

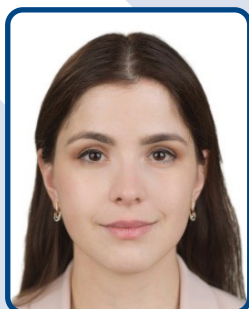
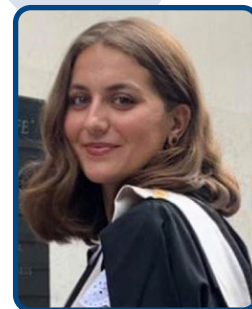
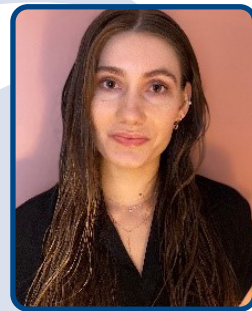
International Bar Association



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# IBA Interns' Newsletter

**SEPTEMBER 2021**



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The findings, interpretations and conclusions expressed herein are the work of the authors and do not necessarily reflect the views of the International Bar Association.

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# Contract law analysis for gig economy workers

## Introduction

This memo will present a contract law analysis of worker agreements between employer and employee, with a focus on how that analysis might be advantageous to gig workers. This memo argues that as an alternative, or as a supplement, to employment rights advocacy, gig workers seeking favorable outcomes in disputes with their employers should consider framing their dispute as a contractual unconscionability dispute rather than as a dispute over an employment contract.

## *Uber v Heller*

In Canada's Supreme Court case *Uber Technologies Inc v Heller*, a Toronto Uber driver, David Heller, sued Uber over a standard form services agreement Heller was required to sign as part of his gig employment. The agreement contained a clause stating that the agreement would be governed exclusively by the laws of the Netherlands and that, before proceeding to arbitration in the Netherlands, any dispute would first be addressed through compulsory mediation. Moreover, to invoke the arbitration clause, claimants would have pay approximately US\$14,500 in arbitration fees.<sup>1</sup>

In writing for the majority, Justices Abella and Rowe held that according to the precedent set by *TELUS Communications Inc v Wellman*, the enforceability of potentially unfair arbitration clauses should be assessed using the doctrine of unconscionability.<sup>2</sup> Unconscionability is an equitable doctrine that allows contracts obtained by the abuse of unequal bargaining power to be set aside by the courts, protecting vulnerable individuals in the contracting process. The majority noted that specific factors in the Uber contracting case at issue compelled the doctrine's application. Factors cited by the court included the imbalance of power between the two parties; the role of standard form contracts and the resulting inability to negotiate; the lack of information in the Arbitration Clause about the mediation and arbitration terms in the Netherlands;

the disproportionate costs associated with arbitration; and the significant impact the clause would have on Heller's substantive rights.

## Heller's general international contract ramifications

While *Uber v Heller* is a Canadian case, its reasoning may be adapted by gig worker advocacy groups elsewhere and invoked in cases with similar facts.

This memo will now provide more details on the tests used by the majority in the *Heller* decision. First, Justices Abella and Rowe cited a two-element unconscionability test: unconscionability requires an inequality of bargaining power arising from a weakness or vulnerability and, secondly, an improvident transaction.<sup>3</sup> The court emphasised that there are no strict criteria with respect to what constitutes 'inequality' – it can arise from personal characteristics of the claimant and/or circumstantial vulnerability. On meeting the second element requirement, the judges noted that the improvidence of a bargain 'cannot be reduced to an exact science'.<sup>4</sup> The judges adopted looser criteria because they wanted to ensure that the unconscionability test was not 'more formalistic and less equity-focused'.<sup>5</sup>

Abella and Rowe's decisions provide a pathway for Uber drivers and other gig workers around the world to challenge potentially unfair worker agreement terms. Often, service agreements between large corporations and a lower-income individual contain a range of potentially unfair terms that disadvantage the gig worker for not being classified as an employee. Some of these terms include restraint of trade clauses, unfair fees and charges, unfair cancellation clauses and excessive penalties for failure to obtain a certain level of performance. Looking at service agreements through the lens of unconscionability could provide the framework for gig workers to challenge other potentially unfair terms.



Gig worker litigants using the unconscionability argument to secure a finding of contractual inequality should consider narrowing the scope of Abella and Rowe's first element of the unconscionability test. Abella and Rowe did not precisely define the boundaries of 'inequality', instead preferring a standard that is so malleable that it might become meaningless. Instead, parties seeking to advance an unconscionability argument ought to shift the focus of the inequality branch of the unconscionability test to its traditional focus on procedural exploitation, rendering fairness of outcome the decisive issue.<sup>6</sup>

### Potential future gig worker advocacy: United States

To craft an effective gig worker advocacy strategy, gig workers will have to consider their country's specific legal context.

In the US, the Supreme Court has repeatedly upheld arbitration clauses under the Federal Arbitration Act.<sup>7</sup> In employment agreements, US courts have cautioned against the use of state law to refuse enforcement of arbitration agreements. It is for this reason that arbitration clauses have become the norm in consumer and employment contracts.<sup>8</sup>

When seeking to invalidate a mandatory arbitration clause, gig worker advocates in the US should consider asserting that certain contractual clauses are unconscionable. There is merit to this claim because unconscionability has been recognised under US law per the *Restatement of Contracts*<sup>9</sup> and Article 2 of the *Uniform Commercial Code*.<sup>10</sup> As long as: (1) courts do not exempt arbitration from unconscionability applications in US law, and (2) the 'unconscionable' clause is a condition of employment and the employment contract has no 'opt out' clause to dispel procedural unconscionability, courts may use unconscionability to strike down

an unfair arbitration clause. Courts must first analyse disparities in the bargaining power of the two parties. Next, courts must analyse the substance of the contract and determine whether the bargain itself shocks the conscience or is beyond reasonable expectations.

Gig worker advocates should pursue the unconscionability argument because there is precedent for its application in US courts. For example, in *Casement v Soliant Health, Inc.*, a federal court in California determined an arbitration agreement's forum selection clause was unconscionable because the plaintiff lived in California and would have been required to arbitrate in Jacksonville, Florida.<sup>11</sup> However, in the same case the court severed the substantively unconscionable forum selection and choice of law clauses, ultimately ordering the arbitration be conducted in the claimant's jurisdiction. The court noted that there is a strong legislative and judicial preference for severing unconscionable terms and enforcing the rest of the agreement.<sup>12</sup>

Thus, as seen in the Heller and Casement cases, gig workers and advocacy groups should consider invoking the unconscionability argument by citing these and other cases.

#### Notes

1. *Uber Technologies Inc. v Heller*, 2020 SCC 16 2 at para 10 [*Heller*].
2. 2019 2 SCR 144 at para 85.
3. *Heller*, *supra* note 1 at paras 62-65.
4. *Ibid* at 78.
5. *Ibid* at 82.
6. Chris Hunt, 'Unconscionability in the Supreme Court of Canada: *Uber Technologies Inc v Heller*' (2021) *The Cambridge Law Journal* 80(1), 25-28.
7. *Federal Arbitration Act*, 9 USC S 1-16 (1925) [FAA].
8. Andrea Cann Chandrasekher & David Horton, 'Arbitration Nation: Data from Four Providers' (2019) 107:1 *Calif L Rev* 1 at 12-18.
9. *Restatement (Second) of Contracts* S 208 (1981).
10. UCC S 2-302 (1998).
11. *Casement v Soliant Health, Inc.*, 2020 WL 2062173 at \*9 (ED Cal 2020).
12. *Ibid*.



