman. Substantive equality is different from formal equality because it takes into account gendered biological differences which consequently lead to unequal treatment. The term equality for women is understood to mean “the right to be equal to men.” This understanding came from the fact that women faced inequalities in labor

⁸ Neera Chandhoke, “The illusions of formal equality”, *The Hindu online edition of India's National Newspaper* (2000), <http://www.hindu.com/2000/05/02/stories/05022523.htm>.

⁹ Murray Wesson, “Discrimination Law and Social Rights: Intersections and Possibilities,” *Juridica International XIII* (2007): 75, <http://www.juridicainternational.eu>.

¹⁰ The Equal Rights Trust, “The Ideas of Equality and Non-Discrimination: Formal and Substantive.” This article introduces and critically examines various conceptions of formal and substantive equality. The article contends that ultimately the human rights based model to equality may be a better approach than the formal and substantive models considered.

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relations.¹¹

The problem is in formality and neutrality of laws that treat everyone equally by disregarding differences between men and women and women have to be treated similar like men if they want to reach equality. In reality, we can see they are not treated alike. Due to the formal notion of equality, women will be disadvantaged because of the differences between them, namely biological differences, their roles in society etc. In this regard, substantive equality takes into consideration biological differences between men and women, for example, woman bear children, not man. In reaching the substantive equality differences between men and women and nuances at this nature should be taken into account. We considered how women get equality provided by the government and reveal that equal treatment of men and women and neutral provisions for men and women provided by the legislation of the Kyrgyz Republic lead to inequality for women. Let us look the following example. There exists a principle, called “a principle of Snow White” where the heroine of the famous fairytale, who takes into consideration the interests of each gnomes and gives pies each of them but with different fillings.¹² In addition to, another example taken from Canadian experience: Let us consider, what will happen, if there are two people and you give each of them two basket of strawberries. One has an allergy to strawberries, another has not, and in result they do not get an equal benefit from such treatment. You did not take into consideration their different interests. Equal treatment to them could mean to offer them such kind of fruit which can be appropriate for each person. As well, the legislation in providing to its population equality should take into account differences between men and women.

¹¹Principles of the Convention on the Elimination of all Forms of Discrimination against Women, available at <http://www.spp.nus.edu.sg> (pdf).

¹² N.A Shvedova, *Prosto o slozhnom: gendernoe prosveshenie* (Voronezhii Gosudarstvennyi Universitet, 2002), e-book, <http://www.owl.ru/win/books/easygender/>

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Let us look one of countries, which prefers substantive approach to equality. We will analyze the Republic of South Africa because during the apartheid period in South Africa, the country fought against racism and sexism. Gender discrimination in South Africa is deeply penetrated in ethnic traditions. Each tradition perceives women “as inferior to men.”¹³ In Kyrgyzstan women face this even today. Most of men do not permit wives to work. If a woman cannot have a child, her husband will remarry to continue family line. Apartheid period passed, post-apartheid period came to South Africa, but oppression was still growing.¹⁴ Under these circumstances we can say that women constitute one of the most vulnerable groups in the country. After being post-apartheid democratic country, South Africa adopted a new Constitution which includes substantive, rather than a formal approach to equality.¹⁵ The importance of the substantive equality is its commitment to improve position of weaker sections of society namely women’s position.¹⁶ In the South African Constitution, equality is enunciated as a value and as a right. The constitutional equality is stated in point 3 of section 9 of the Constitution of South Africa:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status...”¹⁷

¹³ Shaina Hutson, “Gender Oppression and Discrimination in South Africa,” *Essai* 5, no. 26 (2007), p.83, <http://dc.cod.edu/essai/vol5/iss1/26>.

¹⁴ *Ibid.* at 84.

¹⁵ Ockert Dupper, “Affirmative action and Substantive equality: The South African experience,” *South African Mercatile law journal* 14 (2002): 275, <http://www.heinonline.org>.

¹⁶ Murray Wesson, “Discrimination Law and Social Rights: Intersections and Possibilities”, *Juridica International XIII* (2007): 74-82, <http://www.juridicainternational.eu>.

¹⁷ S. Afr. Const. 1996 §9: (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

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If we read the third subsection carefully, it includes the prohibition of direct or indirect discrimination on a number of bases. We can see that South Africa prefers a substantive approach to equality. Even indirect or in other words non-intended discrimination is outlawed. Furthermore, subsection 3 includes the prohibition of indirect and direct discrimination on a number of grounds such as gender, pregnancy, marital status, conscience, sexual orientation. The Constitution of the Republic of South Africa includes more wide grounds than the Constitution of the Kyrgyz Republic. Article 16 of the Constitution of the Kyrgyz Republic says: “No one can be discriminated on the grounds, including sex, race, language, disability, ethnic origin, religion, age, political or other opinion, birth, property or other status.”¹⁸ As we see, our Constitution includes the same grounds as included in most laws. We do not have in Constitution of the Kyrgyz Republic such grounds as pregnancy, marital status or sexual orientation. South African Constitution is different from our Constitution, as it takes into consideration the position of woman, difference from man that is pregnancy and marital status. As was mentioned above, it embraces substantive equality. For this reason, the approach to equality in Kyrgyzstan must be substantive and be filled gaps in legislation in order to reach substantive equality.

c. Analysis of formal equality v. substantive equality

For purposes of the present research, substantive approach to equality should be preferred. Under Kyrgyz legislation the approach to equality is formal not substantive. Formal notion of equality leads to inequality, as discussed earlier. Formal equality gives rights employers apply the same hiring criteria to men and women. Sometimes these hiring

¹⁸ Konstitusiiia Kyrgyzskoi Respubliki [Constitution of the Kyrgyz Republic], June 27, 2010, art.16.

