

Discrimination
on other grounds:
race
religion
sexual orientation

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Multilevel protection against discrimination

UNITED NATIONS

- **International Covenant of Civil and Political Rights (1966)**

individual complaint to the Human Rights Committee

- **Convention on Elimination of Racial Discrimination (1965)**

individual complaint to the Committee on Racial Discrimination

- other UN treaty bodies: CEDAW, CRPD, etc

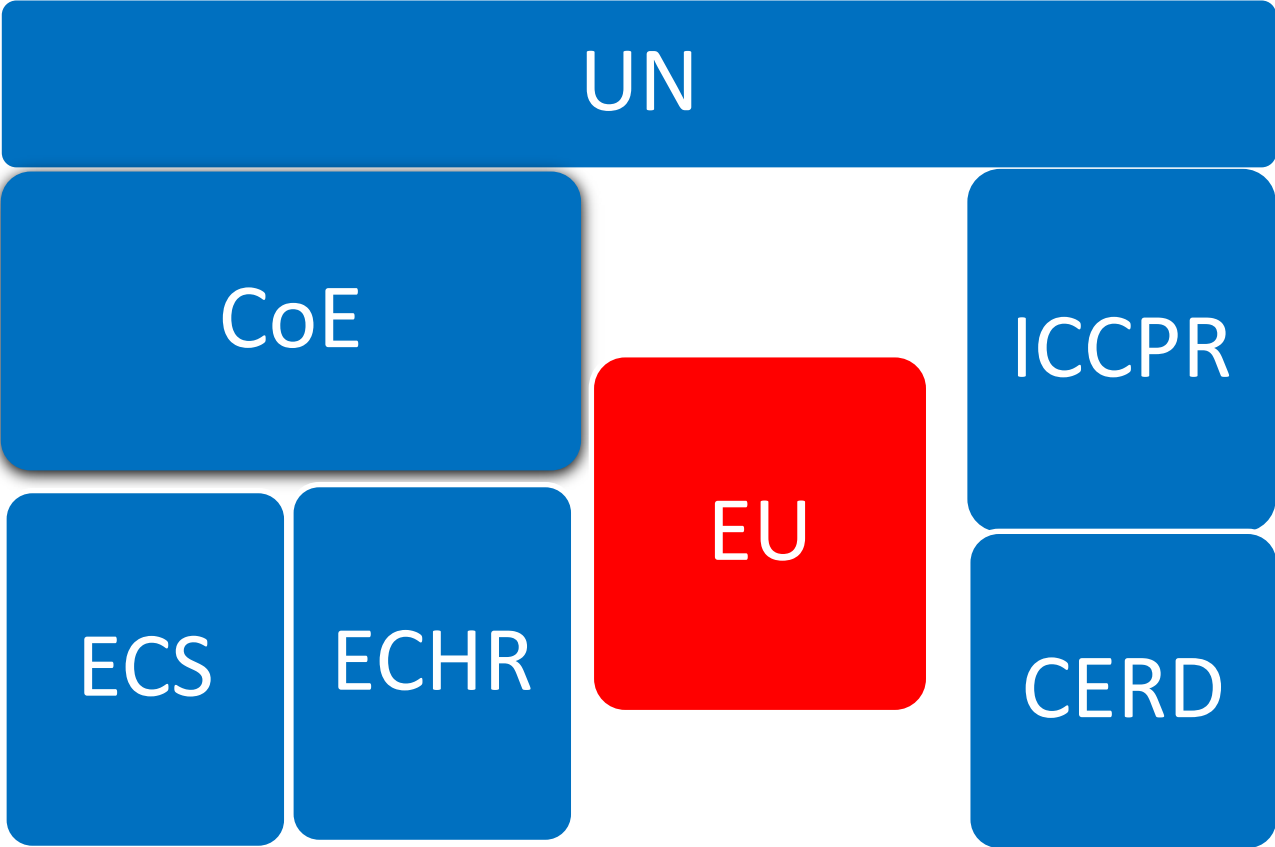
COUNCIL OF EUROPE

- **European Convention of Human Rights (1950)**
- Protocols to the Convention, including Protocol no. 12 (2000)

individual complaint to European Court of Human Rights

- **European Social Charter (1996)**

collective complaint to European Committee of Social Rights



EU anti-discrimination law

- Art. 10 TFUE

combating discrimination with regard to sex, **race and ethnic origin, religion and belief**, disability, age and **sexual orientation** in all actions and policies of the EU