## On our way to higher ceilings we forgot: Gender equality in the legal profession and the case of Greece

**A**t a hypothetical future, in the year 2030, meritorious women are sharing the United Kingdom's upper echelons of high-earning professions equally with men. Those higher ceilings represent the utmost goal, in the year 2021, and diversity initiatives are deployed for this purpose. Yet despite all efforts, and in spite of the country's rapid social progress in several other fronts, gender parity appears to be too slow a vessel to steer.

Elsewhere it is not. On the other side of the English Channel, if you head towards Eastern Europe and the Balkans, another picture emerges: gender parity is not so much a goal to be attained in the future, as an attainment to be recovered from the past. In countries like Greece, women have been ascending to the most senior roles of high-earning professions, including law, for the past decade. This engineering, whether the work of political action or of historical chance, is an engineering worth knowing and understanding nonetheless. Perhaps, in the midst of envisaging those higher ceilings of the year 2030, we could ponder those that have been built before.

### 50/50 est. some time ago

Greece is a model worth thinking about. The country currently boasts two women in the most senior positions of governance: the President and the President of the Supreme Court.<sup>1</sup> The Supreme Court, in particular, has seen four female presidencies since 2011, while the Council of State (CoS) has seen two female presidencies since 2018.<sup>2</sup> To put this into perspective, in the United Kingdom, the first (and last) female President of the Supreme Court was appointed in 2017, while the position of the Lord Chief Justice has always been, as the title itself reveals, not a Lady but a Lord.<sup>3</sup>

If there is a clear feminisation of these presidential offices in Greece, it is because women have been flooding the most senior levels of the judiciary for a while. Back in 2014,

male judges in the Supreme Court totalled 115. The number of women was not far from that — resting higher at 117. More recently, in 2021, women made up 16 out of 32 newly appointed Supreme Court judges, while in 2020 they represented 17 out of 22. A female majority is similarly observed in all three echelons of the CoS: councillors (60 per cent), associate councillors (65 per cent) and assistant judges (76 per cent).

Further, according to the European Parliament's most recent report on gender balance in the legal profession, Greece claimed some of the highest rates of female court presidents (70 per cent) and female notaries (83 per cent), and in general, the highest numbers of female members of the bar (57 per cent).<sup>4</sup> When it comes to membership in the bar, Greece and Latvia appear to be faced with the 'underrepresentation of men', the report solemnly points out.

And it is not just Greece. Eastern Europe has feminised the legal profession to such an extent that the goal of '50/50 by 2030' would be a downgrade from the current rates of women in law, albeit a timely remedy for male underrepresentation.<sup>5</sup> Besides the judiciary, women are flooding senior roles of private firms just as finely. In 2018, a report published by Grant Thornton revealed that Eastern Europe performed best in the representation of women in the private sector, with 36 per cent of senior roles held by women.<sup>6</sup> By contrast, the EU remained at 27 per cent, while the United Kingdom held one of the lowest rankings at 22 per cent.<sup>7</sup>

### The profession and the state

It would be a myopic claim to make that Greece and Eastern Europe have championed equality of the sexes. Simply put, they have not. Yet we must speak of the fact that change has been far more rapid there, than in Western Europe. Admittedly, history has a role to play. The huge numbers of men killed during the Second





World War generated a demand for women to learn skills and assume leadership. However, the strengthening of women's roles is not merely an inadvertent relic of warfare. It is also a matter of the sociopolitical landscape of the state. For example, if the Greek judiciary is not only feminised but also socially diverse, it is because, in Greece, it is still possible to climb the ladder. Lest we forget that the profession reflects the state.

Therefore, we could inquire whether the gender dynamics in law, and any white-collar profession, so to speak, are intrinsically intertwined with governmental choices. The eastern region's political history can testify to that. In Eastern Europe, the Communist regime, which ideologically nurtured gender equality, enacted a number of policies to encourage women to work.<sup>8</sup> In the 1960s, there were 2,500 independent women judges, while women made up the majority of accountants and economists.<sup>9</sup> In 1983 in Greece, the social-democratic government (PASOK) enacted a series of female-empowering laws, including the requirement that women retain their surnames after marriage.<sup>10</sup> In the period between 1993 and 2000, women occupied some 64 per cent of new managerial positions in the public sector.<sup>11</sup> In 2001, the government legislated gender quotas requiring that at least one third of positions be filled by each sex in relation to all collective parts of public institutions.<sup>12</sup> In the year 2021, in the United Kingdom, the choice of a woman to carry her own name still remains a topic of debate. And so are gender quotas or any prospect of similar legislation. Perhaps, political willingness it is.

This sets a different tone to the discussion of why some countries are setting goals that are already behind. And along with that, is the question of why the achievements of Eastern Europe and the Balkans have been left unheard. There comes a sense of emptiness in realising that, for whatever reason, whether forgetfulness or pride, there is little question or curiosity for those countries that are already conquering what we hope to discern in the year 2030.

Ignorance, let it be. But blissful it is not.

#### Notes

1. Elected in 2020, Katerina Sakellariopoulou became the first woman to hold the office of the President of the Hellenic Republic (the Head of State of Greece). Elected in 2021, Maria Georgiou became the fourth female President of the Hellenic Supreme Court of Civil and Criminal Justice in Greece ('Areios Pagos').
2. The incumbent President (Maria Georgiou) became the fourth female President following Angeliki Aleiferopoulou (2020-2021), Vasiliki Thanou-Christofilou (2015-2017) and

Rena Asimakopoulou (2011-2013). Further, Mary Sharp (2020-2021) and Katerina Sakellariopoulou (2018-2020) became the first two women to hold the office of the President of the Council of State. The Hellenic Council of State (CoS) ('Symvoulío tis Epikrateias') is the Supreme Administrative Court of Greece.

3. The Baroness Hale of Richmond (Lady Hale) served as President of the Supreme Court of England and Wales from 2017 to 2020. She was succeeded by The Lord Reed of Allermuir (Lord Reed), who is the incumbent President.
4. In using the expression of '50/50 by 2030' I refer to the title of the International Bar Association's nine-year global project for achieving gender parity in the highest levels of the legal profession, themselves referring to the 2030 United Nations Sustainable Development Goal No 5 on gender equality. For more information, click [here](#). For statistical data on the performance of Eastern European countries on gender parity, see European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, 'Mapping the Representation of Women and Men in Legal Professions Across the EU' (Legal and Parliamentary Affairs, 2017).
5. See report from the European Commission for the Efficiency of Justice, *European Judicial Systems: Efficiency and Quality of Justice* (CEPEJ Studies No 26, 2018).
6. Grant Thornton, 'Women in Business 2018: New perspectives on risk and reward' (2018).
7. For 17 years, Grant Thornton has been publishing an annual report on 'Women in Business'. Strangely, for the last three years, the reports have not maintained the geographical comprehensiveness of the previous reports, and countries have not been addressed individually. Grant Thornton justifies this change in the introductory text of its 2019 report on the basis that making recommendations is more important than publishing figures. Given the said lack of statistical continuity, I have chosen not to include data from the 2019-2021 reports.
8. The Communist Party Congress of 1924 instructed the Party 'to intensify the work of improving the qualification of female labour and, where possible, to draw women into industries where they have either never been employed or employed in inadequate numbers', which 'is necessary to combat conservatism in the attitude toward women inherited from capitalist society'.
9. William M Mandel, 'Soviet Women in the Work Force and Professions' (1971) 15 *The American Behavioral Scientist* 2, 255-280.
10. Law 1250/1982 introduced civil marriage and abolished the legal institution of the dowry. Article 1329/1983 requires that women keep their maiden name after marriage and even pass it on to their children.
11. United Nations Committee on Elimination of Discrimination Against Women, 'Greece describes wide range of legislation promoting gender equality as anti-discrimination committee continues exceptional session' (WOM/1361, 2002).
12. Greece has had an extensive history of gender quotas. Herein I refer to Law 2839/2000, Art 6 Government Gazette applicable to all collective organs of public institutions and Law 2910/2001, art 75 para 1 requiring at least one third of candidates from each sex in the party ballots for local and regional elections. Other gender quotas include Law 3653/2008, art 57 entitled 'Institutional frame for research and technology' requiring that one third of councils and committees in the field of research and technology must be of each sex; Law 3839/2010, art 2 entitled 'Selection of managers and directors of administrative units on basis of objective and meritocratic criteria' requiring that one third of service councils at high and mid-level public administration, must be of each sex.