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criteria for employment which appear neutral in reality may lead to inequality and discriminate against women. When establishing requirements for employment, should be taken into account that men and women are difference, their biological difference and their roles in life. Theoretically it can be applied either for women or men. In practice they cannot be applied equally for men and women. We should not forget that in Kyrgyzstan women and men have different roles, obligations, access to resources and therefore, they have unequal opportunities to realize their labor rights. Consequently, the laws which are adopted influence them totally differently.

Therefore the approach to equality should be substantive. Substantive equality requires government to take positive actions in respect of women. For purposes of the present research one of ways to reach equality, we have to protect women through special measures, measures as quota system, positive discrimination, affirmative actions in order to avoid inequality, barriers and reach equality. In the present research in addition we discussed the South African jurisdiction. From their experience we can see in order to reach equality, they prefer substantive approach to equality. In the Constitution of the Republic of South Africa was incorporated the term indirect discrimination,¹⁹ which lead to restore the exercise of women's violated rights. Further in next chapter we will widely discuss about the legislation of South Africa and case law regarding the equality.

Since we have already defined the equality and two approaches to equality namely formal and substantive, it is time to determine the concept of discrimination. In order to deeply understand the concept of equality, we will look it through the prism of discrimination.

¹⁹ S. Afr. Const., 1996.

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A. THE CONCEPT OF DISCRIMINATION

If we look in any laws, there is no specified definition of discrimination. Many international conventions on human rights simply provide grounds on which discrimination should be prohibited. Article 26 of International Covenant on Civil and Political Rights not only provides everyone equality before the law and equal protection of the law, but also provides that any discrimination should be prohibited by law, and guarantee to everyone equal and effective protection against discrimination on any grounds, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁰ This provision directs the elimination of such kind of discrimination. From the South African Constitution we discussed that the discrimination can be direct or indirect. Section 9 (3): “The state may not unfairly discriminate directly or indirectly against anyone...”²¹ Let us discuss these types of discrimination. As a starting point we will begin with the direct discrimination.

a. Direct Discrimination

What does it mean? Discrimination which straightly indicates to the sex. In order to understand this type of discrimination, we will look it through the example of sexual harassment in work place. Mostly woman can face to this type of discrimination because she is a woman and in addition defenseless. Often men take advantages from it. We will discuss South Africa because gender discrimination here is deeply rooted in the ethnic traditions. Each tradition describes women as inferior to men. Because of these cultural traditions, gender equality in South Africa was continuing battle, and will continue. Traditional African culture

²⁰ General Comments, adopted by Committee of United Nations Organization of human rights according to International Covenant on Civil and Political Rights, entered into force June 19, 1989.

²¹ S. Afr. Const., 1996 §9-3.

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stipulates the different roles of men and women in society.²² In the sphere of labor relations those women who are employed find job with the lowest wages. The most common ways for women to make money were through brewing beer, domestic work and casual work on farms owned by whites. Moreover, 57 percent of all employed South African women work as domestic servants or agricultural laborers.²³ Such kind of discrimination i.e. direct discrimination towards women takes place in South Africa. In the beginning of this subchapter we mentioned sexual harassment. When we say sexual harassment, we mean not only sex act. The concept “sexual harassment” includes also tricks, touching, namely such actions which create an abusive situation for woman.²⁴ As an example, consider the situation if you want to get a promotion in job you should spend the night with boss. Such kind of discrimination towards women is very abusive and infringes women’s human dignity. As it was above mentioned, there is another type of discrimination, i.e. indirect discrimination.

b. Indirect Discrimination

In the present research, the author discussed the national legislation and international convention, how they define discrimination. Under these laws, the prohibition of discrimination therefore includes measures that are not discriminatory on their face but are discriminatory in fact and effect, i.e. indirect discrimination.²⁵ In order to clarify the term indirect discrimination let us look the European Commission non-discrimination law, the

²² Shaina Hutson, "Gender Oppression and Discrimination in South Africa," *ESSAI* 5, Article 26 (2007), <http://dc.cod.edu/essai/vol5/iss1/26>.

²³ *Ibid.*

²⁴ Zoya Hotkina, *Seksualnye domogatelstva na rabote* 20(2006).

²⁵ Christa Tobler, "Limits and potential of the concept of indirect discrimination," *European Commission* (2008): p. 5, <http://ec.europa.eu/social/BlobServlet?docId=1663&langId=en>.

