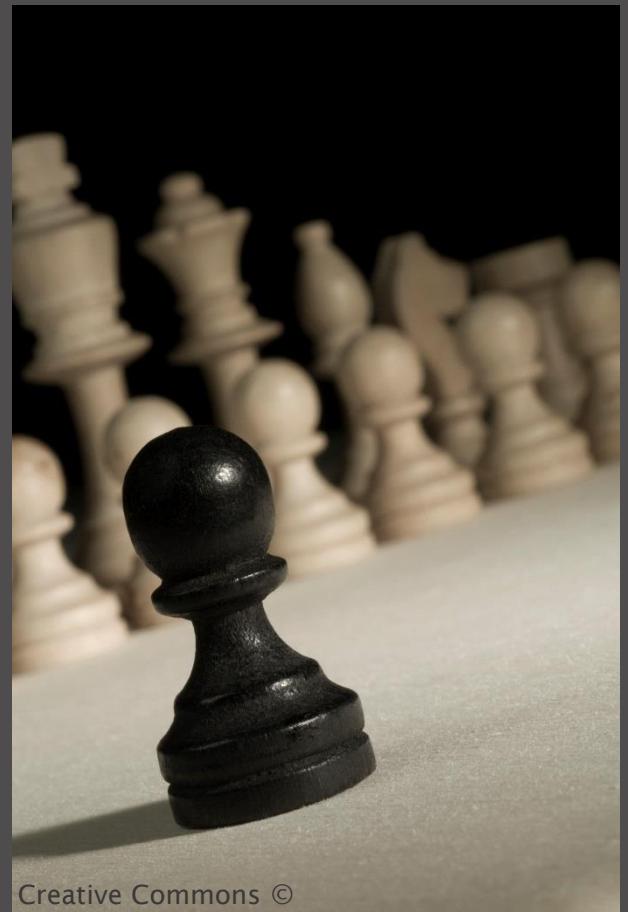


# Taking EU equality law to the next level: in the search of coherence & better enforcement

Dr Sara Benedi Lahuerta

[s.benedi-lahuerta@soton.ac.uk](mailto:s.benedi-lahuerta@soton.ac.uk)



Creative Commons ©

# Outline

---

1. Evolution of EU Equality Law
2. Lack of coherence & how to address it
3. Gender reassignment
4. Reasonable accommodation
5. Equality bodies
6. Wider standing rules
7. Concluding remarks

# Evolution of EU Equality Law

---

## Equal treatment as...

- A **market** right → 1950s
  - ✓ Equal Pay (current art 157 TFEU)
  - ✓ Nationality discrimination (current art 18 TFEU)
- A **social** right → 1970s – Equal Treatment Directive 76/207
- A **fundamental** right:
  - ✓ Charter on fundamental social rights for workers (1989)
  - ✓ Art 19 TFEU → New Directives:

D 43/2000:  
Race/Ethnic origin

D 78/2000:  
Religion/belief, disability, age,  
sexual orientation

D 2006/54  
(Recast):  
Men & Women

- ✓ EU Charter of Fundamental Rights: art 21

Financial crisis 2008 → equality law/policies on hold

# Lack of coherence?

---

## Progressive evolution of EU equality law

- ↳ Different levels of protection for different grounds → “Hierarchy”
  - ↳ Are all these differences justified?
- ↳ Uneven enforcement mechanisms for different grounds
  - ↳ Why are equality bodies only required for gender & race discrim.?
  - ↳ Mismatch between objectives and tools to achieve them:
    - ✓ Equality law based on individual enforcement → victims' action
    - ✓ BUT: victims tend not to report discrimination

## Constitutionalisation despite these inconsistencies?

# The search for coherence (I)

---

## ‘Hierarchy of equalities’: product of policymaking contingencies

- **Council**: ‘the different forms of discrimination cannot be ranked’
- **Commission**: need to develop ‘a coherent and integrated approach towards the fight against discrimination’

## Substantive equality → dignity:

- Underlying value of EU equality law
- CJEU ruling in *P v S*: based on individual dignity & freedom
- AG Poiares Maduro in *Coleman*: ‘to determine what equality requires in any given case it is useful to recall the values underlying Equality. These are human dignity and personal autonomy’
- No legislative distinctions between grounds (Canadian Supreme Court)

# The search for coherence (II)

---

More coherence could be achieved at different levels:

Substantive level:

- Internal coherence: achieving a congruent legal framework
- External coherence: converging towards international standards