# An examination of Canadian mining companies' breach of human rights abroad

Canada has been considered a nation that protects human rights and attempts to spread such an ideal on an international level. Despite such a portrayal, Canada is home to two-thirds of the mining companies of the world, many of which have been accused of human rights abuses abroad in countries where the rule of law is weak such as Eritrea and Guatemala.<sup>1</sup>

Recent decisions from Canadian courts have been more welcoming to the grievances of plaintiffs who have suffered from such human rights abuses. A recent decision from the Supreme Court of Canada (SCC), *Nevsun v Araya*, has opened the door for plaintiffs to bring about tort lawsuits for the human rights abuses that Canadian companies have committed outside of Canada.<sup>2</sup>

This summary seeks to compare other jurisdictions' use of international torts committed outside by their own corporation, relative to Canada. By understanding these different jurisdictions, we can provide better policy recommendations for courts and Parliament to move forward to better hold Canadian corporations accountable for their actions abroad.

## Corporate human right abuses

Domestic laws in developed countries strictly forbid human right abuses by corporations by making them unlawful domestically. Unfortunately, this principle has not always applied to the works of corporations from developed countries engaging in countries where the rule of law is not as strict as countries like Canada.<sup>3</sup>

As a result, these corporations have evaded accountability since Canadian laws do not allow for any accountability for the actions that domestic companies commit abroad. A report found that '28 Canadian mining companies and their subsidiaries were linked to 44 deaths, 403 injuries, and 709 cases of criminalization, including arrests, detentions, and charges in Latin America between 2000 and 2015'.<sup>4</sup>

## Current Canadian laws

The current federal laws put in place against corporate human rights abuses abroad are scarce. Parliament does have a Human Rights Act, but that Bill focuses only on protecting human rights within Canada.

However, Parliament is considering drafting a modern slavery law to make these corporations accountable: 'Following a private member's bill and ongoing government consultation, an all-party parliamentary group announced in April a draft Transparency in Supply Chains Act (TSCA), which seeks to impose obligations, including a legal duty of care, on Canadian businesses to actively take steps to prevent the use of modern slavery in their overseas supply chains.'<sup>5</sup>

## Court jurisdiction

One leading case in Canada has improved the claims for plaintiffs to bring international torts to Canadian courts: *Araya v Nevsun*. *Araya* went all the way up to the Supreme Court of Canada. In *Araya*, the plaintiffs worked at a mine, which was owned and operated by an Eritrean corporation, the Bisha Mining Share Company. This company was 60 per cent owned by Nevsun Resources Ltd., a publicly held Canadian corporation.<sup>6</sup>

The plaintiffs were forced to provide labour under dangerous and harsh conditions. 'To ensure the obedience of conscripts at the mine, a variety of punishments were used. 'The plaintiffs commenced a class action in British Columbia against Nevsun and sought damages for breaches of customary international law prohibitions against forced labor, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.'<sup>7</sup>

It was decided that customary international law was part of Canadian law. Nevsun was a company bound by Canadian law. It was not plain and obvious that the Eritrean workers' claims against Nevsun based on breaches of customary international law could not succeed. Those claims were therefore allowed to proceed

## Jurisdictional comparisons

### Australia

Australian courts have taken the opportunity to deal with matters related to human rights abuses outside of the country. There are different means for Australian courts to have jurisdiction over such matters. Usually, there needs to be a nexus where there is a link between the wrongdoing and jurisdiction.<sup>8</sup>

The courts in Australia can control their own proceedings and decide to stay a proceeding in some cases. Australia has developed its own test of *forum non conveniens* to decide which jurisdiction is the most appropriate place to hear a case. The test of *forum non conveniens* makes it harder for corporations to avoid the Australian jurisdiction than its counterparts in other common law jurisdictions.

As a result, Australian tort law is more liberal when it comes to the *forum non conveniens* rules than other commonwealth nations and Canadian courts can learn from this jurisdiction.<sup>9</sup>

### Netherlands

European law can provide insights on how to bring about torts committed outside of the EU.

In the EU, courts decided they can consider a subsidiary of a European company as part of the claim within their jurisdiction so long as the claim against both entities is closely related. 'This jurisdictional decision is important, as it implies that a forum court may hear a complaint filed by a foreign plaintiff against a foreign corporation for foreign harm.'<sup>10</sup>

## Policy recommendations

### 1. Transparency

Canadian companies outside of Canada should be required to disclose their actions. Transparency is essential for holding corporations accountable for their actions. To do so, Parliament can empower embassies to hold data on these corporations.

### 2. Fines and penalties

Legislation should be drafted to enact fines and criminalise human rights abuses. Fines similar to Canada's Bill C-11 should be implemented in cases where a human rights abuse is established abroad.<sup>11</sup>

### 3. Remedies

Parliament should also give a statutory tort for victims to bring a claim against the corporation in Canada and recover damages. Similar to Canada's Privacy Act, the latter provides a private cause of action for victims to bring to court and recover for damages that they have suffered from businesses' breach of privacy.

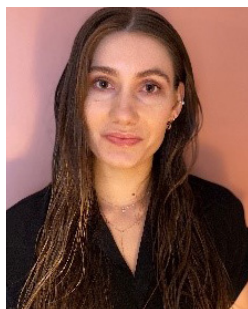
### 4. Set up an investigatory committee

The government of Canada is already setting up an ombudsman for such complaints. However, an investigation committee similar to the office of the privacy commissioner would be a good model to follow for human right abuses abroad.

