

# DISCRIMINATION ON GROUNDS OF RACE AND SEXUAL ORIENTATION

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## Structure of presentation

Similarities

Differences

Jurisprudential puzzles

- Racial Equality Directive:
  - Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of racial or ethnic origin
- Employment Equality Directive:
  - Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (religion or belief, disability, age and sexual orientation)
- No definition of ground: real, assumed, associated, etc.
- Key concepts
- BoP
- NGO and TU role
- Sanctions and remedies
- Volume of preliminary referrals reaching CJEU
- Judicial cooperation on racist and homophobic hate speech and hate crime

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## Similarities I: legal basis

Article 19 TFEU  
 Article 21 Charter of Fundamental Rights of the EU  
 2000 anti-discrimination directives  
 Victims Rights Directive

- Racial or ethnic origin
  - Social construct based on proxies such as religion, skin colour, language, traditions
  - Transversal
  - Geographically contingent
  - Etymologically: race = ethnicity
  - Race, ethnicity, origin are interchangeable concepts
  - International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) (United Nations) covers: race, colour, descent or national or ethnic origin
- A person's sexual orientation to:
  - persons of the same sex (homosexuality)
  - persons of the opposite sex (heterosexuality)
  - persons of either sex (bisexuality)
  - Where do Ts in the LGBTQI movement belong?

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## Similarities II

Puzzles of defining ground of discrimination

## Similarities II: obstacles

- Data collection
  - lacking
  - proxy based
- Except on hate speech and crimes
- Renders policy making and litigation cumbersome

- RED's scope is broader than EED's
  - RED: all social fields, including empl, social security and health care, education, access to goods and services and housing
  - EED (art. 3) covers: employment and occupation
  - Plans to level out protection under EU law: Horizontal Directive
- Enforcement
  - RED: Article 13 equality bodies to promote racial equality
  - EED: no body for promotion
- Exceptions
  - EED Recital (22): "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon"
  - RED Art 3(2) does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons
  - YET, nationality discrimination (TCNs) can amount to indirect race discrimination

## Differences

- Scope of protection
- Enforcement
- Exceptions

Problematic for race: narrowing RED's personal scope

Roma - CHEZ C-83/14, invoking ICERD, ethnicity

Moroccans, immigrants - Feryn, C-54/07

Foreigners - Jyske Finans C-668/15 and Heiko Jonny Maniero C-457/17, place of birth not recognised as equivalent of descent under ICERD

Trans is addressed through sex in CJEU caselaw

MB v Secretary of State for Work and Pensions Case C-451/16

A person who has changed gender cannot be required to annul the marriage which he or she entered into before that change of gender in order to be entitled to receive a retirement pension at the age provided for persons of the sex which he or she has acquired. Such a condition constitutes direct discrimination based on sex.

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## Differences II

Definition of protected ground

- Feryn

- a policy where immigrants, Moroccans are not considered for employment is **direct discrimination**
- under EU law, a complaint can be made without there being a direct individual victim

- CHEZ

- discrimination ,together with the Roma' - in/direct discrimination by association is covered
- failure to decisively qualify discrimination: **facts may constitute direct but also indirect discrimination**
  - direct discrimination exists where ethnicity has determined the decision for the treatment, where treatment was by reason of ethnicity
  - indirect discrimination considers the effect of a measure, which is 'ostensibly' neutral or neutral 'at first glance' for a specific racial or ethnic group

- Jyske Finans

- No discrimination if difference in treatment is based solely on a person's country of birth

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## Jurisprudence I

Qualification of racial or ethnic discrimination

- Even if apparently neutral, legislation that would put only same sex couples at a particular disadvantage is directly discriminatory
  - C-267/06 Tadao Maruko: denial of survivor's pension to same sex partner constitutes direct discrimination on the grounds of sexual orientation
  - C-147/08 Jürgen Römer: Denial of supplementary retirement pension to same sex partner constitutes direct discrimination on the grounds of sexual orientation
  - C-267/12 Hay: exclusion of same sex partners from benefits established in collective agreements constitutes direct discrimination on the grounds of sexual orientation
- Member States remain free to decide whether or not to institute and recognise legally recognised same-sex partnerships
- However, once national law recognises such relationships as comparable to that of spouses then the principle of equal treatment applies

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## Jurisprudence II

Qualification of sexual orientation discrimination

- C-673/16 Coman
- right of residence in Romania of a same sex partner of a Romanian man who had married his partner in Belgium
- does term "spouse" in Article 2(2)(a) Citizens' Directive (2004/38/EC) include a non-EU national that is legally married to an EU citizen in another Member State?
- CJEU: the term "spouse" is indeed gender neutral and may therefore include spouses of the same sex. Therefore, Romania could not rely on its national law as justification to refuse the recognition of a marriage between two persons of the same sex legally concluded in another Member State for the granting of residence rights. Such a refusal would mean different applications of the EU citizen's freedom of movement among its Member States, depending on whether or not national law allows same-sex marriage

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## Jurisprudence III

Tackling lack of same sex partnership and/or marriage in certain member states

- Limitations of Coman
  - Member States must recognise a same-sex marriage validly contracted in another Member State only in relation to residence rights
  - Member States are free to bar same-sex couples from marrying on their territory
  - judgment applies to same-sex spouses but not to registered partners (see Article 2(2)(b) Citizens' Directive)
  - it concerns only couples married in an EU Member State and is confined to questions of free movement of persons
- Parris C-443/15
  - no entitlement to surviving partner pension if same sex marriage only became available after the date of retirement
  - Case turns not on so called intersectional discrimination but the question of marriage/partnership recognition

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## Jurisprudence IV

Limiting the scope of judicial protection against marriage/partnership discrimination

- Recognition of diverse forms of racism prevalent in Europe: overlaps between the forms and comparators
  - Romaphobia, Afrophobia, Islamophobia, Xenophobia, Antisemitism
- Tackling hate speech
  - Case C-507/18 (GC), NH: homophobic statements by a person during a TV programme according to which such person would never recruit any LGBT person, even in the absence of any recruitment procedure is discriminatory, as long as the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical
  - Case C-201/13 (GC), Deckmyn: original publishers of the drawings (the plaintiffs in this case) have a legitimate interest in ensuring that their copyright is not associated with discriminatory messages in reproduction of a famous Belgian comic where some characters had been replaced by a far right party with offensive images of Muslim women and people of colour. RED needs to be considered when interpreting Copyright Directive (parody exception).

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## Jurisprudence V

What lies ahead for racial and sexual orientation equality challenges?