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Racial and Employment Equality Directives. These Directives contain legal definitions of indirect discrimination. Under these definitions, “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of [a particular characteristic] at a particular disadvantage compared with other persons, unless that provision, criterion and practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”²⁶ Under these definitions we can assume that some prima facie neutral provisions, criterion put persons at a disadvantage compared with other persons. We will consider the situation where the employer establishes hiring criteria such as, appearance, education, work experience, age, sex, recommendations from last work place. He can choose not to accept a female applicant for job knowing that she is in the age of 25-30. Because in these ages she can leave job and give birth and go to maternity leave. We see hiring requirements prima facie are not discriminatory but in practice they are discriminatory i.e. indirectly discriminate. Therefore, we will discuss conditions and requirements that have an adverse impact on women in employment, namely requirements which often unrelated to the job.

Age. One of the most common forms of indirect discrimination concerns age. While caring for children, during this period women will be out of the labor market. When entering to labor market, women have to meet with this requirement, if they enter, they find themselves competing with men of their age who have years of job experience and qualifications. In next chapter we will examine statistics of the level of employment of population of the Kyrgyz Republic on age group.

²⁶ Christa Tobler, “Limits and potential of the concept of indirect discrimination,” *European Commission* (2008): 5, <http://ec.europa.eu/social/BlobServlet?docId=1663&langId=en>.

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Education and job experience. One of the basic forms of indirect discrimination is if you have not a job experience and qualification. You may lack chances to get high-salary and prestigious jobs. This requirement has an adverse impact on women. The roles of women in Kyrgyz society are caring for children and performing other domestic duties. As everybody knows, this work is always unpaid and is not valued. Women who accommodate work and home are often find part time jobs and in low positions. Thus in entering to labor market, where values qualification and job experience, but not skills and experiences as a mother, consequently women find themselves in a disadvantaged position and indirectly discriminated.

In addition, as already discussed, the role of women as caring for children and responsible for domestic duties can result to delay to get an education. Because of this inequality in educational qualifications between the sexes, educational requirements will lead to exclude more women than men from selection of candidates for a job.

Appearance. There are employers that pay attention to the appearance of employees and include to hiring requirements for job. Even it is not necessary in performing a job. Employer does not employ women who are not attractive. Many women think that they had been subject to discrimination related to appearance. Even jobs in field like law, where appearance does not play important role in job performance, one study found that attractive attorneys, regardless of qualification and experience, earned significantly more than their less attractive colleagues, and that the inequality increases over time.²⁷

²⁷ Jeff E. Biddle & Daniel S. Hamermesh, "Beauty, Productivity and Discrimination: Lawyers' Looks and Lucre," *Journal of labor Economics* 16, no.1 (January 1998): 172, <https://links.jstor.org/sici?sici=0734-306X%28199801%2916%3A1%3C172%3ABPADLL%3E2.0.CO%3B2-N>.

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Further, we will discuss the Regulation on Dress Code adopted by Jogorku Kenesh of the Kyrgyz Republic.²⁸ It states provisions such as, only women may be required to wear skirts and only men may be required to have short hair. This law prohibits wearing of short and gaudy clothes. Such kind of decision was approved in 29th of June 2012 in the committee meeting of the Parliament on order and deputy ethics.²⁹ It provides basic requirements which define the standards of external appearance and style of state employee and person who stay in Jogorku Kenesh. Also there are recommendations to appearances of men and women. The recommendations for female state employees are to wear classical suit, such as jacket, blouse or skirt of blue, black or brown color, the classical length have to be up to the knee. It's prohibited to wear "mini" skirts, tasteful and simple jewelry is permitted, also recommended simple make-up.³⁰

This regulation carries the discriminatory character against women. The length of the skirt or any external attributes is not important in performing the job. The occupational ability is have to be valued and not the length or color of the skirt. Nevertheless the committee approved the law.

In this chapter we discussed the concept of equality, its types and the concept of discrimination, types of discrimination. We will now discuss positive discrimination. It is one of ways in reaching substantive equality. In the present research we observe South African jurisdiction. Let us look what about is said in the Constitution. According to point 2 of section 9 of South African Constitution³¹ is guaranteed equality for women and allows for

²⁸ Polozhenie ob odezhde [Regulation "On Dress Code] adopted by Jogorku Kenesh of the Kyrgyz Republic.

²⁹ Kyrgyzskoe telegrafnoe agenstvo, "Ofisialnyi zapret na noshenie yubok," *Belyi parus*, <http://www.paruskg.info/2012/06/26/65329>.

³⁰ Polozhenie ob odezhde [Regulation "On Dress Code] adopted by Jogorku Kenesh of the Kyrgyz Republic, downloaded from <http://kabar.kg/rus/society/full/36067>.

³¹ S. Afr. Const., 1996 §9-2.

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affirmative action to address both gender and race inequality. Let us discuss more about positive discrimination below, another meaning is affirmative action.

c. Positive Discrimination

To guarantee substantive equality, women may need to be treated differently in comparison with men. In this respect, the UN Human Rights Committee notes:

*the principle of equality sometimes requires states to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a state where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state should take specific action to correct those conditions.*³²

Therefore, a State's obligation to protect from discrimination is not just to avoid discrimination but includes taking positive actions as well. As discussed above, South African approach to equality is substantive. In this case President of the Republic of South Africa, Nelson Mandela said, "Freedom cannot be achieved unless women have been emancipated from all forms of oppression, ... unless we see in visible and practical terms that the condition of the women of our country has radically changed for the better, and that they have been empowered to intervene in all aspects of life as equals with any other member of society." He believes in absolute equality and wants women to have the same rights and the same power as men in order to participate in society as well as in politics.³³ The South African Constitution in Section 9 (2) allows for affirmative action in order to guarantee equality "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed

³² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No.18, para. 10.*

³³ Shaina Hutson, "Gender Oppression and Discrimination in South Africa," *ESSAI 5*, Article 26 (2007), <http://dc.cod.edu/essai/vol5/iss1/26>.