#### Notes

1. Canada not walking the talk on its miners' abuses abroad, campaigners say <https://news.mongabay.com/2020/07/canada-not-walking-the-talk-on-its-miners-abuses-abroad-campaigners-say>
2. *Nevsun Resources Ltd v Araya*, [2020] SCJ No 5
3. Canada not walking the talk on its miners' abuses abroad, campaigners say <https://news.mongabay.com/2020/07/canada-not-walking-the-talk-on-its-miners-abuses-abroad-campaigners-say>
4. *Ibid.*
5. [www.hrw.org/world-report/2020/country-chapters/canada#](http://www.hrw.org/world-report/2020/country-chapters/canada#)
6. *Nevsun Resources Ltd v Araya*, [2020] SCJ No 5
7. *Ibid.*
8. Joanna Kyriakakis, 'Freeport in West Papua: Bringing Corporations to Account for the International Human Rights Abuses under Australian Criminal and Tort Law' (2005) 31:1 *Monash U L Rev* 95.
9. *Ibid.*
10. Cedric Ryngaert, 'Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v. Shell Litigation in the Netherlands' (2013) 8:2 *McGill Int'l J Sust Dev L & Pol'y* 245.
11. For a better understand of bill C-11 go to <https://parl.ca/DocumentViewer/en/43-2/bill/C-11/first-reading>





# Engendering a more equitable antitrust: The bi-directional relationship between gender and competition

**A**cross the various iterations of competition policy, ensuring equality of opportunity — competition ‘on the merits’ — emerges as a point of near consensus. While some jurisdictions may ascribe additional values and objectives to competition policy, few wholly reject the foundational principle of ‘protecting the competitive process so consumers receive the full benefits of vigorous competition’.<sup>1</sup> Vigorous competition requires market entry by incumbent-disrupting competitors; thus, when women are widely excluded from the marketplace, the ‘winners’ of the competitive process prevail less because of ‘the quality of their products, their prices, the novelty they can produce, [and] their services’,<sup>2</sup> and more as a consequence of weakened constraints on incumbent firms — that is, less competition. This article examines evidence affirming a bi-directional relationship between gender and competition, first discussing how gender influences market entry, market outcomes and product cost, followed by an analysis of how competition policy influences gender (in)equality. To understand this bi-directional relationship is to understand that ‘protecting the competitive process’ requires a competitive process characterised by greater gender equity.

Competition may affect gender inequality and gender inequality may also affect competition.<sup>3</sup> ‘Gender influences both the propensity to enter markets and the outcomes experienced within markets, impacting efficiency in ways that are relevant for competition authorities.’<sup>4</sup> Formal (de jure) and informal (de facto) barriers inhibit the market entry of female entrepreneurs, reducing the quality pool of entrepreneurs as well as the competitive pressures on incumbent or less efficient firms. Formal barriers to entry include laws banning or restricting women from working in specific industries<sup>5</sup> and acquiring property.<sup>6</sup> Absence

of sexual harassment laws also bears a negative correlation to female business ownership.<sup>7</sup>

However, the informal barriers to women’s market entry are perhaps most intransigent. Even in industries where evidence attests to a strong demand-side preference for female professionals, women remain far outnumbered by men, indicating the existence of informal barriers to women entering the profession: ‘only 6% of urologist[s] in the US are women, despite 30% of urology patients being women, and these female patients having strong preferences to be seen by a female urologist’.<sup>8</sup> Basic supply-and-demand principles suggest that female patients strongly preferring treatment by female urologists — of which there are notably few — would encourage more women to enter the urology profession; however, ‘the continued failure to train sufficient numbers of female urologists [...] suggests the market mechanism is not working well’.<sup>9</sup> This imbalance carries negative consequences for market competition, since incumbent firms maintain greater market power and therefore higher prices.

Gender also influences the prices consumers pay, with women paying more for a range of products effectively identical to those purchased by men (the so-called ‘pink tax’<sup>10</sup>), suggesting the need for demand-side remedies to improve consumers’ ability to drive competitive incentives and obtain better market outcomes.

Conversely, competition policy itself may influence gender inequality. Through the efficient and competitive functioning of markets providing substitute services, the promotion of competition in markets complementing female economic engagement, the potential definition of a separate market for gendered products in merger analysis, and the prioritisation of



market studies in key markets for women, competition policy can increase women's economic engagement and reduce gender inequality.

With studies repeatedly finding a strong negative correlation between female labour force participation and time spent working in unpaid activities<sup>11</sup>—and women engaged in significantly more unpaid work than men<sup>12</sup>—ensuring the availability and affordability of market substitutes to those services traditionally supplied by women within the household may be 'key to creat[ing] the right incentives for women's labour market participation'.<sup>13</sup> Sectors related to the provision of care services constitute markets where greater competition could be especially effective in 'releasing' women to work in the formal labour market. A Japanese Fair Trade Commission study emphasised the lack of competition in the childcare service market, resulting in a scarcity of supply that hinders women's labour market participation.<sup>14</sup> Moreover, the promotion of competition in markets whose good functioning complements female economic engagement (eg, financial and infrastructure markets) can achieve a 'double dividend' by supplying women with the means to access other services, including education and health services.<sup>15</sup>

Because price differentials unfavorable to women (the 'pink tax') are sustained by the perceived costliness of deviating from the expected choices prescribed by one's identity,<sup>16</sup> '[u]nderstanding how gender may influence demand substitutability, and hence allow the targeting of female consumers, may therefore be an important factor for competition authorities to consider when defining markets'.<sup>17</sup> Additionally, the prioritisation of market studies in key markets for women can yield insight into whether particular features inhibiting the development of such markets exist.

The fact that competition authorities likely cannot address the entire spectrum of gender inequality does not mean these authorities are without tools to promote women's economic engagement. Intergovernmental organisations can also contribute to the advancement of gender equality. The International Competition Network (ICN) is well-poised to effect increased international cooperation in incorporating gender considerations into competition policy, with ICN work products broadly recognised for their ability to set global standards.<sup>18</sup>

Crucially, a gender (in)equality-conscious competition policy may represent a valuable tool in helping governments 'build back better' post-Covid-19. With women working in greater numbers than men in industries 'that have been disproportionately affected by the sharp and potentially persistent demand shock' precipitated by the Covid-19 pandemic, pandemic-related job loss has resulted in disproportionate economic harm to women.<sup>19</sup> A strong competition policy 'offer[s] a practical and potentially high impact opportunity to drive greater gender equality within markets, and hence to help deliver a stronger, fairer and more resilient economic recovery'.<sup>20</sup>

While it may be the case that antitrust law 'cannot be expected to solve the larger political and social problems facing the [world] today',<sup>21</sup> the wholesale failure of competition authorities to utilise their mandates to acknowledge and address barriers to market entry faced by women constitutes an abdication of antitrust's most fundamental guiding principle — ensuring equality of opportunity. 'Sexism excludes less powerful competitors, prevents competition on the merits, and tilts the scales in favor of the powerful. The glass ceiling is just another cartel.'<sup>22</sup>

## Notes

1. Carl Shapiro, *Antitrust in a time of populism*, 61 Int'l J. Indust. Org. 714, 745 (2018).
2. Eric Johnson, *Google and Apple should have limits, too, says Europe's competition enforcer, Margrethe Vestager*, Vox (Sept. 20, 2016, 6:30 AM), [www.vox.com/2016/9/20/12981880/google-apple-regulation-antitrust-taxes-margrethe-vestager-european-commission-recode-podcast](http://www.vox.com/2016/9/20/12981880/google-apple-regulation-antitrust-taxes-margrethe-vestager-european-commission-recode-podcast).
3. See Estefania Santacreu-Vasut & Chris Pike, *Competition Policy and Gender* 38, 14, 33 (2018).
4. *Id.* at 14.
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16. See G. Akerlof & R. Kranton, *Economics and Identity*, 105 Quarterly J. Econ., 715-53 (2000).
17. Santacreu-Vasut & Pike, *supra* note 3, at 23.

