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The European legal framework on equality

With special attention to the EU Charter of Fundamental Rights, its legal value and the issue of the horizontal direct effect of Article 21 in the case law of the CJEU

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Presentation chart

- I) The concept of prohibition of discrimination
- II) The sources of the European legal framework on equality
- III) Primary EU law
- IV) Directives 2000/43 and 2000/78
- V) The role of the Charter of Fundamental Rights

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I) The concept of prohibition of discrimination

- **General principle of equality**
 - Equal treatment of the like and unequal treatment of the unlike
 - Prohibition of arbitrary differentiation
 - Distributive justice
- **Prohibition of discrimination**
 - Prohibition of less favourable treatment because of certain protected characteristics
 - E.g. gender, racial origin, religion, sexual orientation, disability
 - Systems for indicative or exclusive enumeration of features ("open" or "closed" list)
 - Equality + Dignity
 - Possibility of justification for certain objective reasons

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I) The concept of prohibition of discrimination

Distinctive cases:

- **Prohibition of discrimination based on nationality**
 - Resulting from the free movement of workers (Articles 18 + 45 TFEU)
- **Prohibition of discrimination on the basis of the type of employment contract**
 - Measure to protect employees with atypical employment relationships
 - e.g. fixed-term contracts, part-time contracts, etc.
- **Prohibition of discrimination in the exercise of rights under Union law**
 - Prohibition of unfavourable treatment in retaliation
 - e.g. Article 12 of Directive 2002/2041, Article 14 of Directive 2019/1158, Article 17 of Directive 2019/1152

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II) The sources of the European legal framework for the prohibition of discrimination

Variety of sources

1. National law
2. Union law
3. International law
 - O.E.E.
 - E.g. UN *Convention on the Rights of Persons with Disabilities (U.N.C.R.P.D.)*
 - International Labour Organization
 - E.g. *I.S.C. No. 111*
 - Council of Europe
 - *ECHR* (Article 14 + 12th Additional Protocol)
 - *(Revised) European Social Charter*

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II) The sources of the European legal framework for the prohibition of discrimination

Variety of sources

- E.g. ECtHR, *I.B. v. Greece* (ref. 552/10)
 - Discrimination due to asymptomatic HIV => Violation of Articles 8 + 14 ECHR
 - Also: direct discrimination on the grounds of disability (Directive 2000/78)
 - BAG, 19.12.2013 - 6 AZR 190/12.
- ECtHR, *Eweida etc. v United Kingdom* (ref. 48420/10)
 - Discrimination based on religious symbols => Violation of Article 9 ECHR
 - Also: direct or indirect discrimination on grounds of religion (Directive 2000/78)
 - CJEU C-157/15, *G4S Secure Solutions*
- EHRC, *GENOP/DEH and ADEDY v Greece* (ref. 66/2011)
 - Age discrimination => Article 4(1) + Preamble of the ECHR.
 - Also: direct age discrimination (Directive 2000/78)
 - CJEU C-143/16, *Abercrombie & Fitch Italia*

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II) Primary EU law

- **Treaties**
 - Articles 2 and 3(3) TEU
 - Article 10 TFEU
 - Article 19 TFEU
 - the Union's competence for regulatory action
 - For 7 restrictively listed discrimination characteristics (closed list)
- **General principles of Union law**
 - General principle of non-discrimination
 - CJEU C-144/04, *Mangold*, par. 75-77
- **Charter of Fundamental Rights**
 - Article 21(1)
 - Other articles: 20 (equality), 26 (disability), etc.

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IV) Directives 2000/43 and 2000/78

Directive 2000/43

- 2 restrictively listed distinctive features
 1. Racial origin
 2. Ethnic origin
 - No interpretative broadening allowed
e.g. ECJ C-571/10, *Kamberaj* => No discrimination on the basis of third country nationality
- Forms of discrimination:
 1. Direct discrimination, 2. Indirect discrimination, 3. Harassment, 4. Order to discriminate
- Possibilities to justify direct discrimination:
 - Article 4: Substantial and decisive occupational requirement
 - Article 5: Positive action
- Power in the public and private sectors

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IV) Directives 2000/43 and 2000/78

Directive 2000/78

- 4 restrictively listed distinguishing features
 1. Religion or Belief, 2. Special needs (disability), 3. Age, 4. Birth (sexual) orientation
 - No interpretative broadening allowed
 - e.g. ECJ C-13/05, *Chacón Navas* => no discrimination on the grounds of illness
- Forms of discrimination:
 1. Direct discrimination, 2. Indirect discrimination, 3. Harassment, 4. Order to discriminate
- Possibilities to justify direct differential treatment:
 - Article 2(5): measures necessary for security, protection of public order, health and the rights and freedoms of others
 - Article 4(1): Essential and decisive occupational requirement
 - Article 4(2): professional requirement especially towards churches and organisations with ethics based on religion or belief
 - Article 6(1): Specific justification for differential treatment on grounds of age
 - Article 7: Affirmative action and special measures for people with disabilities
- Power in the public and private sectors
 - Article 3(4): Possibility for the armed forces to be exempted from different treatment on grounds of disability or age

