

THE JURISPRUDENCE OF DISCRIMINATION AS OPPOSED TO SIMPLE INEQUALITY IN THE INTERNATIONAL CIVIL SERVICE

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I. INTRODUCTION

When dealing with allegations of unequal treatment, it has been the practice to refer to and apply the ‘similarly situated’ test as the best way to determine whether a rule or decision breached the principle of equality. . . . [The cases reveal] the inadequacy of the approach where the issue is one of discrimination as opposed to simple inequality.¹

So wrote Judge James Hugessen, judge of the Federal Court of Canada and of the International Labor Organization Administrative Tribunal (ILOAT), dissenting from the judgment of the ILOAT in the case known as *Mr. R. A.-O.*² That case involved a claim of entitlement to certain benefits for an employee’s same sex domestic partner on the same basis as those benefits were paid to employee spouses by the United Nations Educational, Scientific and Cultural Organization (UNESCO). Judge Hugessen drew a basic distinction between simple inequality—inconsistent treatment without valid reasons—and true discrimination in law or administration that offends human dignity or other norms of equality. Breathing life into this distinction, Judge Hugessen suggested a new analytical framework for claims of employment discrimination in the international civil service. In the same way that national and supranational courts in Europe, North America, and elsewhere are revisiting the nature and contents of the principle of equality before the law,³ so too, a dialogue about this “ancient and undeniable truth”⁴ of human relations has been initiated within the community of tribunals that adjudicate employment claims brought against public international organizations, such as

¹ *Mr. R. A.-O.*, I.L.O. Admin. Trib., Judgment No. 2193, ¶ 18 (2003) (Hugessen, J., dissenting).

² *Id.* In accordance with the practice of most international administrative tribunals, the tribunals’ judgments will be referred to in this article by the plaintiffs’ surnames or pseudonyms given by the tribunals. The alphabetically first plaintiff is used where there have been multiple plaintiffs in a case.

³ See Catherine Barnard & Bob Hepple, *Substantive Equality*, 59 CAMBRIDGE L.J. 562 (2000) (assessing cases from the United Kingdom, the European Community and the European Court of Human Rights).

⁴ Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 595 (1982). While conceding the prominence of equality to Western legal and moral thought since Plato and Aristotle, Westen posits that “[e]quality is an undeniable and unchangeable moral truth because it is a simple tautology.” *Id.* at 547–48.

the International Labor Organization (ILO), the United Nations (UN) and the World Bank.⁵

This Article examines the similarly situated test for unequal treatment, as applied by the ILOAT and other international administrative tribunals that adjudicate employment claims involving public international organizations, in order to highlight the inadequacies of that test and to elaborate upon Judge Hugessen's alternative analytical framework.

First, the principal conceptions of equality before the law are briefly considered. Second, the reader is introduced to the international civil service, the international administrative tribunals, and the key principles in their jurisprudence. Third, the tribunals' major decisions under the general principle of equality are reviewed and compared, with an eye on judicial approaches to employment discrimination under municipal law primarily in North America and Europe. Finally, drawing from the established jurisprudence as well as Judge Hugessen's dissenting opinion in *Mr. R.A.-O.*, the author proposes a unifying framework for analyzing cases of both simple inequality and true discrimination in the international civil service.

II. EQUALITY BEFORE THE LAW

A. Conceptions of Equality Under National Constitutions

The principle of equality before the law is a protean concept.⁶ In the United States, the first country to give effect to the principle in constitutional jurisprudence, the guarantee of equality is sometimes viewed as a circular, empty constraint,⁷ "a mere tautological recognition" that the law should do what it intends to do.⁸ In the United Kingdom and some other parliamentary democracies in the common law tradition, equality is not a fundamental legal principle at all, but a right that supreme Parliament may give and taketh away as it will.⁹ Many continental European constitutions promise equality in its

⁵ See generally 1 C.F. AMERASINGHE, *THE LAW OF THE INTERNATIONAL CIVIL SERVICE* 312-16 (2d ed. 1994).

⁶ Catherine Barnard, *The Principle of Equality in the Community Context: P. Grant, Kalanke and Marshall: Four Uneasy Bedfellows?*, 57 CAMBRIDGE L.J. 352, 362 (1998) (citing John Scharr, *Equality of Opportunity, and Beyond*, in *NOMO SIX: EQUALITY* (J. Chapman & R. Pennock eds., 1967)).

⁷ Cf. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-1, 1436 (2d ed. 1988).

⁸ See U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring).

⁹ See Arthur Chaskalson, *From Wickedness to Equality: The Moral Transformation of*

substantive senses of distributive equality and equal human worth.¹⁰ But in their application by courts in Europe, these high minded principles sometimes give way to positivist syllogisms,¹¹ and in the hard cases, to total judicial deference for legislative prerogatives.¹² Conversely, courts in the “southern” democracies like India and South Africa, have tended to embrace and expand their constitutions’ substantive conceptions of equality.¹³

For purposes of this Article, the principle of equality is framed as two distinct legal rights: First, there is the right to equal treatment, addressing what Judge Hugessen referred to as simple inequality; Second, there is the right to treatment as an equal.¹⁴ The latter right is one way to address what Judge Hugessen would call true discrimination.¹⁵

The terminology of “right to treatment as an equal” has not gained currency in jurisprudence, but the concepts to which it refers—the dignity, autonomy, and worth of the individual—are seen throughout the cases under the principle of equality.¹⁶ While this right is a substantive conception of equality, it does not require equality of results or redistributive justice.¹⁷

South African Law, 1 INT’L J. CONST. L. 590, 591 (2003).

¹⁰ See Gustavo Zagrebelsky, *Ronald Dworkin’s Principle Based Constitutionalism: An Italian Point of View*, 1 INT’L J. CONST. L. 621, 637, 642–43 (2003).

¹¹ See *id.* at 622, 649.

¹² See Bernhard Schlink, *Hercules in Germany?*, 1 INT’L J. CONST. L. 610, 614–15 (2003) (Dworkin’s anti-positivist thesis that there is one right answer to every legal question is rejected in German constitutional tradition).

¹³ See Chaskalson, *supra* note 9, at 600–01; Upendra Baxi, “A Known But An Indifferent Judge”: *Situating Ronald Dworkin in Contemporary Indian Jurisprudence*, 1 INT’L J. CONST. L. 557, 581–83 (2003).

¹⁴ TRIBE, *supra* note 7, § 16-1, at 1437–38 (citing Ronald Dworkin, *Social Sciences and Constitutional Rights: The Consequences of Uncertainty*, 6 J.L. & EDUC. 3, 10–11 (1977)). Although the tribunals’ judgments interchangeably use “principle” and “right” as well as “equality” and “equal treatment,” this Article considers equal treatment to be one of the rights that flows from the principle of equality.

¹⁵ A possible third iteration of the principle of equality—the right of nondiscrimination—may be viewed instead as a framework for enforcement of either or both of the two other rights. Discrimination requires a breach of either equal treatment or the right to be treated as an equal, but it is possible to have infringements of equal treatment or the right to be treated as an equal without infringing any particular right of nondiscrimination. See Barnard, *supra* note 6, at 355, 363–64.

¹⁶ See Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 563 (2004).

¹⁷ See TRIBE, *supra* note 7, § 16-1, at 1438 n.18.

The right to equal treatment is the widely recognized conception of equality.¹⁸ It is a formalistic right, requiring consistent treatment, aiming for procedural justice, but not necessarily seeking a moral or substantively correct outcome.¹⁹ The right to equal treatment condones bad treatment as long as like persons are treated equally badly.²⁰ Some scholars would reframe equal treatment as a positive right to be treated reasonably under one's own circumstances.²¹ As such, the abstract right to equal treatment says little about the attendant obligations of the lawmaker or the administrator of the law, because it is rare that laws or administrative actions are wholly arbitrary.²²

B. Conceptions of Equality in International Administrative Tribunals

For more than thirty years, the right to equal treatment has been part of the jurisprudence of international administrative tribunals like the ILOAT.²³ They have used the quintessentially formalist similarly situated test for analyzing all claims of inequality and discrimination in employment.²⁴ Under the test, "[t]he principle of equality means that those in like case[s] should be treated alike, and that those who are not in like case[s] should not be treated alike."²⁵ Where an individual plaintiff or class of persons is similarly situated to another whom the employer has treated differently, then unequal treatment cannot stand.²⁶ But where the plaintiff and his comparator are not similarly situated, then there is no unequal treatment, and on the contrary, the organization may be required to treat the two persons differently.²⁷ The similarly situated test has worked reasonably well in cases of simple inequality in the international organizations, that is, a lack of evenhandedness in the administration of the terms and conditions of employment.²⁸ But where the issue was one of systematic

¹⁸ See generally Barnard, *supra* note 6.

¹⁹ Barnard & Hepple, *supra* note 3, at 563.

²⁰ *Id.* See generally Brake, *supra* note 16.

²¹ Westen, *supra* note 4, at 576–77 (“[I]f rationality review has merit, it is not because the state is constitutionally obliged to have rational reasons for treating people ‘unlike’ (as opposed to ‘alike’) but because the state is obliged to have [a] rational and legitimate reason for *every* way in which it treats people.”) (emphasis in original).

²² RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS* 1204 (2000).

²³ See 1 AMERASINGHE, *supra* note 5, at 314–16.

²⁴ See *id.* at 316.

²⁵ De Los Cobos, I.L.O. Admin. Trib., Judgment No. 391, ¶ 9 (1980).

²⁶ See 1 AMERASINGHE, *supra* note 5, at 316.

²⁷ See *id.*

²⁸ See generally *id.* at 328–41.

discrimination—institutionalized unequal treatment on the basis of personal characteristics that may be irrelevant to employment—then the similarly situated test has proved inadequate.²⁹

Over the years, in discrete extensions of the traditional similarly situated test the international administrative tribunals have begun to sketch out substantive approaches to analyzing claims of employment discrimination in the international civil service which include concepts of equality of opportunity and of nondiscrimination against designated categories.³⁰ Judge Hugessen's dissenting opinion in *Mr. R.A.-O.* sought to synthesize some of those disparate judgments into a new analytical framework that would vindicate the right to treatment as an equal.³¹ He envisaged a substantive conception of equality that is driven by such values as the dignity, autonomy, and worth of the individual person.³²

Judge Hugessen's approach mirrors the constitutional jurisprudence in Canada and also the current legal trends in some European courts to recognize something like the right to treatment as an equal.³³ Those relatively recent developments in jurisprudence outside the United States recall the journey of American case law from Justice Harlan's lonely dissent in *Plessy v. Ferguson* to Chief Justice Warren's opinion for a unanimous court in *Brown v. Board of Education*, both of which emphasized the autonomy and worth of the individual as an essential aspect of the principle of equality before the law.³⁴ International administrative tribunals are on a similar journey today.

²⁹ *Mr. R.A.-O.*, I.L.O. Admin. Trib., Judgment No. 2193, ¶ 18 (2003) (Hugessen, J., dissenting).

³⁰ See Barnard & Hepple, *supra* note 3, at 565–66.

³¹ *Mr. R.A.-O.*, I.L.O. No. 2193, ¶¶ 21–27 (Hugessen, J., dissenting).

³² *Id.*

³³ See Barnard & Hepple, *supra* note 3, at 567.

³⁴ Bob Hepple, *The European Legacy of Brown v. Board of Education*, 2006 U. ILL. L. REV. 605, 610–11 (2006). See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.”); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 494 (1954) (“To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

III. THE INTERNATIONAL CIVIL SERVICE AND INTERNATIONAL ADMINISTRATIVE TRIBUNALS

The employees of international organizations traditionally have been considered to be international civil servants, that is, public servants to the international community.³⁵ Judicially created rules of employment law within international organizations have been heavily influenced by the law of public administration, and less so by private employment law.³⁶ Consequently, allegations of employment discrimination in international organizations are analyzed by their respective tribunals using a framework that broadly applies to other forms of discrimination in government administration, as discussed below.

A. Public International Organizations and International Administrative Tribunals

Starting in 1865, with the establishment of the International Telegraph Union (now the International Telecommunication Union), states have established international intergovernmental organizations (IGOs) to serve public purposes that were seen as best achieved on a transnational basis.³⁷ Today, the United States recognizes more than eighty IGOs,³⁸ and there are many others.

IGOs are typically bestowed with immunity from the jurisdiction of member states' courts to preserve their independence and international character.³⁹ As a corollary of this jurisdictional immunity, the employees of these organizations—the international civil service—have no recourse under

³⁵ For a brief summary of the origins of the international civil service, from the Congress of Vienna (1814–15) to the League of Nations, see Aamir Ali, *The International Civil Service: The Idea and the Reality*, in INTERNATIONAL ADMINISTRATION: LAW AND MANAGEMENT PRACTICES IN INTERNATIONAL ORGANISATIONS I.1 (Chris de Cooker ed., 1990). For a more comprehensive review, see JACQUE LEMOINE, *THE INTERNATIONAL CIVIL SERVANT: AN ENDANGERED SPECIES* 15–27 (1995).

³⁶ See 1 AMERASINGHE, *supra* note 5, at 176.

³⁷ See LEMOINE, *supra* note 35, at 21.

³⁸ See 22 U.S.C. § 288, Notes (2000). In addition, the European Union is comprised of numerous constituent organizations. See Europa, *How is the EU Organized?*, http://europa.eu/abc/panorama/howorganized/index_en.html (last visited Oct. 16, 2007).

³⁹ See generally Charles H. Bower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1 (2000).

national laws regulating employment.⁴⁰ Enter the international administrative tribunals, which over time have been established by various international organizations to provide judicial review of the acts by the organizations as employers.⁴¹

1. International Labor Organization Administrative Tribunal

The oldest and most prolific of the existing tribunals is the ILOAT. Established in 1946 as the successor to the League of Nations Tribunal (1927 to 1946), the ILOAT has decided over 2,600 cases as of February 2007, recently averaging about 100 judgments per year.⁴²

Although it is formally an organ of the ILO, other IGOs can accept the jurisdiction of the ILOAT, and the tribunal currently has jurisdiction over employment claims from forty-nine international organizations.⁴³ These include UN specialized agencies such as the Food and Agricultural Organization (FAO), UNESCO, and the World Health Organization (WHO), as well as other organizations like Interpol and the World Trade Organization (WTO).⁴⁴ The ILOAT has jurisdiction over organizations that are part of the UN common system, organizations that track the coordinated organizations, as well as organizations that do not participate in any coordinated employment policies.⁴⁵ A common denominator of the organizations that accept the

⁴⁰ While it is not unheard of for a national court to exercise jurisdiction over international organizations in employment cases, such cases have been the rare exception. See 1 AMERASINGHE, *supra* note 5, at 45.

⁴¹ For a detailed analysis of the need for and origins of the international administrative tribunals, see *id.* at 26–48. See also Kay Hailbronner, *Immunity of International Organisations from National Jurisdiction, with particular reference to Germany*, in INTERNATIONAL ADMINISTRATION, *supra* note 35, at III.3 (reviewing German constitutional jurisprudence suggesting the immunity of international organizations with respect to employment relations is conditional upon the availability of effective judicial protection, as provided by international administrative tribunals). The International Court of Justice affirmed the judicial character of international administrative tribunals, in *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, 52 (Jul. 13).

⁴² See International Labor Organization, Triblex http://www.ilo.org/dyn/triblex/triblex_br_owse.home (last visited Oct. 16, 2007).

⁴³ See Organizations Under the Jurisdiction of the ILOAT, <http://www.ilo.org/public/english/tribunal/orgs.htm> (last visited Sept. 20, 2007).

⁴⁴ *Id.*

⁴⁵ The UN, the ILO, the World Health Organization (WHO) and a dozen other IGOs have agreed to develop common standards for salaries, benefits and other terms of employment, known as the “UN common system.” See Jacques Tassin, *Administrative Coordination in the*

ILOAT's jurisdiction is that they are headquartered in Europe or North Africa, although they employ staff worldwide.⁴⁶

The seven judges of the ILOAT are appointed for three year renewable terms by the ILO Conference, the highest organ of the ILO.⁴⁷ The judges are of different nationalities and typically have been eminent jurists in their countries.⁴⁸ Usually, they sit in panels of three, but larger panels are permitted for exceptional cases.⁴⁹

2. *United Nations Administrative Tribunal*

The United Nations Administrative Tribunal (UNAT) was established in New York in 1949 to receive complaints from the UN and the UN specialized agencies.⁵⁰ A number of specialized agencies based in Europe elected to accept the jurisdiction of the ILOAT, as noted above,⁵¹ rather than that of the UNAT.⁵² Two other specialized agencies, the World Bank and the IMF, chose neither tribunal and established their own administrative tribunals much later.⁵³ The UNAT's jurisdiction includes employment claims from the UN Secretariat, several UN agencies and programs including the UN Children's Emergency Fund (UNICEF), the International Maritime Organization (IMO),

UN Family, in INTERNATIONAL ADMINISTRATION, *supra* note 35, at 1/25. The "coordinated organizations" are NATO and five other IGOs based in Europe that have agreed to coordinate their salary-setting policies. Their coordination does not extend to other terms of employment. See Walter Fürst & Helge Weber, *Uniformity in Service Law and Judicial Remedies for Staff Members of the European Coordinated Organisations*, in INTERNATIONAL ADMINISTRATION, *supra* note 35, at V.1/1-3.

⁴⁶ The WHO, for example, is based in Geneva but has a highly decentralized structure with offices around the world, and the WHO also includes the Pan-American Health Organization, a distinct international organization headquartered in Washington. See About the WHO, <http://www.who.int/about/structure/en/index.html> (last visited Oct. 16, 2007).

⁴⁷ Statute of the Administrative Tribunal of the International Labor Organization art. III, Oct. 9, 1946, as amended through June 16, 1998, available at <http://www.ilo.org/public/english/tribunal/Stateng.htm>.

⁴⁸ See Members of the Administrative Tribunal, <http://www.ilo.org/public/english/tribunal/judges.htm> (last visited July 6, 2007).

⁴⁹ Statute of the Administrative Tribunal of the International Labor Organization, *supra* note 47, art. III.

⁵⁰ See generally 1 AMERASINGHE, *supra* note 5, at 54-57.

⁵¹ See *supra* note 43 and accompanying text.

⁵² 1 AMERASINGHE, *supra* note 5, at 60.

⁵³ *Id.*

the International Civil Aviation Organization,⁵⁴ and claims for pension benefits from a host of IGOs that participate in the UN Joint Staff Pension Fund.⁵⁵

Like the ILOAT, the UNAT is comprised of seven judges of different nationalities, who sit in panels of three.⁵⁶ They are appointed for four year renewable terms by the UN General Assembly. The UNAT has decided more than a thousand cases.⁵⁷

3. Other Tribunals

Until 1988, legal claims by employees of the organizations comprising the European Union were heard by the European Court of Justice (ECJ).⁵⁸ Subsequently, those claims were heard by the Court of First Instance until the Civil Service Tribunal was established in 2005.⁵⁹ The judges of all three tribunals are appointed by the European Council of member states, for renewable terms of three to six years.⁶⁰

Several other IGOs have elected to establish their own administrative tribunals. Among the IFIs, notable examples are the World Bank Administrative Tribunal (WBAT),⁶¹ the Administrative Tribunal of the Asian

⁵⁴ *Id.* at 57.

⁵⁵ *Id.* The UN Joint Staff Pension Fund is a multi-employer pension fund of which FAO, ILO, WHO and other organizations are members, in addition to the UN Secretariat. See generally UN Joint Staff Pension Fund, <http://www.unjspf.org> (last visited Oct. 16, 2007). Thus, staff of the ILO would take their complaints about the pension fund to the UNAT and all other employment complaints to the ILOAT. Statute of the Administrative Tribunal of the U.N., G.A. Res. 351(IV), art. 14(2), adopted Nov. 24, 1949, as amended through Dec. 12, 2000, available at <http://www.un.org/staff/panelofcounsel/pocimages/atstat.pdf> [hereinafter UNAT Statute].

⁵⁶ UNAT Statute, *supra* note 55, art 3.

⁵⁷ See Numerical Index of Administrative Tribunal Judgments As of November 2005, <http://www.un.org/staff/panelofcounsel/xatjnum.htm> (last visited Oct. 29, 2007). The UNAT and other elements of the UN's internal system of administrative justice recently have been the subject of a comprehensive review and recommendations for change. See REPORT OF THE REDESIGN PANEL ON THE UNITED NATIONS SYSTEM OF ADMINISTRATION OF JUSTICE, U.N. doc. A/61/205 (July 28, 2006); The Secretary General, *Note on the Report of the Redesign Panel on the United Nations System of Administration of Justice*, U.N. Doc. A61/758 (Feb. 23, 2007).

⁵⁸ See CURIA, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES: HISTORIC LANDMARKS, BUILDINGS, AND SYMBOLS 4, <http://curia.europa.eu/instit/services/dpi/historiq.pdf> (last visited July 6, 2007). The ECJ is formally called the Court of Justice of the European Communities.

⁵⁹ *Id.* at 5.

⁶⁰ See ECJ, FAQ's, <http://curia.europa.eu/en/instit/Services/dpil/faq2.htm#cjce> (last visited Sept. 24, 2007).

⁶¹ The WBAT was established in 1980 and has decided more than 360 cases. See Judgments

Development Bank (AsDBAT),⁶² and the International Monetary Fund Administrative Tribunal (IMFAT).⁶³ Similarly, among the coordinated organizations in Europe, there are administrative tribunals or equivalent appeals boards, notably at the Council of Europe, NATO, and the Organisation for Economic Co-Operation and Development (OECD).⁶⁴

B. General Principles of Employment Discrimination Law

It is widely accepted that public international organizations are bound by the principle of equality in their employment relations.⁶⁵ While some would contend that this broad principle is *jus cogens* under international law, and therefore, compulsory for all subjects of international law, the jurisprudence does not support that conclusion as to international organizations.⁶⁶ Rather, the principle of equality and the right to equal treatment became part of the internal employment law of international organizations through specific judgments of the international administrative tribunals, many of which are reviewed in this Article.⁶⁷ These judgments are premised on the view that the employment rules and actions of these intergovernmental organizations have an administrative character, and therefore, should be constrained by the general

& Orders, [http://wbln0018.worldbank.org/crm/wbt/wbtwebsite.nsf/\(decisiondateweb\)?OpenView](http://wbln0018.worldbank.org/crm/wbt/wbtwebsite.nsf/(decisiondateweb)?OpenView) (last visited July 6, 2007).

⁶² Dating to 1991, the Statute of the AsDBAT is patterned after the WBAT Statute. The tribunal has decided seventy-seven cases as of August 2006. See ADBT Decisions by Number, <http://www.adb.org/Documents/Reports/ADBT/number.asp> (last visited Oct. 29, 2007).

⁶³ The IMFAT was formally established in 1994 and has decided twenty-one cases on the merits. See IMF Administrative Tribunal: Judgments, <http://www.imf.org/external/imfat/index.htm> (last visited July 6, 2007).

⁶⁴ 1 AMERASINGHE, *supra* note 5, at 57–59, 62.

⁶⁵ *Id.* at 315–16.

⁶⁶ Compare Advisory Opinion OC-18/03, Juridical Condition and Rights of Undocumented Migrants, Inter-Am. C.H.R. § 101 (Sept. 17, 2003) (concluding that the “principle of equality before the law, equal protection before the law and non-discrimination [in terms of labor rights] belongs to *jus cogens*”), with Sandesh Sivakumaran, *The Rights of Migrant Workers One Year On: Transformation or Consolidation?*, 36 GEO. J. INT’L L. 113, 136 (2004) (commenting that the Inter-American Court’s pronouncement is “unlikely true . . . as regards the entire list of unacceptable grounds of discrimination”).