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19. See Chris Pike, *Shaping the 'she-covey': Using gender inclusive competition policy to build back better*, OECD on the level (Aug. 18, 2020), <https://oecdonthellevel.com/2020/08/18/shaping-the-she-covey-using-gender-inclusive-competition-policy-to-build-back-better> ('In addition, many women around the world have been forced to retreat from the workforce to provide unpaid child or elderly care and household work.').

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## Successes and failures in the provision of legal technical assistance to strengthen the rule of law

### Status of the rule of law

As part of my IBA legal internship, I conducted research on the status of the rule of law in the last decade and rule of law promotion efforts, with a focus on technical assistance, including its successes and failures.

The World Justice Project (WJP) Rule of Law Index measures the state of the rule of law by examining eight factors: (1) Open Government, (2) Order and Security, (3) Regulatory Enforcement, (4) Civil Justice, (5) Criminal Justice, (6) Fundamental Rights, (7) Constraints on Government Powers, and (8) Absence of Corruption.<sup>2</sup> WJP has recorded a global decline in the rule of law for the fourth year in a row.<sup>3</sup> Factors 6, 7, and 8 have seen the steepest decline among more than 50 nation states, including Venezuela.<sup>4</sup>

This article will focus solely on the success in the provision of legal technical assistance to strengthen the rule of law in Kosovo as a case study, and on the failure in the provision of legal technical assistance to strengthen the rule of law in Venezuela as a case study, which shows the need for more effective and greater legal technical assistance.

### Legal technical assistance

Numerous types of assistance exist to strengthen the judicial and legal systems

of countries with a weak rule of law. One relevant approach is the use of legal technical assistance, which focuses on providing the necessary skills and expertise to low and low-middle-income nation states to improve their rule of law.<sup>5, 6</sup> This assistance can take the form of expert deployments, mentoring, coaching, workshops, fellowships, scholarships and exchange programmes. Assistance is provided primarily by Western nation-states (i.e., the US, through its Department of State and the United States Agency for International Development (USAID)), private foundations and international organisations such as the United Nations, the World Bank, and the International Development Law Organization (IDLO).<sup>7, 8</sup>

### Kosovo

Promoting the rule of law is an exceedingly difficult undertaking, and the results have been a mixture of successes and failures. Kosovo stands out as a success story. In the last few years, the United States and ally partners such as the American Bar Association Rule of Law Initiative (ABA ROLI) have prioritised legal technical assistance in Kosovo by basing the assistance on the nation state context, ensuring national ownership, and ensuring a coherent and comprehensive



strategic approach.<sup>9,10</sup> As a result, Kosovo ranked second in the WJP's 2020 Rule of Law Index in the Eastern Europe and Central Asia Region, with only Georgia ranking higher. Kosovo ranked 54th among 128 countries with a score of 0.54.<sup>11</sup>

Notably, Kosovo ranked 25 out of 128 in the Order and Security factor, which measures how well a society ensures the security of the population and property.<sup>12</sup> Therefore, Kosovo is a successful example of what legal technical assistance efforts can achieve when implemented successfully based on the nation state context. This approach is the most effective and sustainable approach to strengthen the rule of law because it empowers citizens and legal systems with the use of transferable expertise.

## Venezuela

Unlike Kosovo, Venezuela had some of the lowest scores among the eight factors that the WJP Rule of Law Index measures. For example, Venezuela had a score of 0.17 in the Constraints on Government Powers factor according to the WJP Rule of Law Index 2020 report, placing the nation state in 128th place out of 128. (Note: this factor measures "the extent to which those who govern are bound by law.")<sup>13</sup> Nicolás Maduro is responsible for the constraints on the rule of law by usurping the legislative and the judiciary, establishing an illegitimate Constituent National Assembly that favoured his hunger for power,<sup>14</sup> and creating one of the worst cases of constitutional gridlock in Latin America. Multiple international actors such as the Office of the United Nations High Commissioner for Human Rights (OHCHR),<sup>15</sup> the Norwegian Refugee Council (NRC),<sup>16</sup> and the European Union<sup>17</sup> have provided legal technical assistance to Venezuela with the purpose of strengthening its rule of law. However, the failures and obstacles are also greater than the successes due to the legal technical assistance focus on publicly condemning the actions of Maduro in international conferences, and the absence of effective mentorship and coaching towards citizens and legitimate key figures who might be able to ensure rule of law implementation.

As a result, Venezuela has a score of 0.17, ranking 128 out of 128 in the rule of law global rank.<sup>18</sup> Venezuela's downward trend shows the need for effective and greater technical assistance that enhances factors such as Constraints on Government Powers

in order to hold the state constitutionally and institutionally accountable under the law.

## Conclusion

Although Kosovo stands out as a successful case study in the provision of legal technical assistance to strengthen the rule of law, it is important to acknowledge that the rule of law is under siege worldwide. The downward trend in Venezuela shows sufficient evidence to establish the need for effective and greater technical legal assistance to strengthen the rule of law as a whole. As the decline of the rule of law continues to spread in nation states such as Afghanistan, Colombia, Hungary, Poland, the Philippines, and Turkey, the international community must come together rapidly to act and preserve the security and civil liberties of citizens, the independence of the judiciary and the creation of efficient measurements to hold governments accountable.

The efforts provided by the ABA ROLI in Kosovo to strengthen the rule of law serve as a model to follow for future rule of law promotion efforts. The necessary technical legal assistance must be strategically based on the context and political sphere of the nation state, on the presence of national ownership to empower national stakeholders and citizens to continue implementing the law, and on the presence of a coherent and comprehensive strategic approach that meets the present needs. It is up to us to fulfill the premise that no one is above the law.

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Shereen Hafidh



## Giving with one hand, taking with another: Iraq's next opportunity for transitional justice


**B**efore the dictatorships, wars, invasions and conflict, Iraq's ethnic and religious diversity was its richest asset. Today it is the country's greatest tool for exploitation. Since the rise of the Islamic State of Iraq and the Levant (ISIL), minority communities have been subjected to attacks at extreme levels. Following the besiegement of Sinjar on 3 August 2014, 12,000 Yazidis were killed, abducted, sexually enslaved, forcibly married, radicalised and raped. 400,000 people, over half of them Yazidis, were forcibly displaced, with many today missing or living in terrible conditions in IDP camps.<sup>1</sup>

The horrors experienced by victims call for a victim-centred approach in effecting transitional justice to restore the rule of law. On 1 March 2021, the Iraqi Parliament adopted the Yazidi [Female] Survivors Law (YSL),<sup>2</sup> which aims to give reparations to minority communities subjected to grave crimes by ISIL. This legislation was hailed as a 'milestone'<sup>3</sup> by the international community

as it recognises the crimes committed by ISIL as a genocide and crimes against humanity, and importantly includes sexual violence. While the YSL has many flaws, this article will highlight two key loopholes in Iraq's domestic law which will likely hinder the effectiveness of the YSL without legislative amendments or clarifications in the implementing regulations.

