

The concept of equality as applied by the CJEU and the ECtHR

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Two systems, two approaches

The challenge before us

- Academic writers, e.g. Besson (2008) and Burri (2013): Very different approaches of the two systems with respect to discrimination, in spite of judicial dialogue and references in particular by the CJEU to the ECtHR.
- Increased relevance of the topic due to the aim of accession of the EU to the ECHR following Art. 6(2) TEU (request for an advisory opinion pending at the CJEU).
- On the level of soft law, the Handbook on European non-discrimination law jointly published by the EU’s Fundamental Rights Agency and the ECtHR may be seen as an attempt to bring the two legal orders closer to each other even before accession.

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Overview

Structure of the presentation

- By way of general background:
Some differences between the two systems as a whole.
- Basic understanding of “equality” as a legal concept under the ECHR and EU law: a common starting point.
- Differences in the meaning and reach of the prohibition of discrimination under the ECHR and under EU law:
 - Sources of the prohibition.
 - Nature: accessory or stand-alone.
 - Discrimination grounds.
 - Forms of discrimination.
 - Justification.

The larger context (1)

Origins: Bill of rights vs. economic law

- ECHR:
Set up as a general bill of rights, with the non-discrimination provision of Art. 14 ECHR as a particular human rights aspect.
- EU law (at the time: Community law):
 - Originally set up as economic law (though serving higher ends), including, among others, prohibitions of discrimination.
 - Originally mostly discrimination on grounds of nationality.
 - Only one social law provision, on equal pay for men and women, with an economic background; later declared by the CJEU to have a double aim, both economic and social; *Defrenne* (1976).

The larger context (2)

Intergovernmental vs. supranational organisations

- ECHR:
 - Classic intergovernmental cooperation, binds only the States.
 - Though with the special aspect of the right of individuals to bring actions to the ECtHR, as a last instance.
- EU law (originally: Community law):
 - From the beginning supranational integration.
 - EU partially intergovernmental; though following the Lisbon revision, only the special field of the Common Foreign and Security Policy remains intergovernmental in nature.
 - Particularly sophisticated system for the protection of individual rights.
 - EU law other than Directives can also directly bind individuals.

Interpreting equality (1)

A common starting point

- Underlying both ECHR and EU non-discrimination law is an Aristotelian understanding of equality:
 - I.e. a general definition according to which legal equality means that similar situations are to be treated in the same manner and different situations are to be treated differently, according to their difference.
 - ECtHR: leading case *Thlimmenos* (2000).
 - CJEU: as of *Italy v Commission* (1963).
- Accordingly, both legal orders:
 - Place great importance on comparability;
 - Recognise that discrimination can result from either different treatment of comparable situations or from same treatment of non-comparable situations.

Interpreting equality (2)

CJEU case law

- CJEU, on equality:
“comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified”; *Chatzi* (2010), concerning parental leave.
- CJEU on discrimination:
“[...] can arise only through the application of different rules to comparable situations or the application of the same rule to different situations”; thus the CJEU e.g. in *Schumacker* (1995), concerning taxation, and in *Hill* (1998), concerning social employment law.

Interpreting equality (3)

ECtHR case law

- ECtHR, *E.B. and others v. Austria* (2013):
„[...] not every difference in treatment will amount to a violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory [...]. However, this is not the only facet of the prohibition of discrimination under Article 14. 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 [...]“.

Prohibition of discrimination (1)

(In principle) Unitary source vs. multiple source

- ECHR:
 - One Convention, one provision, namely 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.”
 - (Plus the European Social Charter.)
- EU law:
 - Multiplicity of sources, on different levels of the legal system.
 - Today a complex multi-layered system: primary law (i.e. Treaties, Charter of Fundamental Rights, General Principles) – lots of secondary law.

