

# The wider legal framework of equality in Europe

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APPLYING EU ANTI-DISCRIMINATION LAW  
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## The role of a lawyer in litigating human rights (discrimination) cases

- Distinguish between directly binding, binding and non-binding sources of law
- Choose as a reference the most protective standard, taking into consideration:
  - EU law (primacy and direct effect) and case-law of the CJEU
  - International law (UN and Council of Europe conventions) and decisions of judicial and quasi-judicial bodies in individual or group cases
  - Comparative sources (i.e. decisions of national courts or authorities, including equality bodies)
- Require courts to interpret national law in accordance with international and EU law
- Require courts and other national authorities to give effect to judgments of international courts (consider: judgments against other countries)
- Require courts to ask the CJEU to give preliminary rulings on the validity and interpretation of EU law
- In the future – Require the highest courts to ask ECtHR to give advisory opinions on questions of principle on the interpretation and application of the Convention rights (Protocol no. 16 – Protocol on the Dialogue)
- Having exhausted domestic legal remedies, litigate the case on international forum (consider: forum shopping)

# Plurality of human rights regimes

- Division of labour in international human rights law and organizations
- Human rights specialization within international law (conventions, courts)
- International law: validity, primacy and effect established according to national rules
- EU law: primacy, direct effect, fundamental rights as one of the objectives
- Plurality of legal sources and courts (differences in jurisdiction, methods of interpretation)
- Potential conflict between scope and nature of rights protection in different human rights regimes:
  - international: universal and regional
  - EU
  - national
- Judicial borrowing and dialogues

# International law protection against discrimination

## UNITED NATIONS

- International Covenant of Civil and Political Rights (1966) + individual complaint to the Human Rights Committee
- Convention on Elimination of Racial Discrimination (1965) + individual complaint to the Committee on Racial Discrimination
- Convention on Elimination of Discrimination against Women (1979) + individual complaint to the CEDAW Committee
- Convention on Rights of a Child (1989) + individual complaint of children to the CRC Committee (since 2014)
- Convention on Rights of People with Disabilities (2006) + individual complaint to the RPD Committee

## COUNCIL OF EUROPE

- European Convention of Human Rights (1950)
- Protocols to the Convention, including Protocol no. 12 (2000) + individual complaint to European Court of Human Rights
- European Social Charter (1996) + collective complaint to European Committee of Social Rights
- ...

# EU as a human rights regime

## Article 6 TEU

1. *The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*

*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*

*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*

2. *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*

3. *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*

# Growing Charter jurisprudence

- Not adding new competences
- Binding since 2009 (Treaty of Lisbon) as a primary source of law for EU institutions and MS implementing EU law
- Contentious issues:
- C-617/10 *Akerberg Fransson*

CJEU reviews actions of MS implementing EU law if there is a convincing connection between national legislation and EU law

- *The field of application of the Charter of Fundamental Rights of the European Union, so far as concerns action of the Member States, is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law. The fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations.*
- *The Court thus has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.*
- C-236/09 *Melloni*

National standard of rights protection shall not compromise the primacy, unity and effectiveness of EU law:

- precluding the executing judicial authorities from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State.

## EU-ECtHR special relationship

- EU: ECHR-compatibility

Art. 52 par. 3 CFR

*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*

- ECtHR: equivalence test

*Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [2006]

## EU accession to the ECHR

- i.e. problem with individual *locus standi* before the CJEU
- Introducing external control of the ECtHR over the acts and omissions of EU institutions (in addition to MS implementing the EU law)
- ECJ Opinion 2/94 – lack of the legal basis
- Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedom of 5 April 2013
- CJEU Opinion 2/13 – Draft Agreement incompatible with the Treaties
  - Autonomy of the EU: standard of rights protection may compromise the primacy, unity and effectiveness of the EU law
  - Principle of mutual trust
  - Request for advisory opinions to the ECtHR
  - Monopoly over dispute settlement
  - Co-respondent procedure and the problem of distribution of powers
  - Prior involvement procedure and the problem of primacy
  - Lack of jurisdiction in the field of the Common Foreign and Security Policy

# Principle of equality and non-discrimination in EU law

- Recognized as a fundamental principle of the EU law
- Incorporated in primary and secondary law
- Originally: protection against discrimination on the basis of nationality (gender discrimination as a means to alleviate comparative economic advantages)
- since 1999: recognized as a human right, indirectly linked with internal market
- Direct applicability: the prohibition of discrimination as a fundamental principle of EU law  
*C-144/04 Werner Mangold [2005]*
- Since 2009: Articles 20-27 of the Charter a binding law
- in fact, many principles of non-discrimination: differences in personal and material scope, as well as judicial standard of review (scrutiny)

# Hierarchy of protected grounds in the EU antidiscrimination law

	EMPLOYMENT	SOCIAL SECURITY	GOODS AND SERVICES	EDUCATION
RACE AND ETHNICITY	2000/43/EC	2000/43/EC	2000/43/EC	2000/43/EC
GENDER	2006/54/EC	79/7/EEC	2004/113/EC	
RELIGION DISABILITY AGE SEXUAL ORIENTATION	2000/78/EC			

# ECHR

## Article 14

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.

## Protocol no. 12

The enjoyment of any right set forth by law 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.

