

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

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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

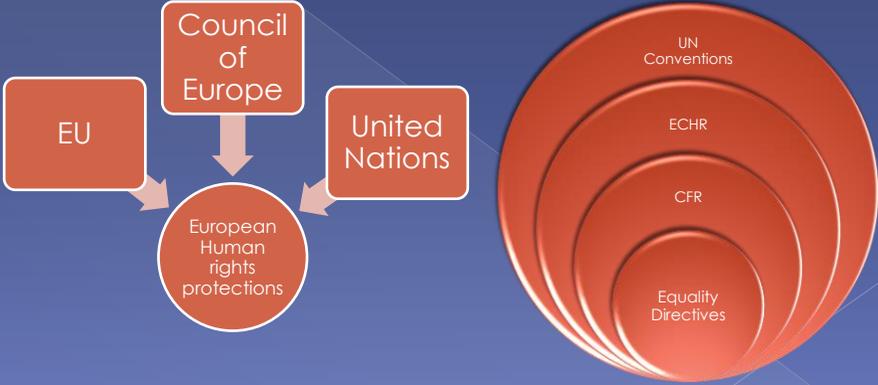


A cartoon illustration on a white background. On the left, a blue tree trunk with three yellow stars is shown. A branch extends to the right, forming a shape similar to the European Union flag. A man in a black suit and top hat is using a chainsaw to cut through the branch. He is looking back over his shoulder with a nervous expression. The chainsaw is cutting through the wood, with sparks flying. The cartoon is signed 'Salerno' in the bottom right corner.

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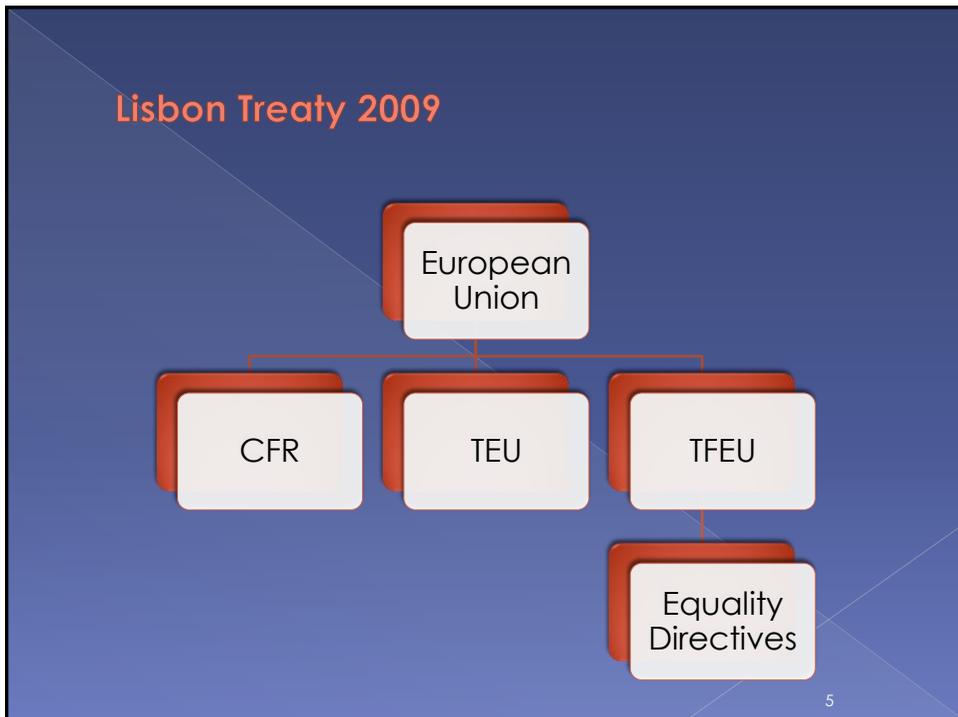
The right to equality in Europe: institutions and legal frameworks



A diagram illustrating the legal frameworks for equality in Europe. On the left, three boxes labeled 'EU', 'Council of Europe', and 'United Nations' have arrows pointing towards a central circle labeled 'European Human rights protections'. On the right, a series of four concentric circles represent a hierarchy of legal instruments, from the outermost 'UN Conventions' to the innermost 'Equality Directives'. The circles are labeled from top to bottom: 'UN Conventions', 'ECHR', 'CFR', and 'Equality Directives'.

