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
EU Symposium on LGBTI rights in Hong Kong

Working Together for an Inclusive Society: LGBTI Rights in Comparative Perspective

Distinct and parallel

- Equality Directives
- CFR
- ECHR
- UN Conventions
Related and overlapping

UN Conventions
ECHR
CFR
Equality Directives

Relationship between and right to equality and other rights

Discrimination
- Multiple discrimination
- Related rights (family life, privacy)
- Conflicting rights (freedom of religion and...
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).

Lisbon Treaty

Diagram:
- European Union
  - CFR
  - TEU
  - TFEU
  - Equality Directives
**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)

**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
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)

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)
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.
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.

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 and Member States provided time to change their policies and practices as well as the national laws.
EU and Council of Europe
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
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
Case law: relationship between ECHR and EU Directives

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
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

---

**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
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
**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

---

**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
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.

The EU and UN

[Diagram showing the relationship between UN, CERD, CEDAW, CRC, ICCPR, ICESCR, CAT, CRPD, and EU Ratification]
**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

---

**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”
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 month’s 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.

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; 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

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
**Case law on disability**

Zv 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.

**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.
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