- Art. 19 TFUE

competence to take actions to combat discrimination with regard to the above grounds and **harmonize laws** of Member States in the area of anti-discrimination

- Art. 21 Charter of Fundamental Rights

prohibition of 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

ECHR anti-discrimination provisions

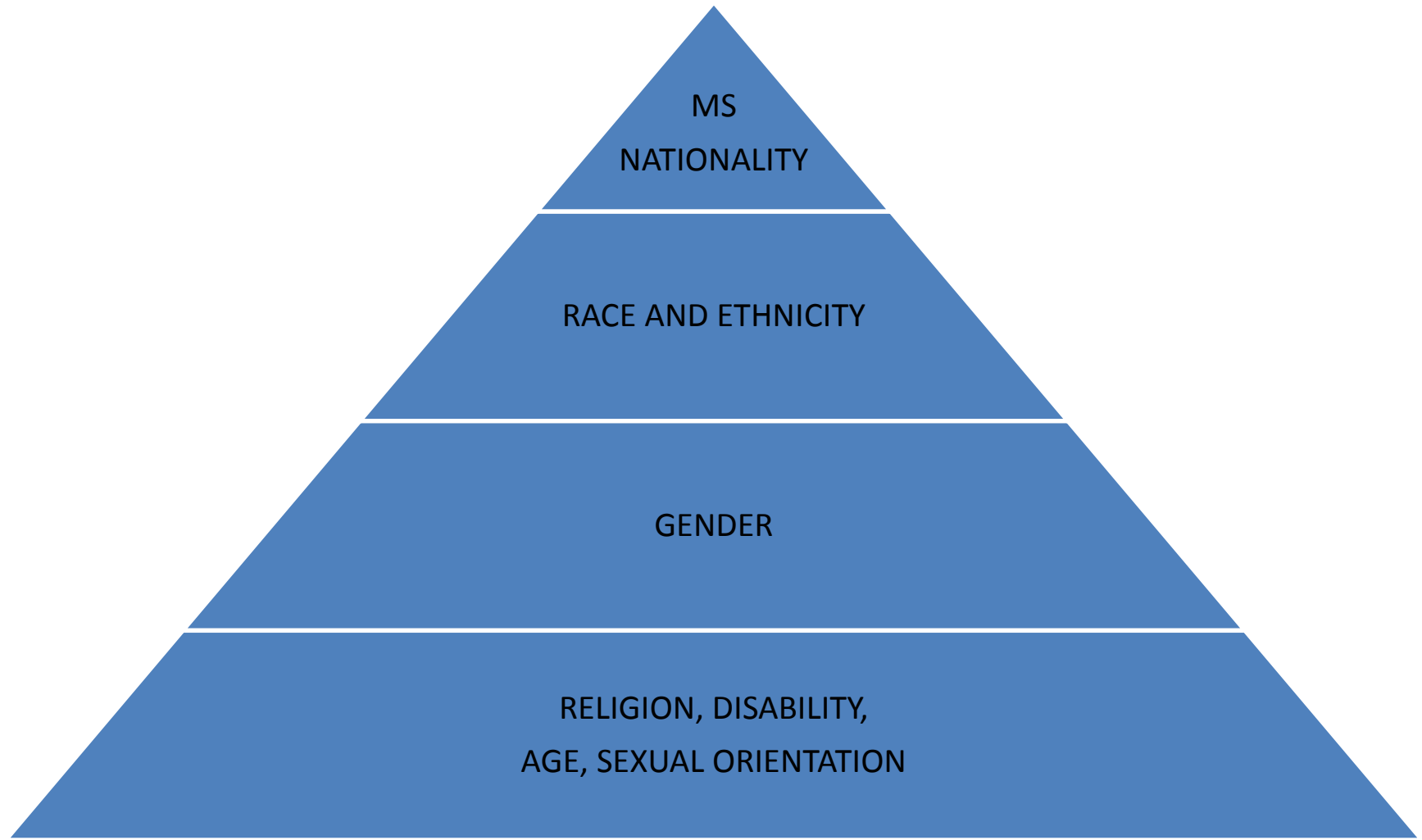
- Art. 14 ECHR

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.

- Protocol no. 12

The enjoyment of any right set forth by law 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.