Enforcement level: aligning:

- EU equality law **objectives**: ‘putting into effect’ equal treatment
- **Mechanisms/tools** to be put in place at national level

Individual & remedial action        Underreporting

# How should EU Equality Law evolve to be more coherent?

---

## Improving substantive coherence:

1. Explicit prohibition of gender identity discrimination
2. Accommodation of religious beliefs through the concept of indirect discrimination



Creative Commons ©



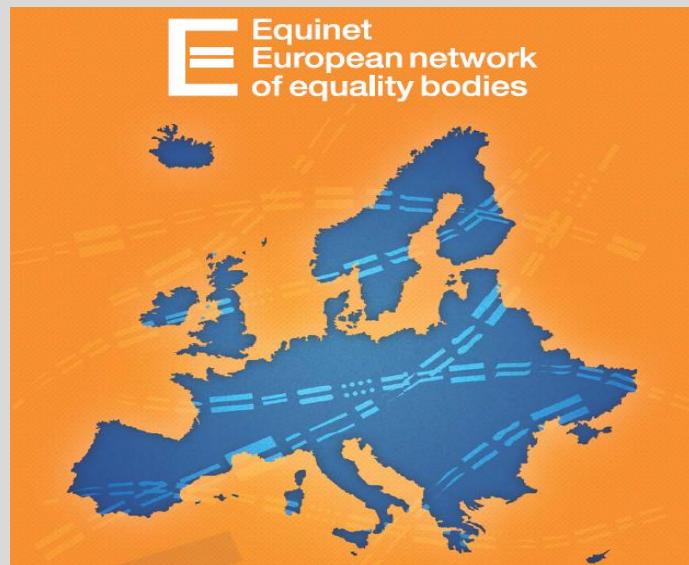
Creative Commons ©

# How should EU Equality Law evolve to be more coherent?

---

## Improving the coherence of enforcement strategies:

1. Equality bodies for all protected grounds



Source: [www.equineteurope.org](http://www.equineteurope.org)

2. Wider standing rules: collective enforcement



Creative Commons ©

# Explicit prohibition against gender identity discrimination (I)

---

## EU law protection against gender reassignment discrimination:

- Since *P v S* (1996), considered to fall under ‘sex discrimination’

CJEU: ‘based, essentially if not exclusively, on the *sex* of the person concerned’

- No explicit prohibition, except...
- ... Recital 3 of Recast Directive → hardly implemented by MS

## Problems:

- Lack of awareness & underreporting
- Transgender people: highest levels of discrimination among LGB: 30% in *access* to employment; 23% *in* employment

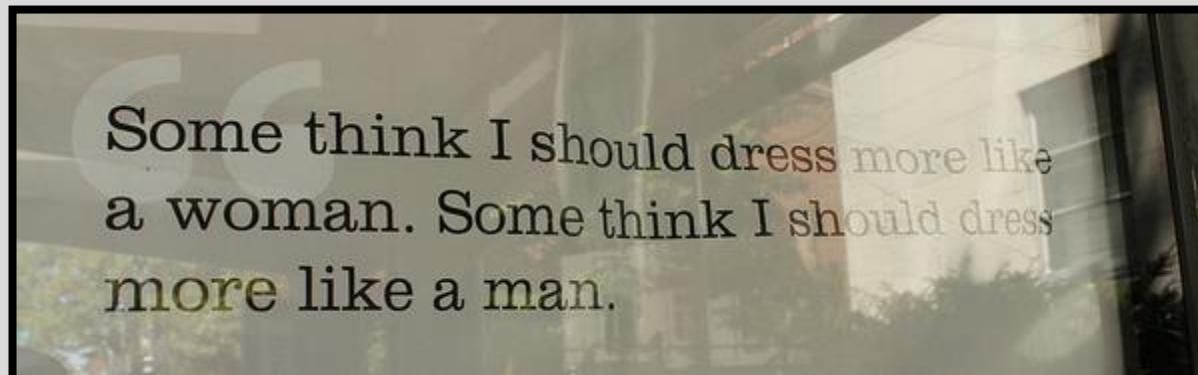
# Explicit prohibition against gender identity discrimination (II)

---

## Gender reassignment or gender identity?

Uncertainty about the scope of the case-law based prohibition:

- CJEU judgments only concern claimants who had undergone [gender reassignment surgery](#)
- What about trans people who have not/do not intend to undergo gender reassignment?
- ‘Fluidity’ of gender for some trans people



