

The right to equality in Europe: EU Equality Directives and related laws

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The right to equality in Europe

- Relationships between:
 - EU Equality Directives and EU Human Rights Frameworks
 - EU and Council of Europe
 - EU and United Nations

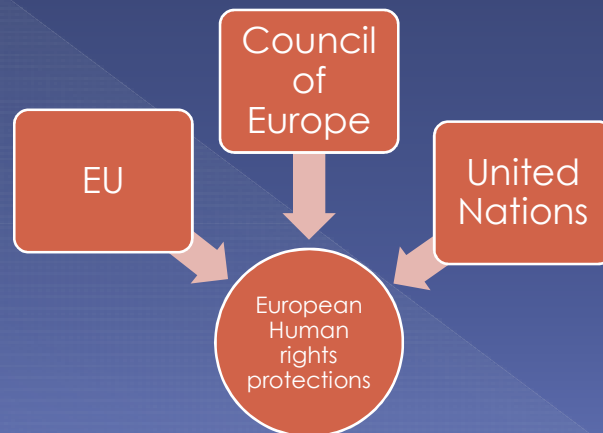
Equality as a human right

"The Union is founded on the values of respect for human dignity, freedom, democracy, **equality**, the rule of law and **respect for human rights**, including the rights of persons belonging to **minorities**. These values are common to the Member States in a society in which pluralism, **non-discrimination**, **tolerance**, justice, solidarity and **equality between women and men prevail.**"

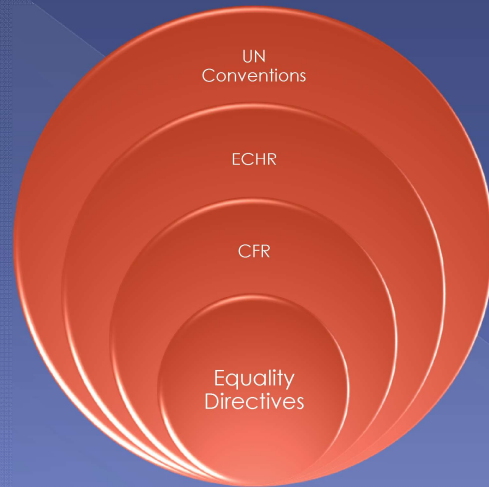


Article 2, Treaty of the EU

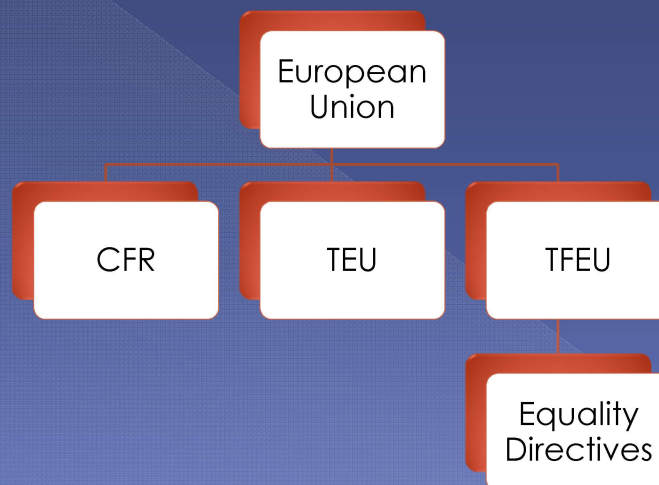
The right to equality in Europe: institutions



The right to equality: legal frameworks



Lisbon Treaty 2009



Lisbon Treaty: TEU

- Sets out aims and objectives of the EU with equality and other human rights at its heart
- Charter of Fundamental Rights has the same status as the TEU and the TFEU: article 6(1)
- Requires the EU to accede to the ECHR: article 6(2)
- Fundamental rights under the ECHR and Member States constitute “general principles” of the Union’s law: article 6(3)

