



20 Years of EU Anti-Discrimination Law:

Shortcomings and Progress

**ERA's (European Law Academy)
Webinar for University Professors and Law Lecturers**

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Today

- 1) **Developments pre-Amsterdam Treaty**
- 2) **From Amsterdam Treaty to Lisbon Treaty**
- 3) **Lisbon Treaty and beyond**
- 4) **The balance of 20 years: major trends and themes since adoption of 2000 Equality Directives**



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Pre-Amsterdam Treaty

Amsterdam – Lisbon Treaty

Lisbon Treaty on

Trends and Themes

1957 (1959) -1997 (1997): Developments pre-Amsterdam Treaty

Gender equality	Race and ethnicity, religion, sexual orientation, age, disability	Other grounds (e.g. linguistic rights, intersection between anti-discrimination law and rights of EU citizens, multiple discrimination)
<ul style="list-style-type: none"> Art 119 EEC (a fairly general single provision) Secondary legislation (examples of directives) Active jurisprudence of the CJEU on gender equality, based on the extensive interpretation of the principle of equality 	<ul style="list-style-type: none"> No provisions of primary EU law CJEU case law on transsexuals Failure to frame sexual orientation as part of gender equality Episodic reference to race, religion and other grounds 	<ul style="list-style-type: none"> CJEU jurisprudence regarding right to a name (C-168/91 <i>Konstantinidis</i> 1992) Language rights of EU citizens

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Pre-Amsterdam Treaty	Amsterdam – Lisbon Treaty	Lisbon Treaty on	Trends and Themes
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Example of Gender & Sexuality in EU Law pre-Amsterdam (before 1997)

Case	Situation	Is it covered by "sex equality" of Art. 119 EEC (157 TFEU) ?	Effect
C-13/94 <i>P v S and Cornwall County Council</i> (1996)	The case concerned a trans woman from the United Kingdom, referred to as 'P' in court proceedings, who was dismissed from her post after informing her employers that she was undergoing gender reassignment	Yes <i>(Mr. X to Ms. X situation)</i>	From the 1990s onwards, intersex equality has been treated as a matter of sex discrimination (Art. 157 TFEU = Art. 119 EEC)
C-249/96 <i>Grant v. South-West Trains Ltd.</i> (1998)	The case concerned employment benefits for a lesbian couple	No <i>(Mr. X + Mr. Y to Ms. W. + Ms. Z situation)</i>	The LGB-rights received a green light at the CJEU only after the reform of EU primary law, via Amsterdam Treaty, inserting sexual orientation as a separate ground Art. 19 TFEU (= Art. 13 EEC)

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Pre-Amsterdam Treaty	Amsterdam – Lisbon Treaty	Lisbon Treaty on	Trends and Themes
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From Amsterdam Treaty (1997)



Art. 157 TFEU
(former 119 EEC / 141 EC)

“1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. ...”

+ [New provision] **Article 19 TFEU** (Art. 13 EC in 1997)

“1. ... the Council... may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. ...”

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2000 Equality Directives: Celebrating 20 Years in 2020

• *Sex:*

Directive 2006/54/EC (a.k.a. “Equal Treatment” or “Gender/Sex Equality” Directive);

• *Racial and ethnic origin:*

Directive 2000/43/EC (a.k.a. “Race Equality Directive”, or RED) ;

• *Religion, disability, age, and sexual orientation:*

Directive 2000/78/EC (a.k.a. “Framework Equality Directive”, or FED).



