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Racial, religious or sexual orientation discrimination in the EU

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LEGAL BASIS OF THE EU LEGISLATION

- Amsterdam Treaty 1997 (art. 13 EC) :
- *«the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.»*

TWO EU DIRECTIVES

The Race Equality Directive 2000/43 (29 June 2000) - framework for combating discrimination on the grounds of racial or ethnic origin

o • The Employment Equality Directive 2000/78 (27 November 2000) - framework for combating discrimination on the grounds of

o • religion or belief

o • age

o • disability

o • sexual orientation

SCOPE OF THE EU DIRECTIVES

2 directives cover employment(public & private):

- o Access
- o Dismissal
- o promotion
- o Pay
- o working conditions
- o vocational training
- o membership of organisations

ADDITIONAL SCOPE OF THE EU RACE EQUALITY DIRECTIVE

The Race Equality Directive also covers:

- ◊ access to goods and services
- ◊ social protection
- ◊ social advantages
- ◊ education

BROADENING SCOPE OF THE EU DIRECTIVES

- o Religious discriminations outside employment
- o => e.g.: the islamic headscarf in schools

PROVING DISCRIMINATION

- A key issue...
- But numerous difficulties!
- Practical obstacles in collecting evidences
- National courts are reluctant to shift the burden of proof

THE EU DIRECTIVES REQUIREMENTS

- o In both directives (s. 15 of the recitals)
- o *«The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies (...). Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence. »*

ETHNIC REGISTRATION

- o A tricky topic (Croatian case example – obligation for the EU accession – to increase the percentage of ethnic minorities in public administration up to 5%, today is about 3%)

Necessary steps forward

- o To prove indirect discriminations (usually stays invisible)
- o To monitor discriminations (there is no unique mechanism)
- o To implement positive actions (specially quota system)

INDIRECT DISCRIMINATION- ECtHR

- **Thlimmenos case (No 34369/97)**, the ECtHR recognised that a conduct may be discriminatory if two persons are treated alike while their situations are significantly different.
- **In D.H. and others v Czech Republic (No 57325/00)**, the state was the author of indirect discrimination for failing to adapt to Roma pupils tests to determine in which kind of schools children were to be sent, according to their level. Indeed, the authorities had shaped this test to the mainstream Czech population, without regard to the specificities of Roma people, leading them to be more likely to fail.

RACE OR ETHNIC DISCRIMINATION

- Race or ethnic origin is the motive for discrimination that receives the broadest protection under EU law, which covers employment, as well as access to social security scheme and to goods and services supply.
- The ECtHR considers that the prohibition of racial discrimination “is a particular affront to human dignity and requires from the authorities special vigilance and vigorous reaction” (Nachova & others v Bulgaria case, No 43577/98 & No 43579/98).
- Even if the ECtHR does not explicitly require the existence of “very weighty reasons” for the justification of racial discrimination, it has nonetheless stated that “a special importance should be attached to discrimination based on race” (Cyprus v Turkey case).

RACE OR ETHNIC DISCRIMINATION

- o the ECtHR has noticed many discriminatory conducts without making any reference to Article 14.
- o In the case of **35 East African Asians (No 4626/70)** the European Commission on Human Rights found that racial discrimination could amount to degrading treatment under Article 3 of the Convention. The applicants, of Asian origin were restricted to enter and remain in the United Kingdom although they were British citizens.
- o the Commission has held that even if the applicants has been treated as “second class citizens”, no further action was called for, given that they have been later admitted to the UK.

INTERSECTION BETWEEN RACE AND SEX

- o the ECtHR seems to require very strong evidence to establish such discrimination, making it very difficult for the applicant.
- o **Single axis approach!!!!**
- o For example, in **Abdulaziz, Cabales & Balkandali v the UK** an immigrant women had faced serious obstacles to enter the UK and the ECtHR held that the applicant has been discriminated against on the ground of sex, not race.