Lisbon Treaty: TFEU

- Organises the functioning and areas of competence of the EU
- Power to develop Equality Directives on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation: article 19
 - Race Directive 2000/43/EC
 - Framework Directive 2000/78/EC
 - Gender Goods and Services Directive 2004/113/EC
 - Recast Gender Employment Directive 2006/54/EC
- **Note:** Proposal for Horizontal Directive 2008 (to complement Framework Directive) not implemented

Equality Directives: scope

	Employment, Vocational training	Social security	Goods and Services	Housing	Education
Race	Yes	Yes	Yes	Yes	Yes
Sex	Yes	Yes	Yes	Yes	No
Disability	Yes	No	No	No	No
Sexual orientation	Yes	No	No	No	No
Religion or belief	Yes	No	No	No	No
Age	Yes	No	No	No	No

Charter of Fundamental Rights

- Agreed in December 2000 but not legally binding until 1 December 2009
- Sets out key human rights of EU citizens in relation areas of dignity, freedom, equality, solidarity, citizens' rights and justice where EU has competence
- Charter applies to all EU institutions, legislation, policies and to Member States in implementing EU legislation
- Charter is directly enforceable by the CJEU
- National courts must apply Charter to cases involving the application of any EU law (including the Equality Directives)



Charter of Fundamental Rights

Right to non-discrimination

“ Any discrimination based on **any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited**” : article 21(1)

Charter of Fundamental Rights

	Equality Directives	Charter: article 21
Status	"Framework" for equality which national Governments must implement	Constitutional right to equality
Effect		Disapply inconsistent national laws Declarations where EU laws are incompatible with Charter
Application	Member States	Member States and EU Institutions (eg proposed laws)
Characteristics	Limited to six specified characteristics	Broader (eg political opinion, language)

Charter: relationship between CFR and Equality Directives

Egenberger Case C-414/16 17 April 2018

Issue: Does German law comply with Framework Directive and CFR?

Facts:

Application for employment in German Charity to produce CERD report, requirement that member of Protestant Church. E applied but not given interview

Held: GOR exception in Framework Directive must be proved to be necessary to apply and that requirement is proportionate, not proved here

Directive only provides framework for equality, article 21 of CFR provides right to non-discrimination on grounds of religion

National law that is not consistent with CFR must be disapplied

Similar approach in **IR v JQ C-68/17 11 September 2018**

Facts: remarriage of a Roman Catholic doctor in Germany without first marriage annulled

Held: (1) GOR exception does not apply here as in role as doctor adherence to notion of marriage not necessary
(2) Others in same role as JQ were not of Catholic faith so no GOR



Case study: Equality Directive incompatible with CFR

Achats Case C-236/09 1 March 2011

Issue: Does the Gender Equality Directive comply with the CFR?

Facts:

NGO brought a claim against the Belgium government to annul the Belgium equality legislation permitting gender discrimination in insurance matters (eg life, driving)

Belgium equality legislation implemented the Gender Goods and Services Directive 2004/113/EC which permitted such discrimination

Reference made to the CJEU on the interpretation of the Directive

Case study: Equality Directive incompatible with CFR

Achats Case C-236/09 1 March 2011

Held:

Article 4 prohibits direct and indirect sex discrimination in the provision of goods and services

Article 5(1) prevents "...the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services" in insurance contracts concluded after 21 December 2007

Exception

Article 5(2): notwithstanding article 5(1), sex may be used as a determining factor in the assessment of risk "based on relevant and accurate actuarial and statistical data"

Applies only to contracts concluded before 21 December 2007;
Member States must compile and publish data relating to sex as an actuarial factor, and review their decision in December 2012

Case study: Equality Directive incompatible with CFR

Achats Case C-236/09 1 March 2011

Held:

Recital 4 refers to equality between men and women as a fundamental principle of the EU