⁶⁷ See *Dadivas*, I.L.O. Admin. Trib., Judgment No. 60 (1962); Press, I.L.O. Admin. Trib., Judgment No. 66 (1962); but cf. 1 AMERASINGHE, *supra* note 5, at 315 (because tribunal judgments do not extensively or specifically discuss the basis of the law of equal treatment, it “would not be unrealistic to conclude” that the tribunals have implicitly regarded general principles of law as the source of this law).

principles of law—consistency and evenhandedness—that commonly restrain public administration at the national level.⁶⁸

There is no single body of employment law for IGOs. Each organization has its own internal employment law comprised of both written and unwritten sources of law.⁶⁹ The written sources of law include, first and foremost, the constitutive instrument of the organization, for example, the UN Charter or the Articles of Agreement of the IMF.⁷⁰ Secondly, staff regulations and other terms of employment have been established by the high legislative organs of the IGOs, such as the UN General Assembly and the IMF Executive Board, and by the organizations' chief executives, like the Secretary General of the UN and the Managing Director of the IMF.⁷¹

Only a minority of IGOs' Constitutive treaties acknowledge the principle of equality and particular antidiscrimination norms. Article 8 of the UN Charter specifically rules out sex discrimination in employment at the UN, and Article 1 of the Charter provides more broadly that the purposes of the organization include international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."⁷² IGOs that lack such treaty-based norms adopted equivalent prohibitions against employment discrimination in some of their earliest legislative acts. Typical of these broad norms was Rule N-1 of the IMF Staff Regulations, dating to 1946, which provided that "the employment, classification, promotion and assignment of persons on the staff of the Fund shall be made without discriminating against any person because of sex, race, or creed."⁷³

Such general pronouncements leave many procedural and substantive aspects of discrimination law unaddressed. None of the IGOs have comprehensive legislation governing claims for employment discrimination in the ilk of Title VII of the U.S. Civil Rights Act of 1964, the UK Race Relations

⁶⁸ See 1 AMERASINGHE, *supra* note 5, at 314–15.

⁶⁹ E.g., Report of the Executive Board to the Board of Governors of the International Monetary Fund, EBAP/92/147, Attachment II, Oct. 9, 1992, *reprinted in* 1 Int'l Mon. Fund Admin. Trib. Rep.'s 251, App. at 17–18 (2000) [hereinafter IMFAT Report]. See also Robert A. Gorman, *The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank*, 25 COMP. LAB. L. & POL'Y J. 423 (2004).

⁷⁰ See IMFAT Report, *supra* note 69, at 17–18.

⁷¹ See *id.*

⁷² U.N. Charter art. 8, ¶ 1.

⁷³ IMF By Laws R. & Regs. N1 (1969). In 1979, this regulation was amended slightly and renamed Rule N-2.

Acts of 1968, or the Canadian Human Rights Act of 1976. In confining their anti-discrimination legislation to high principles, the equality law of the IGOs is not unlike many of the continental European systems, in which broad constitutional provisions and penal law traditionally have been the primary protections against employment discrimination.⁷⁴

International agreements are among the written sources of non-binding but persuasive law,⁷⁵ including Article 26 of the International Covenant on Civil and Political Rights (1966),⁷⁶ Article 2 of the Universal Declaration of Human Rights,⁷⁷ and Article 14 of the European Convention on Human Rights.⁷⁸

The unwritten sources of law for an organization are its own administrative practice, which may give rise to legal rights, and the so-called "general principles" of international administrative law.⁷⁹ It is through deployment of these general principles that international administrative tribunals have wielded considerable judicial authority over the development of employment law, especially the principle of equality, in the international civil service.

⁷⁴ See generally Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241 (2003). Under recent directives of the European Council, including Directive 2000/78, establishing a general framework for equal treatment in employment and occupation, states of the European Union are required to provide effective civil law remedies for employment discrimination. See Council Directive, 2000/78, 2000 O.J. (L 303) 16.

⁷⁵ Mr. I.M.B., I.L.O. Admin. Trib., Judgment No. 2120, ¶ 10 (2002); Mr. R.A.-O., I.L.O. Admin. Trib., Judgment No. 2193, ¶¶ 14–15 (2003) (Hugessen, J., dissenting).

⁷⁶ International Covenant on Civil and Political Rights art. 26, G.A. Res 2200A(XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 ("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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

⁷⁷ Universal Declaration of Human Rights art. 2, G.A. Res. 217A (III), U.N. GAOR, Supp. No. 16, U.N. Doc. A/810 (Dec. 10, 1948) (Article 2 begins "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

⁷⁸ European Convention on Human Rights art. 14, Nov. 4, 1950, Europ. T.S. 5, 213 U.N.T.S. 221 ("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.").

⁷⁹ IMFAT Report, *supra* note 69, at 17, 19. See Gorman, *supra* note 69, at 429–30.

1. *General Principles in the International Court of Justice*

In public international law, “the general principles of law recognized by civilized nations” are referred to as a source of law in Article 38 of the Statute of the International Court of Justice (ICJ),⁸⁰ and before that, Article 38 of the Statute of the Permanent Court of International Justice (PCIJ) (1921–1945).⁸¹ In spite of concerns that tribunals would expand the scope of international law beyond that which states consented, these provisions recognized that an international court must be given some power to develop an international jurisprudence.⁸²

By design, the scope of these “general principles of law” were ill-defined, and reflected a disagreement among the drafters as to whether general principles extended to natural law concepts grounded in conscience and subjective morality.⁸³ The PCIJ and the ICJ, as well as early ad hoc international arbitral tribunals, had been conservative in their reliance upon general principles, mainly referring to principles of legal procedure such as estoppel and *res judicata* and only rarely invoking more substantive maxims such as *pacta sunt servanda*,⁸⁴ unjust enrichment, equity (abuse of rights), and respect for acquired rights (vested rights).⁸⁵

Indeed, there appears to be not a single case in which the ICJ has invoked general principles in the natural law sense, nor could a case be found in which the ICJ has referred to equality as a general principle of law.⁸⁶ However, in a

⁸⁰ Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, T.S. No. 993.

⁸¹ Statute of the Permanent Court of International Justice art. 38, Dec. 16, 1920, 6 L.N.T.S. 379.

⁸² IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 16 (5th ed. 1998); see also Wolfgang Friedmann, *The Uses of “General Principles” in the Development of International Law*, 57 AM. J. INT’L L. 279, 280 (1963).

⁸³ BROWNLIE, *supra* note 82, at 15–16. For a summary of the scholarship discussing the narrowness or breadth of the concept of general principles under the ICJ statute, see Erika de Wet, *Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice*, XLVII NETH. INT’L L. REV. 181, 185–88 (2000).

⁸⁴ Signifying that the agreements and stipulations of the parties to a contract must be observed. West’s Encyclopedia of America Law, <http://www.enotes.com/wests-law-encyclopedia/pacta-sunt-servanda>.

⁸⁵ Friedmann, *supra* note 82, at 287; BROWNLIE, *supra* note 82, at 17–18; Lord McNair, *The Generalized Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT’L L. 1, 18 (1957).

⁸⁶ *But cf.* Barcelona Traction (Second Phase) (Bel. v. Spain), 1970 I.C.J. 3, 32 (the right to protection from racial discrimination has become *erga omnes*, deriving from principles and rules

widely-cited dissenting opinion in the *South West Africa* case, Judge Kotaro Tanaka, former justice in the Supreme Court of Japan, concluded that equality before the law, and in particular non-discrimination based on race, is a universal legal norm under international conventions, international custom, and general principles of law.⁸⁷

It has been noted that, whereas the ICJ's failure to make significant use of general principles as a source for developing the state of international law may relate to that tribunal's dependence upon the consent of states for jurisdiction and the acceptability of its decisions and opinions, such an inhibition need not apply to tribunals operating in other, newer spheres of international law.⁸⁸ Indeed, scholars recognized early on that the rapid development of new areas of international law, specifically, for international commercial transactions and for the administrative law of international organizations, calls for a liberal approach to general principles as a source of law.⁸⁹

2. *General Principles and Equality in the French Conseil d'État*

The concept of general principles of law features prominently in French administrative law, the body of municipal law that has been more influential than any other upon the jurisprudence of international administrative tribunals.⁹⁰ Taking the concept far beyond that seen in the ICJ, France's Conseil d'État has adopted many general principles of law to protect individual rights from the power of the administrative state, and to enforce the rule of law in the absence of legislative or constitutional constraints.⁹¹ These principles include equality before the law, essential individual liberties, and the judicial review.⁹² Such protections are closely analogous to those in the Bill of Rights and the Equal Protection and Due Process Clauses of the Fourteenth

concerning basic human rights).

⁸⁷ *South West Africa Cases (Second Phase)* (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 300 (July 18) (Tanaka, J., dissenting).

⁸⁸ Friedmann, *supra* note 82, at 280–81.

⁸⁹ *Id.* at 281; see also McNair, *supra* note 85, at 1.

⁹⁰ L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 3 (5th Ed. 1998). See 1 AMERASINGHE, *supra* note 5, at 49, 277.

⁹¹ See BROWN & BELL, *supra* note 90, at 216–17. The French judiciary is comprised of two parallel branches, the judicial courts that have jurisdiction over civil and criminal matters, and the administrative courts that handle public law matters. The Conseil d'État is the highest administrative court. See *id.* at 9.

⁹² *Id.* at 219–20.

Amendment to the United States Constitution.⁹³ In France, the 1958 Constitution of the Fifth Republic does not express these individual rights, but they have been declared general principles of law by the French administrative courts, derived from such sources as the 1789 Declaration of the Rights of Man and the Preamble to the 1946 Constitution of the Fourth Republic.⁹⁴

Additionally, general principles of due process and equality were derived by the Conseil d'État from the natural law philosophy of the Enlightenment,⁹⁵ and were also the inspiration for principles of equality in the United States Declaration of Independence and Constitution. Derived as they are from natural law, these principles have carried moral as well as legal connotations.⁹⁶ Without this natural law element, the principle of equality in the hands of an administrative court could never reach beyond a rule of evenhandedness in government administration, a rule of equal treatment in the most literal sense. This subjective element to general principles has been much criticized in France, with references to "activist" judges and "American-style" judicial review.⁹⁷ But it is clear that the Conseil d'État has retained a moral, natural justice element in the principle of equality, allowing the principle to be used by the court at times to pursue social justice.

The first case in the Conseil d'État applying the general principle of equality in the civil service was *Barel*, in 1954.⁹⁸ The five plaintiffs had been refused the opportunity to sit for the entry examination for the Ecole Nationale d'Administration, and no explanation was given. On appeal, the plaintiffs argued that the motive for the refusal was that they were Communists. When the minister responsible declined to give a reason for the refusal or to produce the relevant files to the court, the Conseil d'État accepted the plaintiff's argument as to motive, and ruled that this violated the general principles of freedom of opinion and equal access to the civil service.⁹⁹ The court could have reached the same outcome simply by reference to the authority's failure

⁹³ See *id.* at 220.

⁹⁴ *Id.* at 218. For a discussion of the natural law underpinnings of such instruments as the United States Declaration of Independence, the French Declaration of the Rights of Man, and the International Covenant on Civil and Political Rights, see CLAYTON & TOMLINSON, *supra* note 22, at 22–24.

⁹⁵ BROWN & BELL, *supra* note 90, at 218.

⁹⁶ BERNARD SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD 212 (1954).

⁹⁷ See *id.* at 213–14.

⁹⁸ CE, May 28, 1954, Rec. Lebon 308.

⁹⁹ SCHWARTZ, *supra* note 96, at 255.

to provide adequate reasons.¹⁰⁰ But by invoking the principle of equality, the Conseil d'État signaled its determination to use the principle not merely for administrative evenhandedness but in the active pursuit of justice.

This is further illustrated in the cases of *Peynet*, from 1973, and *Ville de Toulouse*, from 1982, where the Conseil d'État extended private sector job protections to cover public civil servants. In *Peynet*,¹⁰¹ by invoking general principles, the court extended to civil servants a rule protecting pregnant women from dismissal in the private sector.¹⁰² In *Ville de Toulouse*,¹⁰³ the Conseil d'État invoked general principles to extend the private sector minimum wage to public sector casual laborers.¹⁰⁴ Both of these outcomes were controversial in France and they demonstrated the degree to which general principles could be invoked to expand substantive protections under the rubric of equality.¹⁰⁵

3. The General Principle of Equal Treatment in the International Administrative Tribunals

In the same year as the *Barel* decision from the Conseil d'État, the ILOAT for the first time referred to its implicit power to invoke principles of equity to provide clarity to the staff regulations of an international organization.¹⁰⁶ This was followed by judgments invoking such maxims as estoppel and *patere legem*.¹⁰⁷ In 1962, in the cases of *Dadivas* and *Press*, the ILOAT for the first

¹⁰⁰ The Conseil d'État, at the urging of Judge Maxime Letourneur, who would later serve on the ILOAT, had recently overturned the long-standing precedent which held that the administration was not required to give reasons for its decisions unless specifically required by statute. SCHWARTZ, *supra* note 96, at 211.

¹⁰¹ CE, June 8, 1973, Rec. Lebon 406.

¹⁰² BROWN & BELL, *supra* note 90, at 211.

¹⁰³ CE, April 23, 1982, Rec. Lebon 152.

¹⁰⁴ BROWN & BELL, *supra* note 90, at 228.

¹⁰⁵ See *id.*

¹⁰⁶ Tranter, I.L.O. Admin. Trib., Judgment No. 14 (1954) ("[T]he Judge is bound to observe strictly the rules of law and can have recourse to equity only in the event of lack of clarity of the text or silence of the regulations.").

¹⁰⁷ E.g., Waghorn, I.L.O. Admin. Trib., Judgment No. 28 (1957) ("[T]he complainant, by accepting on several occasions and without reservation the payments made to him by the Organisation, in sizable and generous amounts, may be considered under general principles of law as having acquiesced in the actual offers which were made to him and as having relinquished the remainder of his claims."); D'Andecy, I.L.O. Admin. Trib., Judgment No. 51 (1960) ("Any authority is bound by its own rules for so long as such rules have not been amended or abrogated."); Wakley, I.L.O. Admin. Trib., Judgment No. 53 (1961) ("[T]he general principle

time invoked equality as a general principle of law, thereby resolving any doubt as to whether, in cases between an IGO and its staff, the concept of general principles would be limited to those recognized by the ICJ.¹⁰⁸ Not coincidentally, the vice-president of the ILOAT at this time was Maxime Letourneur, judge in the Conseil d'État and noted expert on general principles of law.¹⁰⁹

As a rule, however, the international tribunals have been more conservative than the French Conseil d'État in their resort to the general principle of equality. The cases reviewed below demonstrate that the tribunals usually avoided invoking the principle in the sense of the right to treatment as an equal. As traditionally applied, the tribunals' "similarly situated" construct for analyzing claims for equal treatment insisted on evenhandedness and not natural justice.¹¹⁰

Before closing this introduction to the international administrative tribunals, it should be noted that the tribunals are not bound by each others' judgments. As explained by the Administrative Tribunal of the European Bank for Reconstruction and Development (EBRDAT):

The jurisprudence developed by the administrative tribunals of international organisations is a prime source for the general principles of international administrative law. This does not mean that one administrative tribunal is bound to follow the approach let alone the particular decision of another tribunal. On the other hand, it does mean that the reasoning of other administrative tribunals is persuasive.¹¹¹

of law according to which the payer is entitled to pursue the recovery against the payee of sums paid in error is applicable to the present case.").

¹⁰⁸ Dadivas, I.L.O. Admin. Trib., Judgment No. 60 (1962); Press, I.L.O. Admin. Trib., Judgment No. 66 (1962) ("[T]he organisation is bound to respect the principle of equality as between officials in the same position. . .").

¹⁰⁹ See *supra* note 100.

¹¹⁰ The courts of the EU have been notably more willing than the international administrative tribunals at other IGOs to apply substantive concepts of equality in order to expand the scope of statutory rights of non-discrimination into general rights applicable in contexts not contemplated under the statutes. For example, in the case of *Speybrouck*, on facts similar to those in *Peynet* from the French court, the EU's Court of First Instance extended to the staff of the EU organizations the job protections for pregnancy found in a directive aimed at the Member States. Case T-45/90, *Speybrouck v. European Parliament*, 1992 E.C.R. II-33.

¹¹¹ Mr. C, European Bank for Reconstruction & Dev. (E.B.R.D.) Admin. Trib., Decisions No. 01/03 (2003).

When tribunals invoke general principles of law, the need for consistency with the jurisprudence from other tribunals is compelling because the legitimacy of general principles depends on the premise that they are "so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations."¹¹² The constant tension between, on the one hand, the application of the general principle of equality by different tribunals in disparate circumstances, and, on the other hand, the preservation of the legitimacy of the principle through its coherence, is seen throughout the judgments discussed below.

IV. THE JURISPRUDENCE OF EQUALITY IN INTERNATIONAL ADMINISTRATIVE TRIBUNALS

This part first explains the elements of the traditional similarly situated test. Second, cases applying the test in the international administrative tribunals are considered, with an emphasis on the tribunals' explicit and implicit innovations to the test in response to the analytical difficulties that have arisen. Finally, recent cases that have departed from the traditional test are considered in light of the need for a more robust legal framework.

A. The Similarly Situated Test

The principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike.¹¹³

This is the classic formulation of the right to equal treatment, long recognized by international administrative tribunals as one of the general principles of international administrative law. This formulation, which is said to come "straight out of Aristotle,"¹¹⁴ also has been invoked by the ECJ as a general principle under Community Law.¹¹⁵

¹¹² IMFAT Report, *supra* note 69, at 18.

¹¹³ De Los Cobos, I.L.O. Admin. Trib., Judgment No. 391 ¶ 9 (1980).

¹¹⁴ Sean Pager, *Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality*, 51 AM. J. COMP. L. 553, 555 (2003). See Barnard, *supra* note 6, at 363.

¹¹⁵ E.g., Case 80/70, *Defrenne v. Bel.*, 1971 E.C.R. 445.

The similarly situated test is marked by three notable characteristics: (1) Prejudice is not a factor in the analysis; the test applies equally to intentional and unintended discrimination and to any category of persons; (2) Because the test does not protect any particular categories of persons, it is open to a plaintiff to put himself into any relevant category and compare his treatment to that of others in the category; (3) In making such a comparison, the plaintiff's circumstances must be nearly identical to those of the persons who were treated differently; otherwise, the tribunals will find that the plaintiff was not similarly situated to his comparators, and thus, the differential treatment did not infringe the right to equal treatment.¹¹⁶ These three characteristics, and their application in the cases, are explained next.

1. Prejudice Is Not a Factor

The similarly situated test for equal treatment was never concerned with prejudice. In the international administrative tribunals, as in the French Conseil d'État, claims of biased motive are analyzed as an abuse of power (*détournement de pouvoir*), or what English courts would call bad faith or improper purpose.¹¹⁷ Scholars and tribunals occasionally refer to *détournement de pouvoir* in a broader sense that includes abuse of power through discrimination and unequal treatment.¹¹⁸ But in its usual sense, the doctrine applies more narrowly to ill will, personal prejudice, and irrelevant considerations in individual decisions.¹¹⁹ When invoking the doctrine of *détournement de pouvoir* in its usual sense, the tribunals have engaged in a burden-shifting analysis that requires plaintiffs to produce some evidence giving rise to at least an inference of improper motivation, to which the organization can respond with its own proof of proper motive.¹²⁰ Tribunals usually will rule for the plaintiffs in such mixed-motive cases, where there is

¹¹⁶ See generally 1 AMERASINGHE, *supra* note 5, at 314, 335–37, 339.

¹¹⁷ *Id.* at 278.

¹¹⁸ E.g., C.F. Amerasinghe, *Détournement de Pouvoir in International Administrative Law*, 4 Zaö. R. V. 439, 440–62 (1984) (Ger.).

¹¹⁹ *Id.* at 467.

¹²⁰ See *id.* at 475–79 (citing, e.g., Olivares Silva, I.L.O. Admin. Trib., Judgment No. 495 (1982) (plaintiff's burden is to show it is more probable than not that a bias against him for his activities in the staff association was a factor in the decision-maker's mind; prejudice is usually concealed, so its existence may be proven by inference)).

credible evidence that ill-will, prejudice or some other improper motive was a factor, even if not the predominant factor, in the decisionmaker's mind.¹²¹

Cases of systemic differential treatment traditionally were not analyzed as *détournement de pouvoir*, and the tribunals avoided probing the organization's proffered purposes for the differentiation. Even where plaintiffs claimed that prejudice, such as gender bias, was at play in the differential treatment, the tribunals originally applied the similarly situated test no more stringently than in cases of simple inequality.¹²² Reinforcing the conclusion that the traditional similarly situated test was concerned solely with administrative evenhandedness and not human rights and dignity, the jurisprudence of the ECJ applies the same similarly situated test to all manner of administrative acts under Community Law, from employment discrimination, to tariffs, to advertising laws.¹²³

As a rule of evenhandedness controlling the exercise of government authority, the similarly situated test of equal treatment may be viewed as a particular application of the *Wednesbury* unreasonableness test under English law,¹²⁴ and the rational basis test for equal protection under the United States Constitution.¹²⁵ A key difference, however, is that bad faith is explicitly an element of the *Wednesbury* test, and prejudice can be a consideration under the

¹²¹ *E.g., Olivares Silva*, I.L.O. No. 495, ¶ 23. *But see* Suntharalingam, W.B. Admin. Trib., Decision No. 6, ¶ 29 (1981) (evidence of irritation by supervisor with plaintiff's unsatisfactory performance does not give rise to an inference that prejudice or discrimination was a factor in the decision to terminate employment).

¹²² *See generally* Mr. R.A.-O., I.L.O. Admin. Trib., Judgment No. 2193, ¶ 18 (2003) (Hugessen, J., dissenting).

¹²³ *Compare* Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-0621 (unmarried same sex couple not similarly situated to married opposite-sex couple; no violation of equal treatment to discriminate between them in employment benefits), *with* Case C-309/89, *Codornou SA v. Council of EU*, 1994 E.C.R. I-1853 (Spanish producers of sparkling wine are similarly situated to producers in France and Luxembourg; regulation granting exclusive use of the term "cremant" to producers in France and Luxembourg violated the right to equal treatment).

¹²⁴ *See* CLAYTON & TOMLINSON, *supra* note 22, at 1209–09; *Provincial Picture Houses v. Wednesbury Corp.* (1948) 1 K.B. 223 (Eng.) (when reviewing discretionary acts of government, court will consider whether account has been taken of the pertinent factors and extraneous circumstances have been disregarded; court will not evaluate the reasonableness of the outcome in substance).

¹²⁵ *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.").

U.S. rational basis test.¹²⁶ While international administrative tribunals have had occasion to apply both *détournement de pouvoir* and equal treatment analysis in the same case, an inquiry for bad faith or prejudice has not traditionally been integral to the tribunal's equal treatment framework.¹²⁷

2. Open Comparison

Another basic difference between the similarly situated test of equal treatment and U.S. employment discrimination law is that in the United States, a case is effectively over if the plaintiff fails to prove an intent to discriminate on impermissible grounds. U.S. plaintiffs have no cause of action for simple unequal treatment having a rational basis.¹²⁸ By contrast, because the similarly situated test is not specifically concerned with prejudice or even employment relations, a plaintiff who has standing can invoke this test to complain about any differential treatment, as between the plaintiff and similarly situated comparators. There is no requirement to show or even allege that the differential treatment implicates a protected classification, such as race, nationality, or sex.¹²⁹

This aspect of the test can lead to absurd outcomes. For example, when incorrect administration results in one person receiving better treatment than what is required under the relevant substantive criteria, then a similarly situated person may claim a right to equal treatment, i.e., an equally incorrect outcome under the substantive criteria.¹³⁰ The ECJ and its subordinate courts

¹²⁶ Animosity toward the impacted class of persons cannot constitute a legitimate government interest under U.S. constitutional jurisprudence. *Romer v. Evans*, 517 U.S. 620, 631–32 (1996); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

¹²⁷ In its very first case, the World Bank Administrative Tribunal considered claims of improper motivation and unequal treatment in a challenge to changes in the organization's tax reimbursement system that had a disproportionate financial impact upon U.S. nationals. The changes were upheld on the basis that their purpose had been nondiscriminatory, the organization's choice reasonable, and hence, there had been no abuse of power. *De Merode*, W.B. Admin. Trib., Decision No. 1, ¶¶ 47, 85–87 (1981).

¹²⁸ *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”) (emphasis in original).

¹²⁹ See *Press*, I.L.O. Admin. Trib., Judgment No. 66 (1962) (holding when work of authorship is jointly created by employees, there is no duty to identify the individual authors, but equal treatment is violated when the organization selectively identifies some but not all joint authors).