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to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”³⁴

Positive discrimination focuses on substantive equality. In order to achieve substantive equality in the sphere of employment, it maybe necessary to establish special quotas for women for example, in legislative bodies, in the lists of parliamentary candidates. For example, Kosovo provides its women no less than 40 percent in all bodies, while Kyrgyzstan provides no less than 30 percent.

From the abovementioned, we can conclude that to achieve substantive equality it should be provided preferential rights to those who suffer from discrimination, for example special quotas for women. Under Kyrgyz legislation the approach to equality is formal and was suggested the equality to be substantive. We also discussed South African approach which prefer substantive notion to equality. In next chapter, we will focus on international and national legislation in protection of women’s rights in employment.

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One of the basic and legally binding international instruments in protection of women’s rights, which eliminate any kind of discrimination against women, is the Convention on the Elimination of all forms of Discrimination against Women (hereinafter CEDAW Convention). The aim of the CEDAW Convention is the elimination of all forms of discrimination against women on the basis of sex, and guarantees women the equal recognition, enjoyment and exercise of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, domestic or any other field, irrespective of their marital status, and on a basis of

³⁴ S. Afr. Const., 1996 §9-2.

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equality with men.³⁵ The starting point is to clarify the legal meaning of “discrimination against women.” CEDAW Convention defines discrimination contained in article 1:

“any distinction, exclusion or restriction which has the purpose or effect of denying women the exercise of human rights and freedom is discrimination even where discrimination was not intended. This would mean that an identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face.”³⁶

This definition not only limited to direct discrimination, but any act that has a result of inequality between men and women. We see that CEDAW is the most important and basic international treaty for all women. It also eliminates gender based discrimination.³⁷ In other words hierarchal relations between men and women, social and cultural norms, such as men are bread-winners and women are child-rear. Article 2 of CEDAW obliges state parties to fulfill substantive provisions of the convention, to adopt a policy on eliminating of all forms of discrimination against women, to include principle of equality to national legislation, to protect women against discrimination by eliminating customary and all other practices that perpetuate the hierarchal relations and stereotyped roles for men and women, to establish legal protection of women's rights and ensure through competent national courts the effective protection of women against any act of discrimination. In addition it is vital to mention the basic provision of the article, which obliges state parties to take steps to modify or abolish

³⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 19 October 2010, CEDAW/C/2010/47/GC.2, p. 2, <http://www.unhcr.org/refworld/docid/4d467ea72.html>, [accessed 4 March 2013].

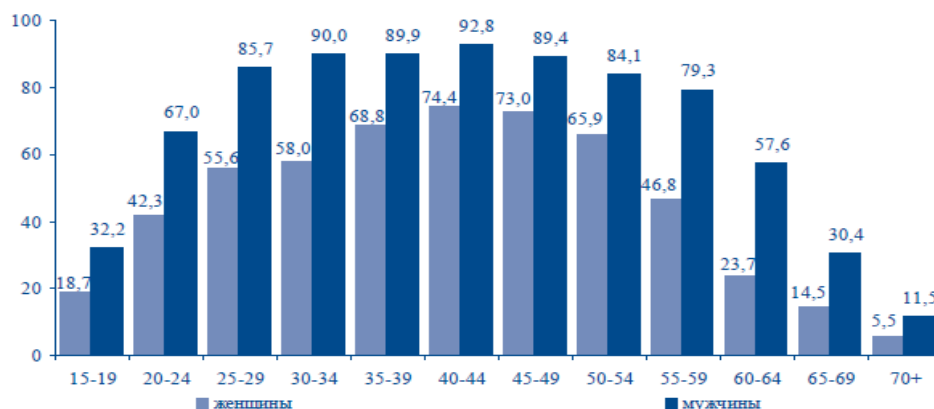
³⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 19 October 2010, CEDAW/C/2010/47/GC.2, p. 3, <http://www.unhcr.org/refworld/docid/4d467ea72.html>, [accessed 4 March 2013].

³⁷ *Ibid.* at 2.

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existing laws, regulations, customs and practices which constitute discrimination against women. All these provisions identify legal obligations of state parties under the Convention.³⁸

Kyrgyz Republic ratified the CEDAW Convention in 1997. Certainly, it is lawfully bound to all abovementioned state obligations. For the purpose of my present research we will review the legislation of the Kyrgyz Republic. Explore current legislation of the Kyrgyz Republic in accordance with provisions of the CEDAW Convention. This research focuses on women and according to National Statistical Committee of Kyrgyz Republic by 2012 women constitute 50.6% of whole Kyrgyz population.³⁹ Even women are leaders in terms of quantities, but often suffer from discrimination because in our society exists stereotype because of biological differences between men and women. Due to these biological differences, our society imposes different roles to men and women. Men as bread-winners and women as child-carer and in addition to responsibility for all domestic tasks. Therefore, women often enter to labor relations in later ages than men, until children are grown up. The following table shows us the level of employment of men and women by age.⁴⁰



³⁸ U.N. Treaty Collection, Status as at 25-12-2012 10:03:39 EDT, ch.IV, HR, Convention on the Elimination of All Forms of Discrimination against Women [hereinafter the CEDAW Convention], New York, 18 December 1979, art.2, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

³⁹ Natsionalnyi Statisticheskii Komitet Kyrgyzskoi Respubliki "Chislennost mujchin i jenshin", <http://stat.kg/images/stories/docs/KZ/Demo/demo5.pdf>.