Article 21 Charter prohibits discrimination on grounds including sex

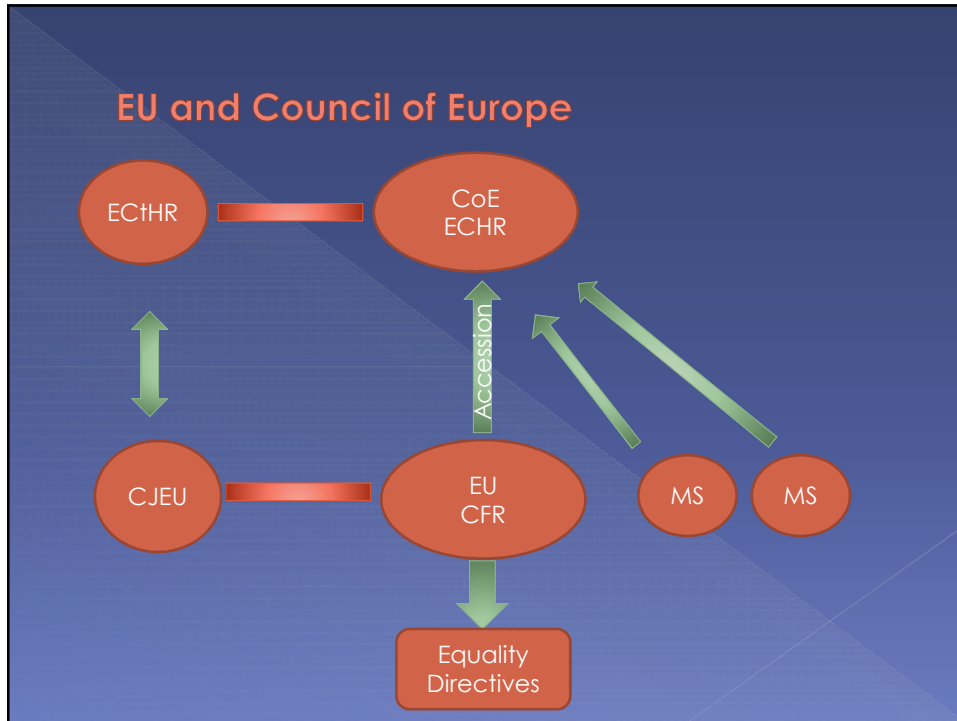
Article 23 requires equality between men and women in all areas

No time limit on derogation under article 5(2)

Article 5(2) is "incompatible with articles 21 and 23" and invalid from 21 December 2012.

Insurers were required to change their policies and Member States their national laws.





EU accession to ECHR

- TEU requires the EU to accede to the ECHR: article 6(2)
- Currently ECHR are **general principles** of EU law but not binding on EU institutions **leaving a gap in protection and enforcement**
- Accession will enable EU citizens to bring claims in the ECtHR where alleged breaches of the ECHR by the EU institutions or Member States in implementing EU law
- **Draft agreement April 2013 was rejected by CJEU: Opinion 2/13, 18 December 2014**
Draft agreement does not sufficiently preserve EU autonomy
- Progress on accession stalled

The EU Directives and the ECHR



- Relationship between ECHR and EU Equality Directives
- CJEU reference to ECtHR case law where relevant to interpreting EU Equality Directives
- Case study of religious discrimination: divergent approaches of ECtHR and CJEU

EU Directives and Article 14 ECHR

	Equality Directives	ECHR (Article 14)
Scope	Six protected characteristics	Article 14: includes "other status" eg being a prisoner
Key concepts	Direct and indirect discrimination Harassment Reasonable accommodation (disability)	Direct and indirect discrimination (but note direct discrimination can be justified) Reasonable accommodation
When engaged	And must be within scope (eg employment, services, education)	Not a free standing right, another right must be engaged: - Art 9: Freedom of religion and discrimination (wearing religious dress at work); - Art 8: family life and discrimination (eg sexual orientation discrimination and employment benefits)

