

Discrimination on grounds of race, religion, sexual orientation

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Legal provisions in the EU

- Article 19 TFEU (ex article 13EC)
- Race Directive: Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22
- Employment Equality Directive: Directive 2000/78/EC of 27 Nov. 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16: religion or belief, disability, age and sexual origin

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Difference between the Directives



- Protection against racial and ethnic origin discrimination stronger than protection against discrimination on grounds of religion or belief, disability, age and sexual orientation
 - More areas covered
 - Duty to designate equality body/bodies
 - Less exceptions allowed
- Proposal COM (2008) 426 for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

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Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Ferijn NV* [2008] ECR I-05187 CJEU



- a policy where members of certain racial or ethnic groups are not considered for employment is directly discriminatory
- under EU law, a complaint can be made without there being a direct individual victim
- The statements made in public were enough for a presumption of discrimination, thus burden of proof shifted to employer who had to prove that recruitment policy was not discriminatory (Art 8, Directive 2000/43)

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Other cases under the Race Directive



- Case C-391/09 *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija* [2011] ECR I-3787
- Case C-415/10 *Galina Meister v Speech Design Carrier Systems GMBH*, 19 April 2012
- Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others*, 24 April 2012
- Case C-394/11 *Valeri Hariev Belov v ChEZ Elektro Balgaria AD and others*, 31 Jan 2013

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Case law under the Employment Equality Directive



- Case C-267/06, *Tadao Maruko v Versorgungsanstalt der Deutschen Bühnen* [2008] ECR I-1757
- Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* [2011] ECR I-3591
- Cases C-124/11 *Dittrich*, C 125/11 *Klinke* and C 143/11 *Muller v Bundesrepublik Deutschland* 6 Dec 2012
- Case C-267/ 12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* 12 Dec 2013

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Conclusion previous four cases

Rule:

- 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
- Registered same-sex partners must thus, under national law, be in a comparable situation to married partners

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ACCEPT case

- Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, 25 April 2013:
- facts were capable of amounting to facts from which a court could presume discrimination
- club could rebut presumption by distancing itself from discriminatory statements and/or by including provisions in its recruitment policy to comply with the equal treatment principle

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Definition racial or ethnic origin



- Absent from Race Directive
- ICERD: race, colour, descent or national or ethnic origin
- ECRI: “race”, colour, language, religion, nationality or national or ethnic origin
- Race Directive: racial and ethnic origin:
 - probably includes colour and descent
 - does not include nationality or religion
 - national origin?

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Problems with defining race and racism



- Heavily negatively loaded
- abuse of theories about race and racism are casting long shadows over debate in Europe
- in many EU countries, problematic to talk about race and racism
- Compromise: Recital 6 Preamble Race Directive: “the EU rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in the Directive does not imply an acceptance of such theories”

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- HRC: Art 18 ICCPR:
 - protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.
 - The terms "belief" and "religion" are to be broadly construed.
 - Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religion

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- Wide interpretation
- All traditional religious beliefs included, but also non-traditional religious beliefs
- Non-religious beliefs included
- *Campbell and Cosans v United Kingdom* App. Nos 7511/76 and 7743/76 (1982) 4 EHRR 293: religious or philosophical conviction or belief must :
 - attain a certain level of cogency, seriousness, cohesion and importance
 - be worthy of respect in a democratic society
 - not be incompatible with human dignity
 - not conflict with fundamental rights
 - relate to a weighty and substantial aspect of human life and behaviour

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Subjective belief?

- who determines whether a belief attains level of cogency, seriousness, cohesion and importance and thus attracts protection?
- ECtHR: *“the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”* (Manousakis and Others v Greece App. No. 18748/91 (1997) 23 EHRR 387 and Hasan and Chaush v Bulgaria, App. No. 30985/96 (2002) 34 EHRR 55)

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Occupational requirements

Article 4 (1) Directive 2000/78: *Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of 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.*

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Occupational requirements

- Applicable to racial or ethnic origin, religion or belief, disability, age and sexual orientation (and sex).
- So, there is no discrimination where:
 - Due to the nature and context of the job
 - There is a genuine and determining occupational requirement of a job
 - And, applying this is a proportionate means to achieve a legitimate aim

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Article 4(2) Directive 2000/78

Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

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Article 4(2) Directive 2000/78

- Part 1: exception occupational requirements. For this exception to apply the following is needed:
 - churches and other public or private organisations with ethos based on religion or belief
 - genuine, legitimate and justified occupational requirement
 - due the nature or context of the job/activities
 - should not justify discrimination on another ground
- Part 2: allows churches and other public or private organisations with an ethos based on religion or belief to require individuals working for them to act in good faith and with loyalty to the organisation's ethos

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ECHR Article 8

- Article 8 Right to respect for private and family life
 - Art 8(1): Everyone has the right to respect for his private and family life, his home and his correspondence
 - homosexual relationships fall under the scope of Article 8 (*Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Smith and Grady v. the United Kingdom*, App. Nos 33985/96 and 33986/96, ECHR 1999-VI)

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- Article 14 Prohibition of discrimination
 - *The enjoyment of the rights and freedoms set forth in this 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*
- Sexual orientation not mentioned in Art 14
- Falls under 'or other status' (e.g. *Salgueiro da Silva Mouta v. Portugal*, App. no. 33290/96, ECHR 1999-IX: violation article 8 and article 14 in conjunction with article 8)

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- (1): *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.*
- (2): *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others*

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- *Eweida , Chaplin, Ladele and McFarlane v. the United Kingdom* Application nos. 48420/10, 59842/10, 51671/10 and 36516/10
- Ladele and McFarlane: dismissed for refusing to work with same-sex couples
- Both believed that homosexual relationships were contrary to God's law
- Considered working with same-sex couples meant condoning homosexuality

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- To decide whether interference is proportionate, fair balance needs to be struck between the interests at stake
- national authorities are allowed wide margin of appreciation when it comes to striking a balance between competing ECHR rights
- possibility of changing jobs had to be weighed in the overall balance when considering whether restriction is proportionate

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- Areas to be interpreted:
 - Definitions: racial and ethnic origin, religion or belief
 - occupational requirements in Art. 4(2)
 - Clash between rights
- ECtHR case law as guidance
- Role for practitioners: get cases referred so these areas can be developed