Equality Directives and Human Rights Frameworks

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EU and International human rights frameworks

- EU as a global leader in promoting equality
- Relationship between Equality Directives and EU Human Rights Frameworks
- Relationship between the EU and Council of Europe
- Relationship between the EU and United Nations

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EU Symposium on LGBTI rights in Hong Kong

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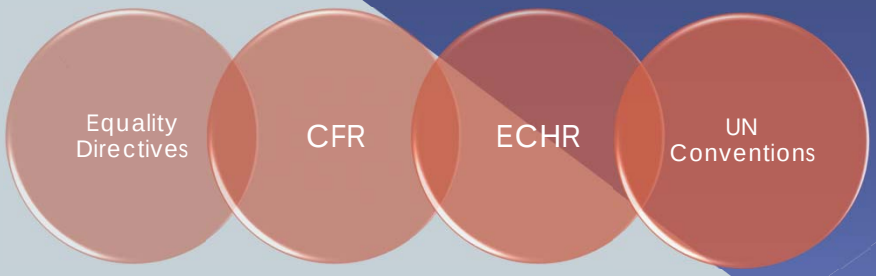
Distinct and parallel



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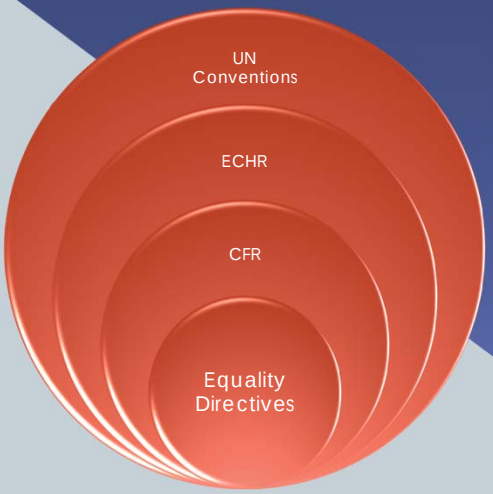
Related and overlapping



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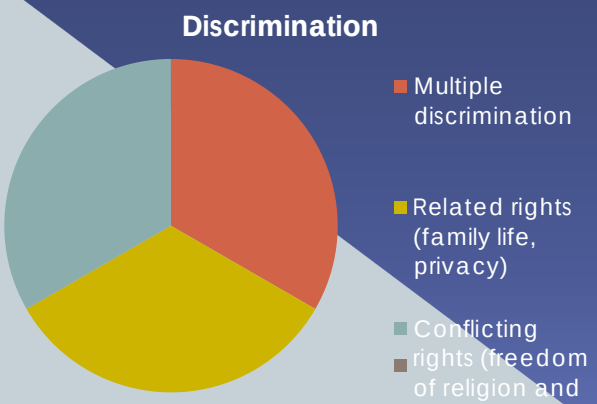
Relationship between and right to equality and other rights



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Lisbon Treaty

Key points:

- Came into force 1 December 2009: significant changes to constitutional framework of the EU.
- Frameworks of human rights protections considerably strengthened
- Three main documents: the Treaty of the European Union (TEU) the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights (CFR)

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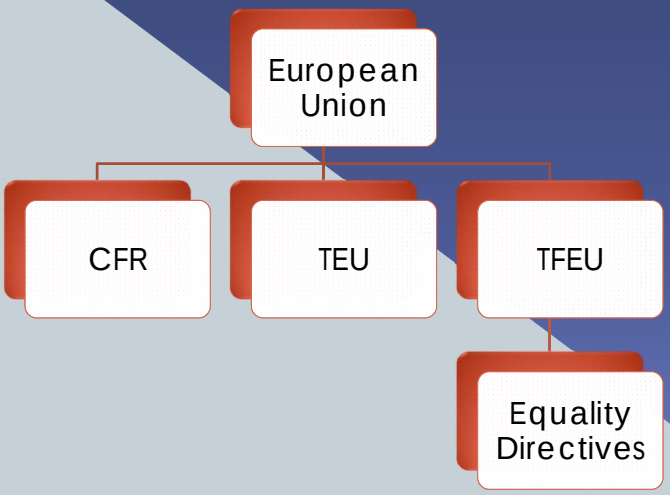
Lisbon Treaty



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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)
- Require 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 take action and develop Directives to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation: article 19

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Charter of Fundamental Rights

- Agreed in December 2000 but not 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)

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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)

