

Definition of key concepts

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... international law ...

- As already explained, there are many instruments of international law, where discrimination is banned
- EU law – special definitions of:
 - Direct discrimination
 - Indirect discrimination
 - Harassment
 - Sexual harassment



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TFEU

- Art. 19
- Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, 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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Charter of fundamental rights of the EU

- *art. 21*
- Any discrimination based on 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.
- 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.
 - *Article 23*
 - **Equality between women and men**
- Equality between women and men must be ensured in all areas, including employment, work and pay.
- The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.



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Primary law – no definition of key concepts

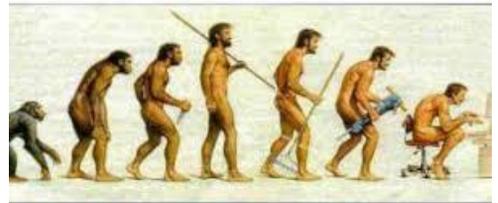


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What about secondary law?

- Equal pay – 1970s – just ban on discrimination
- Social security – 79/6/ECC
- Recast directive – 2004/56/EC



- Race and ethnic origin – 2000/43/EC
- Goods and services – gender – 2004/113/EC
- Framework directive – 2000/78/EC



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Equality in EU secondary law

- **Gender equality**
- **Directive 2006/54 / EC of the European Parliament and of the Council concerning the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation**
- **Council Directive 92/85 / EEC on the introduction of measures to promote the improvement of safety and health at work for pregnant workers and workers who have recently given birth or are breastfeeding**
- **Council Directive 79/17 / EEC on the progressive implementation of the principle of equal treatment between men and women in matters of social security**
- **Directive 2010/41 / EU of the European Parliament and of the Council concerning the application of the principle of equal treatment for men and women exercising an autonomous activity and repealing Council Directive 86/613 / EEC**
- **Council Directive 2004/113 / EC implementing the principle of equal treatment between men and women as regards access to goods and services and their provision**
- Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU



Equality in EU secondary law

- **Non-discrimination (race, religion, disability, gender and sexual orientation)**
- **Council Directive 2000/43/EC which implements the principle of equal treatment between persons irrespective of racial or ethnic origin**
- **Council Directive 2000/78/EC which implements the principle of equal treatment in employment between persons irrespective of sexual orientation, age, disability and religion**



Types and forms of discrimination

- **direct discrimination:** a case in which a person is treated less favorably than another person was or was;
- **indirect discrimination,** a case in which a visibly neutral provision, criterion or practice has caused some disadvantage compared to other people, unless this provision, criterion or practice is objectively justified by a legitimate aim and unless the means to achieve it objective are reasonable and necessary.
- **Harassment** = unwanted behavior that has the purpose or effect of deteriorating the dignity of the person and creating an intimidating, hostile, shameful, humiliating or offensive atmosphere.
- **Sexual harassment** = any form of undesirable behavior of a sexual nature, expressed in verbal, non-verbal or physical form, which has the purpose or effect of deteriorating the dignity of the person and creating an intimidating, hostile, humiliating, humiliating or offensive atmosphere
- Discrimination also includes **instructions to discriminate**
- Discrimination based on sex is also discrimination against women in relation to their pregnancy or maternity leave



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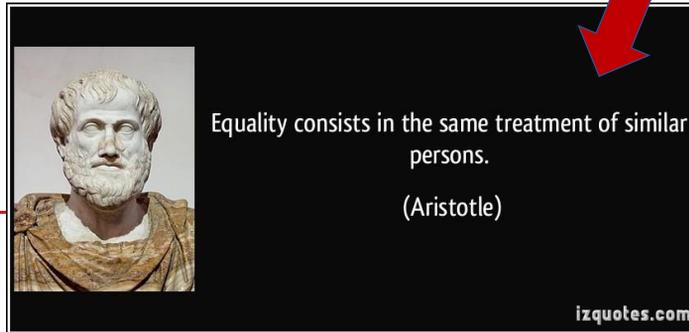
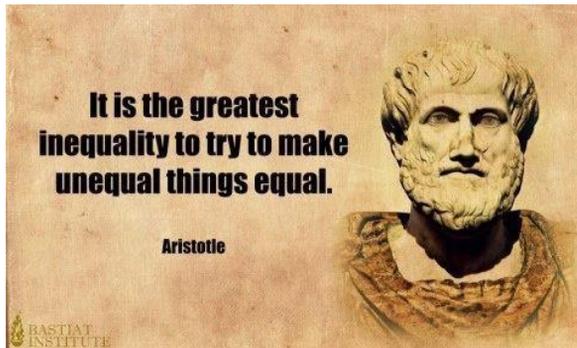
Direct discrimination

- **Direct discrimination is an act in which one person is treated less favourably than another in a comparable situation for reasons prohibited by law.**
- **Examples: a waiter in a restaurant refuses to serve a guest because of his ethnic group; an employer refuses to hire a woman who has the necessary qualifications to work as a forklift in a warehouse on the grounds that he does not hire women for that job.**
- **... BUT**
- **What about the comparator?**



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Questions not only for judges...

- What's the same? - people can't be the same, nor is that the purpose
- What is comparable? - E.g. comparable work, work of equal value?
- What are similar situations? - Pregnancy and illness?