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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)

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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

	EMP	Social security	GFS	Housing	Education
Race	Yes	Yes	Yes	Yes	Yes
Sex	Yes	Yes	Yes	Yes	No
Disability	Yes	No	No	No	No
SO	Yes	No	No	No	No
RB	Yes	No	No	No	No
Age	Yes	No	No	No	No

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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 against EU Institutions and Member States
- National courts must apply Charter to cases involving the application of any EU law (including the Equality Directives)



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Charter of Fundamental Rights

Article 20: right to equality before the law

Article 21: 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)

	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)

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Charter of Fundamental Rights

Article	Right
Article 1	Human dignity
Article 7	Private and family life
Article 10	Freedom of religion
Article 16	Freedom to conduct business
Article 23	Equality between men and women
Article 25	Rights of the elderly: life of dignity, independence and participation
Article 26	Rights of persons with disabilities: independence, integration and participation
Article 47	Right to an effective remedy

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Race discrimination and right to a remedy

Equality Ombudsman Sweden v. Braathens Regional Aviation C-30/19 April 2021

Facts: Claim for racial discrimination brought by Ombudsman on behalf of passenger of Chilean origin. Was subjected to extra security check on board the flight because he was thought to be of Arabic origin

Before the Stockholm District Court Braathens agreed to pay the amount of compensation claimed (10,000 Swedish Kroner), but without admitting liability for the discrimination.

Court refused, despite submissions by Ombudsman, to make orders that there had been discriminatory conduct by Braathens, given they didn't admit liability

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Race discrimination and right to a remedy

Equality Ombudsman Sweden v. Braathens Regional Aviation C-30/19 April 2021

Reference made by Supreme Court to CJEU to determine whether refusal to make finding of race discrimination was a breach of article 47 CFR, right to an effective remedy.

Held:

Inability of Swedish Court to make finding of discrimination was in breach of the provisions:

- Article 7 and 15 regarding right of enforcement and appropriate sanctions of Race Directive;
- Article 47 CFR on the right to an effective remedy.

As a result of article 47, must disapply any national law that is inconsistent with the rights.

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Race discrimination and right to a remedy

Equality Ombudsman Sweden v. Braathens Regional Aviation C-30/19 April 2021

Held:

Article 15 Race Directive
"Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive."

- Payment of money not in itself a sufficient remedy
- Finding of discrimination has an important deterrent effect

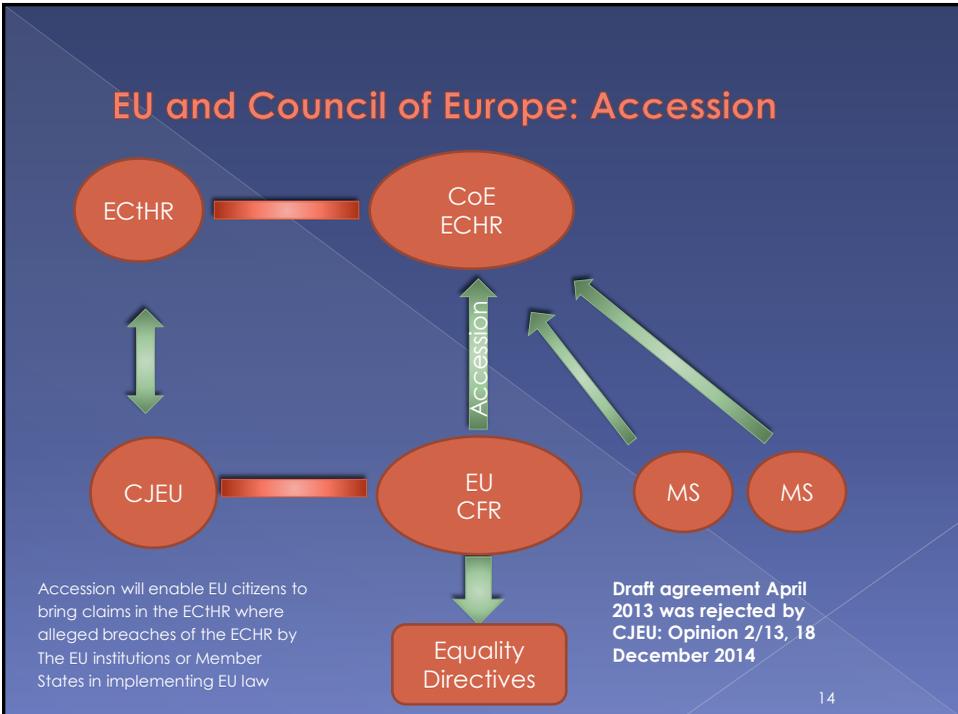


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EU Directives and Article 14 ECHR

	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)

CJEU also refers to ECtHR case law where relevant to interpreting EU Equality Directives

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Case studies: 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;
 - protecting rights of others.