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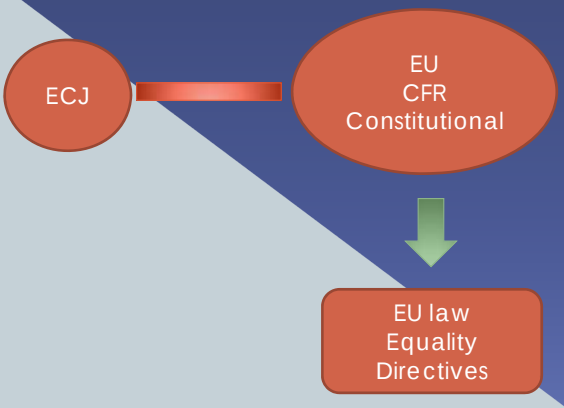
Charter of Fundamental Rights



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Charter of Fundamental Rights

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

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

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Charter of Fundamental Rights

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

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Charter of Fundamental Rights

Achats Case C-236/09 1 March 2011

Held:

Recital 4 refers to equality between men and women as a fundamental principles 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 and Member States provided time to change their policies and practices as well as the national laws.

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EU and Council of Europe

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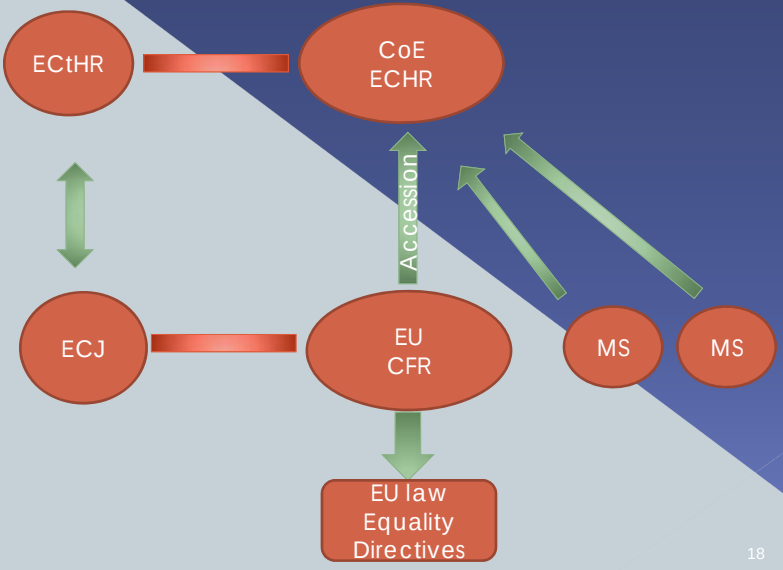
EU and Council of Europe



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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

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EU accession to ECHR

- **Draft agreement: April 2013**
  Co-respondent procedure before ECtHR (EU and Member States)
  Procedure for prior rulings by ECJ
- **ECJ Opinion 2/13, 18 December 2014**
  Draft agreement does not sufficiently preserve EU autonomy (eg Procedure for prior rulings of ECJ) and breaches EU law
  Contrast position of EU institutions and 28 Member States

  Major setback to EU accession
  http://cjicl.org.uk/2014/12/20/court-justice-european-union-finds-draft-agreement-eu-accession-echr-incompatible-eu-law/

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Case law: relationship between ECHR and EU Directives

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Religious discrimination and freedom of religion

Eweida v UK, Chaplin v UK, Ladele v UK, McFarlane v UK
Applications 48420/10, 59842/10, 51671/10 and 36516/10
European Court of Human Rights, 15 January 2013

What are the key elements of the right to manifest your religion in employment?

Relationship between articles 9 and 14 rights and religious discrimination claims

Balancing conflicts between religious manifestations and sexual orientation discrimination

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Religious discrimination and freedom of religion

Eweida v UK, Chaplin v UK

Unsuccessful claims of direct and indirect religious discrimination in UK domestic courts

Did the UK domestic courts properly apply domestic discrimination law in compliance with article 9 and 14?

Reasoning of ECtHR applicable to interpreting Directive 2000/78/EC in relation to religious discrimination

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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

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 and freedom of religion

Eweida v UK, Chaplin v UK

Relevant principles for indirect religious discrimination claims:

Eweida

- Uniform aim of professional image and brand
- Other religious groups were able to wear religious dress with BA uniforms
- BA 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 and freedom of religion: conflict with sexual orientation

Ladele v UK, McFarlane v UK

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 freedom of religion: conflict with sexual orientation

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 freedom of religion: conflict with sexual orientation

Ladele v UK, McFarlane v UK

Implications for EU Directives and CFR

UK domestic discrimination law covers discrimination on grounds of sexual orientation in public functions and provision of services