Case study: religious discrimination and freedom of religion



- Religious discrimination: key current issue in Europe, particularly against Muslims: almost 1/5 reported religious discrimination in 2017, compared to 1/10 in 2008: FRA
<http://fra.europa.eu/en/publication/2017/eumidis-ii-main-results>
- Relationship between religious discrimination and rights of others (eg sexual orientation)
- Until 2017 no ECJ cases on religious discrimination: ECHR cases provide guidance

Case study: religious discrimination and freedom of religion



Freedom of religion

- Freedom of thought: article 9(1)
- Right to manifest religion
- Limitations only where:
"necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." Article 9(2)
- Possible limitations at work:
- dress codes; health and safety; days of work; protecting rights of others.

Religious discrimination and freedom of religion



- **Eweida v UK, Chaplin v UK**, European Court of Human Rights, 15 January 2013
- Intervention by Equality and Human Rights Commission
- Freedom of religion and religious discrimination claims: articles 9 and 14
- Unsuccessful claims of direct and indirect religious discrimination in UK domestic courts: did courts properly apply domestic discrimination law in compliance with article 9 and 14?
- What are the key elements of the right to manifest your religion in private employment?

Religious discrimination and freedom of religion

Eweida v UK, Chaplin v UK

Held:

Eweida, 5 to 2 was a breach of article 9
Chaplin, unanimously was no breach of article 9

- Court emphasised the importance of the right to freedom of religion and positive obligation on States to protect it in the private sector

The visible wearing of a cross or other manifestation does not need to be a **mandatory requirement** of a religion in order to be protected

The fact that an employee can **change jobs** should not be determinative as to whether there was an interference with article 9 rights, but **a factor in deciding whether policies were proportionate**

Religious discrimination and freedom of religion

Eweida v UK, Chaplin v UK

Relevant principles for indirect religious discrimination claims:

Eweida

- Uniform to ensure professional image and brand is a legitimate aim
- But measures were not proportionate because:
 - (a) Other religious groups were able to wear religious dress with BA uniforms
 - (b) BA had changed its uniform policy to permit wearing of the religious items

Chaplin

- Dress policy of nurses in hospitals was for health and safety reasons
- Concern of injuring patients with items getting caught
- No other religious groups were able to wear religious items

Religious discrimination and freedom of religion

Achbita v G4S Secure Solutions C-157/15 14 March 2017

Facts: Achbita a Muslim employed as receptionist. Unwritten rule that all G4S workers could not wear visible signs of religious, philosophical or political belief.



A wanted to start wearing Islamic headscarf, told against policy of neutrality, company then formally introduced a policy.

Held:

Meaning of religion and freedom of religion should be interpreted consistently with article 9 ECHR

Religious discrimination and freedom of religion

Achbita v G4S Secure Solutions C-157/15

Held:

There was no **direct discrimination** as the policy related to all religious, philosophical or political beliefs

On **indirect discrimination**:

- Aim of neutrality was legitimate and consistent with CFR article 16 right to conduct business;
- Aim consistent with Eweida ECHR decision;
- Policy is “**appropriate**” where it is “genuinely pursued in a consistent and systematic manner”
- Policy is “**necessary**” where it only applies to workers that interact with customers
- For national courts to decide whether indirect discrimination

Religious discrimination and freedom of religion

Achbita v G4S Secure Solutions C-157/15

Analysis:

On indirect discrimination:

- **Status of freedom of religion diminished:** not sufficient consideration of status of article 9 right to freedom of religion and that it may take precedence over business interests;
- **Policy applying to all religions:** why does that make it proportionate?
- **Neutrality:** does this have the same application in private sector as justification of secularism of the public sector? How does dress affect ability to be neutral in workplace?
- **Questionable reasoning**

Religious discrimination and freedom of religion

Bougnaoui v Micropole C-188/15 (France) 14 March 2017

Facts: Bougnaoui employed as a design engineer, wore an Islamic headscarf. Customer objected and asked that she not wear it, B dismissed for refusing to remove it.