⁴⁰ Natsionalnyi Statisticheskii Komitet Kyrgyzskoi Respubliki, *Jenshiny i mujchiny Kyrgyzskoi Respubliki 2005-2009 Sbornik genderno-razdelennoi statistiki*, (Bishkek, 2010), p.84. In the table "женщины" means women and "мужчины" means men, http://www.un.org.kg/index2.php?option=com_resource&task...id...

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In this table we see, the level of men's employment is much higher than women's. From ages 30-35, 55-59 and 60-64 women's level is lower, because in these ages women give birth to child, care, bring up grandchildren. In 40-49 the level of men and women becomes closer. Women when entering to labor market, then realize that they work with males with same ages, but without work experiences and training. In addition, later entrance to labor market limits women to gain high position of employment which offer high salaries. Women's roles of child caring and domestic responsibilities limit them to work in full time jobs. Let us consider women in positions at level of decision making. According to the report of the Kyrgyz Republic on implementing provisions of the CEDAW Convention by I-quarter of 2012 the proportion of women-deputies of local kenesh constitutes only 16% or 1326 women to 6753 men.⁴¹ We see that men prevail in political positions. If in 2010 the level of women was 25%, however by 2012 the level is reduced to 19.8%.⁴² The essence of this problem namely reduction in the level of women lies in the fact that there is a well-established and traditional stereotype that the family is the primary responsibility of women,⁴³ as discussed earlier. Based on the stereotype the level of women in employment always will be low. According to the article 5 of the CEDAW it is necessary to take appropriate measures to modify negative traditions and cultural stereotypes⁴⁴ which hamper women in entering to

⁴¹ Report of the Kyrgyz Republic on implementing provisions of the Convention on the Elimination of All Forms of Discrimination against Women, <http://www.gov.kg/wp-content/uploads/2012/12/O-Четвертом-периодическом-докладе-Кыргызской-Респуб>.

⁴² Ibid.

⁴³ Alternative Report of Council of NGO's to the Second Periodic Report of the Kyrgyz Republic to the Committee of Convention on the Elimination of All Forms of Discrimination Against Women, <http://www.wsc.kg/24>:

⁴⁴ U.N. Treaty Collection, Status as at 25-12-2012 10:03:39 EDT, ch.IV, HR, Convention on the Elimination of All Forms of Discrimination against Women [hereinafter the CEDAW Convention], New York, 18 December 1979, art.5, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

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labor relations without restrictions and barriers. In addition, when entering to labor market employers develop their own hiring requirements and criteria for employment. Some examples are following:

1. A requirement that applicants for employment have to be between 21 and 25.
2. An education requirement.
3. A requirement that all employees work full time.
4. An appearance requirement.⁴⁵

We see that these requirements will be discriminatory against women for those who particularly cannot comply with them. According to the article 2(c) of the CEDAW Kyrgyz Republic is lawfully bound “To establish legal protection ...to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”⁴⁶ This provision was incorporated in the article 30 of the Law of the Kyrgyz Republic “On state guarantees of the equal rights and equal opportunities for men and women” where women who face gender discrimination have rights to apply to the courts.⁴⁷ According to the alternative report made by the Council of NGO’s to the Third Periodic Report of the Kyrgyz Republic to the Committee of the CEDAW, considering that powers of the courts is to review a very wide range of cases, and a lack of gender sensitivity and competence of employees, we can say with certainty that a particular mechanism, where

⁴⁵ These four requirements were taken in <http://www.job.kg>. It’s a special internet site, attended by users who want to get a job, find employees, and improve professional skills, http://www.job.kg/viewprofile.php?sel=profile&id_vac=39975.

⁴⁶ U.N. Treaty Collection, Status as at 25-12-2012 10:03:39 EDT, ch.IV, HR, Convention on the Elimination of All Forms of Discrimination against Women [hereinafter the CEDAW Convention], New York, 18 December 1979, art.2(c), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

⁴⁷ Zakon Kyrgyzskoj Respubliki “O gosudarstvennyh garantijah ravnyh prav i ravnyh vozmojnostej dlya muzhchin i zhenshin,” (Law of the Kyrgyz Republic “On State guarantees of the equal rights and equal opportunities for men and women”) August 4, 2008, № 184, art.30.