Directive 2000/78/EC only covers sexual orientation discrimination in employment, but article 21 of CFR relevant

Indirect religious discrimination provisions in Directive must be interpreted in light of Article 9 ECHR case law and article 21 of CFR regarding sexual orientation discrimination

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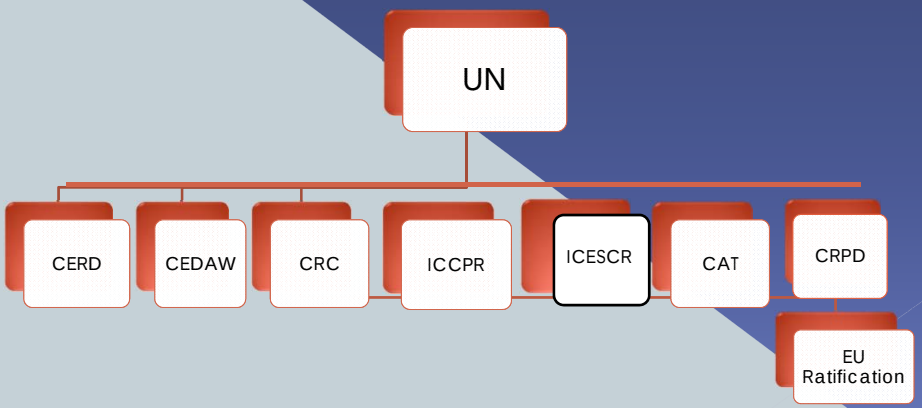
The EU and UN



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EU Ratification of UNCRPD

Convention on the Rights of Persons with disabilities

Entered into force 3 May 2008, EU ratified the Convention on 11 January 2011

First time the EU has ratified an international human rights Convention: ratification of other UN Conventions?

CRPD binding on EU institutions: arguable EU not fully compliant with CRPD as no protection from disability discrimination in housing, education, and health (strong argument for Proposed Directive)

CRPD relevant to interpretation of disability discrimination law

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Case law on disability

Chacon Navas C-13/05 11 July 2006

Meaning of disability

No definition in Framework Directive 2000/78/EC

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"

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Case law on disability

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

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."

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Case law on disability

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

Held:

- An illness can constitute a disability; and fact that it only partially affects a person's ability to work is not determinative;
- reduction in working hours may constitute a reasonable accommodation

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Case law on disability

Kaltoft C-354/13 Denmark,18 December 2014

Held:

- Employee dismissed for reasons related to obesity;
- Obesity is not itself a protected characteristic under Directive 2000/78/EC;
- But applying CRPD, where it involves a limitation which results from a physical, mental or psychological impairment hindering participation it may be a disability

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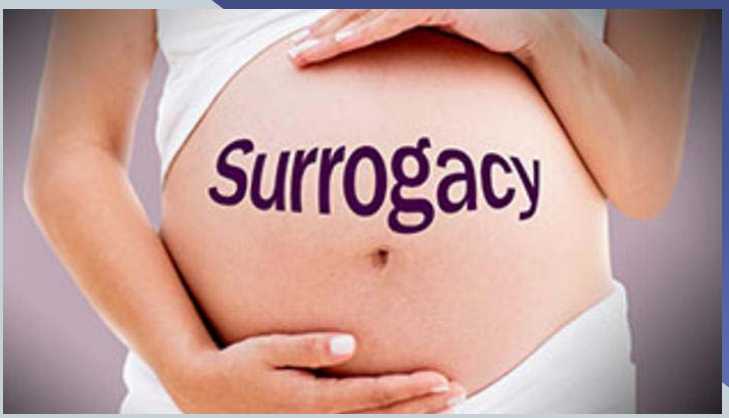

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Case law on disability

Z v Government Department Ireland C-363/12 18 March 2014

Facts:

Ms Z had no uterus and could not have a pregnancy but had healthy ovaries and was fertile

Had a child with husband by surrogacy mother in US, not granted maternity leave

Whether sex discrimination (Gender Directive 2006/54/EC) disability discrimination (Directive 2000/78/EC)

Held:

- No pregnancy discrimination as she was not pregnant
- Applied CRPD but was no disability discrimination: she had a long-term physical impairment, but it did not affect her ability to carry out and participate in work

Note: Questionable conclusion and approach to disability discrimination

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Conclusions

- Equality Directives: must comply with and be interpreted consistently with CFR
- EU unlikely to be able to accede to ECHR in near future
- But ECHR case law directly applicable to interpretation of Equality Directives
- UNCRPD: directly applicable in interpretation of Equality Directives, development of law and policy

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