# Explicit prohibition against gender identity discrimination (III)

---

**Social situation:** Increasing social acceptance (Eurobarometer 2015):

- 53% of respondents: comfortable/indifferent with having a trans person in the highest political office (42% in 2012)
- 67% of respondents: comfortable/indifferent to work with a trans person

**At international level:** growing consensus on the need to prohibit gender identity discrimination expressly

- Yogyakarta principles (2006)
- UN Human Rights Commissioner (2012)
- Parliamentary Assembly, Council of Europe: Resolution 2015
- EU Fundamental Rights Agency (FRA)

# Explicit prohibition against gender identity discrimination (IV)

---

## Proposal:

Introduce an express prohibition of **gender identity** discrimination

**BUT:** lack of an obvious legal basis

## Options:

- Relying on *P v S* → extensive interpretation of term ‘sex’ (art 19 TFEU)
- Possibility to rely on art 352 TFEU
  - ✓ Used in 1970s to enact sex equality legislation when no specific legal basis
  - ✓ Hurdle: requires consensus at the Council

# Accommodation of religious beliefs through indirect discrimination (I)

---

Currently, duty of reasonable accommodation for:

**The disabled:**

Art 5 Dir 2000/78



**Pregnant women:**

Art 5(1) Dir 92/85



BUT:

- People protected under other grounds may also require adjustments
  - ✓ Age
  - ✓ Religion or belief
- In other jurisdictions (US & Canada): additional grounds covered

↳ Some **age-related** conditions can amount to a ‘disability’

↳ But what about **religion?**

# Accommodation of religious beliefs through indirect discrimination (II)

---

ECtHR:

*Thlimmenos* (2000):

*"The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different"*

↳ Reasonable accommodation comes within the scope of indirect discrimination → objective justification

ECtHR seems more favourable to its application in the private than in the public sector:

- Public sector: *X v UK* (1981); *SH and HV v Austria* (1993); *Kosteski* (2006); *Sessa* (2012)
- Private sector: *Eweida* (2013)

# Accommodation of religious beliefs through indirect discrimination (III)

---

CJEU:

Case 13/63 *Italian Republic v Commission*; Joint Cases T-18/89 and 24/89 *Tagaras*:

*'The principle of equal treatment requires not only to treat in the same manner identical situations, but also to treat differently different situations'*

Case 130/75, *Prais* – accommodation of religious beliefs is ‘desirable’

*‘if a candidate informs the appointing authority that religious reasons make certain dates impossible for him the appointing authority should [...] endeavour to avoid such dates’*

# Accommodation of religious beliefs through indirect discrimination (IV)

## Pending Cases:

- Muslim women working in private companies
- Dismissed because wearing the hijab at work breached the companies' neutrality policies

### C-157/15 Achbita

- ✓ Started to wear scarf at work after some time
- ✓ 'Should never wear scarf'



Source: Mizrahilaw.com

### C-157/15 Bougnaoui

- ✓ Wore scarf from day one
- ✓ 'Should not wear scarf while in contact with clients'



Source: inspiringmuslimwomen.tumblr.com

# Equality bodies

---

**EU duty to set up equality bodies only concerns:**

- Gender & race
- Within employment & for access to goods/services

**Problems:**

- In some Member States: equality bodies have **only the minimum required powers**
  - EU ratification of **Convention on the Rights of Persons with Disabilities**
  - Proposal for a new Directive prohibiting discrimination:
    - ✓ In access to goods/services
    - ✓ On grounds of religion/belief, age, disability, sexual orientation
-  **Includes duty to set up equality bodies**