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IV) Directives 2000/43 and 2000/78

Scope of application	Directive 2000/43	Directive 2000/78
Employment, self-employment, work, vocational training, trade union membership	✓	✓
Social protection	✓	✗
Social benefits	✓	✗
Education	✓	✗
Access to goods and services available to the general public	✓	✗

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V) The role of the Charter of Fundamental Rights

Article 21(1) CFR:

- Open list of protected features
 - "especially because of..."
 - Indicative list of 18 protected characteristics
- Article 51 CFR: Limited scope
 - Binding the institutions of the Union without restrictions
 - It binds Member States, **when they apply Union law**
 - CJEU C-617/10, *Akerberg Fransson*, para 17.
 - e.g. CJEU C-258/14, *Florescu*, para. 48
 - **It does not broaden** the scope of EU law
 - e.g. CJEU C-301/21, *Curtea de Apel Alba Iulia and Others*, paras 72-78
 - e.g. CJEU C-94/20, *Land Oberösterreich*, para. 59-62

Article 21(2) CFR:

- Concerns discrimination on the basis of nationality

V) The role of the Charter of Fundamental Rights

Possibilities for the protection of **individuals** in the event of incorrect transposition of the **Directives**:

1. Interpretation of national law in conformity with the Directives

- CJEU C-817/19, *Ligue des droits humains*, para 86.
- Limit the contra legem interpretation (CJEU C-176/12, *Association de médiation sociale*, paras 38-39)

2. Direct effect of the Directives

- Requires a sufficiently clear, precise and heresy-free provision
- **Vertical** direct effect => obligations at the expense of the State
- **Horizontal** direct effect => obligations against another private individual
 - ! Established case law of the CJEU: the Directives **do not** develop a horizontal direct effect (CJEU C-573/17, *Popławski*, paras 65-66)

3. Other possibilities:

- Claim for damages against the State before a national court (C-6/90, *Francovich*)
- Infringement procedure against the Member State (Article 258 TFEU)

V) The role of the Charter of Fundamental Rights

Opportunities to develop a **horizontal** direct effect

1. Non-discrimination as a **general principle** of Union law

- Common constitutional traditions
- The Directive merely specifies this principle
- CJEU C-144/04, *Mangold*, paras 74-76
- CJEU C-555/07, *Kücükdeveci*, paras 21-22, 50

2. Article **21(1) CFR**

- Explicitly enshrines the general principle of non-discrimination
- Similar to the non-discrimination provisions of the founding Treaties (e.g. ECJ 43/75, *Defrenne*)
- CJEU C-414/16, *Egenberger*, paras 75-77

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V) The role of the Charter of Fundamental Rights

Consequences of a horizontal direct effect

1. The contrary provision of national law is inapplicable:

- e.g. CJEU C 414/16, *Egenberger*, para 79

2. Birth of rights in favour of the private individual:

- e.g. CJEU C 193/17, *Cresco Investigation*, paras 78-81
- e.g. CJEU C-684/16, *Max-Planck-Gesellschaft*, paras 74-79

▪ **Not all** the provisions of the Charter have a direct effect:

- e.g. CJEU C-569/16 and C-570/16, *Bauer*, paras 90-91 => **yes** Article **31(2) CFR**
- e.g. CJEU C-176/12, *Association de médiation sociale*, para. 38-39 => **no** Article **27 CFR**
- Article **20 CFR**; See. C-715/20, X, point 86.

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V) The role of the Charter of Fundamental Rights

Derivative EU law as a limitation of Article 21(1) CFR

- Other acts of secondary Union law limiting Article 21(1) CFR
 - e.g. CJEU C-528/13, *Léger*, para. 46-51
 - e.g. CJEU C-190/16, *Fries*, para. 73-78
 - e.g. CJEU C 356/12, *Glatzel*, para. 47, 49

Directives 2000/43 and 2000/78 as a limitation of other provisions of the CFR

- Article 11 CFR (freedom of expression)
 - CJEU C-507/18, *Associazione Avvocatura per i diritti LGBTI*
- Article 16 CFR (freedom to conduct a business, freedom of contract)
 - CJEU C-356/21, *J.K.*, para. 74-78

Compliance with the principle of proportionality (52(1) of the CCT) is crucial

**Thank you for your
attention**

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