### Reparations under international law

States have an obligation to provide reparations to individuals who suffered certain violations of international law, even if committed by a non-state actor. This right is guaranteed in various international instruments, including the International Covenant on Civil and Political Rights<sup>4</sup> and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic



Principles and Guidelines).<sup>5</sup> Although soft law, the latter may be considered to be customary international law as it does ‘not entail new international or domestic legal obligations’.<sup>6</sup>

### **Scope of the Yazidi [Female] Survivors Law**

The YSL provides a comprehensive reparations programme to male<sup>7</sup> and female Yazidis, Turkmen, Christians and Shabaks who suffered crimes perpetrated by ISIL and later freed after 3 August 2014.<sup>8</sup> These crimes include acts of sexual violence, such as sexual enslavement, forced marriage and forced pregnancy.<sup>9</sup> The YSL provides various forms of reparations corresponding to the categories set out in the Basic Principles and Guidelines.<sup>10</sup> The most notable measures include a monthly salary,<sup>11</sup> the provision of health and psychological rehabilitation centres in and outside Iraq,<sup>12</sup> a free housing unit or residential plot of land,<sup>13</sup> the search for missing persons,<sup>14</sup> excavation of mass graves<sup>15</sup> and promises to strengthen prosecutions against perpetrators.<sup>16</sup>

### **The status of children born from rape by ISIL fighters**

The Basic Principles and Guidelines recommend a flexible definition of ‘victim’ to include the ‘immediate family or dependents of the direct victim’.<sup>17</sup> This is not reflected in the YSL, as provisions on the registration of children born of rape by male ISIL fighters were discarded in the final draft.<sup>18</sup> By not extending victim status to the many children born from rape,<sup>19</sup> this exacerbates discrimination against minority communities. Taking Yazidis as an example, for a child to be accepted as a Yazidi, both parents must be Yazidi. However, under Iraqi law, children born to Muslim or unknown fathers are registered as Muslim.<sup>20</sup> Additionally, in order to issue a birth certificate, the father must be present in court or his death certificate must be obtained. This is nearly impossible for ISIL fathers who have fled.

These flaws in the domestic law ostracise children and their mothers, placing children at risk of abandonment.<sup>21</sup> They will be unable to access the services under the YSL, and other basic services such as education or healthcare. This violates the Convention on the Rights of the Child, which obliges the State to ensure immediate access to birth registration.<sup>22</sup> Without amending

domestic legislation, the provisions under the YSL aimed to safeguard child survivors are therefore ineffective. The YSL ought to have addressed this crucial issue or have introduced exemptions to children born of rape.

### **Ineffective guarantees of non-repetition**

Under the YSL, those accused of kidnapping or enslaving Yazidi victims will not benefit from amnesty.<sup>23</sup> In addition, the Directorate and Ministry of Foreign Affairs are to coordinate with judicial investigations and international committees to facilitate prosecution.<sup>24</sup> However, Iraq lacks legislation to effectively hold ISIL offenders accountable. Firstly, international crimes such as genocide, war crimes and crimes against humanity are not criminalised under the Iraqi Penal Code.<sup>25</sup> Instead, most charges brought against ISIL fighters have been based on the Anti-Terrorism Law,<sup>26</sup> which is vague as it covers both serious and petty crimes and does not include sexual violence.

Secondly, discrepancies between domestic legislation and the YSL place a significant bar to justice for many victims subjected to forced marriages by ISIL fighters. The Penal Code allows rapists to marry their victims to avoid prosecution, thereby permitting marital rape.<sup>27</sup> Additionally, men are granted a legal right to ‘punish’ their wives.<sup>28</sup> Thirdly, the Personal Status Law allows for children as young as 15 years old to be married in ‘urgent’ situations if the child’s legal guardian and the judge approve.<sup>29</sup> Overall, by doing more to silence victims than punish offenders, these loopholes render Iraq as an unattractive jurisdiction for victims to seek justice. For a young girl raped by an ISIL fighter, who later forcibly married her, Iraq’s domestic law provides little to no remedy. This in turn renders the YSL’s guarantees of non-repetition ineffective even before implementation.

### **Conclusion**

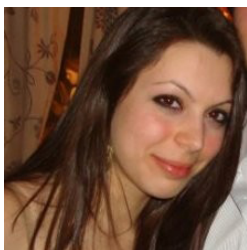
The YSL, if implemented correctly, can have transformative effects on victims and Iraq as a whole by restoring humanity and empowering those subjected to the gravest crimes. However, full and proper implementation of the YSL cannot begin without legislative amendments, which may become a reality in the new draft Penal Code introduced to Parliament in August 2021.<sup>30</sup> By giving with

one hand and taking with another, victims who are paralysed between a haunted past and an uncertain future are dealt empty promises with little hope for true transitional justice.

#### Notes

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- 3 Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, 'UN Special Representative Patten Welcomes Iraqi Yazidi Survivors' Law and Calls for Its Swift and Full Implementation to Benefit Survivors of Sexual Violence Perpetrated by ISIL' (4 March 2021) [www.un.org/sexualviolenceinconflict/press-release/un-special-representative-patten-welcomes-iraqi-yazidi-survivors-law-and-calls-for-its-swift-and-full-implementation-to-benefit-survivors-of-sexual-violence-perpetrated-by-isil](http://www.un.org/sexualviolenceinconflict/press-release/un-special-representative-patten-welcomes-iraqi-yazidi-survivors-law-and-calls-for-its-swift-and-full-implementation-to-benefit-survivors-of-sexual-violence-perpetrated-by-isil).
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- 5 United Nations General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (adopted 16 December 2005) UN Doc A/RES/60/147.
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- 10 Basic Principles and Guidelines (n 5) Principle IX.
- 11 YSL (n 2) art 8.
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- 13 *ibid* art 8(4).
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- 20 Nationality Identity Card Law No.3 of 2016, arts 20, 26. See also Juvenile Welfare Law No.76 of 1983, art 45.
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Zara Cassid



## The hypothyroidism human rights crisis: an easily treated but perpetually ignored disease that robs women of their lives

I spent my 20s desperately trying to find out what was happening to my body. Frequent doctor's visits yielded no answers. My symptoms were written off as 'stress' and I was repeatedly handed prescriptions for antidepressants I knew wouldn't help. Behind the scenes, blood tests revealed exactly what was going on, but my GP kept me in the dark and

allowed my health to deteriorate. It wasn't until I could barely function, that I was finally diagnosed with hypothyroidism.

Also called an underactive thyroid, hypothyroidism is a common condition that occurs when the thyroid cannot produce enough hormones to meet the body's needs.<sup>1</sup> These hormones are crucial for every



biological process,<sup>2</sup> and when there aren't enough, the effects are truly debilitating.<sup>3</sup> Cripplingly fatigued and deeply depressed, you lose the ability to concentrate or remember things. You can no longer think clearly or express your thoughts, you gain weight that's impossible to lose and no matter how much sleep you get, you never feel rested.<sup>4</sup> In short, your mind and body become a prison from which you cannot escape.

After I was diagnosed, I was put on the standard treatment, levothyroxine.<sup>5</sup> Five months later, some of my symptoms had improved, but I was a shell of my former self and my health continued to deteriorate. I visited my GP often, who regarded my persistent symptoms as completely unrelated to my thyroid. I was sent for numerous invasive medical tests which revealed nothing. My requests to be referred to an endocrinologist were denied. And my concerns were constantly dismissed as 'thyroid tunnel vision', despite my symptoms being listed on the NHS website as those of hypothyroidism.<sup>6</sup> One GP even told me 'I'm not saying you have cancer, but...'.

