

THE CONCEPT OF EQUALITY UNDER EU LAW AND THE ECHR: ON THE WAY TO EU ACCESSION

Evelyn Ellis

Introduction

TEU Article 6(2): “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.....”

Not dealing with scope and coverage of the two systems of law, nor about positive action, multi-dimensional discrimination or procedural arrangements.

The EU concept of non-discrimination

Definitions in the Recast Directive (Directive 2006/54, OJ [2006] L 204/23), the Race Directive (Directive 2000/43, OJ [2000] L 180/22), the Framework Directive (Directive 2000/78, OJ [2000] L 303/16), and the Goods and Services Directive (Directive 2004/113, OJ [2004] L 373/37). See also TFEU Article 157.

(a) Direct discrimination

Race Directive, Article 2(2)(a): “direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”. See also Recast Directive, Article 2(1)(a), Framework Directive, Article 2(2)(a), and Goods and Services Directive, Article 2(a).

The aim of direct discrimination is to protect formal equality.

Legislative formulation implies (1) adverse treatment and (2) causation.

No requirement of intention or motive.

Situations of victim and comparator must be “comparable”. See Case C-356/09 *Kleist* [2010] ECR I-?: “The comparability of such situations must be examined having regard *inter alia* to the object of the rules establishing the difference in treatment.....”

Discrimination by association included: Case C- 303/06 *Coleman v Attridge Law* [2008] ECR I-5603. Also probably discrimination on the basis of perception.

Direct discrimination can occur in the absence of an identifiable victim: Case C-54/07 *Feryn* [2008] ECR I-5187.

(b) Indirect discrimination

Race Directive, Article 2(2)(b): “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are

appropriate and necessary". See also Recast Directive, Article 2(1)(b), Framework Directive, Article 2(2)(b), and Goods and Services Directive, Article 2(b).

The aim of indirect discrimination is to protect substantive equality.

No requirement of intention or motive.

Definition a contingent one.

Choice of comparator group of critical importance; see Case C-249/97 *Gruber* [1999] ECR I-5295.

Proof of adverse impact: see Case C-167/97 *Ex p Seymour-Smith* [1999] ECR I-623.

(c) Justification

There is no discrimination where a protected classification is not the cause of the adverse treatment. See Case 129/79 *Macarthys Ltd v Smith* [1980] ECR 1275: "It cannot be ruled out that a difference in pay between two workers occupying the same post may be explained by the operation of factors which are unconnected with any discrimination on grounds of sex".

Indirect discrimination can be justified. Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607: by "objectively justified factors which are unrelated to any discrimination". Such justification operates to disprove causation.

Direct discrimination cannot usually be justified: Case C-356/09 *Kleist* [2010] ECR I-?. See also Case C-127/92 *Enderby* [1993] ECR I-5535. Once adverse impact and causation have been established, direct discrimination can only be negated by proof of one of the discrete defences contained in the Directives.

Exceptionally, direct discrimination on the ground of age can be justified pursuant to Article 6(1) of the Framework Directive.

The ECHR concept of non-discrimination

Article 14: "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

Protocol 12: "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1".

Covers both direct and indirect discrimination. Direct discrimination means “treating differently, without an objective or reasonable justification, persons in relevantly similar situations”: *Zarb Adami v Malta* (2007) 44 EHRR 43. Indirect discrimination was defined in *DH v Czech Republic* (2008) 47 EHRR 3: “A general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group and ... discrimination potentially contrary to the Convention may result from a *de facto* situation”

Belgian Linguistics Case (1979-80) 1 EHRR 252: “It is important... to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aims and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized”.

Both types of discrimination are apparently justifiable. Increasingly rigorous standard of scrutiny. See eg. *Timishev v Russia* (2005) 44 EHRR 776.

Breadth of ECHR concept demonstrated by *Thlimmenos v Greece* (2001) 31 EHRR 411.

What will happen to these concepts after accession to the ECHR by the EU?

Possible that separate régimes will be maintained or even merge in line with EU approach. Why?

1. EU law more developed than that of ECHR.
2. Mutual respect between the two Courts. See *Bosphorus* (2006) 42 EHRR 1. See also Article 6(3) and 6(1) of the TEU and Articles 52(3) and 53 of the Charter of Fundamental Rights.
3. The European Court of Human Rights may be using the word “justification” to indicate absence of causation – in same way as the CJEU.

Further reading:

Besson, “Gender Discrimination under EU and ECHR Law: *Never Shall the Twain Meet?*” *Human Rights Law Review* 8:4 (2008) 647.

Lock, “EU accession to the ECHR: implications for the judicial review in Strasbourg” [2010] *ELRev* 777.

Weiss, “Human rights in the EU: rethinking the role of the European Convention on Human Rights after Lisbon” [2011] *European Constitutional Law Review* 64.