¹³⁰ *Brake*, *supra* note 16, at 604 (summarizing Christopher Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1222–24 (1997)).

partially compensate for this deficiency of the similarly situated test by overlaying another rule, which provides that no person may rely, in support of a claim on an unlawful act in favor of another.¹³¹

The open comparison of the similarly situated test contrasts with the law of employment discrimination in the United States, where courts generally adhere strictly to the categories of protected classes enumerated in the Constitution and the relevant statutes.¹³² Canada's Charter of Rights and Freedoms, and the jurisprudence thereunder, follow a middle route, enumerating categories of protected classes but inviting consideration of other "analogous" protected classes, as discussed later.¹³³

3. *Identity of Circumstances*

One might expect, absent the need to prove intent or membership in a protected class, that plaintiffs in the international civil service would have great success winning claims of unequal treatment using the similarly situated test. For most of the history of the international administrative tribunals, however, the reverse was true. One reason for this was the tribunals' adherence to the origins of the right to equal treatment as a constraint upon administrative acts of discretion, and their reluctance to apply the right against discriminatory legislative acts. Thus, in three notorious cases from the early 1970s—*Taylor-Ungaro*¹³⁴ and *Kiewning-Korner Castronovo*¹³⁵ from the ILOAT, and *Mullan*¹³⁶ from the UNAT—systematic gender discrimination in the administration of employee benefits was affirmed because that discrimination was sanctioned in the relevant staff rules.¹³⁷ Given that the female plaintiffs in those cases were placed de jure into a different class than

¹³¹ E.g., Case T-298/02, *Romeu v. Comm'n of the Eur. Cmty.*, 2005 E.C.R. II-4599, ¶ 77.

¹³² E.g., *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (holding alienage or citizenship discrimination does not offend the prohibition against national origin discrimination in Title VII of the Civil Rights Act of 1964). But see *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998) (holding same sex sexual harassment constitutes discrimination "because of . . . sex" within the meaning of Title VII). Constitutional rational basis review is, however, open to wide comparators.

¹³³ See *infra* note 400 and accompanying text.

¹³⁴ I.L.O. Admin. Trib., Judgment No. 167 (1970).

¹³⁵ I.L.O. Admin. Trib., Judgment No. 168 (1970).

¹³⁶ U.N. Admin. Trib., Judgment No. 162 (1972).

¹³⁷ *Taylor-Ungaro*, I.L.O. No. 1671, ¶ 1; *Kiewning-Korner Castronovo*, I.L.O. No. 168, ¶ 1; *Mullan*, U.N. No. 162, at VIII.

their male comparators, they were not deemed similarly situated to the comparators.¹³⁸

A second set of reasons for plaintiffs' limited success with discrimination claims relates to the litigation process within the international organizations. Although the tribunals are not courts of review, in the sense that they generally owe no deference to the findings in earlier internal processes of administrative review, the tribunals rarely look beyond the case records developed in those earlier processes, and they almost never hold oral hearings. When plaintiffs are pursuing their complaints pro se in those earlier internal processes, as is often the case, the cases begin from emotionally charged but inartfully pled complaints, which are built upon mistaken legal foundations and then hindered by the plaintiffs' ineffective investigations into the relevant circumstances.

A third factor, and the most significant for this paper, has been the traditional strictness of the test for similarity of circumstances as between the plaintiff and the comparators. For years, international administrative tribunals demanded near-identity of circumstances between the plaintiff and the comparators. Anything less and the plaintiff was deemed not similarly situated to the comparators and, *ipso facto*, not a victim of unequal treatment.¹³⁹

B. The Test Evolves

As shown above, the traditional approach to the similarly situated test was a formalistic one, requiring near-identity of circumstances between the plaintiff and the comparators who were being treated differently. This was the same approach followed by the ECJ applying Community Law.¹⁴⁰ Cases applying the similarly situated test in this way have yielded confusing results,

¹³⁸ *Taylor-Ungaro*, I.L.O. No. 167, ¶ 1; *Kiewning-Korner Castronovo*, I.L.O. No. 168, ¶ 1; *Mullan*, U.N. No. 162, at VIII.

¹³⁹ For an example of all three factors at play, see *Dadivas*, I.L.O. Admin. Trib., Judgment No. 60 (1962). Although the claim of unequal pay was never very compelling in that case, the claim was hampered by the plaintiff's initial emphasis on challenging the pay rules, her inartful framing of the issues, and her failure to identify comparators that, in the Tribunal's words, "performed *exactly* the same duties as she did." *Id.* at II(2)(a) (emphasis added).

¹⁴⁰ *E.g.*, Case 817/79, *Buyl v. Comm'n of the European Cmty.*, 1982 E.C.R. 245, ¶ 29 (when European Council amended its staff regulations to provide a different exchange rate for payment of salaries in other than Belgian francs than the rate used for payment of pensions, the court ruled there was no discrimination because "discrimination in the legal sense consists of treating in an identical manner situations which are different or treating in a different manner situations which are identical. The situation of a serving official differs considerably from that of a pensioner . . .").

particularly where the issue was one of true discrimination, that is, unequal treatment motivated by or reflecting prejudice. This part separately reviews the cases involving simple inequality and those involving true discrimination, to illuminate the inadequacies of the test in the latter set of cases.

Because the similarly situated test is unconcerned with prejudicial motive, it does not acknowledge this distinction between simple inequality and true discrimination. Judge Hugessen suggested that this is the fundamental flaw in the similarly situated test and that a more robust analytical framework is required in cases of true discrimination.¹⁴¹ But the tribunals have responded to the inadequacies of the similarly situated test by discretely expanding upon the traditional test in both categories of cases, often to the detriment of jurisprudential coherence.

Interestingly, the tribunals have tended to be circumspect in their opinions in true discrimination cases, even where departures from the traditional similarly situated test were clearly at play. Because the tribunals have been more forthcoming with their reasoning in cases of simple inequality, those cases are reviewed first.

1. The Similarly Situated Test in Cases of Simple Unequal Treatment

The case of *De Los Cobos*, from 1980, is a frequently cited example where unequal treatment was alleged but, there was no plausible contention that prejudice was involved.¹⁴² The ILO faced a critical financial crisis brought on by the withdrawal of the United States from membership from 1977 to 1980.¹⁴³ To address the crisis, the Director-General temporarily shortened the work week and reduced salaries for employees.¹⁴⁴ This action was challenged by more than 100 employees alleging, among other things, a breach of equality because the cuts did not apply to certain categories of employees.¹⁴⁵

In a modest departure from the similarly situated test that had been used to unfortunate result in *Taylor-Ungaro*, the ILOAT continued its inquiry beyond the fact that the plaintiffs were classified de jure in a different employment category than their colleagues who received different treatment. The tribunal

¹⁴¹ Mr. R.A.-O., I.L.O. Admin. Trib., Judgment No. 2193, ¶ 18 (2003) (Hugessen, J., dissenting).

¹⁴² I.L.O. Admin. Trib., Judgment No. 391 (1980).

¹⁴³ William P. Alford, *The Prospective Withdrawal of the United States from the International Labor Organization: Rationales & Implications*, 17 HARV. INT'L L.J. 623 (1976).

¹⁴⁴ *De Los Cobos*, I.L.O. No. 391, at A.

¹⁴⁵ *Id.* at C.

examined whether the plaintiffs' circumstances were substantively and relevantly different from those of the exempted employees.¹⁴⁶ For example, one category of employees exempted from the cuts was the so-called "experts," specialists in a field who usually contract with an IGO to work on a specific project or to provide expertise for a fixed period. The tribunal observed that, unlike the plaintiffs whose salaries were borne by the administrative budget that was under strain, "most experts are usually paid out of funds obtained from outside the ILO."¹⁴⁷ Thus, the experts' circumstance was different, in a way that was relevant to the differential treatment, from the staff affected by the cuts.¹⁴⁸ No reasonable rule of law could require the organization to cut salaries of experts who are paid outside the budget, as a condition to legitimately cut salaries for those who are paid within the budget.¹⁴⁹ Moreover, the tribunal's observation that "most"—but not all—such experts are "usually"—but not always—paid from outside sources, seems to acknowledge that the relevant difference in circumstance between the plaintiffs and their colleagues who received different treatment need not be true in every single case.¹⁵⁰ It was sufficient that the relevant difference in circumstance exists in the large.

Another example from the ILOAT of how the similarly situated test inquires for a relevant difference in circumstances is the case of *Tarrab* (No. 7) from 1982.¹⁵¹ A staff member in the professional category of staff challenged an increase in certain allowances paid to support-level "general service" staff.¹⁵² The tribunal ruled the difference in allowances was justified, not simply because of the *de jure* distinctions between the professional and general service staff, but also because there were relevant differences in recruitment patterns between the two categories of staff.¹⁵³

Whereas the ILOAT's inquiry for a relevant difference in circumstances was rather superficial in those two cases, the ECJ seemed to take a more probing inquiry, as illustrated in the 1983 case of *Ferrario*.¹⁵⁴ That case

¹⁴⁶ *Id.* ¶ 9.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* It might be argued by Westen, *supra* note 4, that this case does not implicate equality at all; rather, the ILOAT cast in equality terms a simple review for arbitrariness.

¹⁵⁰ *De Los Cobos*, I.L.O. No. 391, ¶ 9.

¹⁵¹ I.L.O. Admin. Trib., Judgment No. 498 (1982).

¹⁵² *Id.* at A.

¹⁵³ *Id.* ¶ 1.

¹⁵⁴ Case No. 152/81, *Ferrario v. Comm'n of the European Cmty.*, 1983 E.C.R. 2357.

involved claims by Italian nationals working in Italy for certain allowances to pay for higher education for their children.¹⁵⁵ The organization paid those allowances only to expatriate employees whose children attended higher education at least fifty kilometers from the place of employment in northwestern Italy.¹⁵⁶

The ECJ started by accepting that the organization may legitimately compensate expatriates for the disadvantages of working away from their country of origin, including the cost of sending children back to their country of origin for higher education.¹⁵⁷ In response, the plaintiffs pointed out that the policy allowed expatriates to receive the allowance in respect of children studying in a third country, or even in Italy where the parent is employed.¹⁵⁸ The ECJ retorted that such a situation also entails disadvantages for expatriates in comparison to local nationals, and anyway, the statistics showed that the number of expatriate staff whose children attended higher education in the place of employment was small, so the organization "cannot be criticized for having left that option open for such employees."¹⁵⁹ This latter point follows from *De Los Cobos*, that it is not necessary for the organization's differential treatment to match a difference in circumstance in every case, as long as the circumstances differ in the large.

For sixteen years after the *De Los Cobos* judgment in 1980, the similarly situated test governed with the somewhat deeper inquiry into the relevant difference between the plaintiffs' circumstances and those of colleagues who were treated differently. The tribunals did not seriously question the organizations' asserted purposes for the differential treatment.

But in the case of *D'Aoust*,¹⁶⁰ from 1996, the IMFAT suggested a subtle but significant innovation to the similarly situated test. At issue was the IMF's practice, when determining the initial job grade and salary of a new employee, to truncate the weight attached to prior work experience at ten years for non-economists positions, whereas new economist hires were given full credit for prior experience, and presumably, higher initial salary grades and salaries.¹⁶¹

¹⁵⁵ *Id.* ¶ 5.

¹⁵⁶ *Id.* ¶ 2.

¹⁵⁷ See discussion of the principle of geographic distribution, *infra* note 256 and accompanying text.

¹⁵⁸ *Ferrario*, 1983 E.C.R. 2357, ¶ 12.

¹⁵⁹ *Id.*

¹⁶⁰ I.M.F. Admin. Trib., Judgment No. 1996-1.

¹⁶¹ *Id.* ¶ 7(b).

The IMFAT observed that, because economics is at the heart of the IMF's mission, the organization could favor economists in deciding upon the terms of staff employment, but "not unreasonably."¹⁶² The meaning of this wordplay is mysterious. At a minimum, as in the earlier cases, the IMFAT here required that the difference in treatment have a relationship to real differences between the categories of affected staff that are relevant to legitimate organizational interests. Thus, the IMF can favor economists in the terms of employment, because there are real differences between economists and others, and because economics is at the heart of its mission.

But the IMFAT may have introduced a further constraint upon the organization's discretion to favor economists—that it act "not unreasonably"—which would suggest that the degree of differential treatment should bear a relationship to the degree of difference in circumstances between the plaintiff and his comparators.¹⁶³ For the ILOAT in *De Los Cobos*, it was enough to have found a relationship between the organization's interests and the differential treatment; there was no further inquiry into the degree of differential treatment. For the IMFAT in *D'Aoust*, however, it may be that the differential treatment is valid only if it is judged not unreasonable in relation to the difference in circumstances.

Significantly, in *D'Aoust* the IMFAT did not engage in a vigorous analysis of the degree of differential treatment, as related to the difference in circumstances between the plaintiff and economists at the IMF. In *D'Aoust*, it may have been that the special place of economists in the IMF was obvious and beyond question, or it may have been that the tribunal was attentive to the limits of its own competence to delve into the nuances of human resources management.

The additional element of reasonableness, or rationality, in the similarly situated test for equal treatment was amplified by the WBAT in the case of *Mould* from 1999.¹⁶⁴ In that case, a retired staff member who was legally separated from his wife sought a ruling that, after a divorce, she would remain eligible for the subsidized pension that is payable to a surviving spouse.¹⁶⁵ He claimed that the denial of the surviving spouse pension would discriminate against divorced couples.¹⁶⁶ The tribunal wrote that "differential treatment is

¹⁶² *Id.* ¶ 29.

¹⁶³ *Id.*

¹⁶⁴ W.B. Admin. Trib., Decision No. 210, ¶ 26 (1999).

¹⁶⁵ *Id.* ¶ 3.

¹⁶⁶ *Id.* ¶ 10.

not necessarily discriminatory if there is a rational nexus between the classification of persons subject to the differential treatment and the objective of the classification."¹⁶⁷ The tribunal ruled the organization's objective of providing for the needs of persons "who remain married to and dependent on" the retired staff member is reasonably related to the differential treatment of divorced couples.¹⁶⁸

In the case of *Mr. "R"*,¹⁶⁹ from 2002, the IMFAT picked up the *Mould* "rational nexus" phrasing and placed it within a broader burden-shifting framework.¹⁷⁰ The case involved a plaintiff who previously held the position of resident representative in a member state, a position "akin to that of an ambassador," which carries certain exceptional benefits and allowances.¹⁷¹ Upon completing his rotation, he accepted a different position with the IMF as head of a training center in a nearby member state.¹⁷² The latter position did not carry those exceptional benefits and allowances.¹⁷³ He claimed discrimination vis-à-vis the organization's resident representative in that latter member state.¹⁷⁴

Under the burden-shifting framework announced in *Mr. "R"*, the plaintiff bears an initial burden of showing that the organization distinguishes among categories of staff including the plaintiff.¹⁷⁵ With this *prima facie* showing of unequal treatment, the burden shifts to the organization, first, to produce evidence supporting the asserted legitimate purposes for the differential treatment,¹⁷⁶ and second, to persuade the tribunal that the "allocation of differing benefits to different categories of staff was . . . reasonably related to the purposes of those benefits."¹⁷⁷

The IMFAT's use of the term "allocation of benefits" rather than, say, "difference in benefits" foreshadowed a more probing analysis than was seen in previous cases under the similarly situated test. In *D'Aoust*, the tribunal

¹⁶⁷ *Id.* ¶ 26.

¹⁶⁸ *Id.*

¹⁶⁹ I.M.F. Admin. Trib., Judgment No. 2002-1.

¹⁷⁰ *Id.* ¶ 38. The IMFAT's burden-shifting framework for cases of unequal treatment is to be distinguished from the ILOAT's burden-shifting framework for *détournement de pouvoir* in mixed-motive cases, discussed *supra* note 118 and accompanying text.

¹⁷¹ *Mr. "R"*, I.M.F. No. 2002-1 ¶ 9.

¹⁷² *Id.* ¶ 6.

¹⁷³ *Id.* ¶ 9.

¹⁷⁴ *Id.* ¶ 19.

¹⁷⁵ *Id.* ¶ 47.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* ¶ 124.

observed that the differential treatment should be “not unreasonable,” but the tribunal addressed the issue summarily.¹⁷⁸ In *Mr. “R”*, while ruling in the organization’s favor, the tribunal assessed how the policy of differential benefits was decided, and what alternatives were considered.¹⁷⁹ The tribunal noted that the decision to differentiate in benefits was taken by the second most senior official in the organization’s management, overruling the recommendation of the Human Resources Department, after extended consideration of more than one option.¹⁸⁰ Hence, it appears that the reasonableness of the degree of differentiation depends in part upon the thoroughness of the process leading to the decision on the differential treatment.

The IMFAT’s construct may be compared to two other burden-shifting frameworks for employment discrimination used by the Supreme Courts of the United States and Canada. In *McDonnell Douglas Corp. v. Green*,¹⁸¹ the U.S. Supreme Court adopted a three-step framework for allocating burdens of proof in cases arising under Title VII of the Civil Rights Act of 1964. First, the plaintiff bears a modest burden of proving a prima facie case of discrimination, giving rise to a presumption of unlawful discrimination.¹⁸² Second, the employer must rebut that presumption by producing a legitimate, nondiscriminatory reason for its action.¹⁸³ Third, the plaintiff bears the burden to prove that discrimination was a motivating factor for the action, and thus, that the asserted legitimate reason is a pretext.¹⁸⁴

Under the Canadian framework adopted in the *B.C. Firefighters* case,¹⁸⁵ once an employee has established a prima facie case of discrimination, the burden shifts to the employer to prove that its differential treatment was adopted in the honest and good faith belief that it was reasonably necessary to the fulfillment of a legitimate work-related purpose that is rationally connected to job performance, and that such differential treatment is in fact reasonably

¹⁷⁸ D’Aoust, I.M.F. Admin. Trib., Judgment No. 1996-1, ¶ 29.

¹⁷⁹ *Mr. “R”*, I.M.F. Admin. Trib., Judgment 2002-1, ¶¶ 62–64.

¹⁸⁰ *Id.* ¶ 64.

¹⁸¹ 411 U.S. 792 (1973).

¹⁸² *McDonnell Douglas*, 411 U.S. at 802. To prove a prima facie case, the plaintiff must show that he belongs to a protected class, was rejected from a job or employment benefit for which he was qualified and applied, and after the rejection the employer continued seeking applicants or providing the benefit to others. *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 804.

¹⁸⁵ *B.C. Pub. Serv. Employee Relations Comm’n v. B.C. Gov’t & Serv. Employees’ Union*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 (Can.).

necessary to the accomplishment of that purpose.¹⁸⁶ Thus, the employer bears the ultimate burden under the Canadian framework.

In line with both the U.S. and Canadian approaches, the IMFAT test in *Mr. "R"* places a modest burden on the plaintiff to establish a presumption of unequal treatment simply by showing that the organization treats similarly situated employees differently.¹⁸⁷ The IMFAT's approach then follows the Canadian example of placing the ultimate burden upon the organization to disprove the presumption of unequal treatment.¹⁸⁸

It is striking that the IMFAT used this elaborate analysis in *Mr. "R"*, a fairly straightforward case about different benefits for differently situated jobs. Quite unlike the U.S. and Canadian cases that use a burden-shifting framework, *Mr. "R"* alleged no invidious discrimination and there was no affront to human rights or dignity; it was a case of simple administrative inequality.¹⁸⁹ Even in cases involving true discrimination, the use of a burden-shifting analysis in employment discrimination cases is not uncontroversial.¹⁹⁰ The U.K. House of Lords has endorsed the following view:

It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case.¹⁹¹

¹⁸⁶ *B.C.*, 176 D.L.R. (4th) at 24-25.

¹⁸⁷ *Mr. "R"*, I.M.F. Admin. Trib., Judgment No. 2002-1, ¶ 47.

¹⁸⁸ *Id.* For a broader comparison between U.S. and foreign tests for employment discrimination, see, e.g., Rosemary Hunter & Elain W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. REV. 108 (1998).

¹⁸⁹ Once again, it might be said by Westen, *supra* note 4, that *Mr. "R"* was not an equality case at all, and that the IMFAT's use of an equality analysis only cloaks its review for arbitrariness.

¹⁹⁰ See Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995).

¹⁹¹ *Zafar v. Glasgow City Council*, [1997] 1 W.L.R. 1659, 1665, [1998] I.R.L.R. 36 (H.L.) (quoting Neill, L.J., in *King v. Great Britain China Centre*, [1992] I.C.R. 516, 528-29 (C.A. Civ. Div.)).

The burden-shifting constructs are faulted not only for intruding into the judicial authority of the court, but also for stepping on the intentions of legislatures and, in jury cases, befuddling jurors with legalisms.¹⁹² However, the IMFAT's burden-shifting framework in *Mr. "R"* has been received quite positively.¹⁹³ The IMFAT and other international administrative tribunals do not have juries to befuddle. Also, the organizations' antidiscrimination regulations have been relatively spare, especially as regards procedural and evidentiary matters, so there is less risk of the framework stepping on legislative intentions. Conversely, the framework brings greater clarity to the elements of the judicial analysis, which can be useful to both IGOs and potential plaintiffs in evaluating their positions in circumstances of possible unequal treatment or discrimination.

2. *Applying the Similarly Situated Test in Cases of True Discrimination*

As noted previously, claims of prejudice in individual decisions are analyzed by the tribunals under the doctrine of *détournement de pouvoir*.¹⁹⁴ But that doctrine is ill-suited to cases of systemic discrimination, such as bias or stereotyping in the rules on allocation of jobs and benefits; in such cases, it rarely will be possible to attribute abuse or bad faith to any decisionmaker. Accordingly, the tribunals have addressed such cases under the similarly situated test, in the same way as claims for simple administrative evenhandedness.

Most of the cases involving systemic discrimination have fallen into one of three categories: discrimination against women, discrimination based on expatriate status, and discrimination in favor of married employees. Each of these categories will be considered in turn.

a. *Cases of Discrimination Against Women*

Gender discrimination has been the most common allegation in the tribunals' jurisprudence of discrimination involving prejudice. Starting in 1970, several cases were brought to the ILOAT, the UNAT, and other tribunals by female employees complaining about explicit sex discrimination in the

¹⁹² Davis, *supra* note 190, at 707.

¹⁹³ See Mr. C, E.B.R.D. Admin. Trib., Decision No. 01/03 (2003), *supra* note 111 and accompanying text.

¹⁹⁴ See *supra* note 118 and accompanying text.

administration of benefits by international organizations. The first three of these cases were decided against the plaintiffs on grounds that the differential treatment was required by the organizations' internal legislation, and thus, on a *de jure* basis, the female employees were not similarly situated to their male counterparts.¹⁹⁵ Subsequently, the tribunals' reversed themselves, but without clearly explaining the reasons for doing so, or disavowing the earlier judgments.

In the cases of *Taylor-Ungaro*,¹⁹⁶ from 1970, and *Mullan*,¹⁹⁷ from 1972, the ILOAT and UNAT, respectively, upheld decisions to withhold from female staff members certain travel benefits in respect of their husbands, because the husbands were not financial dependents of the staff members. Those decisions had been taken consistently with staff rules promulgated by the administrations, which provided for payment of such benefits for the wives of male staff regardless of the wives' dependent status, but required female staff to show that their husbands were dependent in order to receive the benefit.¹⁹⁸ In turn, the staff rules' distinctions based on gender were viewed by the tribunals as following from the primary legislation (staff regulations) adopted by the highest legislative organs (the General Assemblies) of the respective organizations.¹⁹⁹

The tribunals determined that, because the female plaintiffs were, *de jure*, in a different category than their male colleagues, there was no identity in the circumstances, and the two categories were not similarly situated.²⁰⁰ Thus, the differential treatment was appropriate. In *Taylor-Ungaro*, the key passage reads as follows:

As to invalidity, four grounds are alleged by the complainant, namely, sex discrimination, category discrimination, lack of agreement with the Staff Council and lack of consultation with the Staff Council. As to the first three, the Tribunal considers that, even if the allegation was well founded in fact, it would not affect the validity of Rule 302.3023 inasmuch as the Director-General by making the Rule would not be

¹⁹⁵ See *supra* Part IV.A.3.

¹⁹⁶ See *Taylor-Ungaro*, I.L.O. Admin. Trib., Judgment No. 167 (1970).

¹⁹⁷ See *Mullan*, U.N. Admin. Trib., Judgment No. 162 (1972).

¹⁹⁸ *Mullan*, U.N. No. 162, at VIII; *Taylor-Ungaro*, I.L.O. No. 167, ¶¶ B-C.

¹⁹⁹ *Mullan*, U.N. No. 162, at IX; *Taylor-Ungaro*, I.L.O. No. 167, ¶ 2.