Prohibition of discrimination (2)

Accessory vs. stand alone prohibition

- ECHR:
 - Art. 14 ECHR can be relied on only together with other provisions (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination [...]”).
 - Except for countries where Protocol No. 12 applies.
- EU law:
 - Many free-standing.
 - Basic distinction between economic law and social law, though both are, in principle, based on the same concepts and share many features.
 - Statutory social law is more developed (definitions, proof, enforcement, remedies and sanctions).

Prohibition of discrimination (3)

Many grounds from the beginning vs. development

- Art. 14 ECHR, many grounds from the beginning: “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”.
- EU law:
 - Marked development over time, including new grounds.
 - In the social field including in particular:
 - Sex discrimination: Art. 157 TFEU (since 1957) + various Directives (since the 1970ies);
 - Discrimination on grounds of part-time work: Directive 97/81;
 - Discrimination on grounds of fixed-term work: Directive 1999/70;
 - Racial and ethnic discrimination: Directive 2000/43;
 - Discrimination on grounds of religion or belief, disability, age and sexual orientation: Directive 2000/78.

Prohibition of discrimination (4)

Discrimination grounds: open vs. closed system

- Art. 14 ECHR: “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”.
- EU law:
 - For a long time a closed list that developed over time:
 - New grounds were added through new legislation, as already indicated for social law.
 - Very rarely a ground was interpreted broadly to include a new issue: e.g. the ground of sex was interpreted to include gender reassignment of transsexual people; *P. v S.* (1996).

Prohibition of discrimination (5)

Practical consequence

- Given the different development, the same issue may appear at different times in the two legal systems.
- E.g. sexual orientation:
 - ECtHR:
 - *Dudgeon v. UK* (1981), though here only under Art. 8 ECHR, as the Court found it unnecessary also to look into Art. 14.
 - *Salgueiro da Silva Mouta v. Portugal* (1999): sexual orientation is a self-standing ground (“any ground”).
 - CJEU:
 - *Grant* (1998), where sex discrimination was argued based on *P. v S.*, which the Court denied, pointing to future legislation.
 - Subsequently *Maruko* (2008), under Directive 2000/78.

Prohibition of discrimination (6)

Discrimination grounds: the open Art. 21 CFR

- More recently Art. 21 CFR:
“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”.
- Note:
 - Wording appears particularly broad.
 - But: in the EU legal system, Art. 21 CFR has a limited function (Tedeschi principle, except under case-law such as *Mangold* and *Kücükdeveci*).
 - In addition: link with the EU’s General Non-discrimination Principles. The CJEU has refused to give those a very broad meaning; *Audiolux* (2009).

Prohibition of discrimination (7)

Broad scope from the beginning vs. ever growing

- ECHR:
Very broad scope from the beginning, development mostly through case law of the ECtHR, based on the conception of the Convention as a “living instrument”.
- EU law (originally: Community law):
 - Very dynamic development through Treaty revisions, creation and revision of secondary law and case law of the CJEU.
 - But: uneven field of application depending on the type of discrimination. E.g.: there is no EU prohibition of discrimination on grounds of religion or belief, disability, age and sexual orientation with respect to services, whilst there are such prohibitions with respect to sex and racial and ethnic origin.

Prohibition of discrimination (8)

Practical consequences

- Some matters are not (directly) covered by EU law.
- E.g. marital status or another form of legal recognition:
 - ECHR:
Vallianatos (2013), concerning Greek law introducing civil unions for opposite-sex couples only.
 - EU law:
 - No competence in this field.
 - Nevertheless indirect relevance in areas where the EU does have a competence, e.g. non-discrimination in employment under Directive 2000/78.
 - E.g. *Maruko*, *Römer and Hay*, concerning pension rights and marriage benefits, respectively, which were granted to opposite-sex couples only.

Prohibition of discrimination (9)

Forms of discrimination

- ECHR:
Slow development of the distinction between direct and indirect discrimination (as of 2005, *Hoogendijk*).
- EU law:
 - Early development of that distinction through case law in the economic and in the social field, since the 1960ies.
 - Now sophisticated, explicit secondary law in the social field, with legal definitions - and a new dividing line (see after justification).
 - Inclusion also of the prohibition of harassment, which is not based on an Aristotelian understanding of equality (i.e. not comparison-based).