DEFINING RELIGION OF DISCRIMINATION

Defining religion

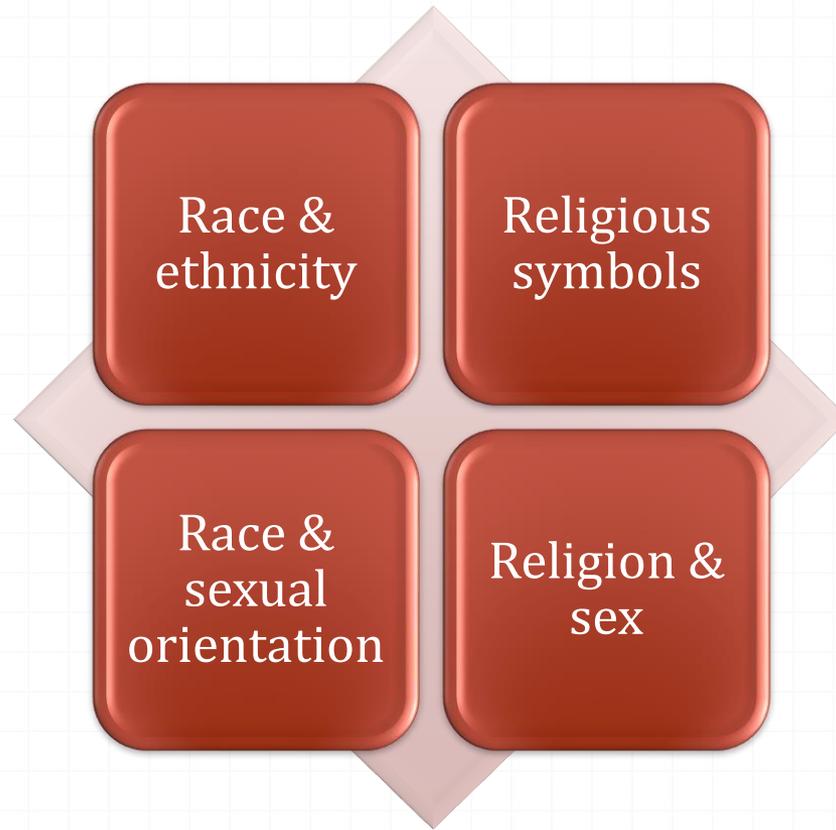
Defining belief

Political opinion

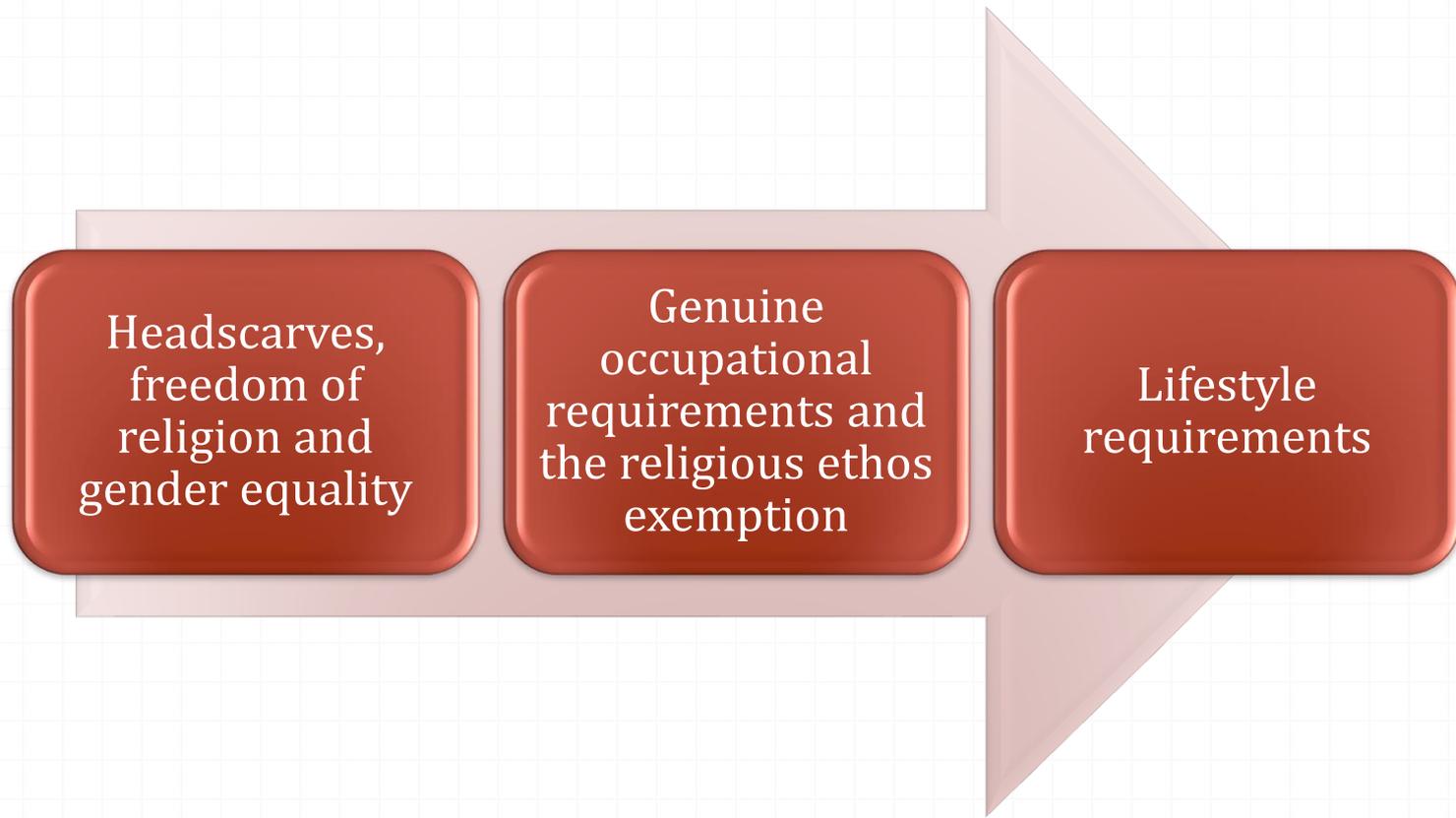
Does belief
include non-
belief?