²⁰⁰ *Mullan*, U.N. No. 162, at IX; *Taylor-Ungaro*, I.L.O. No. 167, ¶ 2.

exceeding the powers conferred upon him under Rule XXXVI of the General Rules of the Organization.²⁰¹

The ILOAT acknowledged that the claim of sex discrimination may be “well founded in fact,” i.e., that it may infringe a right to be treated as an equal, if there is such a right.²⁰² Yet the ILOAT summarily and formalistically condoned unequal treatment that would later be acknowledged as plainly unlawful gender discrimination.

At issue in the third of the early cases, *Kiewning-Korner Castronovo*, was a non-resident allowance payable to expatriate staff by the FAO, which is based in Rome.²⁰³ The ILOAT upheld administrative rules promulgated by the Director-General whereby the allowance was terminated as to female expatriate staff who married local nationals.²⁰⁴ Under Italian law, an expatriate woman who married an Italian man thereby obtained Italian citizenship automatically and without exception, whereas an expatriate man who married an Italian woman did not.²⁰⁵ Therefore, a similarly situated male employee would continue to receive the allowance.

The complainant alleged sex discrimination and violation of Article 15(2) of the Universal Declaration of Human Rights, which provides that no one should be arbitrarily deprived of his nationality.²⁰⁶ The ILOAT dismissed on all counts because the unequal treatment was sanctioned by an administrative memorandum and then a staff rule that were not inconsistent with the authority granted to the Director-General by the General Assembly.²⁰⁷

These early judgments failed to examine whether the plaintiffs were differently situated from their male colleagues in a way that was relevant to the legitimate purposes of the staff rules. They also did not consider whether there was a rational nexus between the allocation of benefits and the purported differences between male and female staff members. Finally, these three judgments certainly did not question the organizations’ supposed legitimate purpose in legislating this unequal treatment, or whether the gender biases that underlay those staff rules nullified the supposed legitimacy of the erstwhile purposes.

²⁰¹ *Taylor-Ungaro*, I.L.O. No. 167, ¶ 2.

²⁰² *Id.*

²⁰³ See *Kiewning-Korner Castronovo*, I.L.O. Admin. Trib., Judgment No. 168, at B–C (1970).

²⁰⁴ *Id.*

²⁰⁵ *Id.* ¶ 2.

²⁰⁶ *Id.* at C.

²⁰⁷ *Id.* ¶¶ 1–2.

The outcomes in these cases reflected an aversion to judicial review of legislative acts even though by the early 1970s the French Conseil d'État, the European Court of Justice and some other courts already had established spheres for judicial review.²⁰⁸ Additionally, the tribunals' circular analysis saved them from reaching the difficult substantive questions: Did those rules, and the administration of the rules, reflect and reinforce prejudice against women; if so, was that prejudice justified; if not, is there a right to be treated as an equal that permits or requires the tribunals to do something about the injustice?

Shortly after the UNAT decision in *Mullan*, the ECJ ruled the opposite way on similar facts in the case of *Sabbatini*.²⁰⁹ The court passed over the organization's contention that the difference in treatment was pursuant to a regulation duly adopted by the European Council, finding an infringement of a provision in the Treaty Establishing the European Community relating to the principle of equal pay for male and female workers.²¹⁰ There are two notable components to this decision. First, unlike the ILO or UNAT, the ECJ is expressly empowered to review the legislative acts of the European Council, and the ECJ had recently confirmed the breadth of that power in another context.²¹¹ Accordingly, this aspect of the decision in *Sabbatini* represented a modest extension of that power to include the review of employment regulations. The ECJ was less constrained by the aversion to judicial review.

Second, the European court recognized that the similarly situated test requires at least a superficial inquiry beyond the de jure classification. The ECJ pointed out that the purpose of the expatriation allowance at issue was to compensate for the special expenses and disadvantages of working away from their habitual place of residence, and that withdrawal of the benefit upon marriage to a local resident could be justified.²¹² However, withdrawing the benefit based on different criteria for men than for women, requiring the latter to prove the financial dependency of their husbands, violated the requirement of equal treatment irrespective of sex.²¹³

²⁰⁸ See George A. Bermann, *The Scope of Judicial Review in French Administrative Law*, 16 COLUM. J. TRANSNAT'L L. 195 (1977).

²⁰⁹ Case 20/71, *Sabbatini v. European Parl.*, 1972 E.C.R. 345.

²¹⁰ *Id.* ¶ 14.

²¹¹ *Comm'n of the European Cmty. v. Council of the European Cmty.*, Case 22/70, 1971 E.C.R. 263 (Council's resolution on member state negotiations for rail transport agreement was a justifiable act). See Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585.

²¹² *Sabbatini*, 1972 E.C.R. 345, ¶ 8.

²¹³ *Id.* ¶ 12.

Nevertheless, the tribunal's inquiry remained superficial and formalistic. The European court did not consider whether the plaintiffs were differently situated from their male colleagues in a way that was relevant to the legitimate purposes of the staff rules. It also did not consider whether there was a rational nexus between the allocation of benefits and the purported differences between male and female staff members.

In *Sabbatini*, the Advocate-General²¹⁴ attempted a more substantive analysis. He wrote that, in spite of advances made in achieving equality between men and women, the laws of member states continued to hold the husband presumptively responsible for providing for the family and to vest in the husband rights to manage a joint estate and to choose the place of residence.²¹⁵ He concluded, therefore, that it was not irrational for the organization to assume that a male, married staff member would be the financial head of household while requiring a female, married staff member to demonstrate that status.²¹⁶ While one might disagree with the Advocate-General's conclusions, nevertheless it is admirable that he advanced a deeper analytical framework that inquired whether there were differences in fact between male and female staff members relevant to any legitimate purposes for the differential treatment. That analysis was a precursor to the reasonable nexus requirement that would later be applied by the WBAT in the *Mould* case and by the IMFAT in the case of *Mr. "R"*.²¹⁷ However, the Advocate-General's analysis was not so deep as to ask whether the differential rules offended the equal dignity of women.

In rebuffing the Advocate-General's opinion, the ECJ in *Sabbatini* did not explain why a male staff member's greater responsibility under the applicable national law to financially provide for the family did not justify his more favorable treatment under the organization's rules. There are at least two possible explanations. One is that the European court discounted the relevance to the question of the employer's compensation and benefits policies of those national laws governing family relations cited by the Advocate-General. Indeed, that national laws may assign greater financial responsibility to the man upon divorce, and give the man a privilege to determine the place of

²¹⁴ An Advocate-General is the European court's independent examiner, whose opinion on the case is normally accorded great weight. See Cyril Ritter, *A New Look at the Role and Impact of Advocates General - Collectively and Individually*, 12 COLUM. J. EUR. L. 751, 756-57 (2007).

²¹⁵ Opinion of the Advocate-General in *Sabbatini*, 1972 C.M.L.R. 945, 950.

²¹⁶ *Id.* at 950, 953-54.

²¹⁷ See *supra* notes 169, 170 and accompanying text.

residence, would seem to be of no import to employees who are not divorcing or relocating, or to the organization's allocation of benefits to those employees.

A second possible explanation for the outcome in *Sabbatini* is that the court considered sex discrimination to be so invidious as to defy the Advocate-General's attempt to rationalize a justification for the differential treatment. However, this explanation is belied by the outcome of two cases decided shortly after *Sabbatini*, on facts similar to the ILOAT case of *Kiewning-Korner Castronovo*. In *Airola*,²¹⁸ the plaintiff was an expatriate working in Italy who acquired Italian citizenship automatically upon her marriage to a local national.²¹⁹ In *Van den Broeck*,²²⁰ the plaintiff was an expatriate working in Belgium who acquired Belgian citizenship upon her marriage to a local national.²²¹ Whereas Italian law provided no possibility for the woman to renounce her newly acquired Italian citizenship, Belgian law did provide that option.²²²

Pursuant to the organization's rules, both female plaintiffs lost their expatriate benefits when they acquired local nationality upon their marriages, even though similarly situated male colleagues would not have lost those benefits (because they would not have obtained local citizenship). Consistent with *Sabbatini*, the ECJ announced in both judgments that "the expatriation allowance must be determined by considerations which are uniform and disregard the difference in sex."²²³

In *Van den Broeck*, the court ruled that this requirement had been met because the plaintiff had the option to renounce the Belgian citizenship acquired by marriage, but did not exercise that option.²²⁴ The ECJ wrote, "[a]s the applicant chose not to avail herself of this right, there are no reasons associated with equal treatment why her [B]elgian nationality should not be taken into account in applying the provision concerned," that is, the staff regulation that deprived her of the expatriate benefits.²²⁵ In other words, although the Belgian law plainly differentiated between the treatment of men and women upon marriage to local nationals, for purposes that the court did not attempt to justify, and although the organization's benefits policies were

²¹⁸ Case 21/74, *Airola v. Comm'n of the European Cmty's.*, 1975 E.C.R. 221.

²¹⁹ *Id.* ¶ 3.

²²⁰ Case 37/74, *Van den Broeck v. Comm'n of the European Cmty's.*, 1975 E.C.R. 235.

²²¹ *Id.* ¶¶ 13-14.

²²² *Id.* ¶ 4.

²²³ *Van den Broeck*, 1975 E.C.R. 235, ¶ 9; *Airola*, 1975 E.C.R. 221, ¶ 9.

²²⁴ *Van den Broeck*, 1975 E.C.R. 235, ¶ 14.

²²⁵ *Id.*

linked to that differential treatment, also for purposes that are controvertible, at best, the ECJ found no violation of the right to equal treatment because the final step in the differential treatment was an act of the plaintiff's own volition.²²⁶

If the ECJ considered sex discrimination invidious and intolerable, the court easily could have reached a different outcome, for example, by questioning whether the organization's link between its benefits policies and the discriminatory Belgian law was reasonably related or necessary to the legitimate purpose of those benefits. In a subsequent case, the European Commission argued that the employee's personal situation, in the sense of his integration into the duty station country, is the paramount consideration in eligibility for these expatriate benefits, and nationality is only a secondary factor.²²⁷ That being the case, it seems unreasonable for the organization to totally deny such benefits to female staff upon their marriages to local nationals, while continuing those benefits to similarly situated male colleagues, simply because of the discriminatory effects of national law and without regard to who actually is more integrated into the duty station country.

In *Airola*, the court ruled there was a violation of equal treatment because the plaintiff had been deprived of the expatriate benefits when she had no option to renounce the automatic acquisition of Italian citizenship upon her marriage.²²⁸ The organization was required to interpret the concept of "nationals" in its staff regulations "in such a way as to avoid any unwarranted difference of treatment as between male and female officials who are, in fact, placed in comparable situations."²²⁹ The fact that, although not volitionally, the plaintiff in *Airola* had obtained the advantages of becoming a citizen of the duty station country apparently was not deemed sufficient to warrant the organization's difference in treatment between her and her male colleagues who also married local nationals.²³⁰ Thus, rather than requiring the organization to abandon the link between its internal rules and discriminatory

²²⁶ See also Case 257/78, *Devred v. Comm'n of European Cmty's.*, 1979 E.C.R. 3767, ¶ 12 ("[W]here the person concerned was able to renounce the nationality which causes her to lose the benefit of the expatriation allowance, there is no reason associated with the purposes for which that allowance was granted for disregarding the fact that, by an act of her own volition subsequent to, but distinct from, her marriage, the official decided to assume the nationality of the place in which she is employed.").

²²⁷ Case T-4/92, *Vardakas v. Comm'n of European Cmty's.*, 1993 E.C.R. II-0357, ¶ 30.

²²⁸ *Airola*, 1975 E.C.R. 221, ¶¶ 11, 13, 16.

²²⁹ *Id.* ¶ 10.

²³⁰ *Id.* ¶ 9.

national laws, the ILOAT modified the organization's rules to compensate for the discrimination at the national level. This gave the plaintiff in *Airola* the best of both worlds, and remedied one inequality by creating another inequality vis-à-vis her male colleagues.

Following the ECJ's groundbreaking decision in *Sabbatini*, other international administrative tribunals began using general principles of equality to overturn staff regulations involving sex discrimination. In cases from 1973 and 1975, on facts similar to those in *Taylor-Ungaro* and *Kiewning-Korner Castronovo*, the Council of Europe Appeals Board ruled it was unlawful sex discrimination to provide allowances for male staff with dependent children but not to female staff with dependent children even if they earned more than their husbands, and it was unlawful to terminate non-resident allowances paid to expatriate female staff upon marriage to local French nationals, even though by operation of French law, the women automatically acquired French citizenship.²³¹

By 1975, the ILOAT had come around to a more probing application of the similarly situated test, at least as regards gender discrimination. In the case of *Rabozée*,²³² the tribunal struck down the organization's sex discrimination in medical insurance coverage.²³³ The female plaintiff sought coverage under the organization's medical insurance for her husband, who held less generous coverage through his employment.²³⁴ Although the applicable rule referred to coverage of the "spouse" and not "dependent spouse," the organization defended the denial of coverage on the basis that the spirit of the rule was to cover dependents only, and the plaintiff's husband was not her dependent.²³⁵ The apparent practice of the organization was to grant spousal coverage to all male staff who requested it, while denying such coverage to female staff unless their husbands were shown to be dependents. The ILOAT overturned the denial of coverage due to the patent sex discrimination in the administration of the gender-neutral rule.²³⁶

The greater significance of this judgment is that, even while the tribunal accepted that the intent of the organization's medical insurance program was to cover dependents only, the ILOAT disputed that a showing of actual

²³¹ Artzet, Council of Eur. Apps. Bd., App. No. 8 (1973); Leguin, Council of Europe Apps. Bd., App. No. 32 (1975).

²³² I.L.O. Admin. Trib., Judgment No. 264 (1975).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

financial dependency was required for spousal coverage. For perhaps the first time in an equal treatment case, and one of the only times in a case involving sex discrimination, the ILOAT openly engaged in a substantive analysis to show that the reality of the plaintiff's circumstance was effectively the same as that of her male comparators who were treated differently. The ILOAT wrote that any spouse should be regarded as dependent, because that is "the actual situation of the spouses, who owe each other a duty of mutual assistance and who, when both are in gainful employment, may be regarded as mutually dependent."²³⁷ This kind of "reality check" by the ILOAT would also be seen in *De Los Cobos*, discussed earlier.²³⁸ As shown below, such an analysis sets an important precedent for later challenges to the privileges accorded to married staff members in the benefits paid by IGOs.

The ILOAT achieved the same result in the case of *Callewaert-Haezebrouck (No. 2)*,²³⁹ also involving sex-based distinctions in the provision of subsidized medical insurance. In contrast to *Rabozée*, where the organization's rules were facially gender-neutral and the discrimination was in the implementation, in *Callewaert-Haezebrouck* the female staff were de jure in a different class from the male staff pursuant to a rule duly enacted by the organization's high legislative organ.²⁴⁰ Thus, in holding that the rule unlawfully discriminated, the ILOAT effectively overturned its earlier judgment in *Taylor-Ungaro*,²⁴¹ which held that de jure differentiation based on sex could not be challenged under the principle of equality because there was no identity of circumstances.²⁴²

However, the tribunal overturned *Taylor-Ungaro* covertly, with absolutely no mention of either that case or the *Rabozée* judgment, and in summary fashion, giving no explanation for this significant about-face in an important sex discrimination case. This reticence contrasts with the tribunal's relatively lengthy opinion two years later in *De los Cobos*—not a sex discrimination case—where the ILOAT explained that de jure differential treatment requires differential circumstances that are substantial and relevant.²⁴³ It may be inferred, from the analytical framework laid out in *De Los Cobos* and from the tribunal's views in *Rabozée* about the mutual dependency of married persons,

²³⁷ *Id.*

²³⁸ See *supra* notes 142–49 and accompanying text.

²³⁹ I.L.O. Admin. Trib., Judgment No. 344 (1978).

²⁴⁰ *Id.* at B.

²⁴¹ I.L.O. Admin. Trib., Judgment No. 167, ¶ 2 (1970).

²⁴² *Id.*

²⁴³ I.L.O. Admin. Trib., Judgment No. 391, ¶ 9 (1980).

that in *Callewaert-Haezebrouck* the ILOAT concluded there was no substantial difference between female and male married staff members that was relevant to the employer's regulation of subsidized health insurance coverage.

The ultimate test of the legitimacy and vibrancy of an equality jurisprudence is its influence over practices and attitudes. By this standard, the similarly situated test for equal treatment as applied by tribunals in the 1970s may be considered a disappointment; it did not succeed in wiping away overt discrimination against women in the international civil service. Thus, eleven years after *Callewaert-Haezebrouck*, and fourteen years after the ECJ struck down a similar rule in *Airola*, UNESCO continued to discriminate against female staff by discontinuing certain expatriate benefits upon their marriage to local nationals, while such benefits continued for men who married local nationals. UNESCO's rule was finally overturned by the ILOAT in 1989, in the case of *Meyer*.²⁴⁴

Again, however, the tribunal's reasoning was covert in *Meyer*, and there was no reference to the *Rabozée* precedent. Rather, the ILOAT abandoned any pretense that it was using the similarly situated test, and simply asserted that the rule "was not enforceable because it was discriminatory: it offended against UNESCO's constitutional objectives, the Charter of the United Nations, the general principles of law and the law of the international civil service, all of which condemn discrimination on the grounds of sex."²⁴⁵ Recalling that, in *Sabbatini* it was not clear whether the ECJ disagreed with the predicates of the Advocate-General's justification for the discrimination against women, or considered that sex discrimination is so invidious as to defy any rationalization, it may be inferred from the strong language in *Meyer* that the ILOAT had reached the second conclusion. The discrimination evidently was so invidious to the ILOAT as to defy any need for the tribunal to explain its overriding of legislative prerogatives.

The gender cases applying the similarly situated test manifest uncertainty or even disagreement within and among the tribunals about the objective of the general principle of equality. In this, the international administrative tribunals were in good company. In *Frontiero v. Richardson*²⁴⁶ from 1972, the U.S. Supreme Court was likewise conflicted over facts similar to those in *Taylor-Ungaro* and *Mullan*.

²⁴⁴ I.L.O. Admin. Trib., Judgment No. 978 (1989).

²⁴⁵ *Id.* ¶ 13.

²⁴⁶ 411 U.S. 677 (1973).

In *Frontiero*, a U.S. Air Force regulation allowed payment of housing and medical benefits automatically for the wives of servicemen, while requiring servicewomen to prove that their husbands were dependent.²⁴⁷ Future Justice Ruth Bader Ginsburg, arguing on behalf of the plaintiffs, contended that “the exclusion of women from benefits to which similarly situated men are automatically entitled lacks the constitutionally required fair and substantial relation to a permissible legislative purpose and therefore must be held to violate the equal protection clause.”²⁴⁸ She contended further that a stricter judicial test than the rational basis standard should be applied to discrimination against women.²⁴⁹

The Supreme Court struck down the Air Force regulation, with eight justices agreeing there was no rational relationship between the discrimination against servicewomen and any legitimate government purpose.²⁵⁰ Four of those justices also agreed with Ginsburg that a stricter judicial test should be applied to sex discrimination, given the history of invidious treatment of women in society and the immutability of sex as a personal characteristic.²⁵¹ Such reference to a history of discrimination and the immutability of personal characteristics, as justifications for creating new categories of persons to whom heightened judicial scrutiny applies, would later be seen in cases from Canada and Europe.

In the gender cases beginning with *Taylor-Ungaro* in 1970 through *Meyer* in 1989, wittingly or not the tribunals participated in a social drama that also was playing out in the courts and the streets of member states in North America, Europe and elsewhere. Viewed with the perspective of thirty years, it is unmistakable that the impugned rules had the effect of perpetuating stereotypes of women, and that those stereotypes had their origins in animosity against women in the workplace. It also is clear that the IGOs were not always proactive about eliminating those differential rules, even when the prejudicial effects were identified.

The most interesting jurisprudential question is why the tribunals accepted such prejudice in the earlier cases but stepped in against it in the later ones. In that regard, it is unfortunate that, in moving from *Taylor-Ungaro* to

²⁴⁷ *Id.* at 678.

²⁴⁸ Brief for A.C.L.U. as Amicus Curiae Supporting Appellants at 60, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1684), available at <http://www.yale.edu/lawweb/avalon/curiae/html/411-677/005.htm> (last visited July 6, 2007).

²⁴⁹ *Id.* at 8–9.

²⁵⁰ See *Frontiero*, 411 U.S. 691–92 (Powell, J., concurring).

²⁵¹ *Id.* at 685–87.

Callewaert-Haezebrouck to Meyer, the ILOAT in particular passed over these opportunities to articulate a substantive rationale why such gender discrimination was eventually found to infringe the principle of equality. The principle originally was used by the French Conseil d'État to enforce evenhandedness in discretionary administrative acts, and that narrow approach—the right to equal treatment—seems to explain the outcomes in *Taylor-Ungaro* and *Mullan*. But the Conseil d'État had long applied the principle in its broader, morally infused sense—the right to treatment as an equal—which is inspired by the Declaration of the Rights of Man and the U.S. Bill of Rights.²⁵² The European Court of Justice likewise leaned toward the latter approach in *Sabbatini* and *Airola*. If the general principle of equality is concerned with more than just administrative evenhandedness, if it is concerned with natural justice and human dignity, then the tribunals should not have been analyzing any of the sex discrimination cases exclusively under the formalistic similarly situated test.

b. Cases of Differentiation Based on Expatriation Status

The case of *Ferrario*, noted above, involved claims for expatriate benefits by employees who were local nationals at the duty station in Italy.²⁵³ As local nationals, the plaintiffs were de jure ineligible for expatriate benefits.²⁵⁴ More recently, the tribunals have addressed whether such differentiation constitutes unlawful discrimination based on national origin.

At this point, it is necessary to explain that among IGOs, the systemic difference in benefits between nationals and residents of the host country and expatriate employees relates to another basic principle of employment in the international civil service, that of the geographical distribution of jobs. Nearly all of the IGO treaties contain a specific obligation to employ international civil servants with “due regard” to recruitment “on as wide a geographical basis as possible.”²⁵⁵ Geographical distribution in employment is seen as

²⁵² See *supra* note 94 and accompanying text.

²⁵³ Case No. 152/81, *Ferrario v. Comm'n of European Cmty.*, 1983 E.C.R. 2357.

²⁵⁴ *Id.* ¶ 5.

²⁵⁵ E.g., U.N. Charter art. 101, ¶ 3; UNESCO Const. art. VI, ¶ 4; International Bank for Reconstruction and Development Articles of Agreement (World Bank) art. V, § 5(d); Articles of Agreement of the IMF art. XII, § 4(d); Agreement Establishing the Asian Development Bank (As DB), art. 34, ¶ 6. For a slightly different, perhaps stronger, formulation of the goal of geographical distribution, see I.L.O. Const. art. 9, ¶ 2 (“So far as is possible with due regard to the efficiency of the work of the Office, the Director-General shall select persons of different

essential to maintaining the legitimacy of the IGOs' work in the eyes of their member states, but it is secondary to the essential requirement of high standards of competence and efficiency.²⁵⁶

Although national origin has long been an invidious ground for discrimination under the laws of the United States, Canada and other countries, this differential treatment based on expatriate status within IGOs has been viewed as necessary to the recruitment and retention of a workforce drawn widely from the member states. In *Ferrario*, the ECJ endorsed these premises, and the judgment gives no hint that anyone involved in the case, even the plaintiffs, believed there was any prejudice at issue.²⁵⁷ However, tribunals would be remiss if they simply presumed that promoting geographical distribution is never a pretext for discriminating on the basis of national origin or nationality, whether intentionally or not.²⁵⁸ The tribunals have made clear that an organization's duty to give "due regard" to geographical distribution is subsidiary to the mandate of highest qualifications.²⁵⁹ As the consensus around expatriate benefits began to show cracks, starting with the case of *De Armas*²⁶⁰ from the AsDBAT in 1998, the stereotype that geographical distribution is objectively necessary for the independence, legitimacy and intellectual diversity of the international civil service came under scrutiny.

The *De Armas* case presented a broad challenge to the expatriate benefits policies of the Asian Development Bank, based in Manila. Filipino staff challenged as discriminatory the payment of home leave and education benefits solely to non-Filipinos.²⁶¹ The AsDBAT first ruled that such benefits do not discriminate based on nationality, because they depend not on the citizenship

nationalities."). In marked contrast to the other international organizations, the ILO Constitution also refers expressly to the employment of women. See *id.* art. 9, ¶ 3 ("A certain number of these persons shall be women.").