I had no choice but to take matters into my own hands. I found out about another treatment called liothyronine, which often helps thyroid patients who have not benefited from levothyroxine.<sup>7</sup> Both are synthetic thyroid hormones, but liothyronine is the active form, T3,<sup>8</sup> whereas levothyroxine is the inactive form, T4.<sup>9</sup> For T4 to have the intended effect, it must be converted to T3 by the body.<sup>10</sup> Studies show that 20 per cent of patients taking levothyroxine cannot convert enough T4 to T3 to feel well.<sup>11</sup> Of the two million patients in the UK taking levothyroxine, this is a significant number indeed.<sup>12</sup> Standard NHS thyroid function tests do not test T3,<sup>13</sup> so such patients will appear to have 'normal' test results despite having sub-optimal or low levels of T3.

A private blood test revealed that my T3 was sub-optimal, so I decided to try liothyronine. Within hours of the first dose, I felt a lightbulb switch back on in my brain. I started to smile for no reason. Within a few weeks, 95 per cent of my symptoms had completely resolved and I lost seven kilograms without trying. It is no exaggeration when I say that liothyronine has given me my life back.

The problem with liothyronine is that it is no longer available on the NHS.<sup>14</sup> Like many other UK patients,<sup>15</sup> I buy it from abroad without a prescription. As the only UK manufacturer, Advanz Pharma debranded it

in 2007 so they could exploit a loophole in NHS pricing regulations, allowing them to charge however much they wanted due to the lack of competition in the market.<sup>16</sup> Despite production costs remaining broadly stable, by 2017 they had inflated the price by 6,000 per cent, costing the NHS £260 per patient for a month's supply.<sup>17</sup> For perspective, the same amount can be purchased in Greece for about €1.<sup>18</sup> Consequently, the NHS stopped prescribing it.<sup>19</sup>

The NHS has defended its decision, claiming that there is insufficient evidence to prove that liothyronine is more effective than levothyroxine,<sup>20</sup> and that its use is linked to a higher risk of certain health complications.<sup>21</sup> Neither claim is true.<sup>22,23</sup> In 2018, Parliamentary Under-Secretary of State for Health and Social Care Lord O'Shaughnessy commissioned a consortium of thyroid associations to investigate.<sup>24</sup> They compiled a 94-page dossier of case studies and evidence revealing the impact of this decision on the quality of life of countless thyroid patients who rely on liothyronine to be able to function, many of whom had to give up often well-paid and high-performing work because they were denied this vital treatment.<sup>25</sup> How nonsensical is it to refuse patients a treatment based on economic reasons when by having that treatment, they are then able to contribute to the economy?

In July this year, the Competition and Markets Authority fined Advanz Pharma more than £100m for the price inflation of liothyronine.<sup>26</sup> But what about the many thousands of patients who have had to source liothyronine at their own expense and at great personal risk? Patients who can't afford to buy it themselves? Patients who were never even told about liothyronine because the NHS stopped prescribing it? These patients have been gaslighted by their doctors and robbed of their quality of life. Their relationships have suffered, they've had to give up their careers and hobbies, and their parenting abilities have been compromised, all because of Advanz Pharma's shameless profiteering and corruption.<sup>27</sup>

The right to health, 'a state of complete physical, mental and social wellbeing (and not merely the absence of disease or infirmity)' is protected in numerous international human rights instruments.<sup>28</sup> States have a duty to protect against human rights abuses by business enterprises under the UN Guiding Principles on Business and Human Rights.<sup>29</sup> And pharmaceutical companies have



human rights responsibilities in relation to access to medicines, particularly in matters concerning women and children.<sup>30</sup> Since women are ten times more likely to develop hypothyroidism than men,<sup>31</sup> restricting access to liothyronine through exorbitant and unjustified price inflation may even amount to indirect discrimination against women under the Equality Act 2010.<sup>32</sup> Furthermore, lack of access to liothyronine for mothers of dependent children compromises their caregiving abilities,<sup>33</sup> which violates Article 3 of the UN Convention on the Rights of the Child.<sup>34</sup> As a result of these failures, thousands of patients have suffered irreparable damage to their lives<sup>35</sup> and continue to miss out on one of the most fundamental human rights: the right to health.

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# Sexual harassment in Russian workplaces



## Introduction

**T**he issue of sexual harassment in workplaces and universities, unfortunately, remains a controversial topic in certain societies, including among social opinion in Russia. Even though the international human rights law clearly outlines the definition of sexual harassment as ‘any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another’<sup>1</sup>, the overall population in Russia still remains poorly informed about this definition or considers this topic irrelevant to the circumstances of the country. Meanwhile, according to a recent survey, every sixth woman and every 13th man in Russia have faced sexual harassment at workplaces at least once throughout their careers.<sup>22</sup>

## #MeToo?

The #MeToo movement, which spread around the world with women raising their voices about their own experiences of sexual violence, sexual abuse and sexual harassment. However, the movement was never able to spread out in Russia in a way that it was influencing the rest of the world. Those women and activists who attempted to support the movement faced public blaming and even violence<sup>3</sup>. In Russia, society still blames the woman for ‘provoking’ inappropriate actions, usually implying that ‘women should act properly so as not to provoke’. A culture of victim-blaming, as well as sexist attitudes, result in the denial of gender-based violence as a serious human rights issue. Such attitudes within the society usually stop women from reporting cases of sexual harassment at work.<sup>4</sup>

During 2020, sexual harassment in Russia was widespread, while the courts usually did not accept the victims’ claims due to insufficient evidence. In January 2020, a famous Russian journal ‘Vedomosti’ published the results of a poll of 20,257 Russian employees (53 per cent male and 47

per cent female), where it found out that 7 per cent of men and 16 per cent of women had experienced sexual harassment at work at least once. The longer the employment history, the bigger the chances that people had experienced sexual harassment. People aged 45 to 54 were twice as likely to become victims of sexual harassment than young people aged 18 to 24.<sup>5</sup>

As there is no definition of ‘harassment’ in the labour code and the law can rarely be helpful for the victims of sexual harassment. On 29 April 2020, two women reported that Aleksey Venediktov, head of the famous radio station Ekho Moskv, had sexually harassed them. Ms Anna Veduta accused Venediktov of showing unwanted attention towards her after a company dinner in 2021 and of attempting to kiss her outside her home. Another woman, who chose to remain anonymous, reported a similar experience in 2017. Mr Venediktov denied all of the accusations, even though during an interview in 2005, he shared that sexual harassment was a ‘right’ at Ekho Moskv.<sup>6</sup>

## No definition – no protection

Currently, Russia has no legal definition of harassment and no definitive instructions on addressing it in law. Under current Russian legislation, the victim can seek protection in two ways: imposing criminal liability or bringing civil liability. Criminal liability is possible only in the most severe cases of sexual harassment, where it can be attributed to sexual abuse and sexual violence: rape (Article 131 of the Criminal Code of the Russian Federation), violent acts of a sexual nature (Article 132 of the Criminal Code), coercion to sexual intercourse (Article 133 of the Criminal Code). Administrative liability for harassment can be addressed through Article 5.61 of the Code of Administrative Offences of the Russian Federation, which implies protection against the humiliation of honour and dignity of another person. The perpetrator can be held responsible through civil liability through a claim for compensation for moral harm caused by sexual harassment (Articles 1099 and 1101

of the Civil Code of the Russian Federation). However, there is no guarantee that the victim would receive any compensation if the claim is successful, as there are no laws or legal cases where moral damages due to sexual harassment would be identified.<sup>7</sup>