Determining and
individual's
religion or belief?

EQUAL TREATMENT OF DIFFERENT GROUPS



THE RELATIONSHIP BETWEEN PROVISIONS ON RELIGION AND GENDER



RELIGIOUS OR BELIEF – ECtHR vs ECJ

- While EU law only protects against discrimination on the ground of religion in the field of employment, the ECHR has a much broader scope of application under **Article 9 of the Convention which guarantees the freedom of religion**, and the ECtHR can also refer to Article 8 on the right to private and family life combined with Article 14.
- The **Employment Equality Directive** establishes exceptions to the rule of non-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”.
- Therefore, religious organisations are allowed to require the fulfillment of certain conditions to their employees, like refusing to hire female priests if it contradicts their beliefs.

RELIGIOUS OR BELIEF – ECtHR vs ECJ

- o In **Hoffman v Austria** the applicant, a Jehova's Witness was denied custody of her children. The Austrian Supreme Court granted the custody to the father, stating that the interest of the children requires such a decision, given that this belief often puts its members on the fringes of society and that their refusal to have recourse to blood transfusion could endanger the children's life.
- o **The ECtHR found that this statement was a violation of Article 14, combined with Article 8.**
- o *It considered that even if the Supreme Court was pursuing a legitimate aim (protecting the children's interests), the means were not reasonable and proportionate because "notwithstanding any possible argument to the contrary, a distinction based essentially on a difference in religion alone is not acceptable".*
- o **ECtHR shows that discrimination on the ground of religion is hardly justifiable, but no reference was made either to "the margin of appreciation" of MS or to the requirement of a defence based on "very weighty reasons".**

RELIGIOUS OR BELIEF – ECTHR vs ECJ

- o In the **Thlimmenos case** a Jehovah's Witness refused to wear the military uniform at time of general mobilisation claiming that his beliefs prohibited the use of weapons. He has been sentenced to four years of imprisonment for insubordination and released on parole after two years.
- o Later he applied for an accountant position where he came second out of sixty applicants in the public examination. The administration nevertheless refused to appoint him because he had been convicted.
- o **The ECtHR disclosed a violation of Article 9 on the freedom of religion combined with Article 14**, because “unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession”.
- o **PROPORTIONALITY TEST** - the applicant had served his sentence for the offence. Imposing an additional sentence preventing the applicant to obtain the position was therefore unreasonable and disproportionate.