Indirect discrimination

- Indirect discrimination is an act of treating someone less favourably on the basis of a criterion that is apparently neutral, unless they are reasonable and justifiable.
- Examples: a restaurant announces a blanket ban on dogs, thereby prohibiting entry to persons with disabilities who use guide or assistance dogs; an advertisement for a position as a construction helper requires applicants to have knowledge of the Ukrainian language; the advertisement states, "We are recruiting... to a young and dynamic team" - this a priori excludes older applicants.



Indirect discrimination

- In its jurisprudence, the CJEU has, in many respects (even indirectly discriminatory), granted Member States wide discretion in their social policies, including employment policy
- But this discretion must not pursue illegitimate goals in relation to equality, such as recruitment and bankruptcy
- Budgetary problems alone do not justify discrimination (Steinicke, C-77/02)
- Company policies are viewed in a slightly more moderate way - for example, if there is a real need for a company to minimize part-time employees and this need can be objectively justified, this company policy can also be tolerated if women are mostly part-time (ECJ Bilka Kaufhaus, I70/84)



The role of the Court of Justice in the area of non-discrimination

- Its jurisprudence is based on the basic concepts and principles of equal treatment and non-discrimination
- Key concepts of discrimination come from ECJ case law
- Taking into account the jurisprudence in the amendments to the directives and in the adoption of new ones (for example 2006/54)



Proving indirect discrimination

- Use of statistics - an admissible means of evidence
- D. H. and others - 80% of pupils in special schools in the Czech Republic - Roma
- 80-90% of part-time employees - women - Christmas bonus only for full-time employees



Harassment

- In Directive 2002/73/EC, harassment is defined as a situation 'where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment'.



Sexual harassment

- Sexual harassment is said to take place where any form of 'unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment



Exceptions

- Occupational requirements
 - Positive action
 - Work-life balance

 - Unequal treatment – objectively justified by legitimate aim, means appropriate and necessary – key question of judicial interpretation
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Positive measures vs. Positive discrimination

- Some form of preference for previously disadvantaged groups to level the playing field - only in comparable situations (not e.g. preference for a less qualified candidate)
- Preference of the bearer of the discrete character in all circumstances
- e.g. quotas



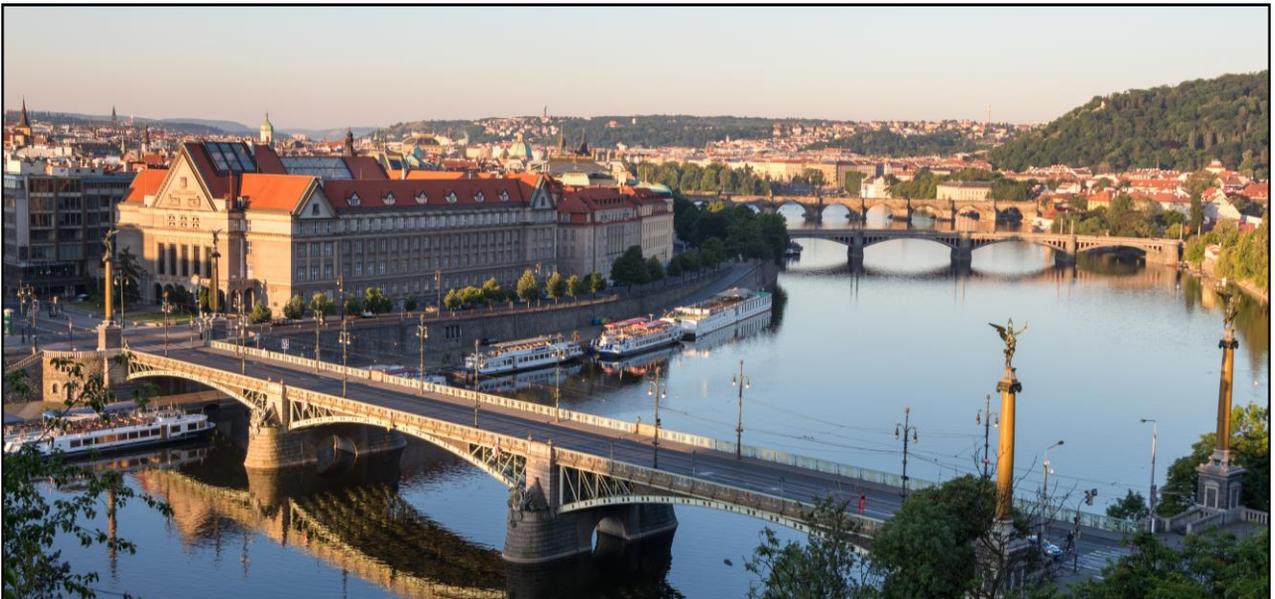
CJEU case-law – recent definitions

- Discrimination even without a victim
- C-54/07 Feryn
- C-83/14 CEZ
- Discrimination even if someone else is the bearer of the discriminatory characteristic
- C-303/06 Coleman (inferred discrimination)
- Discrimination even "without the discriminator"
- C-81/12 Accept, C-507/18 NH
- Discrimination even if and pay - can a finding of discrimination be sought
- C-30/19



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