Only a few cases of sexual harassment were brought to court in recent years. One of the most essential harassment cases was a claim for unfair dismissal filed by a woman in March 2018, where she reported obsessive harassment by her former supervisor. This woman was officially dismissed for not passing the probationary period, while the victim claimed that the dismissal was explicitly related to sexual harassment. The victim demanded financial compensation during the period of forced unemployment and compensation for moral damage. In the district court, the woman's claim was denied due to the expiration of the limitation period (Oktyabrsky District Court of Murmansk, case No. 2-1685 / 2018 ~ M-909/2018), where the court did not take into consideration that the cause of this expiration was the fact that the victim was treated by psychologists for seven months. The Supreme Court decided to reconsider the case on the basis of unjustified dismissal. In December 2019, the regional court did not accept the claim.<sup>8</sup>

According to the Vedomosti journal survey, 17.2 per cent of those who faced sexual harassment submitted a letter of resignation, 9.9 per cent filed a complaint to the human resources department or their immediate supervisor, 9.7 per cent asked their supervisors to be transferred to another department and only 2.6 per cent of victims approached law enforcement agencies.<sup>9</sup>

## Conclusion

As Grant Gilmore wrote in his work *The Ages of American Law*, 'law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law'.

Nowadays, most cases of sexual harassment at work in Russia still remain unnoticed as the victims fear public blaming and shaming. Meanwhile, those who dare to fight for their rights usually end up being fired from their workplaces where sexual harassment occurred.<sup>10</sup> Therefore, the change should start within the society. The victims should receive support, and workplaces should start introducing policies preventing cases of sexual harassment at work.

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Harriet Watson



# Red tape for innovation: A case for regulating the quality of 5G service across Europe

**T**he fifth generation of wireless broadband technologies (5G) is set to be a ‘game changer’ for Europe.<sup>1</sup> 5G itself incorporates a series of ‘disruptive innovations’<sup>2</sup>, but it is also a ‘building block’<sup>3</sup> of a wider ecosystem of innovation. The importance of maintaining a consistent, reliable and secure 5G network is therefore central to the future of Europe.

5G gives rise to a host of new regulatory challenges from spectrum allocation to security.<sup>4</sup> One pan-European regulatory challenge that has received comparatively little attention is Quality of Service (QoS). Broadly, QoS refers to network performance through parameters such as delay.<sup>5</sup> The harmonisation of QoS regulation for 5G networks could promote confidence in the network, which will yield innovation in the wider 5G ecosystem.

Geopolitical tensions over the 5G infrastructure highlight its importance for the future.<sup>6</sup> 5G drives innovation through facilitating its ecosystem of associated applications, such as e-health, e-agriculture and driverless cars.<sup>7</sup> The wider 5G ecosystem is an important way in which 5G is different from its previous generations; it has the potential to fundamentally alter the future of sector coupling.<sup>8</sup> The societal importance of 5G is also significant, and its potential to transform climate solutions has been widely documented.<sup>9</sup> The wider importance of effective network function is why BEREC, the European body for regulating electronic communications, has identified 5G as a strategic priority for 2021–2025.<sup>10</sup>

Distinguishing themes of 5G are high-speed, low-latency and dense connections. Enhanced mobile broadband connections are valuable for entertainment and communications and will dominate the first phase of 5G deployment.<sup>11</sup> Arguably, a distinct value of 5G is its application to the Internet of Things (IoT).<sup>12</sup> This article will primarily reflect on using 5G for innovation of IoT applications, where ultra-reliable, low-latency

connections are both safety-critical and mission-essential.<sup>13</sup>

QoS refers to the ‘characteristics of a telecommunications service that bear on its ability to satisfy stated and implied needs of the user of the service’.<sup>14</sup> It is defined from a systems perspective and includes measurements of speed, accuracy and reliability<sup>15</sup> rather than subjective user metrics, such as user expectations.<sup>16</sup> It is highly relevant for 5G because end-users will increasingly be machines, rather than humans, and variations that a human would not notice could have significant implications for machine function.<sup>17</sup> QoS is not a new requirement, but 5G increases its relevance.

The importance of QoS has been underlined at a global level. However, these commitments remain superficial, calling for a ‘satisfactory quality of service’<sup>18</sup> without further explanation. At a European level, the EU Electronic Communications Code (EECC) addresses QoS by focusing on increasing transparency, to allow end-users to make informed decisions. However, its impact is significantly reduced by the fact that the requirements are primarily at the discretion of the National Regulatory Authorities (NRA),<sup>19</sup> which has led to a fragmented application of QoS standards and monitoring mechanisms across Member States. Measurement indicators vary widely, with an average of 31 indicators per NRA, which is exacerbated when some countries barely monitor QoS.<sup>20</sup> The result of the considerable flexibility of the EECC is that regional and pan-European comparisons of QoS are difficult, with no option for external assurance. Before 5G, implications of such flexibility were limited. However, an economy of IoT, relying on seamless, consistent and reliable 5G will not tolerate even minor QoS discrepancies.

Some stakeholders consider the current framework to be sufficient.<sup>21</sup> It is costly and burdensome to inflict further regulation onto markets that drive for



innovation. For providers, it is preferable to maintain flexibility and allow competitive forces within the 5G market to maintain standards.<sup>22</sup> Providers are also reluctant to disclose additional, commercially sensitive information.<sup>23</sup> Countries such as The Netherlands embrace this entrepreneurial model of regulation<sup>24</sup> towards QoS. Economic gains from differentiated QoS price plans are motivational for providers and consumers seeking different levels of service have more choice. By allowing flexibility, it benefits innovation within the 5G market.<sup>25</sup>

While minimal intervention might be appropriate for promoting innovation within the 5G market, 5G supports a wider ecosystem of innovation that should be accounted for. Trust in the network is consequential for the innovation of devices that depend on ultra-reliant, low-latency 5G connections.<sup>26</sup> Seamless transitions between different QoS areas are essential for IoT technologies, such as driverless cars, to function. Without certainty of consistent QoS regionally, nationally and internationally, IoT devices run the risk of significant ramifications. In the most extreme case, failure to appropriately monitor QoS of the 5G network could result in the loss of life.<sup>27</sup> With no certification of standard, other than trusting market forces, investors and innovators in the entire 5G value chain are left unsure of the QoS and therefore the operational feasibility of their technologies.

The case for regulating QoS standards in Europe revolves around building trust among innovators and their investors in the wider 5G ecosystem. This is important because innovation in the ecosystem will magnify the impact and benefit of 5G to the economy and society. Trust will come from reducing risks of QoS inconsistencies through certified pan-European standards,<sup>28</sup> comparable and transparent QoS measurements and from addressing social challenges of Internet access inequality.<sup>29</sup> Fragmented regulatory frameworks make it difficult to build the confidence of new markets, which is why harmonisation of QoS would be beneficial.

Europe views 5G as a 'building block' for a wider ecosystem of innovation. High level and consistent QoS is a prerequisite for effective 5G enabled IoT technologies. Currently, the regulatory framework for QoS is flexible, and QoS monitoring in Europe is fragmented. Innovators and their investors need to trust that their devices will work effectively and securely across Europe and standardisation of

QoS is required to achieve this outcome. The importance of the wider 5G ecosystem to the future of Europe suggests that the benefits of innovation, built on trust in the network, would outweigh the challenges of additional regulatory requirements for providers.

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