Hierarchy of the protected grounds in the EU



Hierarchy of the protected grounds

	EMPLOYMENT	SOCIAL SECURITY	GOODS AND SERVICES	EDUCATION
RACE AND ETHNICITY	2000/43/EC	2000/43/EC	2000/43/EC	2000/43/EC
GENDER	2006/54/EC	79/7/EEC	2004/113/EC	
RELIGION DISABILITY AGE SEXUAL ORIENTATION	2000/78/EC			

Race & ethnicity

Timishev v. Russia, ECtHR (2005)

- „Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin color or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds”
- Denial of entry exclusively based on Chechen ethnicity
- Violation of Art. 14 and Art. 2 of Protocol 4 (freedom of movement) and Art. 2 of Protocol 1 (right to education)

NOTE

different treatment on the basis of nationality with regard to entry and residence of third-country nationals and their access to employment and to occupation falls outside the scope of Directive 2000/43/EC

Racial Equality Directive

2000/43/EC

- Direct and indirect discrimination
- Harassment, incitement to discriminate
- Material scope – very broad – public and private actions
- Genuine and determining occupational requirements
- Positive measures
- Minimum requirements at the national level
- Effective remedies
- Burden of proof shift
- Prohibition of victimization
- Establishment of an equality body

Racial Equality Directive

2000/43/EC

Material scope:

- conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions
- access to vocational training
- employment and working conditions
- memberships in trade unions
- social protection, social security and healthcare
- social advantages
- education
- access to goods and services available to public, including housing

Framework Decision on combating racism and xenophobia

- Council Framework Decision 2008/913/JHA
- **public incitement to violence or hatred** directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin;
- **public dissemination or distribution** of tracts, pictures or other material containing expressions of racism and xenophobia;
- **public condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes** as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group.
- punishable by effective, proportionate and dissuasive penalties of a maximum of at least one to three years imprisonment.

CJEU case-law

- C-54/07 *Feryn* (2008)

NOTE

the Belgian Centre for Equal Opportunities and Combating Racism can bring legal proceedings in cases of actual or potential discrimination, even if there is no identifiable complainant

- Public refusal to employ immigrants = direct discrimination
- Discriminatory statements = presumption of a discriminatory policy
- For the employer to show the actual recruitment practice does not correspond with the statement

ECtHR case-law

Timishev v. Russia (2005)

- no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified

Sejdić and Finci v. Bosnia and Herzegovina [GC] (2009)

- ineligibility to stand in elections violates Art. 14 i.c.w. Art. 1 Protocol 1 (parliamentary elections) and Protocol 12 (presidential elections)

D.H. v. Czech Republic (2007), *Orsus v. Croatia* (2010)

- Segregation in schools based on eligibility test or language proficiency – indirect discrimination

NOTE

Case-law concerning hate speech, including Holocaust denial - inadmissible for abuse of rights (Art. 17) or no violation of Art. 10

Roma discrimination

Nachova and Others v. Bulgaria (2005)

- violation of Art. 14 i.c.w. Art. 2 (procedural aspect) for a failure to investigate racial motives of a murder

Stoica v. Romania (2008)

- alleged that the ill-treatment by the police and the decision not to prosecute was racially biased
- violation of Art. 3 (material and procedural aspects) and Art. 14 (racially biased investigation)

Paraskeva Todorova v. Bulgaria (2010)

- Violation of Art. 14 i.c.w. Art. 6 para. 1 on account of the court's refusal to suspend the sentence for a Roma woman in order to avoid the impression of impunity among Roma

Koky and others v. Romania (2012)

- Violation of Art. 3 (procedural aspect) for a failure to investigate racial motives of an assault

No Roma discrimination (?)

Roma women sterilization

- *V.C. v. Slovakia* (2011); *K.H. v. Slovakia* (2009) – violation of Art. 3 and / or Art. 8 and Art. 6 par. 1
- No discrimination

NOTE

A.S. v. Hungary, CEDAW (2004) – sterilization without consent amounts to sex discrimination

Refusal to live in caravans on one's land

- *Buckey v. UK* (1996), *Chapman and others v. UK* (2001)
- Objective and reasonable justification
- No violation of Art. 1 Protocol 1 and no discrimination

Disparate treatment of Roma

- EU / ESC / ECtHR

- EU

no legal action in response to Roma evictions and expulsions in France – violation of Racial Equality Directive and Citizens' Directive (?)

- ESC

Centre on Housing Rights and Evictions v. France (2011) – the French zero tolerance policy towards East European Roma living in illegal camps in violation of the European Social Charter.