Prohibition of discrimination (10)

Justification: open vs. closed system

- ECHR:
 - Open system, possibility of “objective and reasonable justification”. Different levels of scrutiny, but usually with a margin of appreciation for the Member States.
 - E.g. *Leventoğlu Abdulkadiroğlu* (2013) on marital names: direct sex discrimination – no objective justification.
- EU law:
 - Not all provisions mention the possibility of justification.
 - If so, then in principle they provide for a closed system with specifically enumerated derogation grounds.
 - Exceptions include e.g. the concept of indirect discrimination (its very definition includes the element of objective justification) and age discrimination (Art. 6 of Directive 2000/78).

Prohibition of discrimination (11)

Direct – indirect discrimination: the dividing line

- ECtHR:
 - Hesitant acceptance of the legal concept of indirect discrimination, as already noted.
 - Today notably applied in the Roma school segregation cases; e.g. *Horváth and Kiss v. Hungary* (2013) – argued by Lilla Farkas as a *direct* discrimination case (did not succeed).
- CJEU; e.g. *Hay*, para. 44:

“The difference in treatment based on the employees’ marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.”
- This has consequences for the issue of justification (!).

Finding (1)

Same aim, important differences ...

- Remember the beginning of my presentation, i.e the findings by Besson and Burri:
 - Very different approaches of ECHR and EU law with respect to discrimination, in spite of judicial dialogue and references in particular in the case-law of the CJEU to case-law of the ECtHR.
 - This might lead to contradictory solutions to concrete cases, for example with respect to the distinction between direct and indirect discrimination and the possibility of justification.
- Particularly interesting issue:

What will happen on the level of case law once the EU will have acceded to the ECHR?

Finding (2)

... and the challenge of EU accession to the ECHR

- Some views of academic writers:
 - Besson (2008) and Haverkort-Speekenbrink (2012) point to the minimum and subsidiary character of the ECHR, which should avoid a levelling down where EU law is more advanced than the non-discrimination law under the ECHR.
 - Gerards (2013): whilst generally the CJEU might have to adapt its interpretations and definitions to the well-established and long-standing human rights case-law of the ECtHR, in the specific field of non-discrimination law it might be the other way round, in order to provide for a high level of protection offered by Art. 14 ECHR in line with the sophisticated doctrine in the case-law of the CJEU.
- As so often: time will have to tell.

For more information (1)

Academic writers mentioned

- Samantha Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?', *Human Rights Law Review* 2008, 647-682.
- Sarah Haverkort-Speekenbrink, *European Non-Discrimination Law. A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue*, Antwerp/Oxford: Intersentia 2012.
- Susanne D. Burri, 'Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case-law of the EU and the ECHR', *Utrecht Law Review* 2013, 80-103.
- Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights', *Human Rights Law Review* 2013, 99-124.

For more information (2)

On the topic by the present speaker:

- **On the complex system of EU non-discrimination law:**
Christa Tobler, 'The prohibition of discrimination in the Union's layered System of Equality Law: From early Staff cases to the *Mangold* approach', in: Allan Rosas/Egils Levits/Yves Bot (eds), *The Court of Justice and the construction of Europe: Analyses and perspectives on 60 years of case-law*, The Hague: Asser Press/Springer 2013, 443-467.
- **On a comparison of ECHR law with EU non-discrimination law:**
Christa Tobler, Equality and non-discrimination under the ECHR and EU law. A comparison with a particular focus on discrimination against LGBTI persons (forthcoming, in a conference report published by the Austrian Federal Chancellery).
- **Generally on EU law, including social/non-discrimination law:**
Christa Tobler/Jacques Beglinger, *Essential EU Law in Charts and Text*, 3rd edition, Budapest: HVG-Orac 2014; see www.eur-charts.eu

Thank you for your attention!

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