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Religious discrimination and freedom of religion

Protection from religious discrimination, freedoms of religion and expression

Right to equality

Protection from LGBTI discrimination

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Religious discrimination: dress codes

- **Eweida v UK, Chaplin v UK No. 48420/10**
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?

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Religious discrimination: dress codes

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**

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Religious discrimination: dress codes

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 where 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

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Religious discrimination: dress codes

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

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Religious discrimination: dress codes

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

Analysis: indirect discrimination:

- **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 some workplaces?
- **Customer facing roles:** why can't employees wear religious dress when dealing with customers?

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Religious discrimination and LGBTI rights



- **Ladele v UK, McFarlane v UK No. 61471/10**
- Unsuccessful UK domestic claims of direct and indirect religious discrimination
- Did the UK domestic courts properly apply domestic discrimination law in compliance with articles 9 and 14?
- Reasoning of ECtHR relevant to interpreting Directive 2000/78/EC in relation to religious discrimination

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Religious discrimination and LGBTI rights

Ladele v UK, McFarlane v UK

Held:

Ladele, 5 to 2 was no breach of articles 9 and 14

McFarlane, unanimously was no breach of article 9 and 14

Article 9 is a qualified right: can be limited to protect the rights of others

Ladele: Local authority entitled to enforce policy of employees not discriminating against others on grounds of sexual orientation in relation to **public service** of civil partnerships

McFarlane: counselling organisation was entitled to enforce policy of providing counselling service without discrimination

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Religious discrimination and LGBTI rights

Ladele v UK, McFarlane v UK

- Directive 2000/78/EC protections from religious discrimination must be interpreted in light of Article 9 ECHR case law regarding protecting rights of others (eg protection from sexual orientation discrimination)
- Consistent with article 21 of Charter Fundamental Rights which prohibits discrimination on grounds including sexual orientation in any area of public life, and must be applied in interpreting Directive

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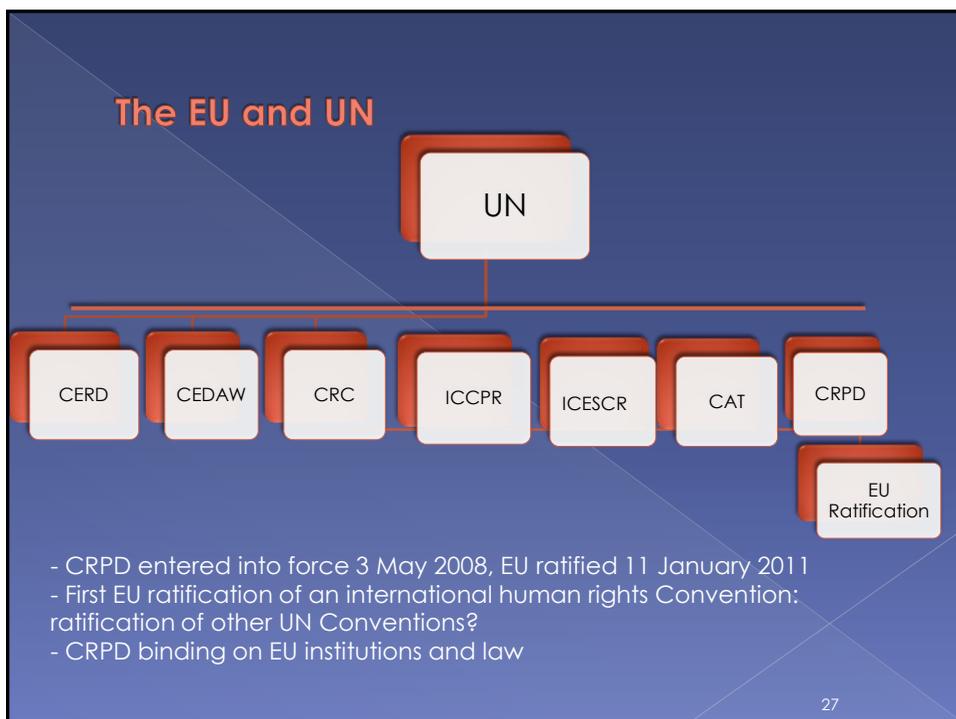
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Religious discrimination and LGBT rights: public versus religious/private life



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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

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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

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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

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Case law on disability discrimination

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

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.”

An illness can constitute a disability where above criteria satisfied

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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 and related rights which **compliment Equality Directives**
- Equality Directives and human rights frameworks in EU, CoE and UN are **all vital** to upholding right to equality and other human rights



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