RELIGIOUS OR BELIEF – ECTHR vs ECJ

- o The ECtHR however, does not always apply such a strict scrutiny, especially not when the case concerns the relationship of religions and a state.
- o In the case of the **Holy Monasteries v Greece**, the ECtHR reached the conclusion that Article 14, combined with the right to court, the freedom of religion and the freedom of association, had not been violated.
- o The Greek authorities had adopted an Act providing for compulsory transfer of property of the Holy Monasteries owned by the Greek Church to the state, while the Act did not affect other churches.
- o The ECtHR held that this difference in treatment was legitimate as regards the close relationship between the state and the Greek Church.

SEXUAL ORIENTATION DISCRIMINATION

- o **EU (after Lisbon)** - Charter of Fundamental Rights of the European Union is the first international human right instrument to explicitly prohibit discrimination on the basis of “sexual orientation” in its Article 21 (1)
- o Under EU law, discrimination on the ground of sexual orientation is prohibited by the Employment Equality Directive and thus applies in the field of employment.
- o **ECHR - Sexual orientation is not expressly referred to in Article 14**
- o it falls under its scope thanks to the terms *“other status”* which provides for an extension of the list of the protected grounds.

SEXUAL ORIENTATION

- o In the case of **Salgueiro da Silva Motta v. Portugal No 33290/96**, a man who had a child with his former wife was now living with another man. He was refused the custody of his child by a Court of Appeal on the ground that “the child should live in a family environment, a traditional Portuguese family, which was certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife.” The Court of Appeal even considered that the father “had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria.”
- o The ECtHR stated that it was a violation of the right to private life (Article 8 of the Convention), but also a discrimination in violation of Article 14. In addition, the Court held that sexual orientation was a “suspect case” requiring a strict scrutiny and only justifiable with “very weighty reasons”.
- o In the **S. L. v Austria case (No 45330/99)** a man considered he was victim of discrimination because the Austrian law criminalised sexual relations between young men between 14 and 18 and adults, whereas lesbians and heterosexual did not suffer such a prohibition. The ECtHR held that it was a discriminatory conduct on the ground of sexual orientation, combining Article 14 and the right to private life (Article 8).

SEXUAL ORIENTATION – ECtHR

- o The prohibition of discrimination on the ground of sexual orientation does not mean that Member States have to allow same-sex couples to marry.
- o ECtHR acknowledged that a cohabiting same sex couple in a stable relationship falls under the scope of Article 8 protecting the right to private and family life (Schalk & Kopf v Austria, No 30141/04).

SEXUAL ORIENTATION-ECJ

- o There are not many rulings from the ECJ available concerning discrimination on the ground of sexual orientation. However, it has carried out a *strict scrutiny* in very recent cases dealing with pensions.
- o In **Maruko case (C-267/06)** a man who was in a life partnership with another man, was refused a widower's pension when his partner died.
- o German law places partners and spouses in a comparable situation concerning survivor's benefit. Therefore the ECJ, which only requires a comparable and not similar situation, stated that such refusal was a discriminatory and unjustified conduct.

SEXUAL ORIENTATION-ECJ

- In **Römer case (C-147/08)** a man who was engaged in a life partnership with another man requested his former employer to recalculate the amount of his retirement pension on the ground of the Hamburg's land law allowing married people to be granted their pension on a more favourable mode of calculation.
- *His employer refused to do so, pointing out the fact that this provision was only applicable to married couple but not couples engaged in a partnership.*
- However, same-sex couples are not allowed to marry and only have the possibility to enter a life partnership.
- **As a consequence, the ECJ stated that such differential treatment was discriminatory given that the regime of registered life partnership has gradually been harmonised with that of marriage, resulting in the absence of legal difference between them.**

FURTHER ACTIONS

- • Training NGOs, trade unions, lawyers and judges
- • Awareness raising

- Strategic litigation
- Learning from other countries experiences

- E.g.: testing, statistics, CRE questionnaire, cessation, ...

DE LEGE FERENDA

- Scope of anti-discrimination law
- Grounds of anti-discrimination law
- Common standards for combating racial crime
- Implementing programs for communities especially discriminated against