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women can make complaints about discrimination in Kyrgyzstan does not exist.⁴⁸ In addition, the basic law of the Kyrgyz Republic does not contain the prohibition of indirect discrimination. Currently, according to the article 16 point 2 of the Constitution of the Kyrgyz Republic: “No one may be subject to discrimination on the basis of sex, race language, disability, ethnicity...”⁴⁹ In the sphere of labor relations, labor legislation of the Kyrgyz Republic is neutral, namely, it treats everybody the same. Labor Code of the Kyrgyz Republic includes gender-neutral provisions namely the article 9 says:⁵⁰

“Each person shall have the equal possibilities to exercise labor rights and freedoms. No one must be limited in their labor rights or be privileged in the exercise of such rights due to their sex, race... Distinctions, exemptions, preferences and limitations set due to specific nature of work or those set to ensure government protection of socially and legally vulnerable persons pursuant to legislation, shall not be deemed as discrimination.”

The first point indicates that men and women have equal possibilities to exercise labor rights. The second point prohibits discrimination in labor relations. According to the convention of International Labor Organization No.111 “Discrimination in respect of employment and occupation”, ratified by the Kyrgyz Republic, discrimination is understood as any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.⁵¹ In the Labor Code of the Kyrgyz Republic abovementioned provisions are fixed in article 9. Equal rights guaranteed by the Constitution of the Kyrgyz Republic and Labor Code of the Kyrgyz Republic are formally

⁴⁸ Alternative Report of Council of NGO's to the Third Periodic Report of the Kyrgyz Republic to the Committee of Convention on the Elimination of All Forms of Discrimination Against Women, p.11, <http://www.wsc.kg/public/files/5bc793c680d7d3e6b4eb548c1eb7096b.pdf>.

⁴⁹ Konstitutsiia Kyrgyzskoi Respubliki [Constitution of the Kyrgyz Republic], June 27, 2010, art.16(2).

⁵⁰ Trudovoi Kodeks Kirgizskoi Respubliki [TK KR][Labor Code], art.9.

⁵¹ International Labor Organization Convention No.111 “Discrimination in respect of employment and occupation”, art.1, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_85_en.pdf.

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equal as we see. Nevertheless in reality, women are continuing to face the discrimination. Discrimination against women is also supported by religion, traditions, and customs. However, relationships between people are regulated not only by religion and cultural norms, but also by the legislation. Therefore, women are fighting for their rights according to but national and international legislations.⁵²

As discussed earlier, customary and all other practices that perpetuate the hierarchal relations and stereotyped roles for men and women must be eliminated under the CEDAW Convention. Kyrgyz Republic in addition to the CEDAW Convention, ratified other international human rights treaties. Under international human rights law everyone has the rights to freedom of expression. People's choice of dressing can be an important expression of their religious, cultural or personal identity or beliefs. As a general rule, the rights to freedom of religion or belief and freedom of expression involve that all people should be free to choose what - and what not – to wear.⁵³ On the subject of it, we will analyze the Regulation on Dress Code adopted by Jogorku Kenesh of the Kyrgyz Republic⁵⁴ which discussed earlier in the first chapter. We assumed that it carries discriminatory character against women. Now we will analyze the Regulation on Dress Code from the prospective of limitation of freedom of expression of women in work place. Provisions of the Regulation prohibit women to wear mini skirts with cuts, décolleté dress or blouse, sweater, pullover and

⁵² *Posobie po provedeniyu gendernogo obucheniya (Manual on gender training)*. This manual has been prepared as a joint project of the Kyrgyz Republic, the Swedish International Development Agency (SIDA) and the United Nations Development Program (UNDP), "Promotion of gender equality in the Kyrgyz Republic" (2004 - 2005) and is intended for trainers and teachers.

⁵³ Amnesty International, "Women's right to choose their dress, free of coercion". This statement was submitted by Amnesty International to the 55th session of the United Nations Commission on the Status of Women (New York, 22nd February – 4 March 2011), p.1, http://www.amnesty.nl/sites/default/files/public/womens_right_to_dress_boerkaverbod_3.pdf (accessed 9 March 2013).

⁵⁴ Polozhenie "Ob odezhde" [Regulation "On Dress Code] adopted by Jogorku Kenesh of the Kyrgyz Republic, downloaded from <http://kabar.kg/rus/society/full/36067>.

others, also it is not allowed to use bright colors in clothes, make ups, manicure, even prohibited strong smell

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perfumes. If we read this regulation in detail, all provisions have discriminatory impact on women. Theoretically, the Regulation on Dress Code for employees of governmental bodies is inherent, but it is not important to indicate in provisions namely women or men have to wear this or that. Such kind of regulations should not be adopted. Because of this prohibition, women cannot freely express themselves, that is freely choose the dressing. Regulation limits the freedom of expression of women. As discussed earlier, freedom of expression entail that all people should be free to choose the dressing. In addition, according to the point 1 of article 20 of Constitution of the Kyrgyz Republic, the laws that deny or derogate human and civil rights and freedoms shall not be adopted in Kyrgyz Republic.⁵⁵ As well CEDAW Convention provision in which says to modify or abolish existing laws... which constitute discrimination against women.⁵⁶ In order to eliminate discrimination based on sex and women fully enjoy their rights and freedoms, we should formulate substantive approach to equality, as discussed in earlier chapter. It means there must be no barriers regarding education, appearance, labor itself and etc. Because such barriers exist, women will not reach the equality. Therefore, the idea is to create substantive approach to equality.

In addition to the above, the conclusion is, there must be an accommodation of differences in provisions about employment. The social barriers must be taken into account. The legislation of the Kyrgyz Republic should aim at prohibiting indirect discrimination and thereby to reach equality for women in labor relations.