- Subsidiary, minimal standard
- Article 14 applied only in conjunction with other Convention rights
- Restrictive, formalistic approach to discrimination claims (equality of treatment) rather than substantive approach challenging disadvantages of disadvantaged groups
- Suspect grounds: nationality, race, religion, gender, illegitimacy, sexual orientation
- Insensitive to certain intersectional discrimination problems such as Roma sterilization, Islamic veil, etc.

# EU - ECtHR approach to prohibition of discrimination

## ECtHR

- Both direct and indirect discrimination may be justified
  - Suspect categories – ‚very weighty reasons‘ to justify different treatment
  - No shift of the burden of proof although changed position regarding the evidence of discriminatory intent and indirect discrimination (Roma cases)
  - Margin of appreciation doctrine
  - No place for substantive equality
- See: EU Fundamental Rights Agency and ECHR Handbook on Anti-Discrimination Law  
<http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law>

# Gender

EU:

Positive measures and facilitating family life:

- C-450/93 *Eckhard Kalanke*; C-409/95 *Hellmut Marschall*; C-158/97 *Georg Badeck and Others*; C-407/98 *Katarina Abrahamsson*; C-476/99 *H. Lommers*; C-319/03 *Serge Briheche*;
- C-104/09 *Roca Álvarez*; C- 5/12 *Betriu Montul*
- Corporate Gender Quota Directive (draft)

Pregnancy:

- C-506/06 *Mayr*
- C-167/12 *CD*
- C-363/12 *Z*

Discrimination in Services:

- C-236/09 *Test Achats*

ECtHR: evolving interpretation:

- *Hobbs, Richard, Walsh and Geen v. UK* (2006) – discrimination of widowers with regard to tax allowance
- *Konstantin Markin v. Russia* (2012) – right to paternal leave
- *Emel Boyraz v. Turkey* (2014) – failure to appoint a woman to a civil service position in the field of security
- But: margin of appreciation doctrine - a wide margin is usually allowed to the State as regards general measures of economic or social strategy - *Stec v. UK* (2006)

# Race and ethnic origin

EU

- C-54/07 *Feryn*
- C-394/11 *Belov*
- C-83/14 *CHEZ*

ECtHR

- Roma discrimination in schools: *D.H. and others v Czech Republic* (2007); *Orsus v. Croatia* (2010); *Kiss v. Hungary* (2013); *Sampanis and others v. Greece* (2012) and *Lavida and others v. Greece* (2013)
- Roma criminal law cases: *Nachova and Others v. Bulgaria* (2005); *Stoica v. Romania* (2008); *Todorova v. Bulgaria* (2010); *Koky and others v. Romania* (2012)

No violation of prohibition of discrimination:

- Roma sterilization: *V.C. v. Slovakia* (2011); *K.H. v. Slovakia* (2009)
- Roma illegal settlements: *Yorjdanova and others v. Bulgaria* (2012); *Winterstein and others v. France* (2013)

# Sexual orientation

EU

- C-267/06 *Tadao Maruko*
- C-147/08 *Römer*
- C-81/12 *ACCEPT*
- C-267/12 *Frédéric Hay*

ECtHR:

- *Vallianatos and Others v. Greece* (2013) – same-sex civil unions
- *X and others v. Austria* (2013) – step-parent adoption
- *Karner v. Austria* (2003); *Kozak v. Poland* (2010) – succession in tenancy
- *Bączkowski v. Poland* (2007) – gay prides

# Disability

EU:

- C-13/05 *Chacon Navas* - definition of disability
- C-303/06 *Coleman* – discrimination by association

\* Ratification of UN Convention on Rights of People with Disabilities (2010)

- C-335/11 *Jette Ring* and C-337/11 *Lone Skouboe Werge* – duty to accommodate long-term impairment
- C-312/11 *Commission v. Italy* – implementation of EU directives (reasonable accommodation)
- C-354/13 *Karsten Kaltoft* – obesity as disability

ECtHR:

- *Botta v. Italy* [1998] – positive state obligations and access to private beach
- *Zehnalova and Zehnal v. Czech Republic* [2002] – access to buildings of public utility
- *I.B v. Greece* [2013] – employment discrimination on the basis of HIV status as violation of Article 8 ECHR



# Disability

- Progressive standards – effectiveness of protection - under the CRPD Convention
- Liliane Gröninger v. Germany (Comm. No. 2/2010; 4.04.2014) - Failure to promote the right to work by failing to facilitate the inclusion of a person with disabilities into the labor market
- „*the range of measures applied to the case of the author’s son was limited compared to the extensive list of available measures described by the State party. The Committee observes that (...) the Convention enshrines the rights to benefit from appropriate measures of promotion of employment opportunities, such as to have effective access to general placement services as well as assistance in finding and obtaining employment. The Committee is of the view that the measures taken by the responsible authorities of the State party to assist the integration of the author’s son into the labour market did not meet the standard of the State party’s obligations*”.
- Szilvia Nyusti and Péter Takács (Comm. No. 1/2010, 16 April 2013) - Failure by the State party’s authorities to eliminate discrimination on the ground of disability by a private credit institution and to ensure that persons with visual impairments have an unimpeded access to the services provided by ATMs on an equal basis with other clients
- H.M v. Sweden (Comm. No. 3/2011, 19 April 2012) - Refusal to grant building permission for the construction of a hydrotherapy pool for the rehabilitation of a person with a physical disability on grounds of incompatibility of the extension in question with the city development plan

• Thank you for your attention!

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