

[Balancing the Principle of Non-Discrimination against Other Fundamental Rights]

Current Reflections on EU Anti-Discrimination Law
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[Introduction]

Source: Thematic study commissioned
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Discrimination Field*

E. Bribosia and I. Rorive, *Towards a
Balance Between the Right to Equality
and Other Fundamental Rights*, 2010,
forthcoming

[Human Rights (HRs) and the EU Legal System]

- General principles of Community law and the role of the ECJ (Art. 6(3) EU)
- EU Charter of Fundamental Rights (2000) and Lisbon Treaty (Art. 6(1) EU)
 - MS observe fundamental rights when implementing Directives (Art. 51 Charter)
 - NB: No universal competence for implementing HRs; competence shared between EU and MS

[Observing HRs and Implementing Directives]

Cf. ECJ, *Lindqvist*, 20 November 2003, C-101/01, paras. 79-90

Conflict between freedom of expression for Mrs Lindqvist and the right to privacy (data protection) for fellow workers in her parish

Para. 87 “it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as inter alia the principle of proportionality”.

[Introduction – Non-Discrimination in the Construction of Europe]

Originally, in the Treaty of Rome, isolated commitments linked to economic objectives:

- no discrimination on ground of sex (pay)
- no discrimination on ground of nationality (within the scope of the Treaty and solely for MS nationals)

Evolution in case-law, prohibition of discrimination on ground of sex = fundamental right

[Introduction – Non-Discrimination in the Construction of Europe (cont'd)]

Treaty of Amsterdam – Competence to formulate an anti-discrimination policy (extended to include other grounds and beyond the field of employment)

Art. 13 EC Treaty

“(...) the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”

[Introduction – Non-Discrimination in the Construction of Europe (cont'd)]

- Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (age, sexual orientation, religion or belief, disability)
- Signs of a general principle prohibiting various forms of discrimination < ECJ

[Introduction – Non-Discrimination in the Construction of Europe (cont'd)]

Charter of Fundamental Rights - Ch. 3: Equality

- Equality before the law (Art. 20)
- Non-discrimination (Art. 21)
- Cultural, religious and linguistic diversity (Art. 22)
- Equality between men and women (Art. 23)
- The rights of the child (Art. 24)
- The rights of the elderly (Art. 25)
- Integration of persons with disabilities (Art. 26)

[Conflicts between HR – General Comments]

- Familiar problems
 - e.g.: freedom of the press v. respect for privacy
 - e.g.: prohibition of torture v. right to life

[Conflicts between HR – General Comments (cont'd)]

- Significant increase over the past 20 years
 - Broad interpretation
 - Horizontal application
 - HR rhetoric

[Conflicts between Equality and HRs – Issues and Challenges]

- 1) Issue of constructing a typology capable of capturing conflicts between HRs
- 2) Issue about the specific nature (or not) of conflicts between the principle of non-discrimination and HRs compared with conflicts between HRs
- 3) Issue about the place of conflicts between grounds for discrimination and of tensions between different aspects of the right to equality
- 4) Issue of defining methodologies which help to resolve these conflicts and the respective roles played by the legislative and the judiciary

[Conflicts between Equality and HRs – Towards a Typology]

- L. Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford, O.U.P., 2007
- E. Brems (ed.), *Conflicts between fundamental rights*, Antwerp-Oxford-Portland, Intersentia, 2008

HR Conflicts – Typology – Lorenzo Zucca

- *Inter-right / intra-right* conflicts
 - clash between two rights or freedoms
 - tensions within a right or a freedom
- *External / internal* conflicts
 - claims arising from the protection of HRs which set one individual against another
 - claims arising from the protection of HRs which collide around the same individual

Conflicts between Equality and HRs – Zucca’s Typology Revisited

Conflict	Inter-right	Intra-right
Internal	e.g. : <u>equality v. privacy</u>	<u>equality v. equality</u>
External	e.g.: <u>equality v. freedom of religion;</u> <u>equality v. privacy</u>	<u>equality v. equality</u>

[Conflicts between Equality and HRs – Typology (cont'd)]

- External inter-right conflict
 - e.g.: equality v. freedom of religion
 - recruiting for an “organisation with ethos”
 - e.g.: equality v. privacy
 - recruiting domestic staff

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[Conflicts between Equality and HRs – Typology (cont'd)]

- Internal inter-right conflict
 - e.g.: equality v. privacy
 - positive action and ethnic statistics
 - reasonable accommodation and disability

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[Conflicts between Equality and HRs – Typology (cont'd)]

- External intra-right conflict
 - e.g.: equality v. equality
 - same-sex marriage and conscientious objection by registrar
 - civil servant who refuses to shake hands with persons of the opposite sex

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[Conflicts between Equality and HRs – Typology (cont'd)]

- Internal intra-right conflict
 - e.g.: equality v. equality
 - reasonable accommodation on religious grounds
 - European Court of Human Rights, *Kosteski v. Former Yugoslavian Republic of Macedonia*, 13 April 2006

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[Conflicts between Equality and HRs – Typology – Insights]

- Different challenges posed by external and internal conflicts
- Inter-right and intra-right conflicts: possible overlap (e.g. religious freedom) and conflicting grounds
- External intra-right conflicts and different conceptions of equality
- Internal intra-right conflicts very limited

[Conflicts between Equality and HRs – Towards a Methodology]

- Question of true and false conflicts
 - Importance of reference context
 - Conflicts between HRs and conflicts between an HR and an interest

Conflicts between Equality and HRs – Methodology (cont'd)

- Hierarchical argument
 - No *a priori* hierarchy
 - Indivisibility and interdependence of HRs
 - Primacy for the right to equality?
 - Hierarchy of grounds?
 - Suspect criteria in Eur. Court HR case-law
 - Keys to conflict resolution in Directives...

Conflicts between Equality and HRs – Methodology (cont'd)

- Markers to help frame the legal argument
 - German concept of *praktische Konkordanz*
 - Proportionality test or weighing up of the interests involved?

[Conflicts between Equality and HRs – Methodology (cont'd)]

- Markers to help frame the legal argument (cont'd)
 - Abuse of process (in the civil law sense)
 - Contours and substance of HRs
 - Impact of rights of third parties
 - Is intervention more serious than a failure to act? Direct discrimination more serious than indirect discrimination?
 - Procedure

[Conflicts between Equality and HRs – Methodology (cont'd)]

- Markers to help frame the legal argument – Procedure (cont'd)
 - Quality of the assessment process
 - Referral to the right *forum* to resolve the conflict on a principled basis