
Expanding the discrimination grounds as a way forward?

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3 sources since 1950

- International Law
- National Law
- Judges

From classical Human rights to Fundamental rights

From civil and political rights to economic rights

Initial grounds of International Law

- Programmatic grounds for the obligations of the State – Rights/ Freedom and equality before the state
 - From UN Conventions and Covenants
 - ECHR Grounds- Open list from article 14:
 - sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status
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–Two types of protection- The Impact of EU Law

- Article 19 par. 1 TFEU grounds – closed list
 - Sex / Ethnic origin / Race / Religion / Convictions/ Disability / Age / Sexual orientation
 - Legislative competence
 - Implemented as economic rights in private Law :
 - employment / access to goods and services
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Eu Charter of Fundamental Rights

- Article 21 – Open list
 - 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 shall be prohibited
 - Within the scope of application of the Treaty and of Community Law
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- The role of Judges in defining new grounds: ex: ECHR

Sexual orientation

Salgueiro da Silva , 21/12/2009

Sexual reassignment

Goodwin 11/02/2002

Birth out of wedlock

Marckx 13/06/1979

Different grounds / Different fields of protection

According to International law

Human Rights:

Hierarchy between grounds:

Race / origin

Sex

Other grounds

Decision of the National Legislator:

Uniform or variable protection?

Other fundamental rights that can be translated by National law as

Prohibited Grounds:

Poverty

Family

Privacy

Health

The French Example

French legislation : 20 Grounds

- Real or assumed origin, appearance of origin, national and ethnic origin, race, sex, pregnancy, family situation, physical appearance, last name, health, disability, genetic characteristics, mores, sexual orientation, age, union activities, mutualist activities, religion, political and religious convictions, belief

A new political response

- A new ground in 2012 : Sexual identity
- A new ground in 2014: Place of residence
- A new ground in discussion:
 - Social precariousness

Political recognition of a human right ?

Legal translation of a social problem?

Same legal mechanism but different purposes.

Application of other grounds

- Mores
- Physical Appearance
- Last name
- Family situation:
 - Discrimination by association
 - Synonymous of maternity /sex

Evolution by judicial interpretation

- Physical Appearance
 - A right not to be subjected to dress codes? or
 - Exterior sign of an otherwise protected grounds?
- Place of residence
 - An obligation of local government to offer services to all? Or
 - An obligation of nationale gouvernement to offer the same service troughout the territory?
 - A mechanism to protect against stereotyping
- Mores

Evolving nature of the protection against discrimination

- From intrinsic characteristics of the person that require protection
 - Race
 - Religion
 - Sex
 - Sexual orientation
- To situations that generate stereotyping
 - France :Place of residence /Physical appearance
 - EU : Age

Various level of protection

- Is it possible to extend maximum protection to all grounds?
 - If not is it only a legal mechanism to forbid taking in consideration some characteristics in certain cases
 - Legibility of the principle of non discrimination to the general public
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Impact on legal theory

- The evolution of the protection against discrimination : **from**
 - Human Rights
 - Fundamental Rights **to**
 - Legal tools?
 - From Public Law to Private law
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