- ECtHR case law on Roma evictions – violation of Art. 8
Connors v. UK (2004); *Yordanova&others v. Bulgaria* (2012)

Religion

Framework Directive

Directive 2000/78/EC

- Prohibition of discrimination with regard to **religion or belief**, disability, age and **sexual orientation**
- Material scope
 - conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions
 - access to vocational training
 - employment and working conditions
 - memberships in trade unions
- No progress with regard to the horizontal directive (!)

Religious exceptions

Art. 4 Directive 2000/78/EC

- both religion and sexual orientation can constitute **a genuine and determining occupational requirement**, provided that the objective is legitimate and the requirement is proportionate
- 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.**
- **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.**

Religious exceptions

- NOTE
- Art. 4 Directive 2000/78/EC as a defense to unequal treatment needs to be narrowly construed
- Proportionality analysis of the post requirements
- *Schüth v. Germany* (2010) – dismissal of a Catholic choirmaster in violation of Art. 8
- *Obst v. Germany* (2010)– dismissal of a PR director of the Mormon's Church – no violation of Art. 8

Religion v. sexual orientation

Vaasa Administrative Tribunal, Finland, vaasan Hallinto-oikeus - 04/0253/3.

- Finnish case – the Lutheran Church does not have the right to deny a homosexual the appointment for a chaplain, since no mention of sexual orientation in its internal rules

Ladele and McFarlane v. UK – pending before ECtHR

- national courts – dismissal based on the refusal to carry out the duties of a registrar, not on religious beliefs
- otherwise the decision would amount to discrimination on the basis of sexual orientation
- balancing between individual rights of non-discrimination and the community's right to non-discrimination.

Religious discrimination

Conscientious objection

- *Pichon and Sajous v France* (inadmissible) – refusal to sell contraceptives does not fall under the scope of protected religious freedom
- *Dojan and others v. Germany* (inadmissible) – mandatory sex education in public schools does not violate the right of parents to educate the children according to their faith
- Article 9 does not always guarantee the right to behave in public in a manner governed by a person's belief or protects each and every act or form of behavior motivated or inspired by religion or belief.

But *Grzelak v. Poland* (2010) and *Jakóbski v. Poland* (2010)

Religious symbols v. state neutrality

- *Lautsi v. Italy* (2011)
- Headscarf cases
- *Eweida and Chaplin v. UK* - pending

Sexual orientation

CJEU case-law

- Directive 2000/78/EC

C-267/06 *Tadao Maruko* (2008) and C-147/08 *Römer* (2011)

- Same-sex partnerships or marriages have the same right to employment-related benefits as marriages
- Survivor's benefits granted under an occupational pension scheme / Supplementary pensions constitute 'pay' and fall in the material scope of the Directive

C- 81/12 *ACCEPT* (Gigi Becali case) – pending

- Public statement about no-gay policy regarding selection of football players to the national team by the main shareholder
- *Probatio diabolica* if the club has to show that the actual selection contradicts the statement

ECtHR case-law

- Discrimination of homosexuals/same-sex couples in areas not covered by the EU law
- no right to marry (*Schalk and Kopf v. Austria*, 2010)
- no right to adopt of the partner's child (*Gas and Dubois v. France*, 2012) – no comparable to a marriage; but ... (*X and others v. Austria* – pending)
- the right to single adoption (*E.B. v. France*, 2008)
- the right to succeed to a tenancy (*Karner v. Austria*, 2003 and *Kozak v. Poland*, 2010)

ECtHR case-law

Taddeuci v. Italy – pending

- refusal to grant the family residence permit to a *de facto* same-sex partner, a third country national
- Art. 8 – respect for family life covers also *de facto* same-sex partners = functional approach to „family”
- *Schalk and Kopf v. Austria*, para. 94 (“the relationship of the applicants, a cohabiting same - sex couple living in a stable *de facto* partnership, falls within the notion of “family life”, just as the relationship of a different - sex couple in the same situation would”)
- a difference in treatment based on marital status can have the effect of discriminating on the basis of sexual orientation when same - sex couples are prohibited from marrying
- Art. 2 para. 2 b of the Citizens’ Directive 2004/38/EC – right of entry and residence of family members of EU citizens – limited to *de iure* partners or spouses
- Art. 3 para. 2 requirement to facilitate entry and residence of *de facto* partners.

Thank you for your attention

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