⁵⁵ Konstitutsiia Kyrgyzskoi Respubliki [Constitution of the Kyrgyz Republic], June 27, 2010, art.20(1).

⁵⁶ U.N. Treaty Collection, Status as at 25-12-2012 10:03:39 EDT, ch.IV, HR, Convention on the Elimination of All Forms of Discrimination against Women, art.2 (f), New York, 18 December 1979, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

In order to analyze the legislation of the Kyrgyz Republic I will compare it with the legislation of another country. Comparative law offers a whole new dimension, from which I

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can learn to respect legal cultures of other peoples, understand own law better and develop standards which might lead to improvement of own law.⁵⁷ Of course it will be useful in practice. As a deciding point I chose South Africa.

A. COMPARATIVE LAW. SOUTH AFRICA

Why South Africa? In South Africa in time of severe apartheid⁵⁸ policy there was Discrimination on grounds of race lasted till the end of 1980. It also created gender and sex discrimination, that is exist patriarchal relationship between men and women, where women are emancipated from patriarchal oppression.⁵⁹ Where men are leader and women are responsible for domestic tasks such as cleaning the house, child care, cooking and of course all are unpaid. This division of roles also exists in Kyrgyzstan as discussed in earlier section. However in South Africa inequality faced by women in employment, we can say, formed by past racial discrimination. South Africa transferred from apartheid to post apartheid democratic republic. It adopted a new Constitution of the Republic of South Africa, which prohibits both direct and indirect discrimination. The Constitution of South Africa includes the term indirect discrimination in section 9, points 3 and 4:

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to

⁵⁷ Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law*, 21(Tony Weir trans., 3rd ed. 1998).

⁵⁸ According to Oxford American Dictionary *apartheid* (in South Africa) is a policy or system of segregation or discrimination on grounds of race.

⁵⁹ Patricia Horn, "Post apartheid South Africa: What about women's emancipation?" *Transformation*, <http://transformation.ukzn.ac.za/index.php/transformation/article/download/552/368> (accessed 4 March 2013).

prevent or prohibit unfair discrimination.⁶⁰

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As well it includes the term unfairly, which mean, there is also can be fair discrimination, which mean affirmative actions of the government towards women in order to reach equality. Finally, indirect discrimination such as marital status also is included. The provisions in the Constitution were included also to the Labor Relations Act 66 of 1995. Schedule 7 point 2 says:

- (1) For the purposes of this item, an unfair labor practice means any unfair act or omission that arises between an employer and an employee, involving-
 - (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
 - (2) For the purposes of sub-item (1)(a)-
 - (a) "employee" includes an applicant for employment;
 - (b) an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms; and
 - (c) any discrimination based on an inherent requirement of the particular does not constitute unfair discrimination.⁶¹

This Labor Relations Act 66 of 1995 is a labor legislation which regulates labor relations between employers and employees. As well as our Labor Code of the Kyrgyz Republic. As we see, the provisions of Labor Relations Act 66 of 1995 consider an employee also as applicant for employment. Applicants for employment were afforded protection. In the labor legislation of the Kyrgyz Republic such provisions are not considered. Another section regarding to indirect discrimination is section 187 point (e) of the Labor Relations Act 66 of 1995. It says that dismissal will be considered as automatically unfair if the reason is:

- (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy; that the employer unfairly discriminated against an employee, directly or

⁶⁰ S. Afr. Const., 1996 §9-3,4.

⁶¹ Labor Relation Act 66 of 1995, sch.7-2, (available at <http://www.info.gov.za/acts/1995/a66-95.pdf>.)

indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, age... marital status or family responsibility.

(2) Despite subsection (1)(e)-

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(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;

(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.⁶²

South African Labor Relations Act as we see includes the term indirect discrimination. In other words, we can say that South Africa legally prohibited indirect discrimination. In each provision of the Constitution and Labor Relations Act which we discussed above, include the term indirect discrimination. The abovementioned section 187 (e) of Labor Relations Act says that a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job. The term “inherent requirement” also expressed in the Convention of International Labor Organization No.111 “Discrimination in respect of employment and occupation.”⁶³ The Convention states that “any distinction, exclusion or preference in respect of particular job based on inherent requirements thereof shall not be deemed to be discrimination.”⁶⁴ According to the Oxford Dictionary “inherent” means a permanent, essential, or characteristic attribute. Dismissal based on inherent requirement can be fair in employment. In order to prove indirect discrimination let us examine indirect discrimination case which was considered by court in South Africa.

There are many indirect discrimination cases and we will analyze one of them. In order to learn how the law on indirect discrimination of South Africa is applied, examine the case *Swart v. Mr. Video Ltd.*⁶⁵ The facts are following: There was an advertisement for a

⁶² Labor Relation Act 66 of 1995§ 187-e.

⁶³ International Labor Organization Convention No.111 “Discrimination in respect of employment and occupation”.

⁶⁴ Ibid. art.1(2).

