Post-Lisbon Anti-Discrimination Law

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The dynamic perspective chosen for the translation of the official title of the presentation:

**Scope of the European Union’s anti-discrimination law and definitions of key concepts:**
- direct discrimination
- indirect discrimination
- harassment and sexual harassment
A preliminary definition of anti-discrimination law:

The corpus of provisions intended, through duties expressed as prohibitions, to prevent the fate of human beings from being determined by natural or ascribed social statuses (sex, race, ethnic origin and so on) and, at the same time, through active duties, to ensure that different subjective identities are all recognised and protected as equals (Barbera 2008)
**Once upon a time …**

comparison with the meta model (sex or gender) and extension of the grounds on which discrimination is prohibited within European Union law
The new frontiers of the principle of equality in European Union law

Primary law
Treaty establishing the EEC
1957 (Art. 119)

Treaty of Maastricht

Treaty of Amsterdam
1997 (1999)

Treaty of Lisbon 2009
(Art. 19 and Art. 157 TFEU)

2000
Treaty of Nice
and Charter of Fundamental Rights

Draft Constitutional Treaty
Rome, 29 October 2004

1971 - ECJ
Defrenne I

2008 - ECJ
Coleman

ECJ
2008
Coleman

ECJ
2008
Primary Treaty law:
Art. 141 TEC, today Art.157 TFEU – Nice Charter of Fundamental Rights (Arts. 20-23)

Secondary Community law:
Dir. 75/117 – Dir. 76/207 – Dir. 98/70 – 86/378/EC and thus also in their amended forms as Dir. 1996/97/EC – Dir. 2002/73 – Dir. 2004/113
Dir. 2006/54 (framework directive)

also known as the *recast directive*, precisely because its function is to harmonise the provisions contained in the earlier directives dedicated to equal treatment of men and women as regards access to employment, training and promotion, in occupational social security schemes, in the application of the principle of equal pay for men and women and the rules on the burden of proof in cases of discrimination on grounds of sex and also in the light of the case-law of the ECJ
Prohibited grounds other than sex/gender

Primary law:
Article 13 TEC, modified by Amsterdam and Nice in 2000, and now Article 19 TFEU
The 2000 Charter of Fundamental Rights (with the binding nature bestowed on it by Lisbon in December 2007 and with its entry into force in December 2009)

Secondary law:
Dir. 2000/43 and Dir. 2000/78
With the effect of suspending the procedure of adopting directives in other specific fields (otherwise known as the “horizontal directive”, necessary to cover the scope of each of the various provisions referred to above)
The structure, scope (as regards objects and subjects), equality institutions and positive actions are the cardinal concepts of these (quasi-) twin directives.

Creation of uniformity in the instruments for intervening in the field of anti-discrimination law.
Direct discrimination – the legal definition

Direct discrimination exists where one person is treated less favourably [on grounds of race or ethnic origin, age, disability, sexual orientation or personal religion or belief] than another is, has been or would be treated in a comparable situation.
Patterns of interpretation

The elastic concept of “comparison”: comparable, virtual and hypothetic male/female worker… .
Problems of interpretation

Justifications and exceptions to the operation of prohibition: as far as direct acts of discrimination are concerned, justifications are ruled out!
Indirect discrimination – the legal definition

Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular [race or ethnic origin, age, disability, sexual orientation, personal religion or belief] 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.
Patterns of interpretation

The three phases in arriving at determination of an act of discrimination:

1. The apparently neutral criterion or practice

2. The position of particular disadvantage (of the group … compared with other persons)

3. The appraisal of the objective justification of the criterion or practice [legitimate aim and use of appropriate and necessary means: Art. 2(2)(b)]
Problems of interpretation

Justifications: are employment objectives, for instance, legitimate grounds for considering that differences in treatment do not constitute acts of prohibited discrimination?
EXCEPTIONS OR THE AREAS IN WHICH THE PROHIBITIONS DO NOT OPERATE (ART. 4 OCCUPATIONAL REQUIREMENTS)

COMMON EXCLUSION: “Notwithstanding Article 2 (1) and (2) (direct and indirect discrimination), the Member States may provide that a difference of treatment based on a characteristic related to [race or ethnic origin, age, disability, sexual orientation or personal or religious beliefs] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.”
SPECIAL EXCEPTIONS
IN THE FRAMEWORK DIRECTIVE

Exceptions or areas of non-operation of the prohibitions on discrimination on grounds of age and disability as regards the armed forces (Art. 3(4))

Exceptions or areas of non-operation of the prohibitions on discrimination on grounds solely of disability (Art. 5 and Art. 7(2))

Exceptions or areas of non-operation of the prohibitions on discrimination on grounds of age as regards employment policy, labour-market and vocational-training objectives, retirement and invalidity benefits (Art. 6(1) and (2)), with this final provision being reinforced by the wording of Art. 3(3).

Exceptions linked to the prohibited grounds of a person’s religion or belief in organisations the ethos of which is based on religion or belief (Art. 4(2))
Harassment – the legislative definition

Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds of [race or ethnic origin, age, disability, sexual orientation or a person’s religion or belief] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practices of the Member States.
Patterns of interpretation

Acts of harassment, sexual harassment and discrimination: dignity and equal treatment and the judgments based on comparisons … problems of a doctrinal nature?

*Blurring of the concept of discrimination…*

Reference to the Coleman and Feryn judgments

Appearance of “discrimination by association” or “transferred discrimination” and “potential discrimination”
Patterns of interpretation

Creation of uniformity in the instruments of anti-discrimination law (Dir. 2002/73; Dir. 2006/54)
The forms of discrimination and harassment over eleven years of the Court’s case-law (... roughly one judgment per year, but on the increase!)

The trend shown by a number of landmark judgments indicating the scope and practical operation of the instruments defined above:

a) The age factor from Mangold to Seda Kücükdeveci: the emerging factor
b) Sexual orientation from the cases of P and Grant through to Römer (and including the Tadao Maruko case): civil rights and anti-discrimination law
c) The disability factor and the complicated relationship between Chacon Navas and Coleman
d) The uniqueness of the Feryn case …
e) The sustainable (and apparent) ease of invoking arguments of a person’s religion and belief … as things stand at present!
The frontiers of equal treatment and anti-discrimination law at the frontier

The constitutional interaction at European and national level in the field of equal treatment: the binding nature of the Nice Charter and the updated Treaty and the use of the general principles of European Union law

Direct horizontal applicability of directives amongst private individuals?

Anti-discrimination law and the object protected: equality versus human dignity?

Europe’s borders, mobility outside of the European Union and acts of discrimination on grounds of race and ethnic origin

Anti-discrimination law and the “soft” social-policy instruments

Who is to supervise the anti-discrimination institutions? The Italian case of the spoils system of the gender-equality institutions and the consolidation of the independent administrative authorities

The immediate necessity: for the grounds of prohibited discrimination to be extended to include acts of multiple discrimination
Appendix:

Focus on national case-law and thoughts on the development prospects for anti-discrimination law in its current state
From European Union law to national law and back again …

Conceptual reference pairs taken from the current situation as regards recent anti-discrimination law, arguing from the inverted perspective

1) Protection and anti-discrimination law
   2) Between public and private
   3) Employment and other fields
The role of the national courts and the frontier of anti-discrimination law

- References for preliminary rulings
  - Consistent interpretation
  - Disapplication