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1997 (1999) - 2007 (2009): From Amsterdam Treaty to Lisbon Treaty

Gender equality	Race and ethnicity, religion, sexual orientation, age, disability	Other grounds (e.g. linguistic rights, intersection between anti-discrimination law and rights of EU citizens, multiple discrimination)
<ul style="list-style-type: none"> • Art 141 TEC (expansion of the provision) • Secondary legislation (examples of directives) • CJEU jurisprudence 	<ul style="list-style-type: none"> • Art 13 TEC • Adoption of the two key Equality Directives in 2000 • First jurisprudence of the Court regarding 2000 Directives (C-144/04 <i>Mangold</i> 2005, C-54/07 <i>Feryn</i> 2008, etc.) 	<ul style="list-style-type: none"> • Permissive stage in CJEU jurisprudence regarding right to a name (C-148/02 <i>Garcia Avello</i> 2003) • Language rights of EU citizens

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2009-... Lisbon Treaty and beyond

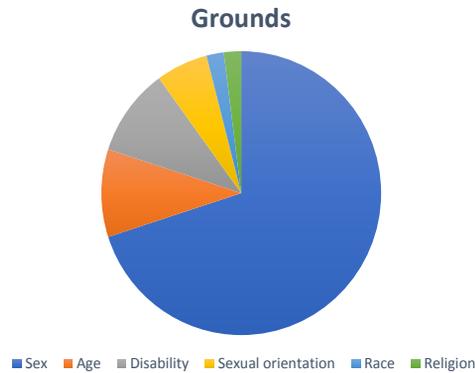
Gender equality	Race and ethnicity, religion, sexual orientation, age, disability	Other grounds (e.g. linguistic rights, intersection between anti-discrimination law and rights of EU citizens, multiple discrimination)
<ul style="list-style-type: none"> • Art 157 TFEU (Parliament receives a role in adoption of the secondary legislation) • Charter of Fundamental Rights receiving status of primarily law (Art 23 equality between men and women) • Secondary legislation (examples of directives and regulations currently at place) • CJEU jurisprudence 	<ul style="list-style-type: none"> • Art 19 TFEU • Charter receiving status of primarily law (Chapter III on equality and other relevant provisions) • EU becomes party to the UN Convention on the Rights of Persons with Disabilities • Intensification of the Court 's jurisprudence on Equality Directives 2000 	<ul style="list-style-type: none"> • Charter receiving status of primarily law (Art 1 on dignity and several other grounds added, e.g. 'language', 'membership of a national minority', 'property' and 'political or any other opinion' and 'genetic features') • Restrictive stage in CJEU jurisprudence regarding right to a name (C-208/09 <i>Von Wittgenstein</i> 2010, C-391/09 <i>Wardyn</i> 2011)

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2000-2020: Major Trends and Themes since Adoption of 2000 Equality Directives

1. Disproportionality amongst grounds of discrimination in CJEU jurisprudence



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2000-2020: Major Trends and Themes since Adoption of 2000 Equality Directives

2. Unequal Material and personal scope of the Twin Directives

Grounds Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes	Yes	Yes	Yes	Yes	Yes
Education	Yes	No	No	No	No	No
Goods and services	Yes	No	No	No	No	Yes
Social protection	Yes	No	No	No	No	Yes

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2000-2020: Major Trends and Themes since Adoption of 2000 Equality Directives

3. Proceduralisation of EU equality law

Art. 7(2) RED & 9(2) FED:

Member States shall ensure that **associations, organizations or other legal entities** that have [...] a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of that complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations [...]

Art. 13 RED (→ "Equality Bodies"):

Member States shall designate **a body or bodies for the promotion of equal treatment** of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individual rights.

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2000-2020: *Proceduralisation of EU equality law*

See cases like C-54/07 *Feryn* [2008] & C-81/12 *Asociatia ACCEPT* [2013]



Why this “empowerment” turn to equality bodies and NGOs is important?