# Wider standing rules

---

## The ‘individual enforcement paradox’:

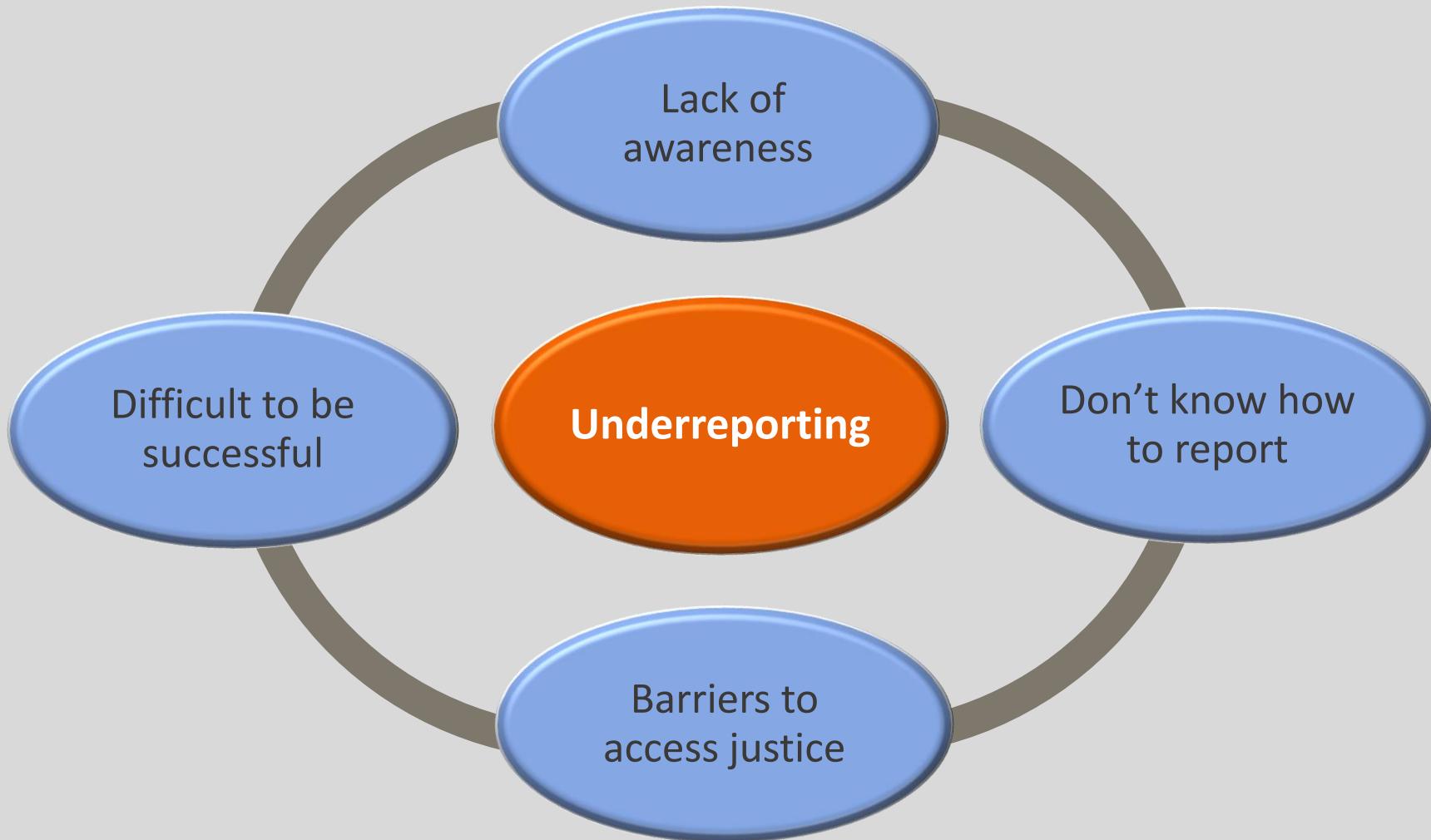
- EU Equality Law expects victims to ‘take action’
- **BUT:**
  - ✓ High levels of underreporting → ***‘underreporting is the norm’***
  - ✓ Victims’ difficulties to recognise discrimination
  - ✓ Barriers to access justice: **where to report, costs,...**
  - ✓ Lack of confidence in the legal system (difficult to be successful,...)
  - ✓ Difficulties to shift the burden of proof to the respondent

## Suggestions for improvement → Wider standing rules:

- Equality bodies/support orgs → representing victims
- Actio popularis → e.g. C-54/07, *Firma Feryn*
  - ✓ Commission Recommendation 2013/396
  - ✓ Directive 2014/54/EU



# 'Underreporting is the norm'... *Why?*



# Concluding remarks

---

- Reasonable accommodation for **religious beliefs**
  - Possible through an extensive **interpretation** of “indirect discrimination” → Case law of the ECtHR & CJEU
  - Golden opportunity: *Achbita; Bougnaoui*
    - ✓ **BUT:** see AG Kokott Opinion in *Achbita* (delivered 31/05/2016)
- Other proposals: require **legislative amendments**
  - ✓ Explicit protection against **gender identity discrimination**
  - ✓ Extension of duties to set up **equality bodies**
  - ✓ Better enforcement requires **wider standing rules**
  - ↳ The EU as a human right actor?