⁶⁵ *Swart v. Mr. Video (Pty) Ltd.* 1998 (CCMA), (S. Afr.).

position as an assistant in a video outlet. Miss Swart applied for the job. In response to her application Miss Swart was rejected, because of age limit of 25 years. She was three years

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older than the required age. She applied for the arbitrary court complaining about the term on the grounds that it was discriminatory against women. Court stated that discrimination could only be justified if it was based on the inherent requirements of the job. The employer's defence was that the age requirement was an inherent requirement for job. Other employees were young, compatibility among employees was important and an older person might be reluctant or unwilling to accept instructions from a younger person. The arbitrator rejected this defence on the grounds that compatibility is not determined by age alone and that, as the applicant was willing to take instructions from a younger person and work with younger members of staff, there was no reason for not employing her. This defence was insufficient to meet the inherent requirement.

So, in this case court found violation, in other words indirect discrimination against women. Legal recognition of indirect discrimination as we see, leads South Africa to consider a lot of indirect discrimination cases and restore the exercise of women's violated rights on labor relations.

The legislation of the Kyrgyz Republic should outlaw discrimination in employment. What is required to ensure equality in employment is the inclusion of the provision prohibiting indirect discrimination in employment to the basic law Constitution of the Kyrgyz Republic and Labor Code of the Kyrgyz Republic. Such inclusion of provision of prohibiting indirect discrimination will provide to employers and employees that government of the Kyrgyz Republic provides substantive equality for all its citizens and prevent discrimination in labor relations.

CONCLUSION AND RECOMMENDATIONS

A country which has declared itself a democratic republic the society lives on the principle of equality. Namely government provides equality to all its population. Although we are a democratic country, stereotyped notion of women and discrimination against women continue to exist and flourish in society. My senior thesis focused on discrimination against women in employment, particularly indirect discrimination. It explains the concept of equality, its historical background and the development of the concept of equality. We explored the legislation of the Kyrgyz Republic on providing right of equality for men and women and how women enjoy their rights. Consequently, I have reached the following conclusion:

- 1) The legislation of the Kyrgyz Republic is neutral, namely, formally it provides equality for men and women, but when implementing women cannot enjoy fully their rights of equality and indirectly discriminated. Consequently, was recommended to prefer Kyrgyzstan substantive approach to equality rather than formal.
- 2) The legislation of the Kyrgyz Republic does not meet obligations under CEDAW Convention. In Kyrgyz society there is still a well-established and traditional stereotype. Under CEDAW Convention Kyrgyzstan is lawfully bound to protect women against discrimination and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women.
- 3) A comparative analysis of legislation of the Kyrgyz Republic and Republic of South Africa allowed to give a recommendation to incorporate the prohibition of indirect discrimination to the basic law Constitution of the Kyrgyz Republic to ensure protection of women against discrimination. In addition, to incorporate the

prohibition of indirect discrimination to Labor Code of the Kyrgyz Republic in order to prevent and protect women against discriminatory practices in employment.

- 4) We explored that Labor Code of the Kyrgyz Republic is neutral, that provide neutral provisions for men and women and was recommended to incorporate characteristics peculiar to women (as gender, pregnancy, marital status, family responsibilities.) Labor Code of the Kyrgyz Republic must focus on protection of women because it will improve the status of women in labor relations and consequently in society.
- 5) In addition was recommended Kyrgyz Republic shall adopt number of affirmative measures, not only on governmental level, but also state and local levels: General quotas in work place, in competitions.

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1. Konstitucija Kyrgyzskoj Respubliki ot 27 ijunja 2010g. art.16, 20.
2. Trudovoi Kodeks Kyrgyzskoj Respubliki ot 4 avgusta 2004g, art.9.

3. Zakon Kyrgyzskoj Respubliki “O gosudarstvennyh garantijah ravnyh prav i ravnyh vozmozhnostej dlya muzhchin i zhenshin,” (Law of the Kyrgyz Republic “On State guarantees of the equal rights and equal opportunities for men and women”) August 4, 2008, № 184, art.30.
4. Regulation on Dress Code adopted by Jogorku Kenesh of the Kyrgyz Republic.
5. Alternative Report of Council of NGO’s to the Third Periodic Report of the Kyrgyz Republic to the Committee of Convention on the Elimination of All Forms of Discrimination against Women, p.11.
6. Alternative Report of Council of NGO’s to the Second Periodic Report of the Kyrgyz Republic to the Committee of Convention on the Elimination of All Forms of Discrimination against Women.
7. Report of the Kyrgyz Republic on implementing provisions of the Convention on the Elimination of All Forms of Discrimination against Women.

International Treaties:

1. Convention on the Elimination of All Forms of Discrimination against Women, new York, 18 December, 1979 adopted by the United Nations General Assembly.
2. International Covenant on Civil and Political Rights adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.
3. International Labor Organization Convention No.111 “Discrimination in respect of employment and occupation”, art.1.
4. UN Committee on the Elimination of Discrimination Against Women, General Recommendations No.28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.

Periodical:

1. Natsionalnyj Statisticheskii Komitet Kyrgyzskoi Respubliki “Zhenshiny i muzhchiny Kyrgyzskoi Respubliki ,” (National Statistical Committee of the Kyrgyz Republic “Women and men of the Kyrgyz Republic”)

Legislation of the Republic of South Africa:

1. Constitution of the Republic of South Africa No.108 of 1995.
2. Labor Relation Act No.66 of 1995.