²⁵⁶ A. LEROY BENNET & JAMES K. OLIVER, *INTERNATIONAL ORGANIZATIONS: PRINCIPLES AND ISSUES* 416–17 (7th ed. 2002). For a detailed review of the origins and critiques of geographical distribution, see LEMOINE, *supra* note 35, at 239–55.

²⁵⁷ *Ferrario*, 1983 E.C.R. 2357, ¶ 9.

²⁵⁸ The U.S. Civil Rights Act outlaws discrimination based on national origin, but does not prohibit differentiation based on citizenship. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). As applied in the international administrative tribunals, the general principle of equality has not made that distinction between national origin and nationality. Even under the U.S. approach, however, a differentiation based on citizenship may be evidence of discrimination based on national origin, and will be unlawful if that is the purpose or effect. *Id.* at 92.

²⁵⁹ See Coates (Nos. 1 & 2), I.L.O. Admin. Trib., Judgment No. 1871 (1999).

²⁶⁰ As. D.B. Admin. Trib., Decision No. 39 (1998).

²⁶¹ *Id.* ¶ 1.

of a staff member but on the place where he serves, that is, his expatriate status.²⁶² Then the tribunal expanded upon the notion, articulated by the IMFAT in *D'Aoust*, that differential treatment must not be unreasonable in relation to a substantial and relevant difference in circumstance.²⁶³ The AsDBAT wrote:

An expatriate staff member, i.e. one who serves outside his home country, is subject to obvious disadvantages *vis-à-vis* a colleague who serves in his home country. On principle, the grant of compensatory benefits to [expatriates] does not constitute discrimination if such benefits are reasonably related and proportionate to those disadvantages.²⁶⁴

This test seems to have two prongs: a reasonable nexus prong similar to that in *Mould* and *Mr. "R"*, discussed above,²⁶⁵ and a proportionality prong that is new. The reference to the principle of proportionality was neither explained nor applied by the tribunal in *De Armas*, which, as discussed below, adjudged each of the benefits in issue based on their reasonable relation or not to the organization's asserted interests.²⁶⁶ Nevertheless, this mention of proportionality drew wide attention from the IGOs, because of its potential to revolutionize the jurisprudence.

The French Conseil d'État had long used a principle of proportionality to control administrative acts in cases involving fundamental freedoms, including freedoms of speech, press and assembly.²⁶⁷ As applied in those contexts, the proportionality principle balances the administration's legitimate interest against the freedom being abridged, and inquires whether the administration has used the "least drastic means" available to vindicate the administration's interest.²⁶⁸ This calls to mind the U.S. Constitutional jurisprudence in First Amendment cases,²⁶⁹ and the strict scrutiny applied in cases of racial

²⁶² *Id.* ¶ 33.

²⁶³ See *supra* note 151 and accompanying text.

²⁶⁴ *De Armas*, As. D.B. No. 39, ¶ 33.

²⁶⁵ See *supra* notes 164, 169 and accompanying text.

²⁶⁶ *De Armas*, As. D.B. No. 39, ¶ 32.

²⁶⁷ Bermann, *supra* note 208, at 224 (citing, e.g., CE, May 19, 1933, [1933] Rec. Cons. d'Et. 541, [1933] D.P. III 354).

²⁶⁸ *Id.*

²⁶⁹ E.g., *Kovacs v. Cooper*, 336 U.S. 77, 87-89 (1949).

discrimination by government.²⁷⁰ In a similar way, the principle of *Verhältnismässigkeit* is applied in German law to protect fundamental constitutional rights,²⁷¹ and English courts have applied heightened scrutiny in cases of interference with human rights.²⁷²

From the early 1970s, in a series of cases involving eminent domain and urban planning, the French Conseil d'État applied proportionality outside the context of fundamental civil liberties.²⁷³ But in those cases, the court only required a balancing of the private interests against the public interests. It did not require the administration to use the least drastic means of vindicating the public interest.²⁷⁴ Subsequently, that less strict variation on proportionality emerged in decisions from the Conseil d'État involving imprisonment and deportation and disciplinary actions in the civil service.²⁷⁵ Similar to the reasonable nexus test discussed above, the principle of proportionality as applied by the Counsel d'État in civil service cases does not require the administration to use the least drastic or restrictive means of achieving the public interest.

Proportionality was imported into European Community law by the ECJ in 1970 in the case of *Internationale Handelsgesellschaft*.²⁷⁶ In that case, which did not involve the civil service, the ECJ was confronted with a bit of rebellion by German courts that were poised to refuse to uphold a Community export and import licensing directive on grounds that it was disproportionate to

²⁷⁰ E.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (strict scrutiny of de jure racial classifications); see *Washington v. Davis*, 426 U.S. 229 (1976) (strict scrutiny of disproportionate racial impact is appropriate only when an invidious discriminatory purpose may be inferred from the totality of the relevant facts).

²⁷¹ See David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 689 n.135 (2005) (German constitutional review for *Verhältnismässigkeit*, or proportionality, in fundamental rights cases is conceptually similar to the U.S. Supreme Court's approach, requiring that the government's means to a legitimate end must have the "least restrictive effect" on a constitutional value, but in practice, the German standard has been less demanding than U.S.-style strict scrutiny).

²⁷² But English courts and scholars have continued to debate whether a principle of proportionality applies in challenges to administrative actions. See CLAYTON & TOMLINSON, *supra* note 22, at 286–88.

²⁷³ *Bermann*, *supra* note 208, at 224–26 (citing, e.g., CE, May 28, 1971, [1971] Rec. Cons. d'Et. 409; CE, Oct. 20, 1972, [1972] Rec. Cons. d'Et. 657).

²⁷⁴ *Id.* at 224–25.

²⁷⁵ BROWN & BELL, *supra* note 90, at 262–63 (citing, e.g., Wahnapo, CE 27 Feb. 1981).

²⁷⁶ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125.

fundamental rights in the German Constitution.²⁷⁷ Even while declining to invalidate the Community directive for violation of a member State's constitutional principles, the ECJ announced as Community Law a principle of proportionality that had much the same result as the German constitutional principles.²⁷⁸

From the start, the ECJ applied the principle of proportionality in a broader range of contexts than the French and German courts from which the principle was borrowed.²⁷⁹ Moreover, in articulating the principle, the ECJ has at some times required only a balancing of interest, but at other times, the ECJ has imposed the additional requirement that the least restrictive means be utilized.²⁸⁰ In this way, the ECJ essentially substitutes its judgment for that of the other organs of the EU, at least in cases where fundamental economic rights and other fundamental rights under Community law are at stake.

With regards to equal treatment in employment, the ECJ incorporated proportionality into its test for sex discrimination in 1984, ruling that a wholesale exclusion of female police officers in Northern Ireland from policing duties that required them to be armed would infringe the requirement of equal treatment between male and female workers if the government has not shown that the exclusion is both appropriate and necessary for achieving legitimate aims of public safety.²⁸¹ But there is a striking lack of clarity as to the particular application of the principle of proportionality to equal treatment in employment in the EU. Some have faulted the "deep-seated conceptual confusion and lack of consistency" in the equal treatment cases of the ECJ and

²⁷⁷ *Id.* at Issue 2, Grounds 1-2.

²⁷⁸ See Law, *supra* note 271, at 720.

²⁷⁹ *E.g.*, Case 114/76, *Bela-Muhle Joset Bergmann KG v. Grows Farm GmbH & Co. KG*, (Skimmed-Milk Powder Case), 1977 E.C.R. 1211 (overturning scheme of milk price supports, due to disproportionate and therefore discriminatory burden upon agricultural sectors that are purchasers of milk).

²⁸⁰ *E.g.*, Case C-177/99, *Ampafrance SA v. Directeur des Services fiscaux de Maine-et-Loire*, 2000 E.C.R. I-7013 (overturning non-deductibility of VAT on certain mixed business and personal expenses; control of tax evasion is legitimate purpose, but proportionality requires that the means must have the "least possible effect" upon Community objectives of tax harmonization). See Gráinne de Búrca, *The Principle of Proportionality and Its Application in EC Law*, 13 Y.B. EUR. L. 105 (1993).

²⁸¹ Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651, ¶ 38. See Case 170/84, *Bilka-Kaufhaus GmbH v. Weber von Hartz*, 1986 E.C.R. 1607, ¶ 37 (exclusion of part-time workers from private sector pension scheme would infringe the treaty right of equal pay regardless of sex, if the exclusions affect far more women than men, the employer has not shown a real economic need, and that the means chosen "are appropriate with a view to achieving the objective in question and are necessary to that end").

the EU legislation.²⁸² Because most of the ECJ's equal treatment judgments come from the posture of preliminary references from national courts (a kind of advisory opinion on what Community Law requires of the national courts), the European court's jurisprudence in this area rarely descends from broad statements of principle to realistic adjudication of cases in controversy.

It appears that the European court's concepts of proportionality in employment, and what is "necessary" to achieve a legitimate end, are more flexible and less onerous for an employer, than the way that necessity is understood under strict scrutiny analysis in the United States.²⁸³ For example, in *Enderby*, the ECJ ruled that, where employer's defense to an unequal pay claim is that market forces require certain jobs predominantly filled by men be compensated at higher levels than comparable jobs predominantly filled by women, then "it is for the national court to assess whether the role of market forces in determining the rate of pay was sufficiently significant to provide the objective justification for part or all of the difference."²⁸⁴ In other words, where the employer's economic need is sufficiently significant, it would appear that the ECJ does not require the employer to demonstrate that its means of addressing that need has the least possible differentiating effect as between male and female employees. For their part, national courts in Europe have applied the ECJ's requirement of proportionality with a realism and balance, at times to the consternation of academics.²⁸⁵

Returning to the analysis of the AsDBAT in the case of *De Armas*, the tribunal referred to but did not in fact apply the principle of proportionality.²⁸⁶ In the same way, while the ILOAT has applied the principle of proportionality in cases about discipline for employee misconduct,²⁸⁷ it has not done so in equal treatment cases. As noted below, the IMFAT subsequently referred to the proportionality element of the *De Armas* test, but also did not apply it,

²⁸² Barnard & Hepple, *supra* note 3, at 583.

²⁸³ But see T.K. Hervey, *Justification for Indirect Sex Discrimination in Employment: European Community and United Kingdom Law Compared*, 40 INT'L & COMP. L.Q. 807, 815 (1991) ("[I]f there exists a non-discriminatory (or less discriminatory) means of achieving the policy, then the principle of proportionality will not be satisfied.").

²⁸⁴ See Case C-127/92, *Enderby v. Frenchay Health Auth.*, 1993 E.C.R. I-5535, ¶ 28.

²⁸⁵ See Hervey, *supra* note 283, at 825 ("The UK courts appear to be in breach of Community law by applying the different standard of 'reasonable need,' in place of the more *sophisticated* principles of the *Bilka* test.") (emphasis added).

²⁸⁶ *De Armas*, As. D.B. Admin. Trib., Decision No. 39 (1988).

²⁸⁷ E.g., *Kigaraba* (No. 6), I.L.O. Admin. Trib., Judgment No. 1445 (1995); *Limage* (No. 3), I.L.O. Admin. Trib., Judgment No. 1878 (1999).

whereas the EBRDAT did apply the principle in one case.²⁸⁸ Thus, nearly a decade after the AsDBAT first mentioned proportionality as a possible element of the equality analysis, the principle has had little impact on the equality jurisprudence of the international administrative tribunals.

In *De Armas*, the one element of the As DB's expatriate benefits that was overturned by the tribunal was the education allowance for home country tertiary education, as applied in cases where the child had received secondary education in the home country.²⁸⁹ The AsDBAT ruled that such a child faces no greater disadvantages than do the children of local nationals, in regard to the relevant issue of access to tertiary education in their home countries.²⁹⁰ Therefore, the benefit bore no reasonable relation to the organization's interest in compensating for the disadvantages of expatriation.²⁹¹

In other words, while the goal of geographical distribution justified the organization paying for those children of expatriate employees to receive secondary education in their home countries, and therefore, to avoid disadvantages in gaining access to home country tertiary education, it was irrational and therefore discriminatory to pay for their home country tertiary education, while local employees were paid no education benefits whatsoever.²⁹² The tribunal thus indicated that it can be appropriate to probe the particular circumstances of upbringing to determine whether the supposed disadvantages of expatriation still apply and justify the differentiation in benefits. In view of this outcome, it is interesting to revisit the case of *Ferrario*, from the ECJ.²⁹³ There, the Italian plaintiff working in Italy complained about the inequity that his expatriate colleagues received an allowance to send their children to higher education, whether in the home country, a third country, or even in the duty station country, whereas he received no allowance while incurring the same expenses for his children.²⁹⁴

While affirming the unequal treatment, the ECJ seemed troubled by the fact that expatriate staff could receive the allowance even when they chose not to send their children to higher education in the duty station country.²⁹⁵ Under

²⁸⁸ Mr. C., E.B.R.D. Admin. Trib., Decision 01/03 (2003).

²⁸⁹ *De Armas*, As. D.B. No. 39, ¶ 63.

²⁹⁰ *Id.* ¶ 62.

²⁹¹ *Id.* ¶¶ 62–63.

²⁹² *Id.*

²⁹³ See Case 152/81, *Ferrario v. Comm'n of the European Cmty.*, 1983 E.C.R. 2357 (1983), *supra* note 154 and accompanying text.

²⁹⁴ *Id.* ¶ 1.

²⁹⁵ *Id.* ¶ 13 ("The Applicants were therefore quite correct to concentrate their argument on

the analysis in *De Armas*, it would be appropriate for the tribunal to probe whether the older children of expatriate staff face disadvantages of expatriation, compared to local nationals, sufficient to justify the differentiation in benefits in that circumstance.

Moreover, according to *Van den Broeck*,²⁹⁶ it may be relevant to the tribunal's analysis that the difference in circumstance which supposedly justifies the differential treatment turns upon the volitional acts of the staff members. Thus, by choosing to send their children for higher education in Italy, when they could have gone to the home country or a third country, the expatriate staff in *Ferrario* seemed to indicate that the disadvantages of expatriation for those children were outweighed by other factors. If so, then just as the organization was correct under the ECJ's analysis to terminate expatriate benefits in *Van den Broeck* for female staff who chose the benefits of local citizenship upon marriage, so too it may have been justifiable to deny education benefits for expatriates who chose to send their children for higher education in the duty station country. However, the fact that the organization reasonably could have denied the education benefits to those expatriate staff in that circumstance does not necessarily mean it was unreasonable and discriminatory in granting those benefits while refusing them to local nationals.

In *Ferrario*, the European court sought solace in the fact that very few expatriates had utilized the option of higher education in the duty station country.²⁹⁷ This is reminiscent of the lesson from *De Los Cobos*, that it is sufficient if the difference in treatment relates to a difference in circumstance that exists in the large.²⁹⁸ The analysis suggests that the outcome in *Ferrario* would have been different if a majority or sizable minority of expatriate staff had elected to educate their children in Italy. Thus, under the general principle of equality, it seems that the reasonableness and legality of systematic differential treatment can turn on the peculiar facts of a given organization at a given time.

Four years after *De Armas*, the expatriate benefits at the IMF were challenged in the case of *Ms. "G"*.²⁹⁹ The organization's rules denied

cases in which children of employees entitled to the expatriation allowance also pursue their higher education in the country in which the parent is employed.").

²⁹⁶ See Case 37/74, *Van den Broeck v. Comm'n of the European Cmtys.*, 1975 E.C.R. 235, *supra* note 220 and accompanying text.

²⁹⁷ *Ferrario*, 1983 E.C.R. 2357, ¶ 12.

²⁹⁸ *De Los Cobos*, I.L.O. Admin. Trib., Judgment No. 391, ¶ 9 (1980).

²⁹⁹ I.M.F. Admin. Trib., Judgment No. 2002-3 (2002).

expatriate benefits to nationals as well as permanent residents of the duty station country.³⁰⁰ The plaintiff in *Ms. "G"* worked at IMF headquarters in the United States and was a lawful permanent resident of the United States, i.e., she held a so-called "green card."³⁰¹ She challenged her ineligibility for expatriate benefits on grounds that the permanent residency test discriminates against her *vis-à-vis* other non-U.S. colleagues who were not permanent residents.³⁰²

Applying the IMFAT's burden-shifting framework announced in *Mr. "R"*, the plaintiff had met her burden of making a *prima facie* case of unequal treatment.³⁰³ Although not discussed in the tribunal's judgment, the organization evidently met its burden of producing evidence of legitimate purposes for the differentiation in benefits, undoubtedly because of its treaty obligation to give "due regard" to geographical distribution in employment.³⁰⁴

Much of the opinion in *Ms. "G"* focused on the final element of the tribunal's burden-shifting framework, i.e., "whether there is a rational nexus between the goals of the expatriate benefits policy . . . and [the organization's] method [of] allocating these benefits."³⁰⁵ The asserted goals of expatriate benefits were to recruit and retain a staff of diverse nationalities, to compensate expatriate staff for costs associated with maintaining and renewing ties with their home countries, and to facilitate their repatriation following service with the organization.³⁰⁶ The IMFAT reviewed at length the process followed in reaching the decision not to pay expatriate benefits to permanent residents of the duty station country, implying again that the reasonableness of the degree of differentiation depends on the process for reaching the decision. The tribunal concluded that total denial of expatriate benefits to permanent residents was reasonable, because "[t]he procedure of selecting it was not arbitrary but deliberate [and] the substance of the Fund's choice is rational and defensible."³⁰⁷

Nowhere in its judgment in *Ms. "G"* did the IMFAT suggest that the organization was under any obligation to choose the least discriminatory means of achieving its legitimate objectives. On the contrary, the tribunal

³⁰⁰ *Id.* ¶ 2.

³⁰¹ *Id.* ¶ 10.

³⁰² *Id.* ¶ 14.

³⁰³ *Id.*

³⁰⁴ See *supra* note 255 and accompanying text.

³⁰⁵ *Ms. "G"*, I.M.F. No. 2002-3, ¶ 79.

³⁰⁶ *Id.*

³⁰⁷ *Id.* ¶ 80.

indicated in *Ms. "G"* that it considered a more reasonable approach would have been a strict nationality criterion, which would have allowed expatriate benefits to permanent residents.³⁰⁸ Thus, the reasonable nexus test acknowledges that where there is more than one reasonable degree of differential treatment the organization has discretion to choose among them.

In *Mr. "R"*, the IMFAT had discussed the principle of proportionality as articulated in the *De Armas* decision from the A.S.D.B.A.T.:

[T]he standard set forth in *De Armas* was that, to be upheld as nondiscriminatory, the expatriate benefits were required not only to be "reasonably related" to but also "proportionate" to the disadvantages of expatriation. This standard, is may be observed, subjects the decision under review to a relatively high degree of scrutiny.

...
... [S]hould the Tribunal choose to apply the standard articulated in *De Armas*, it would consider whether the difference in benefits . . . is not only reasonably related but proportionate to greater disadvantages faced by Resident Representatives than [plaintiff] posted abroad, or whether the disparity may be justified by some other valid distinction between the two categories of staff.³⁰⁹

Thus, the IMFAT described how it would apply the principle of proportionality should it choose to do so. But just as the AsDBAT did not apply the principle in *De Armas*, the IMFAT did not choose to apply it in the case of *Mr. "R"*. It may be inferred that the IMFAT did not even adopt proportionality into its framework for equal treatment. In the subsequent case of *Ms. "G"*, although it was analyzing a question of eligibility for expatriate benefits similar to that in *De Armas*, and although it recited the burden-shifting framework announced in *Mr. "R"*, the IMFAT omitted any mention from *Ms. "G"* of the *De Armas* case or the principle of proportionality.

The only case that arguably applied the principle of proportionality in an equal treatment analysis came from the Administrative Tribunal of the EBRD, based in London. In the case of *Mr. C*, a staff member of UK nationality

³⁰⁸ *Id.*

³⁰⁹ *Mr. "R"*, I.M.F. Admin. Trib., Judgment No. 2002-1, ¶¶ 44, 47.

sought benefits payable to expatriates.³¹⁰ The EBRDAT relied upon the burden-shifting framework of the IMFAT in *Mr. "R"*, but explicitly adopted proportionality as part of the final element of the framework.³¹¹ First, the tribunal found the plaintiff had made a *prima facie* case of unequal treatment based upon the status of expatriation.³¹² Second, the tribunal found the organization had shown a legitimate purpose for the differential treatment, which was to recruit and retain staff of diverse nationalities and to compensate expatriate staff for the disruption of relocating to London.³¹³ Third, the EBRDAT considered whether policies denying expatriate benefits to UK nationals "are rationally related to their purpose and whether they are proportionate to the disadvantages experienced by the expatriates and thus to the achievement of the purpose."³¹⁴ In line with *De Armas*, the EBRDAT analyzed each form of benefit separately and concluded that most of them were "reasonably related . . . and . . . proportionate to the disadvantages experienced by expatriates and thus to the achievement of the [organization's] aim."³¹⁵

However, one aspect of the EBRD's policy on expatriate benefits was found disproportionate and not reasonably related to the organization's legitimate aim—a 2003 amendment to the policy that allowed certain education benefits for the children of expatriate staff to continue even after a staff member acquired UK nationality. The EBRDAT considered that this was at odds with the central thrust of the organization's justification for the education benefits, namely, to compensate for disadvantages peculiarly experienced by expatriates in educating their children while working outside the home country.³¹⁶

The EBRDAT noted that this feature of the policy had been adopted as part of a package of measures, including an expansion of eligibility to cover UK nationals who were recruited by the EBRD from abroad, in partial response to concerns by UK employees about the disparity in benefits between themselves and their expatriate colleagues whose actual family circumstances were

³¹⁰ E.B.R.D. Admin. Trib. 01/3 ¶ 1 (2004).

³¹¹ *Id.* ¶ 88. *See id.* ¶¶ 55–60.

³¹² *See id.* ¶ 85.

³¹³ *Id.* ¶¶ 87–88.

³¹⁴ *Id.* ¶ 88.

³¹⁵ *Id.* ¶¶ 90, 92.

³¹⁶ *Id.* ¶ 93(6).

similar.³¹⁷ The tribunal suggested that, if discrimination against UK nationals was a concern, then the organization's response was inadequate.³¹⁸

The EBRDAT's amended eligibility rules may be summarized as a nationality-or-residence test. Staff could be eligible for these benefits if they were either non-UK nationals or non-UK residents at the time of recruitment, leaving only the UK resident nationals left out of the benefits. Having framed the organization's legitimate purpose as the recruitment and retention of expatriate staff, not only at the time of recruitment but on an ongoing basis, the EBRDAT naturally ruled that purpose was not rationally or proportionately served by the continuation of education benefits after UK nationality was acquired.³¹⁹

A possible justification for the EBRD's amended rules would have been the diversity benefits of recruiting and retaining staff who had made their homes outside the UK until accepting a position with the EBRD in London, on the presumption that, whatever their nationality, such staff would bring a diversity of experiences and intellectual backgrounds to enrich the work of the organization. It is not clear from the judgment whether the organization failed to plead this as a new objective of the amended benefits policy, or whether the tribunal considered it an illegitimate or insubstantial purpose for the organization's differential treatment of staff. It is likely that the ill-defined benefits of diversity would be judged insufficient to justify this differential treatment.³²⁰

In summary, claims challenging expatriate benefits as discriminatory on the basis of nationality or residence have only succeeded in eroding those benefits at the margins. Quite unlike the gender discrimination cases, the international administrative tribunals have had no epiphany about the potentially discriminatory aspects of expatriate benefits. Because this category of differential treatment is grounded in the organizations' obligations under their constitutive treaties to recruit and retain a geographically diverse staff, the tribunals may be appropriately reluctant to put their general principle of

³¹⁷ See *id.* ¶¶ 30, 93(6), 93(8).

³¹⁸ See *id.* ¶ 93(6).

³¹⁹ *Id.*

³²⁰ Indeed, such an approach could be viewed as evidence of national origin discrimination. By paying these benefits to foreign nationals who acquire local nationality, and to local nationals who were recruited from outside the country, such a broad differentiation without regard to individual merit implies there is something innately undesirable about the local nationals of the host country who have not been living abroad. Cf. *id.* ¶¶ 61–62, 64–67 (summarizing Appellant's main argument).

equality squarely into conflict with those treaty-based rules. The tribunals' judgments in these cases have not probed beyond that *de jure* distinction to explain why those obligations are either non-justiciable based as they are in the IGOs' constituent treaties, or legally justified despite their roots in stereotypes about the supposedly immutable national loyalties and nationality based characteristics of international civil servants.