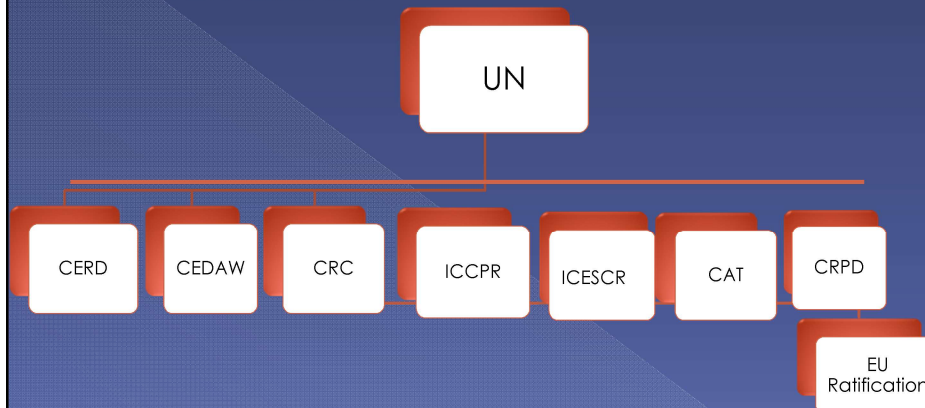
Whether willingness of employer to consider wishes of customer not to wear headscarf a GOR: article 4(1) Framework Directive

Held:

- Exception should be narrowly interpreted;
- Only applies where "nature of the particular occupational activities" or "context on which they are carried out require a characteristic";
- No general policy: subjective considerations of wishes of customers not relevant;
- No GOR, direct discrimination
- Same outcome in Court of Cassation, 22 November 2017

MICROPOLE
Driving Distinction

The EU and UN



- CRPD entered into force 3 May 2008, EU ratified 11 January 2011
- First EU ratification of an international human rights Convention: ratification of other UN Conventions?
- CRPD binding on EU institutions and law

EU ratification of CRPD: implications

- EU law not fully compliant with CRPD:
 - no protection from disability discrimination in services, housing, education, and health (see Proposed Directive)
 - **CRPD Committee Concluding Observations on EU, 2/10/2015**
- CRPD relevant to interpretation of disability discrimination law
 - meaning of disability
 - requirement of reasonable accommodation



Case law on disability discrimination

Chacon Navas C-13/05 11 July 2006

Meaning of disability

No definition in Framework Directive 2000/78/EC

Decision: it refers to "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life" and must be probable to "last for a long time"

Sickness in itself is not a disability

Case law on disability discrimination

Ring C-335/11 and Werge Germany C-337/11 11 April 2013

Facts:

- Ms Ring worked at a Housing Association and suffered constant lumbar pain. Ms Werge worked as an office assistant and was the victim of a road accident and suffered whiplash
- Both were dismissed pursuant to their contracts which permitted dismissal on one months notice where sick for total of 120 days during 12 month period
- Claimants argued that they were disabled and should have been offered reasonable adjustment of part time work

Case law on disability discrimination

Ring C-335/11 and Werge C-337/11 11 April 2013

Held:

As the CRPD has been ratified by the EU, Directive 2000/78 **must as far as possible be interpreted consistently**

Applied definition under CRPD (Art 1):

"include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

Case law on disability

Ring C-335/11 and Werge C-337/11 11 April 2013

Held:

- An illness can constitute a disability where it involves a:

"limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one"

- Reduction in working hours may constitute a reasonable accommodation

Kaltoft C-354/13 Denmark, 18 December 2014:
similar approach to obesity



Conclusions

- Equality Directives are **closely connected** with human rights frameworks in EU, CoE and UN and essential to understand the relationship
- Human rights frameworks provide **constitutional rights** to equality which **complement Equality Directives but have some different effects**
- Equality Directives and human rights frameworks in EU, CoE and UN are **all vital** to upholding right to equality and other human rights