1. Low awareness of legal possibilities to seek judicial redress, frequently combined with imperfect knowledge of the official language of procedure (very often affecting migrants);
2. Serious physical or mental impairments (in the case of disabled people);
3. Age of affected victims (in the case of both youth and the elderly);
4. Religious considerations or subordinated status (e.g. women in some traditional Islamic families); and
5. Fear of public ostracism, considerations of privacy and safety (e.g., LGBT plaintiffs)

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Pre-Amsterdam Treaty

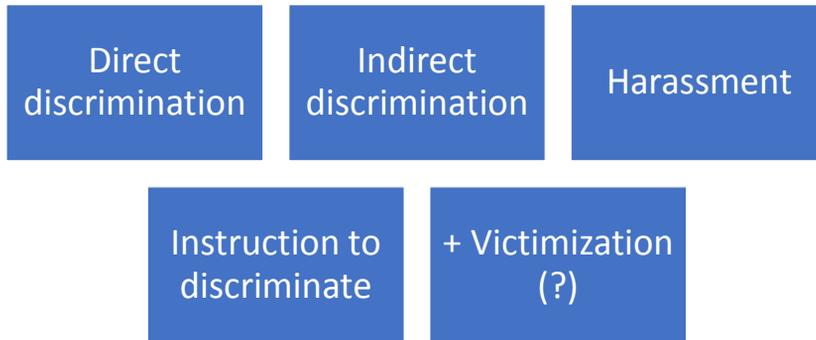
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2000-2020:
Major Trends and Themes since Adoption of 2000
Equality Directives

4. Forms of discrimination in EU anti-discrimination law



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2000-2020:
Major Trends and Themes since Adoption of 2000
Equality Directives

- **Positive discrimination or affirmative action**
(See Art. 157 TFEU, Art. 5 RED & Art. 7 FED)
- **Duties of reasonable accommodation**
(UN Convention on [...] Disabilities, Art. 2.2.(b) & 5 FED)



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Beyond 2000 Twin Equality Directives : EU Citizenship Law

- Recognition of the same-sex marriage (registered in Belgium) in Romania: C-637/17 *Coman* (2018)
- Beyond FED: [EU Citizenship Directive 2004/38 EC](#) – content of the term “spouses”
- Inspiration from US Supreme Court: *Obergefell v. Hodges* (2015)
- CJEU’s cases regarding gay asylum seekers: Joined (Grand Chamber) Cases C-148/13 to C-150/13, *A., B. & C.* (2014) + Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal* (2018)



(Key & Peele, US comedians)

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Beyond 2000 Twin Equality Directives: EU Charter of Fundamental Rights

- Art. 21 Charter:

Prohibition of discrimination based on **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**

- Yet see Art. 6 Charter:

Limited application of the Charter, not implying “the extension of the competences of the Union”

Example of “**language discrimination**” and the limited scope in EU anti-discrimination law:

Case C-208/09, [~~von~~] *Wittgensten* (2011)

& Case C-391/09, *Runevič-Vardyn and Wardyn* (2011)

(Malgożata *Runevič-Vardyn* v. Małgorzata *Runiewicz-Wardyn*)

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Limits, Failures and Prospects of 2000 EU Equality Directives (RED & FED)

• Example of Race

- Poor number of cases at the CJEU based on RED;
- Confusion of discrimination based on “nationality” and “race / ethnic origin” in the jurisprudence of the CJEU;
- Often intersectional status of race discrimination that is difficult to catch within strict reading of RED;
- Insignificant number and subordinate societal status of active plaintiffs coming from disadvantaged ethnic groups;
- Unequal status and activeness of Equality Bodies (under RED) in Member States;
- Issues affecting the burden of proof, indirect discrimination & access to remedies

• Example of Sexual Orientation

- Limited material scope of FED;
- Resistance of Member States to implement FED and Citizenship Directives adequately;
- Concealment of sexuality by plaintiffs in Member States with predominant homophobia, evidenced in both a pressing social embarrassment for individuals and groups advancing sexual emancipation, and a climate of physical and verbal violence.
- Unequal status and activities of Equality Bodies (under RED) in Member States.
- Issues affecting the burden of proof, indirect discrimination & access to remedies

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Thank you for attention!



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For further references, see:

Ulad Belavusau & Kristin Henrard (eds.),
EU Anti-Discrimination Law Beyond Gender,
Hart (Oxford, 2018)