It may be significant that, in these cases about expatriate benefits, the plaintiffs have not played to the moral aspect of the principle of equality; they have not portrayed themselves as persecuted or disadvantaged minorities seeking treatment as equals. As a factual matter, considering that most of the IGOs are based in Western Europe or the United States, where the local nationals have obvious advantages compared to many colleagues from developing countries or non-Western societies, the local nationals of these organizations could have a difficult time making the moral case that this differential treatment leaves them disadvantaged *vis-à-vis* their expatriate colleagues.

c. Cases of Discrimination in Favor of Marriage

We have already seen, in cases like *Taylor-Ungaro*, *Sabbatini* and *Mould*, that international organizations pay a variety of benefits to a staff member's spouse that are not payable to partners of unmarried employees. These benefits include subsidized medical insurance for the spouse, a subsidized pension to the surviving spouse, the costs of certain spouse-accompanied business travel, and, for expatriate staff, the costs of travel between the duty station and the home country.³²¹ Since the late 1990s, many IGOs have adopted some form of domestic partner benefits, whereby registered domestic partners can become eligible for many of these benefits on the same basis as a spouse.³²² However, certain spousal benefits such as the subsidized surviving spouse pension, remain off limits to domestic partners in many IGOs.

International organizations have long taken a flexible approach to the definition of a marriage for purposes of these spousal benefits. Common law marriages, traditional marriages, and other *de facto* marriages were recognized as a matter of practice and policy, with employees bearing some burden to prove that the marriages were recognized under the law of the staff member's

³²¹ See *Taylor-Ungaro*, I.L.O. Admin. Trib., Judgment No. 167 (1970); Case 20/71, *Sabbatini v. European Parl.*, 1972 E.C.R. 345; *Mould*, W.B. Admin. Trib., Decision No. 210 (1999).

³²² E.g., *Adrian*, U.N. Admin. Trib., Judgment No. 1183, at IV (2004).

home country.³²³ As the UNAT has written: "This flexible approach is consistent with the Organization's appreciation of the world's many cultures and reflects the truth that there is no common understanding of the word spouse among the peoples of the world."³²⁴

Although the IGOs are not bound by the marriage laws of their host countries or any member states, their flexible approach to defining marriage has looked to the law of the state where the marriage originated, usually the employee's home country.³²⁵ Because the laws of every country recognize opposite-sex marriage in some form, this approach did not pose difficulties under the principle of equality until unmarried opposite-sex couples and same sex couples gained visibility in more recent years.

Employee benefits tied to marriage can be problematic on a number of fronts. First, there is the prospect of abuse by the employee, both in the initial determination of the existence of a *de facto* marriage in the absence of objective evidence, and in the continuation of benefits in respect of a sham marriage.

Second, tying the organization's recognition of a marriage to the law of the employee's home country carries the potential to import, into the organization's internal benefits practices, discrimination that exists in national laws. This was seen in a different context in *Kiewning-Korner Castronovo* from the ILOAT and *Airola and Van den Broeck* from the ECJ,³²⁶ where benefits were impacted by national laws imposing citizenship on female expatriates upon marriage but not male expatriates.

Third, from a practical perspective, proving what is the marriage law of any given country and how that law applies to the facts of a particular case is no straightforward matter. Plaintiffs often are not represented by counsel, and when they are, it usually will be counsel licensed to practice in the duty station country, and not necessarily in the plaintiff's home country. Nor are the defendant IGOs or the judges on the tribunals experts in the local laws of all member states. Thus, there are risks of error of both law and fact that could

³²³ Geyer (No. 2), I.L.O. Admin. Trib., Judgment No. 1715, ¶ 10 (1998). See Berghuys, U.N. Admin. Trib., Judgment No. 1063, at II-III (2002).

³²⁴ Berghuys, U.N. No. 1063, at III.

³²⁵ See *supra* note 323 and accompanying text.

³²⁶ *Kiewning-Korner Castronovo*, I.L.O. Admin. Trib., Judgment No. 167 (1970); Case 21/74, *Airola v. Comm'n of European Cmty.*, 1975 E.C.R. 221; Case 37/74, *Van den Broeck v. Comm'n of the European Cmty.*, 1975 E.C.R. 235. See *supra* notes 135, 218–21 and accompanying text.

have substantial consequences upon both the livelihoods of the affected staff members and the equality of treatment among similarly situated employees.

Finally, there are the questions of why, and within what limits, an international organization can be said to have a legitimate interest in favoring marriage over other nonmarital relationships, or indeed, subsidizing any staff member who is in a relationship compared to those who are single.

Some of these problems can be illustrated with the case of *Geyer* (No. 2) in 1998 from the ILOAT.³²⁷ The *Geyer* case involved an employee who sought certain spousal benefits for a woman he claimed as his wife. Although the employee, a South African national, had no marriage certificate he asserted that his marriage had been solemnized in a traditional ceremony consistent with local practice.³²⁸ The ILOAT endorsed the policy equating traditional marriages and other “*de facto* situations” with formal marriage, for which entitlement to spousal benefits would arise.³²⁹ However, the tribunal ruled that, as an evidentiary matter, the plaintiff had not met his burden of proving that a traditional marriage existed.³³⁰

Little is disclosed in the judgment about what evidence was presented by the plaintiff or the organization regarding the standards for a traditional marriage under South African law. Rather, it appears that the plaintiff's inconsistent treatment of his marriage when filling-out certain employment forms decisively discredited his marriage claim.

Significantly, at no point did the tribunal question the bona fides of his relationship with the woman claimed as his wife. Yet, nor was the tribunal bothered by the fact that the question of the existence of this *de facto* marriage—a formality that, by definition, is informal—should be determinative of the plaintiff's entitlement to substantial benefits that were payable to others performing the same work.

Other problems with marital benefits were seen in the *Mould* case from the WBAT in 1999.³³¹ There, the plaintiff and his wife were legally separated and living on different sides of the Atlantic Ocean.³³² Although the marriage was effectively over, until a divorce was finalized, the estranged spouse retained eligibility for a subsidized pension of her own if she should be the surviving

³²⁷ *Geyer* (No. 2), I.L.O. 1715.

³²⁸ *Id.* ¶ 4.

³²⁹ *Id.* ¶ 10.

³³⁰ *Id.* ¶ 11.

³³¹ See Mould, W.B. Admin. Trib., Decision No. 210 (1999), *supra* note 164 and accompanying text.

³³² *Id.* ¶ 2.

spouse.³³³ The inequity of this is patent when compared to the categorical prohibition against a subsidized survivor pension to the non-marital partners in bona fide relationships of commitment and succor.

Somewhat to his credit, the plaintiff in *Mould* sought to normalize the situation with a ruling that his wife retained eligibility after divorce, due to her many years in the marriage while he was working at the Bank and the substantial sums they contributed from his paycheck to the pension plan.³³⁴ He claimed discrimination against divorced couples, but the WBAT dismissed the plea summarily, with no substantive analysis.³³⁵ The outcome in *Mould* turned formalistically on marital status and the interpretation of the term “spouse.”³³⁶ This is not to say that a more substantive inquiry would or should have changed the outcome in that case. But it is notable that, in 1999, the World Bank tribunal was not going to question the premise that a marriage gives rise to privileges in employment benefits, no matter the de facto status of the relationship.

In two judgments, the UNAT has taken a similarly formalistic approach to the meaning of “spouse” in the context of claims for benefits on behalf of same sex registered domestic partners.³³⁷ In the *Berghuys* case from 2002, the UNAT ruled there was no discrimination in refusing a surviving spouse pension benefit to the Dutch domestic partner of a deceased international civil servant.³³⁸ The tribunal ruled that the word “spouse” in the applicable regulation is linked to a pledge of marriage, and a registered domestic partnership is not a marriage under Dutch law.³³⁹

While noting the organization’s policy of recognizing de facto marriages, and that a Dutch registered domestic partnership was the closest approximation to marriage for the plaintiff and his partner under Dutch law at the time, the UNAT in *Berghuys* nevertheless considered that they were not similarly situated to a de facto married couple.³⁴⁰ With no irony, the tribunal observed

³³³ *Id.* ¶ 13.

³³⁴ *Id.* ¶¶ 2, 4.

³³⁵ *Id.* ¶ 27.

³³⁶ *Id.*

³³⁷ *Berghuys*, U.N. Admin. Trib., Judgment No. 1063 (2000).

³³⁸ *Id.*

³³⁹ *Id.* at VIII; see also Case C-122/99, D v. Council of E.U., 2001 E.C.R. III-4319, Grounds 2 (ruling no infringement of the right to equal treatment in the denial, from an employee in a same sex domestic partnership registered under Swedish law, of certain allowances that are payable by the European Communities to “a married official”).

³⁴⁰ *Berghuys*, U.N. No. 63, at VII.

that subsequent to the death of the plaintiff's partner, the Netherlands enacted legislation recognizing same sex marriages, thereby confirming, in the tribunal's mind, that domestic partnership is neither identical nor sufficiently similar to marriage so as to pose a problem of unequal treatment in spousal benefits.³⁴¹

The UNAT's analysis stands in contrast to that of the Canadian Supreme Court in *Miron*, discussed below, which concluded that there was no substantive reason to deny automobile insurance benefits to the unmarried opposite-sex couple who were the plaintiffs in the case, and therefore, the principle of equality requires that the word "spouse" in the legislative scheme be interpreted to include the plaintiffs.³⁴² The *Berghuys* case involved another type of insurance scheme, that of the UN Joint Staff Pension Fund (UNJSPF), based in New York, to which the decedent had paid contributions from his salary.³⁴³ The decedent worked for the ILO in Geneva. Despite the fact that both the UNJSPF and the ILO were immune from Dutch marriage law, and despite the fact that neither entity had a legal obligation to look to Dutch marriage law alone when interpreting the word "spouse" in the UNJSPF regulations, the UNAT formalistically determined that Dutch marriage law should govern the issue and, because the plaintiff's Dutch domestic partnership with the decedent was not a marriage under Dutch law, there was no denial of equal treatment.³⁴⁴

A similar outcome was reached by the UNAT in the case of *Adrian*, from 2004.³⁴⁵ That case involved the claim of a UN staff member working in Nairobi for spousal benefits for his same sex partner, with whom he had entered into a French domestic partnership (PACS) in 2000.³⁴⁶ While the tribunal noted that the UN Secretary General recently had announced the recognition of domestic partnerships for most spousal benefits (but not the surviving spouse pension), the new policy did not alter the UNAT's analysis of the plaintiff's non-eligibility prior to that announcement.³⁴⁷ Even while asserting that the Secretary General's recently changed position was "the only one" that allows for the coexistence of conflicting conceptions regarding family relations, "since it accepts both polygamous unions and same-sex

³⁴¹ *Id.* at VI.

³⁴² *Miron v. Trudel*, [1995] 2 S.C.R. 418 (Can.); see *infra* note 401 and accompanying text.

³⁴³ *Berghuys*, U.N. No. 63.

³⁴⁴ *Id.* at VII.

³⁴⁵ U.N. Admin. Trib., Judgment No. 1183 (2004).

³⁴⁶ *Id.*

³⁴⁷ *Id.* at IV.

unions,”³⁴⁸ the tribunal would not fault the Secretary General for having failed to recognize domestic partnerships sooner. Nor did the UNAT consider that the principle of equality required that the change be given retrospective effect so as to compensate the plaintiff employee for the past deprivation of the benefit.³⁴⁹

In the case of *Mr. R. A.-O.* from 2003, the ILOAT reached the same outcome as the UNAT in its own case concerning benefits in respect of a French PACS.³⁵⁰ In this PACS case, decided by three votes to two, the majority relied upon the *Geyer* case³⁵¹ to hold that the word “spouse” under the applicable staff rules is linked to the institution of marriage, and a PACS is not a marriage under French law.³⁵² The majority wrote:

It cannot be said on the basis of the French texts submitted in the present case that the PACS is a form of marriage. On the contrary, these texts draw a clear distinction between spouses bound by marriage and partners bound by a PACS, since it is only by virtue of special provisions that the latter are entitled to certain benefits available to spouses.³⁵³

In these three judgments, the differential payment of employee benefits was deemed appropriate because Dutch and French law placed the plaintiffs *de jure* into a different category than comparable married staff members. To that extent, the judgments are reminiscent of *Kiewning-Korner Castronovo*, the ILOAT’s 1970 decision upholding the termination of expatriate benefits from a female staff member by operation of the gender discriminatory Italian law that imposed Italian citizenship upon her marriage to a local national, and thereby placed her *de jure* into a different category than her male colleagues also married to local nationals.³⁵⁴

However, in *Airola*, the ECJ had overturned a similar termination of expatriate benefits, precisely because the organization’s blind deference to the effects of the Italian law introduced into its own benefits policies an

³⁴⁸ *Id.* at X.

³⁴⁹ *Id.* at XI.

³⁵⁰ *Mr. R.A.-O.*, I.L.O. Admin. Trib., Judgment No. 2193 (2003).

³⁵¹ See *Geyer* (No. 2), I.L.O. Admin. Trib., Judgment No. 1715 (1998).

³⁵² *Id.* ¶10.

³⁵³ *Id.* at Consideration 10.

³⁵⁴ *Kiewning-Korner Castronovo*, I.L.O. Admin. Trib., Judgment No. 170 (1970).

unwarranted difference in treatment between men and women.³⁵⁵ In *Airola*, the ECJ required the organization to interpret the concept of "nationality" in such a way as to eliminate the sex discrimination that was introduced by discriminatory national laws.³⁵⁶

Similarly, in these three cases about spousal benefits for same sex unions, the UNAT and the ILOAT could have required the organizations to interpret the concept of "spouse" so as to eliminate the asserted discrimination, if the tribunals had felt that there was improper discrimination. After all, the IGOs had always taken a flexible approach to defining marriage for purposes of eligibility for benefits.³⁵⁷ Their practices and policies of recognizing marriage by reference to the laws of the employee's home country were more an administrative convenience to the organizations than anything else, which historically did not pose equal treatment problems because every state recognizes opposite-sex marriage in some form.

These three judgments do not meaningfully address the core claims of discrimination, or the long line of cases from *Sabbatini* to *De Armas*³⁵⁸ and beyond, holding that it is necessary to look past de jure classifications and inquire whether the differential treatment is based on substantial and relevant differences in circumstance and bears a reasonable nexus to those differences. Nor was there any cognizance that the IGOs' practice of defining eligibility for employment benefits by reference to the laws of the employee's home country could be flawed when the countries and subnational jurisdictions differ radically in their legal recognition of unmarried couples.

Writing in dissent in the case of *Mr. R.A.-O.*, Judge Rondón de Sansó, from Venezuela, criticized the majority's semantic interpretation.³⁵⁹ While she agreed it was permissible that spousal status, for benefits purposes, could be determined by the law of the staff member's home country, she opined that municipal law and the employer's policies must be interpreted broadly in light of their objectives.³⁶⁰ Of the concept of "spouse," she wrote that for purposes of benefits in an IGO:

³⁵⁵ Case 21/74, *Airola v. Comm'n of the European Cmty's.*, 1975 E.C.R. 221.

³⁵⁶ *Id.* ¶ 12.

³⁵⁷ *E.g.*, Geyer (No. 2), I.L.O. Admin. Trib., Judgment No. 1718, ¶ 10 (1998).

³⁵⁸ See *supra* notes 209, 260 and accompanying text.

³⁵⁹ *Mr. R.A.-O.*, I.L.O. Admin. Trib., Judgment No. 2193 (2003) (Rondón de Sansó, J., dissenting).

³⁶⁰ *Id.*

I consider that this concept should be taken to mean a stable partner bound to the staff member by a permanent relationship which is not prohibited by law but which, on the contrary, is expressly authorised and provided for by specific legislation. To deny that status to an individual who is in a relationship recognised by the state and evidenced by an official document would be to disregard the validity not only of that document, but also of the law establishing it.³⁶¹

In other words, as far as is relevant to the employer's legitimate reasons for paying spousal benefits, the French PACS and other forms of registered domestic partnership are sufficiently similar to civil marriage so as to render irrational, and thus, unlawfully discriminatory, the denial of such spousal benefits to employees in domestic partnerships. Apart from the political firestorm that erupted in the U.N. General Assembly over the question of same sex domestic partnership benefits,³⁶² the IGOs offered no substantial reason why they had an interest in favoring employees who were married over similarly situated employees who were in legally recognized nonmarital relationships of commitment and succor.³⁶³

Following the divided judgment in *Mr. R.A.-O.*, the ILOAT came together in the two most recent judgments concerning the payment of spousal benefits for same sex couples. In *Mrs. A.H.R.C.-J*³⁶⁴ and *Mr. D.B.*,³⁶⁵ both announced in July 2006, the ILOAT overturned the ILO's denial of spousal benefits in respect of domestic partnerships registered under Danish and German law, respectively. Rejecting the organization's reliance upon *Geyer* and *Mr. R.A.-*

³⁶¹ *Id.*

³⁶² See *Adrian*, U.N. Admin. Trib., Judgment No. 1183, at IX (2004).

³⁶³ Evidently, neither of the IGOs involved in these cases, nor a substantial number of states in the UN General Assembly, endorsed the faith-based justifications offered by theocratic states for their "denunciation" of and "extreme opposition" to same sex domestic partnership benefits in the U.N. See *id.* The UNAT's opinion in *Adrian* makes clear that the opposition in the General Assembly was led by representatives of Saudi Arabia and the Holy See, and that their presentations mainly relied upon the theological traditions that their governments represent, respectively, Wahhabist Islam and Roman Catholic Christianity. *Id.* at IX. While it is unclear whether theology could serve as a legitimate reason for a legislative organ of an IGO, such as the General Assembly, there is little doubt that international administrative tribunals would disallow such justifications if offered by the U.N. Secretariat and the administrations of other IGOs.

³⁶⁴ I.L.O. Admin. Trib., Judgment No. 2549 (2006).

³⁶⁵ I.L.O. Admin. Trib., Judgment No. 2550 (2006).

O., the tribunal ruled that the Danish and German plaintiffs had proven that their domestic partnerships were sufficiently similar to marriage under the relevant national laws as to entitle them to recognition for their partners as "spouses" under the organization's rules.³⁶⁶

In so ruling, the ILOAT stood by its analysis in *Mr. R.A.-O.*, where the tribunal had declined to recognize the French domestic partner as a spouse because the French laws "draw a clear distinction between spouses bound by marriage and partners bound by a PACS."³⁶⁷ Yet the tribunal acknowledged in *Mrs. A.H.R.C.-J.* that Danish law likewise "draws a distinction between the 'registered partnership' [and] marriage."³⁶⁸ And in *Mr. D.B.*, the ILOAT referred to the decision of the German Federal Constitutional Court which similarly declared that a German domestic partnership "[was] not a marriage."³⁶⁹ Thus, it is clear that the laws of Denmark and Germany, as with France, draw a clear distinction between marriage and domestic partnership.

However, in the latter two cases, the tribunal conducted an inquiry into the substance of those Danish and German laws, and concluded that the differences between marriage and domestic partnership under Danish and German law are "extremely tenuous."³⁷⁰ No comparison was made between the Danish and German domestic partnership laws and the French PACS. Nevertheless, the tribunal ruled that the organization's differential treatment could not be justified by the distinctions between marriage and domestic partnership in the Danish and German laws.³⁷¹

Thus, there are conflicting results among five cases concerning spousal benefits for same sex couples, all supposedly decided in line with the same general principle of equality. Obviously, this is a problematic jurisprudence. It is no answer that in the latter two cases, the circumstance of domestic partners and married persons under the laws of Denmark and Germany were deemed similarly situated. From all five of the judgments, it is evident that the differences between the domestic partnership laws of the France and the Netherlands, on the one hand, and Denmark and Germany, on the other hand,

³⁶⁶ *Mr. D.B.*, I.L.O. No. 2550, ¶ 4.

³⁶⁷ *Mr. R.A.-O.*, I.L.O. Admin. Trib., I.L.O. Judgment No. 2193, ¶ 10 (2003).

³⁶⁸ *Mrs. A.H.R.C.-J.*, I.L.O. No. 2549, ¶ 12.

³⁶⁹ *Mr. D.B.*, I.L.O. No. 2550, ¶ 4.

³⁷⁰ *Id.* ¶ 12; *Mrs. A.H.R.C.-J.*, I.L.O. No. 2550, ¶ 12.

³⁷¹ *Mr. D.B.*, I.L.O. No. 2550, ¶ 5; *Mrs. A.H.R.C.-J.*, I.L.O. No. 2550, ¶ 12.

are even more “extremely tenuous”³⁷² than the differences between any of those laws and the marriage laws in those countries.³⁷³

In its judgment in *Mrs. A.H.R.C.-J.*, the ILOAT hinted that the different result in the two most recent cases related to an intervening change in practice within the relevant organization, the ILO.³⁷⁴ Subsequent to the tribunal’s judgment in *Mr. R.A.-O.*, the organization had interpreted the term “spouse” to include same sex marriages where the legislation of the country of the staff member’s nationality recognizes such marriages.³⁷⁵ Seizing on what it termed this “broad interpretation” of the term “spouse,” the ILOAT reframed the question as whether, having taken that step, the organization was bound to recognize other same sex unions that were not expressly designated as marriages under the applicable national law.³⁷⁶

Seeming to acknowledge the validity of the criticism from Judge Rondón de Sansó, in dissent in *Mr. R.A.-O.*, the ILOAT wrote:

The Tribunal feels that a purely nominalistic approach to this issue would be excessively formalistic and is inappropriate in view of the fact that the situation varies from one country to another and that great care must be taken not to treat officials placed in comparable situations unequally: it is not because a country has opted for legislation that admits same-sex unions while refusing to describe them as marriages that officials who are nationals of that State should necessarily be denied certain rights.³⁷⁷

However, whereas Judge Rondón de Sansó seemed prepared to take judicial notice that, as far as is relevant to the organization’s benefits schemes, all lawfully registered domestic partnerships are similarly situated to marriages, a majority on the ILOAT continued to adhere to the rule in *Geyer*, requiring individual plaintiffs to prove the “precise provisions” of local law on

³⁷² *Mr. D.B.*, I.L.O. No. 2550, ¶ 5.

³⁷³ For a discussion of the history of the same sex PACS in France and comparisons to the French treatment of marriage and opposite-sex cohabitation outside marriage, see Claudina Richards, *The Legal Recognition of Same-Sex Couples—The French Perspective*, 51 INT’L & COMP. L.Q. 305 (2002).

³⁷⁴ *Mrs. A.H.R.C.-J.*, I.L.O. No. 2549, ¶ 10.

³⁷⁵ *Id.*

³⁷⁶ *Id.* ¶ 11.

³⁷⁷ *Id.*

domestic partnerships and marriage, and their application in his or her situation.³⁷⁸

It must be assumed that, upon the required evidentiary showings, the ILOAT would admit that staff in French PACS relationships or in Dutch registered domestic partnerships would be eligible for equal treatment on the same basis as their Danish and German colleagues, notwithstanding the undisturbed precedents in *Mr. R.A.-O.*, *Berghuys* and *Adrian*. If so, then, just as the ILOAT's judgment in *Callewaert-Haezebrouck* covertly overturned its precedent in *Taylor-Ungaro* without repudiating it,³⁷⁹ likewise the companion judgments in *Mrs. A.H.R.C.-J.* and *Mr. D.B.* have covertly overturned the precedent of *Mr. R.A.-O.* The unthinkable alternative would be that the French PACS has been condemned to inferior status within the employee benefits policies of IGOs, compared to Danish and German domestic partnerships because of subtle differences in national law that have not been established to be relevant to the organizations' purposes in offering spousal benefits.

Just as the reasons behind *Callewaert-Haezebrouck* could be inferred from other tribunal cases involving less controversial subject matter, like *De Los Cobos*, similarly one must look to the other jurisprudence on discrimination for the logic in *Mrs. A.H.R.C.-J.* and *Mr. D.B.* The ILOAT had previously accepted, in *De Los Cobos*, that *de jure* classifications are not sufficient to justify differential treatment, and there must be a difference in circumstance that is substantial and relevant to the organization's legitimate purpose.³⁸⁰ This iteration of the similarly situated test was significantly elaborated by the IMFAT cases of *D'Aoust*, *Mr. "R"* and *Ms. "G"*, as well as *De Armas* from the AsDBAT and *Mr. C.* from the EBRDAT.

Further, the ILOAT had previously indicated in *Rabozée* that, when benefits are tied to employees' personal relationships, then the reality of the plaintiff's relationship should be assessed to see whether it effectively is the same as that of her comparators who were treated differently.³⁸¹ The tribunal wrote that, in offering spousal benefits, the organization's policies must reflect "the actual situation of the spouses, who owe each other a duty of mutual assistance and who . . . may be regarded as mutually dependent."³⁸² Registered domestic partners likewise owe to each other a legal duty of mutual assistance

³⁷⁸ *Id.* ¶ 10.

³⁷⁹ See *supra* note 239 and accompanying text.

³⁸⁰ *De Los Cobos*, I.L.O. Admin. Trib., Judgment No. 391, ¶ 9 (1980).

³⁸¹ *Rabozée*, I.L.O. Admin. Trib., Judgment No. 264 (1975).

³⁸² *Id.*

in many jurisdictions that recognize domestic partnership, and they may be regarded as mutually dependent in fact.³⁸³

Accordingly, there seems to be three possible logics underlying the judgments in *Mrs. A.H.R.C.-J.* and *Mr. D.B.* First, and most narrowly, it could be that the tribunal concluded that the actual situation of the same sex registered domestic partner plaintiffs is not substantially different from the situation of married staff members in a way that is relevant to an international organization's legitimate purposes in offering spousal benefits. Second, the tribunal may have determined that the organization's complete denial of spousal benefits is an unreasonable response in relation to the subtle differences between marriage and domestic partnership under the applicable laws. Third, and most broadly, the tribunal may have decided, in line with a number of courts in North America, that the general principle of equality demands that committed same sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.³⁸⁴

Absent clear guidance from the tribunal on the reasons for the outcomes of *Mrs. A.H.R.C.-J.* and *Mr. D.B.*, as opposed to the three prior judgments on similar facts, these cases may have limited influence within international organizations, just as the sex discrimination cases in the 1970s did not necessarily eliminate discrimination against women.³⁸⁵ Both the IGOs and their employees have no certainty about the present state of the general principle of equality as applied to same sex couples or, for that matter, opposite-sex unmarried couples. Moreover, because the cases seemingly turned on their particular facts, there is no clear legal impetus for the organizations to proactively amend their rules in order to assure equal treatment in benefits to employees who have nonmarital partners.

Even more uncertain is how the ILOAT's approach would be applied to nationals of a state that changes its law to abolish domestic partnership or same sex marriage. Such measures have been considered in both Canada and

³⁸³ See Robert Wintermute, *Same-Sex Marriage: When Will It Reach Utah?*, 20 B.Y.U. J. PUB. L. 527, 532–33 (2006).

³⁸⁴ *Lewis v. Harris*, 908 A.2d 196, 220–21 (N.J. 2006); see also *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baker v. State*, 744 A.2d 864, 870, 886 (Vt. 1999); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Halpern v. Can.*, [2000] 65 O.R. (3d) 161 (Can.); *Barbeau v. B.C.*, [2003] 15 B.C.L.R. (4th) 226 (Can.). For a view on equality for same sex couples under English constitutional analysis, see *Fitzpatrick v. Sterling Housing Ass'n Ltd.*, [1999] W.L. 852150 (H2) (Ward, L.J., dissenting).

³⁸⁵ See *supra* note 244 and accompanying text.

Massachusetts.³⁸⁶ The legal standard becomes even more confused when applied to a federal state, such as the United States or Canada, where subnational units may differ with each other and with the federal government in their approaches to both domestic partnership and same sex marriage. The dynamic state of national and subnational laws in this area makes keeping track of it a Herculean task. To purport to distinguish among the various laws on domestic partnerships, and their relative similarity to marriage in each jurisdiction, seems a truly impractical judicial approach.

Another issue left open by ILOAT in these most recent judgments is the effect, if any, of a "volitional act" on the part of the staff member, as in *Van den Broeck*.³⁸⁷ Consider two scenarios. First, consider that the Netherlands has now legalized both domestic partnership and civil marriage for same sex couples.³⁸⁸ In *Berghuys*, the UNAT noted this fact as a reason why Dutch domestic partners were deemed not similarly situated to Dutch married persons.³⁸⁹ The question is whether the ILOAT would hold that a staff member who chose Dutch domestic partnership instead of Dutch marriage would thereby disqualify himself from equal treatment in spousal benefits. From a purely formalist perspective, the answer should be "yes." But after the judgments in *Mrs. A.H.R.C.-J.* and *Mr. D.B.*, applying a substantive similarly situated analysis, the answer would seem to be "no" because the organization's interest in paying spousal benefits is the same for Dutch domestic partnership as for Dutch marriage, the subtle differences between the two legal institutions are not relevant to the organization's interest, and those differences do not justify a complete denial of benefits from one of the two classes of employees. Yet this outcome is far from certain.

Second, consider the relative ease and informality by which a staff member can change his place of residence in a federal state. In the United States, for example, Vermont, Massachusetts, Connecticut and New Jersey provide same sex couples with legal recognition equivalent to marriage,³⁹⁰ whereas the

³⁸⁶ See Christopher Mason, *Gay Marriage Galvanizes Canada's Right*, N.Y. TIMES, Nov. 19, 2006; Michael Powell & Robin Shuman, *Mass Gay Marriage Law Contested*, WASH. POST, Jan. 3, 2007, at A3.

³⁸⁷ See Case 37/74, *Van den Broeck v. Comm'n of the European Cmty's.*, 1975 E.C.R. 235, *supra* note 220 and accompanying text.

³⁸⁸ See *Berghuys*, U.N. Admin. Trib., Judgment No. 1063 (2002), *supra* note 337 and accompanying text.

³⁸⁹ *Id.*

³⁹⁰ See *Lewis v. Harris*, 908 A.2d 196 (N.J. 2000); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); CONN. GEN. STAT. §§ 46b-38aa to 38pp (2005); VT. STAT. ANN.

neighboring states of Pennsylvania and New York provide no equivalent legal recognition, and New York City provides a domestic partnership registry that carries little significance under state law.³⁹¹

How would the ILAOT decide the case of two registered New Jersey domestic partners who, when one of them obtains a staff position at the ILO, sell their home in New Jersey, relocate their lives to Geneva, but rent an apartment in New York City to serve as their base in the United States? By leaving their New Jersey residence, the couple loses the legal protections accorded to their domestic partnership in that state. Is that a “volitional act” under *Van den Broeck*, sufficient to disqualify them from equal treatment in spousal benefits at the ILO? Does it make a difference if the couple has re-registered their domestic partnership in New York City, which recognizes the partnership but does not afford it legal rights equivalent to marriage?

It is strange that a person’s legal rights to employment benefits on a par with his or her similarly situated colleagues, in an international organization that is not subject to national laws, would depend upon the vagaries of the subnational laws in the country he has left behind. Hopefully this example demonstrates the inadequacy of a legal test for equality that relies upon the law of the place of nationality or residence to discriminate among otherwise similarly situated staff members in the allocation of benefits associated with marriage, de facto marriage, and equivalent relationships of commitment and succor.

In conclusion, it may be said that the similarly situated test continues as the dominant construct in the jurisprudence of the international administrative tribunals, for cases of either simple inequality or true discrimination. But the current test has been substantially innovated in some tribunals with the additional requirement of a reasonable nexus between the organization’s legitimate purposes for differentiating and the extent of the differentiation in term of employment and benefits.³⁹² Nevertheless, there remains great uncertainty about how the similarly situated test would be applied to various circumstances in future cases, especially case of true discrimination as opposed to simple inequality. This is partly due to the tribunals’ reticence about

Tit. 15, §§ 1201–1207 (1999).

³⁹¹ See *Slattery v. City of New York*, 697 N.Y.S.2d 603 (N.Y. App. Div. 1999) (city ordinance establishing domestic partnership registry and granting certain benefits does not impermissibly legislate in state sphere or conflict with state law or policy).

³⁹² See *supra* note 164 and accompanying text.

distinguishing or overturning precedents, or otherwise explaining their reasoning in controversial cases.

C. The Irrelevant Personal Characteristics Test for Cases of True Discrimination

Judge Hugessen, another dissenter in *Mr. R.A.-O.*, was quoted at the start of this Article.³⁹³ Hugessen, a Canadian, wrote that "the time has come" to discontinue the use of the similarly situated test in cases of true discrimination.³⁹⁴ The same conclusion had been reached fourteen years earlier by the Supreme Court of Canada, in the seminal *Andrews* case.³⁹⁵

1. Andrews and the Canadian Test for Irrelevant Personal Characteristics

The concept of "irrelevant personal characteristics" as an element of employment discrimination analysis was developed by Canadian courts. Section 15(1) of the Canadian Charter of Rights and Freedoms provides that: "Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."³⁹⁶

Interpreting Section 15(1), many lower Canadian courts had used a similarly situated test much like that seen in the ECJ and the international administrative tribunals, reflecting the formalist conception of equal treatment.³⁹⁷ But in 1989, in the case of *Andrews*, the Supreme Court of Canada discarded that test and embraced a substantive conception of equality before the law. Justice McIntyre explained, in a concurring opinion:

³⁹³ See *supra* note 1.

³⁹⁴ *Mr. R.A.-O.*, I.L.O. Admin. Trib., Judgment No. 2193, ¶ 18 (2003) (Hugessen, J., dissenting).

³⁹⁵ *Law Soc'y of B.C. v. Andrews*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 (Can.) (holding that citizenship requirement for membership in the British Columbia bar is discriminatory under Section 15(1) of the Charter and not "demonstrably justified" under Section 1 of the Charter).

³⁹⁶ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, ch. 11, § 15(1) (U.K.).

³⁹⁷ *Andrews*, 56 D.L.R. (4th) 1, ¶ 9 (McIntyre, J., concurring with respect to Section 15(1); dissenting from the judgment with respect to Section 1).

The [similarly situated] test . . . is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolph Hitler. Similar treatment was contemplated for all Jews. The similarly-situated test would have justified the formalistic separate but equal doctrine of *Plessy v. Ferguson* 163 U.S. 637 (1896) (citation omitted) . . . [M]ere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. . . . [A] bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions. . . . [T]he [similarly situated] test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the Charter. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.³⁹⁸

In place of the similarly situated test, the Canadian court adopted an “enumerated or analogous grounds” approach for expanding upon the list of irrelevant personal characteristics set out in Section 15 of the Charter.³⁹⁹ This approach had been used by Judge Hugessen on the Canadian federal court, and by several provincial courts.⁴⁰⁰

In the *Miron* case,⁴⁰¹ from 1995, the Canadian Supreme Court explained that the test for “analogous grounds” of discriminating, to which strict scrutiny applies under Section 15 of the Charter, is a flexible test. The Court will consider whether the affected group is historically disadvantaged or a discrete and insular minority,⁴⁰² whether the distinction is based on immutable

³⁹⁸ *Id.* ¶¶ 10–11 (opinion of McIntyre, J., concurring with respect to Section 15(1); dissenting from judgment with respect to Section 1).

³⁹⁹ *Id.* ¶ 28.

⁴⁰⁰ *Id.* ¶ 17.

⁴⁰¹ *Miron v. Trudel*, [1995] 2 S.C.R. 418 ¶ 17 (Can.).

⁴⁰² This factor, borrowed from *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), was cited favorably by the Canadian court in *Andrews*. *Andrews*, [1989] 1 S.C.R. 143, ¶ 31.

characteristics and other personal characteristics, and whether the distinction has been recognized by legislators as impermissible discrimination.⁴⁰³ But the Canadian court noted that none of these factors is decisive, pointing out that sex is not a minority status, and religion is not immutable, yet both are considered to be invidious grounds of discrimination.⁴⁰⁴ The court emphasized that the principle of equality, as adopted in the Canadian Charter of Rights and Freedoms, protects human dignity and individual human rights, and not merely equality of treatment:

Andrews instructs us that our approach must also reflect the human rights background against which the *Charter* was adopted. In evoking human rights law as the defining characteristic of discrimination under s. 15(1) of the *Charter*, this Court in *Andrews* engaged the principle of equality which underlies the constitutions of free and democratic countries throughout the world. This principle recognizes the dignity of each human being and each person's freedom to develop his body and spirit as he or she desires, subject to such limitations as may be justified by the interests of the community as a whole. . . .

The corollary of the recognition of the dignity of each individual is the recognition of the wrong that lies in withholding or limiting access to opportunities, benefits, and advantages available to other members of society, solely on the ground that the individual is a member of a particular group deemed to be less able or meritorious than others. This is the evil we call discrimination.⁴⁰⁵

This emphasis on human dignity as the basic objective of the principle of equality recalls the earlier influence of natural justice upon the Conseil d'État.⁴⁰⁶ By the 1990s, the idea of human dignity as a cognizable right also could be found in French and German constitutional law, labor law and penal law.⁴⁰⁷

⁴⁰³ *Miron*, [1995] 2 S.C.R. 418, ¶ 141 (McLachlin, J., concurring).

⁴⁰⁴ *Id.* ¶ 159.

⁴⁰⁵ *Id.* ¶¶ 155–156.

⁴⁰⁶ See *supra* note 94 and accompanying text.

⁴⁰⁷ See Friedman & Whitman, *supra* note 74, at 256–60.

In *Miron*, the Canadian court made clear that it will apply strict scrutiny to distinctions that are based on personal characteristics and other grounds that are analogous to race, sex, nationality and the like.⁴⁰⁸ The *Miron* case involved the claim by an unmarried couple for automobile accident benefits payable in respect of a "spouse."⁴⁰⁹ The Canadian court ruled that the personal characteristic of being unmarried is an "analogous ground" of discrimination that deserves strict scrutiny, because marital status touches on essential human dignity and the freedom to live with the mate of one's choice, or not, unmarried couples have been historically disadvantaged and ostracized, and legislatures increasingly have abolished or minimized distinctions in legal rights between married and unmarried couples.⁴¹⁰ The court went on to hold that there was no rational connection between the discrimination and the goal of the automobile accident benefit legislation, and therefore, such discrimination could not be demonstrably justified under the Charter.⁴¹¹

On the same day as the *Miron* case, the Canadian court unanimously held in the *Egan* case that sexual orientation was an analogous ground under Section 15 of the Charter because, "whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs. . . ."⁴¹²

2. The Irrelevant Personal Characteristics Test in the ILOAT

After the ILOAT had been seized of the French PACS case of *Mr. R.A.-O.* in 2002, but seven months before judgment was issued in that case, the tribunal adopted an irrelevant personal characteristics test in another case dealing with discrimination based on marital status.⁴¹³ In the case of *Mr. I.M.B.*,⁴¹⁴ the ILOAT considered a policy of the International Atomic Energy Agency (IAEA) prohibiting the appointment of spouses within the same department.⁴¹⁵

⁴⁰⁸ *Miron*, [1995] 2 S.C.R. 118, ¶ 141 (McLachlin, J., concurring).

⁴⁰⁹ *Id.* ¶¶ 3–6.

⁴¹⁰ *Id.* ¶¶ 161–162, 165.

⁴¹¹ *Id.* ¶ 184.

⁴¹² *Egan v. Canada*, [1995] 2 S.C.R. 513 ¶ 5 (Can.). In *Egan*, the court was deeply divided over the question of whether the challenged legislation actually discriminated against homosexuals, either directly or through adverse effect). *Id.*

⁴¹³ *Mr. I.M.B.*, I.L.O. Admin. Trib., Judgment No. 2120 (2002).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

Judge Hugessen wrote that the policy "improperly discriminates between candidates for appointment based on their marital status and family relationship" and "[d]iscrimination on such grounds is contrary to the Charter of the United Nations, general principles of law and those which govern the international civil service, as well as international instruments on human rights," citing Article 26 of the International Covenant on Civil and Political Rights (1966).⁴¹⁶

In language reminiscent of the Canadian Supreme Court opinions in *Andrews* and in *Miron*, the ILOAT continued:

[A]ll forms of improper discrimination are prohibited. What is improper discrimination? It is, at least in the employment context, the drawing of distinctions between staff members or candidates for appointment on the basis of irrelevant personal characteristics. Manifestly, the fact that two staff members may be married to each other is not relevant to their competence or the capacity of either one of them to fulfill their obligations. And, if it is thought that marital or intimate personal relationships between staff members may create management problems, such problems must be dealt with in ways that do not discriminate against either of them as a result of such relationships. The Tribunal notes that [the policy] as it is written, besides being too broad, is not even effective in dealing with the presumed possibility of undue influence or favoritism for it is silent on non-marital [sic] intimate relationships. It also fails to deal with marriages taking place after appointment which are specifically protected by the terms of [staff rules].⁴¹⁷

The ILOAT, thus, laid out a two-step analysis of improper discrimination going well beyond the similarly situated test for equal treatment. First, there is recognition that some employment classifications deserve a stricter analysis, namely, classifications based on characteristics that are irrelevant to competence or capacity, and personal to the individual, going to their human dignity.⁴¹⁸ In *Mr. I.M.B.*, it is suggested that not only marriage but also other

⁴¹⁶ *Id.* ¶ 10.

⁴¹⁷ *Id.* ¶ 11.

⁴¹⁸ *Id.*

forms of intimate personal relationships constitute such irrelevant personal characteristics that are deserving of such stricter scrutiny.⁴¹⁹

Second, there is a requirement of correspondence, or nexus, between the differential treatment and the difference between the affected categories of staff.⁴²⁰ *Mr. I.M.B.* indicates that, when irrelevant personal characteristics are in issue, the ILOAT will apply a stricter scrutiny than the reasonable relationship test seen in earlier ILOAT cases like *Tarrab*, and perhaps the WBAT and IMFAT cases applying the reasonable relationship test.⁴²¹ With irrelevant personal characteristics at issue, the ILOAT looked not simply for a nexus, or a reasonable nexus, but for a nexus that is neither too broad nor too narrow, perhaps suggesting that the principle of proportionality or a kind of strict scrutiny is at work.⁴²²

This framework is subject to criticism on a number of fronts. The first element is not a rigorous test for irrelevant personal characteristics. The ILOAT's test opens the door to claims based upon all manner of personal characteristics, regardless of whether such characteristics traditionally have been viewed as legitimate grounds for differentiation among employees or, conversely, have been a traditional basis for prejudicial treatment.⁴²³ For example, expatriate status is a criterion that seems to satisfy the test for an irrelevant personal characteristic, in that it is irrelevant to the staff member's competence to perform his job and arguably a matter of human dignity. Yet to apply strict scrutiny to international organizations' differentiation based on expatriate status potentially could play havoc with their longstanding, treaty-based policies on expatriate benefits.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ See Mould, W.B. Admin. Trib., Decision No. 210 (1999), *supra* note 164 and accompanying text; Mr. "R", I.M.F. Admin. Trib., Judgment No. 2002-1, *supra* note 169 and accompanying text.

⁴²² Mr. I.M.B., I.L.O. Admin. Trib., Judgment No. 2120, ¶ 10 (2002).

⁴²³ Similarly, the European Court of Human Rights has accepted a long list of "other statuses," such as military rank and profession of work, to which it will apply scrutiny under Article 14 of the European Convention on Human Rights. See CLAYTON & TOMLINSON, *supra* note 22, at 1240-41. It seems to demean the prestige of human rights, and the tremendous struggles of women, racial and religious minorities, and other persecuted and historically disadvantaged groups, to set no limits on the comparators to which the human right of equal treatment applies, such that, for example, servicemen in the armed forces can claim a human right to treatment equal to officers as regards penalties for their violations of military rules. *Engel v. Neth.*, 1 Eur. H.R. Rep. 647 (1976).

The second element of the framework, that the nexus must not be too broad nor too narrow, may not adequately take into account the different interests at play in various contexts. The ILOAT's judgment in *Mr. I.M.B.* seems to build upon the Canadian approach to personal characteristics in employment actions, but without the Canadian balance between employee and employer interests.⁴²⁴ For example, it is difficult to understand why the IAEA would have to relocate out of the work unit one employee in a couple that has begun an intimate relationship or become married, simply to legitimize the rule against placing married employees together in the same unit. When two staff who already work together begin an intimate personal relationship or get married, for the organization to move one of those employees out of the unit could entail a significant disruption to the work unit and to the career of that employee. In contrast, when choosing among qualified candidates to fill a vacant position, not selecting the candidate who is married to a colleague in the work unit would entail no additional disruption to the work unit or to the career of the employee who was not selected.

In any event, having articulated in the case of *Mr. I.M.B.* a new and important substantive test for improper discrimination involving personal characteristics, the ILOAT failed to apply that test seven months later in its judgment in *Mr. R.A.-O.* As discussed above, that judgment denying spousal benefits to an employee in a French PACS was based on an interpretation of the word "spouse" and a formalistic application of the similarly situated test.⁴²⁵

Writing in dissent in *Mr. R.A.-O.*, Judge Hugessen refined the irrelevant personal characteristics test for use in cases involving true discrimination. He wrote:

First, it should be determined whether the challenged decision or rule has drawn a distinction between a staff member and others based on irrelevant personal characteristics, such as race, colour, sex, language, religion, political or other opinion, national or social origin, marital or other status. To be clear, this list is not exhaustive. Secondly, the inquiry must focus on whether the distinction (or differential treatment) has the effect of imposing a burden, obligation or disadvantage not imposed upon other staff members or of withholding or

⁴²⁴ See *Law Soc'y of B.C. v. Andrews*, [1989] 1 S.C.R. 143, 56 D.L.R. 4th 1, ¶¶ 10-11 (Can.), *supra* note 395 and accompanying text.

⁴²⁵ *Mr. R.A.-O.*, I.L.O. Admin. Trib., Judgment No. 2193, ¶ 10 (2003).

limiting access to benefits or advantages which are available to others. Thirdly, the inquiry will determine whether, despite all the above, there are sound administrative reasons for the difference in treatment or if the differential treatment is a fair, reasonable and logical outcome of circumstantial differences.⁴²⁶

Applying this test to the complainant's domestic partnership, Judge Hugessen concluded as to the first prong that the staff rule did distinguish based on an irrelevant personal characteristic, specifically, sexual orientation.⁴²⁷ Although eligibility for the dependency benefit turned on marital status, the effect was to distinguish based on sexual orientation. As Judge Hugessen observed, "[S]urely the only difference in the situation of two couples each legally committed in principle to a lifetime of mutual support and succour where one of the couples is gay and the other is not is that fact alone."⁴²⁸ At the time, sexual orientation was not an explicitly protected classification under the non-discrimination policies of the UN common system. Nevertheless, Judge Hugessen characterized same sex couples as a "highly vulnerable social group" due to the "historic disadvantage, stereotyping, marginalization and stigmatization suffered by homosexuals."⁴²⁹ He thus analogized sexual orientation to other protected classifications, such as sex, nationality and race. This technique for expanding the range of protected classifications, by reference to social ostracism and historic disadvantage, clearly recalls the Canadian jurisprudence under section 15 of the Charter of Rights and Freedoms, discussed above, as well as Ruth Bader Ginsberg's argument to the United States Supreme Court in the *Frontiero* case.⁴³⁰

Interestingly, Judge Hugessen did not invoke the American or Canadian cases in his dissenting opinion, but instead referred to the European Parliament's two resolutions on equal rights for gays and lesbians from 1994 and 1998.⁴³¹ It says much about the aversion of IGOs generally, and the international administrative tribunals in particular, to explicit comparisons to

⁴²⁶ *Id.* ¶ 27 (Hugessen, J., dissenting).

⁴²⁷ *Id.* ¶ 28 (Hugessen, J., dissenting).

⁴²⁸ *Id.* ¶ 20 (Hugessen, J., dissenting).

⁴²⁹ *Id.* ¶ 30 (Hugessen, J., dissenting).

⁴³⁰ See *supra* note 248 and accompanying text. American state courts and Canadian provincial courts that recognized equality rights for same sex couples have similarly referred to the social ostracism and historic disadvantage of sexual minorities. See *supra* note 384.

⁴³¹ *Mr. R.A.-O.*, I.L.O. No. 2193, ¶ 30 (Hugessen, J., dissenting).

or reliance upon municipal law, that Judge Hugessen thought these resolutions of the European Parliament would carry greater persuasive force than binding judgments of the highest court in his own country.⁴³²

As to the second prong, Judge Hugessen found that the distinction, based on marital status, in eligibility for the dependency benefit obviously did impose a disadvantage upon the staff member in a same sex partnership that was not imposed upon other staff members. Specifically, because of his sexual orientation, the homosexual staff member was denied access to benefits for his partner that were available to married heterosexual staff members.⁴³³

Judge Hugessen's third prong, which was a new element to the test after the judgment in *Mr. I.M.B.*, seems to bring in a balancing of employer and employee interests that is also seen in the Canadian jurisprudence. However, when applying this prong to the case of *Mr. R.A.-O.*, Judge Hugessen opined that it was not possible to imagine any justifiable reasons UNESCO might have for discriminating against the complainant based on his same sex relationship:

When determining whether a decision or rule discriminates against a staff member on grounds of sexual orientation, focus should not be on the economic aims and origins of the prohibition against such discrimination in the workplace, but rather on the dignity of the individual and the value of equality as a fundamental human right recognised as such by national legal systems.⁴³⁴

Judge Hugessen's analysis under the third prong of his test could be faulted for inadequately considering the organization's sound reasons for the difference in treatment, assuming the organization plead sound reasons. It is

⁴³² Some American judges and many American legislators have a similar aversion to reliance upon foreign or international law. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 598 (Scalia, J., dissenting) (faulting the majority for "dangerous dicta" that referred to foreign and international judgments rejecting laws against intimate same sex conduct). *See* Diane Marie Amann, *International Law and Rehnquist-Era Reversals*, 94 GEO. L.J. 1319 (2006) (discussing the role of international law in *Lawrence* and other Supreme Court cases, and the backlash including congressional calls to impeach the justices). This aversion contrasts with practice in Commonwealth countries, where courts readily cite to United States judgments on equal treatment. *See* CLAYTON & TOMLINSON, *supra* note 22, at 120-21.

⁴³³ *Mr. R.A.-O.*, I.L.O. No. 2193, ¶ 32 (Hugessen, J., dissenting).

⁴³⁴ *Id.* ¶ 39 (Hugessen, J., dissenting).

not clear from the judgment in this case whether UNESCO faced the same uproar over same sex benefits that was seen in the UN General Assembly in the UNAT's *Adrian* case,⁴³⁵ or made the argument that some of its member states were opposed to the measures. If it did, then the question of an IGO's obligation to respect the views of its member states, whether or not those views hold a majority, deserves a fair hearing under this third prong.⁴³⁶

3. *The IMFAT and Cases of True Discrimination*

The IMFAT recently had two occasions to analyze claims of true discrimination, one alleging hostility because of religion,⁴³⁷ and the other claiming discrimination based on marital status.⁴³⁸ In both cases, the tribunal recognized a distinction between, on the one hand, the right to equal treatment, and on the other hand, the "principle of nondiscrimination that implicates 'universally accepted principles of human rights.'" ⁴³⁹

In the case of *Mr. "F"*, the plaintiff alleged that he was subjected to a hostile and discriminatory work environment because of his religion, and that the abolition of his job position was motivated by that discrimination.⁴⁴⁰ In a work unit devoted to language translation, where most colleagues shared the plaintiff's ethnic background and professed the majority religion, he adhered to a minority religion.⁴⁴¹ Creed is one of the enumerated grounds for which discrimination is expressly prohibited by the Staff Regulations of the IMF.⁴⁴²

The IMFAT immediately recognized that the claim in this case involved an invidious form of discrimination, compared to the "distinctly different and less serious type[s]" of discrimination alleged in its earlier cases.⁴⁴³ However, the tribunal disposed of the plaintiff's complaint about the abolition of his job in rather summary fashion, noting there was no evidence that the decision

⁴³⁵ See *supra* note 362 and accompanying text.

⁴³⁶ See *Adrian*, U.N. Admin. Trib., Judgment No. 1183 (2004); BENNET & OLIVER, *supra* note 256, at 423 ("[UN employee has] 180 bosses to please in addition to his or her supervisors in the Secretariat hierarchy.").

⁴³⁷ *Mr. "F"*, I.M.F. Admin. Trib. Judgment No. 2005-1.

⁴³⁸ *Ms. "M"* & *Dr. "M"*, I.M.F. Admin. Trib., Judgment No. 2006-6.

⁴³⁹ *Id.* ¶ 124 (citing *Mr. "F"*, I.M.F. Judgment No. 2005-1, ¶ 81).

⁴⁴⁰ See *Mr. "F"*, I.M.F. No. 2005-1, ¶ 2.

⁴⁴¹ *Id.* ¶ 19.

⁴⁴² See *supra* note 73 and accompanying text.

⁴⁴³ *Mr. "F"*, I.M.F. No. 2005-1, ¶ 81 (comparing *D'Aoust*, I.M.F. Admin. Trib., Judgment No. 1996-1, *Mr. "R"*, I.M.F. Admin. Trib., Judgment No. 2002-1, and *Ms. "G"*, I.M.F. Admin. Trib., Judgment No. 2002-3).

maker, who was not part of the work unit where the alleged harassment occurred and who shared the plaintiff's religious affiliation, was motivated by religious discrimination.⁴⁴⁴

As to the complaint of hostile and discriminatory work environment, the IMFAT ruled in the plaintiff's favor, finding that harassment did occur and the managers failed their duties under the organization's policy against harassment to "take adequate measures to rectify."⁴⁴⁵ Because this portion of the decision was based upon the organization's written policy, the analysis did not rely upon general principles of equality. However, in what may be viewed as a nod to the moral element of the general principle of equality, the IMFAT in dicta referred to religious prejudice as "a source of discrimination prohibited by the Fund's internal law as well as by universally accepted principles of human rights."⁴⁴⁶

The IMFAT again invoked general principles of human rights law in the case of *Ms. "M" and Dr. "M"*.⁴⁴⁷ There, the plaintiffs appealed the denial of their request that the IMF pension plan give effect to a court order for deduction of child support from the pension of an IMF retiree.⁴⁴⁸ Like most pension plans based in the United States, the IMF pension has a rule allowing court-ordered child support to be deducted from a pension in specified circumstances.⁴⁴⁹ As originally adopted, the IMF's rule required that such deductions arise from a "marital relationship," thus precluding deductions for palimony or child support where there was no marriage.⁴⁵⁰ The plaintiffs' request initially was denied on the basis that the pensioner was never married to Dr. "M", the mother of Ms. "M", to whom the support was owed.⁴⁵¹ However, the IMF then amended its rule to accommodate their situation, and a new request was submitted.⁴⁵² Nevertheless, the new request also was denied due to technical deficiencies in the court order and opposition from the pensioner.⁴⁵³

⁴⁴⁴ *Mr. "F"*, I.M.F. No. 2005-1, ¶ 90.

⁴⁴⁵ *Id.* ¶¶ 100-101.

⁴⁴⁶ *Id.* ¶ 81.

⁴⁴⁷ *See Ms. "M" & Dr. "M"*, I.M.F. Admin. Trib., Judgment No. 2006-6.

⁴⁴⁸ *Id.* ¶ 1.

⁴⁴⁹ *Id.* ¶ 53 n.43.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* ¶ 55.

⁴⁵² *Id.* ¶¶ 57-58.

⁴⁵³ *Id.* ¶ 61.

The IMFAT reversed both denials, and awarded the child support deductions with interest from the date of the initial denial, finding that the faults in the court order were not material, and that the original rule requiring a marital relationship was a discriminatory violation of general principles of law.⁴⁵⁴ In reaching its conclusion on the question of discrimination, the IMFAT recalled the burden shifting framework it had applied in *Mr. "R"* and *Ms. "G"*.⁴⁵⁵ As it had done in those prior cases, the IMFAT evaluated the process by which the rule was adopted, and noted that no consideration had been given to the severe effect of the "marital relationship" requirement upon children born out of wedlock.⁴⁵⁶ The tribunal indicated that, whatever justification the organization had for the "marital relationship" rule to distinguish between court-ordered alimony versus palimony, there was no reasonable basis for distinguishing in the enforcement of child support orders between children from a marriage versus children outside a marriage.⁴⁵⁷

Then the IMFAT went further. Perhaps to reinforce the outcome it already had reached, the tribunal recalled *Mr. "F"* and emphasized that this case implicates principles of human rights.⁴⁵⁸ The tribunal endorsed the ILOAT's judgment in *Mr. I.M.B.*, where marital status was held to be an irrelevant personal characteristic, and the ILOAT had overturned differentiation on that basis as a violation of general principles of human rights, including Article 26 of the International Covenant on Civil and Political Rights (1966).⁴⁵⁹

However, the IMFAT did not expressly adopt an irrelevant characteristics test or any explicit innovation to the framework it had applied in *Mr. "R"* and *Ms. "G"*, where human rights were not at issue. Rather, the IMFAT merely observed that Article 25 of the Universal Declaration of Human Rights, from 1948, protects the equal rights of "[a]ll children, whether born in or out of wedlock."⁴⁶⁰ In light of this general principle of human rights law, the tribunal concluded that, "while the terms of the provision in question may have been understandable, they nevertheless cannot be sustained."⁴⁶¹

In summary, whereas international administrative tribunals for years had made innovations to the similarly situated test in order to adapt the test to

⁴⁵⁴ *Id.* ¶¶ 130–133.

⁴⁵⁵ *Id.* ¶ 128.

⁴⁵⁶ *Id.* ¶ 131.

⁴⁵⁷ *Id.* ¶ 130.

⁴⁵⁸ *Id.* ¶ 124.

⁴⁵⁹ *Id.* ¶ 125.

⁴⁶⁰ *Id.* ¶ 133.

⁴⁶¹ *Id.*

problematic cases, the ILOAT judgment in *Mr. I.M.B.* and Judge Hugessen's dissent in *Mr. R.A.-O.* make a clear break with that tradition. Those opinions introduce a substantive conception of equality grounded in the dignity and worth of the individual person, and suggest a closer degree of scrutiny for cases of discrimination based on irrelevant personal characteristics. However, the ILOAT has cast doubt upon the vitality of the irrelevant personal characteristics test, by its failure to apply that test in judgments concerning claims for spousal benefits in respect of same sex couples. For its part, the IMFAT similarly distinguished cases involving personal characteristics affecting human dignity from other equal treatment cases, but has not articulated a closer degree of scrutiny for those cases.

V. SYNTHESIS: A UNIFYING SUBSTANTIVE FRAMEWORK

For international administrative tribunals, there is an inherent weakness in a principle of equality that purports to draw legitimacy from its universality, but is applied to divergent circumstances within disparate organizations by different tribunals that are under no formal obligation to promulgate a coherent jurisprudence. If nothing else, the preceding review of the equality jurisprudence in the international civil service demonstrates the need for some of the tribunals to more fully explain their reasoning, in order to promote the legitimacy of this general principle of law. Moreover, it is hoped that the cases demonstrates that, while much less articulated than equivalent doctrines in the jurisprudence of some member states, and far from perfect, the equality jurisprudence of the international administrative tribunals has adapted the similarly situated test into a sophisticated and capable analytical construct.

However, there remains the dual risks that, in cases of simple unequal treatment, the similarly situated test as applied by the tribunals treads too heavily upon the reasonable choices by the policymaking organs of the organization, even while the test does not get to the heart of the problem in cases of true discrimination. In the former cases, a less probing inquiry may be adequate, while a more substantial legal framework—such as the personal characteristics test—is clearly needed in the latter cases.

Rather than being viewed as competing tests, the similarly situated test and the personal characteristics test should be seen as distinct branches within a unified framework for tackling equality cases. Elements of such a unified framework can be found in the burden-shifting analysis from the IMFAT

judgment in *Mr. "R"*⁴⁶² and its progeny, in the ILOAT's judgment in *Mr. I.M.B.*⁴⁶³ and Judge Hugessen's dissenting opinion in *Mr. R.A.-O.*⁴⁶⁴

It is proposed that the first step in a comprehensive framework, as in the case of *Mr. "R"*⁴⁶⁵ from the IMFAT and the EBRDAT's decision in *Mr. C.*⁴⁶⁶ would be for the plaintiff to show that the organization distinguishes in its treatment among individuals or categories of staff. That is the *prima facie* showing of unequal treatment, and it is not an onerous burden.

The second step, again in line with *Mr. "R"*⁴⁶⁷ and *Ms. C.*⁴⁶⁸ is for the organization to state a legitimate purpose for the differential treatment and to produce evidence that the differential treatment is rationally related to those purposes. That step resembles the burden upon the defendant under the Canadian Charter to show that the discrimination is "demonstrably justified," what U.K. courts and many European courts would call "objectively justified," or what U.S. courts would term a "business necessity."⁴⁶⁹

The third step is the tribunal's degree of scrutiny. At this step, the path should diverge according to Judge Hugessen's distinction between "discrimination as opposed to simple inequality."⁴⁷⁰ To respect the natural justice aspect of the principle of equality, without unduly interfering in the discretionary business decisions of the organizations, it is necessary to apply a relatively strict standard of review in some cases even while giving more deferential scrutiny to others. Much of the jurisprudence supports this distinction, even while not acknowledging it.

⁴⁶² *Mr. "R"*, I.M.F. Admin. Trib., Judgment No. 2002-1, *supra* note 169 and accompanying text.

⁴⁶³ *Mr. I.M.B.*, I.L.O. Admin. Trib., Judgment No. 2120 (2002), *supra* note 413 and accompanying text.

⁴⁶⁴ *Mr. R.A.O.*, I.L.O. Admin. Trib., Judgment No. 2193 (2003) (Hugessen, J., dissenting), *supra* note 426 and accompanying text.

⁴⁶⁵ *Mr. "R"*, I.M.F. No. 2002-1.

⁴⁶⁶ *Mr. "C"*, E.B.R.D. Admin. Trib., 01/03 (2004), *supra* note 310 and accompanying text.

⁴⁶⁷ *Mr. "R"*, I.M.F. No. 2002-1.

⁴⁶⁸ *Mr. "C"*, E.B.R.D. 01/03.

⁴⁶⁹ For comparisons between U.S. and U.K. approaches in this regard, see Shari Engels, *Problems of Proof in Employment Discrimination: The Need for Clearer Definition of Standards in the United States and the United Kingdom*, 15 COMP. LAB. L.J. 340 (1994). The early cases on the "objectively justified" rule in the European Court of Human Rights and the European Court of Justice are the Belgian Linguistic case (case "Relating to Certain Aspects of the Laws on The Use of Languages in Education in Bel."), 1 Eur. Ct. H.R. 252 (ser. A) 1968, and Case 43/75, *Defrenne v. Sabena*, 1976 E.C.R. 455.

⁴⁷⁰ *Mr. R.A.-O.*, I.L.O. Admin. Trib., Judgment No. 2193, ¶ 18 (2003) (Hugessen, J., dissenting).

To implement such a distinction, it is necessary to know where to draw the line between discrimination and simple inequality. IGOs could legislate this line, as in Section 15(1) of the Canadian Charter of Rights and Freedoms and in U.S. legislation like the Civil Rights Act of 1964. Thus, where organizations have legislated that expatriate status is not an invidious classification, the tribunals should respect that and apply the more deferential review to distinctions on that basis. Such deference was seen in the IMFAT's focus on the process rather than the substance of the decision in *Ms. "G"*,⁴⁷¹ and in much of the analysis in the AsDBAT's case of *De Armas*.⁴⁷²

Absent guidance from the legislative organs of the IGOs, the ILOAT's judgment in *Mr. I.M.B.*⁴⁷³ usefully singles out distinctions based on irrelevant personal characteristics for special scrutiny. Reflecting the Canadian approach to invidious and "analogous" classifications, the ILOAT's test as elaborated in Judge Hugessen's dissent in *Mr. R.A.-O.*, would hold out such classifications as sex, race, nationality and marital status as discriminatory, and therefore, deserving of a stricter degree of review.⁴⁷⁴

Turning to the degree of scrutiny for reviewing cases of simple inequality, the IMFAT's judgments in *Mr. "R"* and *Ms. "G"* are instructive. In both cases case, there was no allegation in the nature of invidious discrimination. Therefore, the tribunal focused very much on the organization's process in reaching the decision to differentiate as it did. While hasty or ill-considered decisions would not per se violate the principle of equality—for example, where the difference in circumstance is obvious and relevant—a well-informed and thoroughly considered decision to differentiate among categories of staff would be entitled to substantial deference.⁴⁷⁵ In particular, it is suggested that under this lesser degree of review, once a tribunal has found that the organization had good reasons for making a non-invidious classification, it should inquire no further; the tribunal should not question whether the extent

⁴⁷¹ *Ms. "G"*, I.M.F. Admin. Trib., Judgment No. 2002-3, *supra* note 299 and accompanying text.

⁴⁷² *De Armas*, As. D.B. Admin. Trib., Decision No. 39 (1998), *supra* note 260 and accompanying text.

⁴⁷³ *Mr. I.M.B.*, I.L.O. Admin. Trib., Judgment No. 2120 (2002), *supra* note 413 and accompanying text.

⁴⁷⁴ *Mr. R.A.-O.*, I.L.O. No. 2193, ¶ 27 (Hugessen, J., dissenting).

⁴⁷⁵ See *Mr. "R"*, I.M.F. Admin. Trib., Judgment No. 2002-1, ¶¶ 62-63 ("In the Tribunal's view, the Applicant's contentions are far from frivolous. . . But however comprehensible the Applicant's position, this judgment call was not his but that of Fund management to make. . . The manner of arriving at the decision taken was deliberate and within the Fund's managerial authority.").

of the differential treatment is substantively fair or proportionate in light of that classification. Arguably, the IMFAT's dicta in *D'Aoust* and *Mr. "R"* indicated a more probing analysis, but the tribunal seemed to pull back in *Ms. "G"*, acknowledging that where there is more than one reasonable approach the organization has authority to choose among them.⁴⁷⁶

In circumstances of true discrimination, the cases support a more rigorous inquiry into the legitimacy of the organization's asserted purpose for making the distinction, and the reasonableness of the degree of differential treatment. In their groundbreaking judgments in *Sabbatini*, and *Rabozée*, the ECJ and the ILOAT, respectively, doubted that actual differences between the legal and economic status of men and women were relevant to the organizations' asserted purposes for differentiating between the benefits paid to men and women.⁴⁷⁷ In *Mr. I.M.B.*, the judgment that introduced the irrelevant personal characteristics test, the ILOAT plainly engaged in a critical evaluation of the substance of the organization's asserted purpose for treating married couples differently from unmarried persons in the same work unit.⁴⁷⁸ In the cases of *Mrs. A.H.R.C.-J.* and *Mr. D.B.*, the ILOAT seemed to doubt that the subtle differences between domestic partnership and marriage under Danish and German laws should be relevant to the organization's purposes for differentiating between the benefits paid to a married employee and one in a domestic partnership and whether the complete denial of benefits to the latter class bore a reasonable relation to those subtle differences in circumstance.⁴⁷⁹ Most recently, in the case of *Ms. "M" and Dr. "M"*, the IMFAT critically evaluated the asserted purpose of the challenged differentiation, and found that the organization had no rational purpose for treating children from a marriage differently from children outside a marriage, in its recognition of child support orders.⁴⁸⁰

It is necessary to reconcile these two degrees of review with those judgments, such as the judgment in *Mr. C* from the EBRDAT, in which tribunals seemed to apply the more probing analysis in circumstances that

⁴⁷⁶ See *Ms. "G"*, I.M.F. Admin. Trib., Judgment No. 2002-3, *supra* note 299 and accompanying text.

⁴⁷⁷ See Case 20/71, *Sabbatini v. European Parl.*, 1972 E.C.R. 345, *supra* note 209 and accompanying text; *Rabozée*, I.L.O. Admin. Trib., Judgment No. 204 (1975), *supra* note 232 and accompanying text.

⁴⁷⁸ *Mr. I.M.B.*, I.L.O. Admin. Trib., Judgment No. 2120 (2002), *supra* note 413 and accompanying text.

⁴⁷⁹ See *Mrs. A.H.R.C.-J.*, I.L.O. Admin. Trib., Judgment No. 2549 (2000).

⁴⁸⁰ See *Ms. "M" & Dr. "M"*, I.M.F. Admin. Trib., Judgment No. 2006-6.

supposedly did not involve invidious classifications.⁴⁸¹ The case of *Mr. C* involved distinctions based on expatriate status.⁴⁸² The same distinctions were at issue in *De Armas* from the AsDBAT, which emphasized that such differentiation is not tantamount to discrimination based on nationality.⁴⁸³ The EBRDAT, in contrast, expressly held that the European Bank's expatriate benefits policies did discriminate based on nationality.⁴⁸⁴ Such a finding is highly controversial, particularly in view of the organization's constitutional mandate of geographical distribution, but could be justified by the severe effects of the differential treatment along national lines, even in the absence of direct proof of a discriminatory purpose.⁴⁸⁵ By making a finding of discrimination on the apparently invidious ground of nationality, the EBRDAT established the basis to move from a deferential scrutiny to a more probing analysis. Under the proposed construct, even if the plaintiff's *prima facie* showing does not establish that the organization's classification is an invidious one, tribunals should be vigilant for evidence that such classification is the purpose or effect, and apply the more stringent degree of review upon such a finding.

VI. CONCLUSIONS

International administrative tribunals face a challenging task but an intriguing jurisprudential opportunity in crafting the legal framework for assessing claims of discrimination in the international civil service. In the absence of clear guidance or restraints from the legislative organs of the international organizations, the tribunals have for decades been relatively free to ponder and perfect their analytical approach to equality as a general

⁴⁸¹ *Mr. "C"*, E.B.R.D. Admin. Trib. 01/03 (2003).

⁴⁸² *Id.*

⁴⁸³ *De Armas*, As. D.B. Admin. Trib., Decision No. 39 (1998).

⁴⁸⁴ *Mr. C*, E.B.R.D. 01/03, ¶ 83.

⁴⁸⁵ See *Espinoza v. Forah Mfg. Co.*, 414 U.S. 86 (1973). See *Marie*, I.L.O. Admin. Trib., Judgment No. 818 (1987) (while dismissing challenge to seniority rules because plaintiff suffered no injury, tribunal cautioned that it would apply closer scrutiny in some circumstances: "The Tribunal will of course consider also whether the purpose or even the mere effect of the rule is to put some members of the staff at a severe disadvantage. If the new method of reckoning seniority did have that effect the Tribunal would have to see whether it was warranted by broader considerations, the Organisation being allowed a large degree of discretion in the matter."). It is submitted that strict scrutiny should apply where invidious discrimination based on sex, race, nationality and the like can be inferred from the severely disproportionate effects of a seniority system.

principle of law. However, the tribunals have comparatively few opportunities to develop this jurisprudence, and they have not always seized those chances to elaborate a coherent framework. This, coupled with the fact that the tribunals are not bound by each others' precedents, has resulted in divergent approaches to this general principle of law, with no tribunal consistently applying either a formalist or a substantive framework. The result is a lack of predictability in the application of the principle of equality in the international civil service.

This Article shows that a unified and substantive framework can be found in the tribunals' own judgments which, in turn, have borrowed from both European and North American jurisprudence. But this more comprehensive framework requires the tribunals to make a fundamental break with their past reliance on the formalist similarly situated test for analyzing cases of both true discrimination and simple inequality.

When invidious discrimination based on irrelevant personal characteristics is a purpose of the organization's classification of its employees or such purpose can be inferred from the effects of the classification, as in *Sabbatini* or *Mr. R.A.-O.*, then the international administrative tribunals should acknowledge the close scrutiny they will give to the organization's asserted justifications and to the necessity of the discriminatory means. The tribunals should engage in close substantive scrutiny with consistency and transparency. Not every such classification will fail this close scrutiny, and one tribunal may yet rule differently than another on similar circumstances. But a more thoroughly reasoned, substantive approach should yield more credible and sustainable outcomes in controversial cases, and greater transparency in the analysis will afford certainty and predictability benefiting all parties.

Conversely, when the claim is for simple unequal treatment between similarly situated coworkers, as in *De Los Cobos* or *Mr. "R,"* the tribunals should continue to acknowledge the authority of the legislative and administrative bodies in the IGOs to make such distinctions reasonably. But the tribunals should more clearly and consistently refrain from close scrutiny of the organizations' means for implementing reasonable distinctions.

By adopting a unified analytical construct that acknowledges different legal tests should apply to cases of discrimination versus those of simple inequality, the international administrative tribunals could greatly improve the legal certainty, predictability and thus, the credibility of equality as a general principle of law in the international civil service.

