

Discrimination - definition of key concepts

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Key concepts

- Direct discrimination
- Indirect discrimination
 - Harassment
- Sexual harassment



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... nothing new on the Earth?

- Equality
 - Very old concept – stemming from antic philosophers
- Discrimination
 - Tragic experience during WW II.
 - Legal definitions and human rights instruments developed (ILO, UN, CoE)



“Equality consists in the same treatment of similar persons, and no government can stand which is not founded upon justice.”

Aristotle (Politics)

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From gender to „equality revolution“

Since 1958
equal treatment
present in the
EU primary law

1958

Until 1997
ban on
discrimination in
workplace based
on sex

1997

Since 1997
6 grounds
*sex,
racial or ethnic
origin,
religion or belief,
disability,
age or
sex. orientation*

1997

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Treaty on the EU

- Article 2
- The Union is founded on the **values** of respect for human dignity, freedom, democracy, **equality**, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, **non-discrimination**, tolerance, justice, solidarity and **equality between women and men** prevail.

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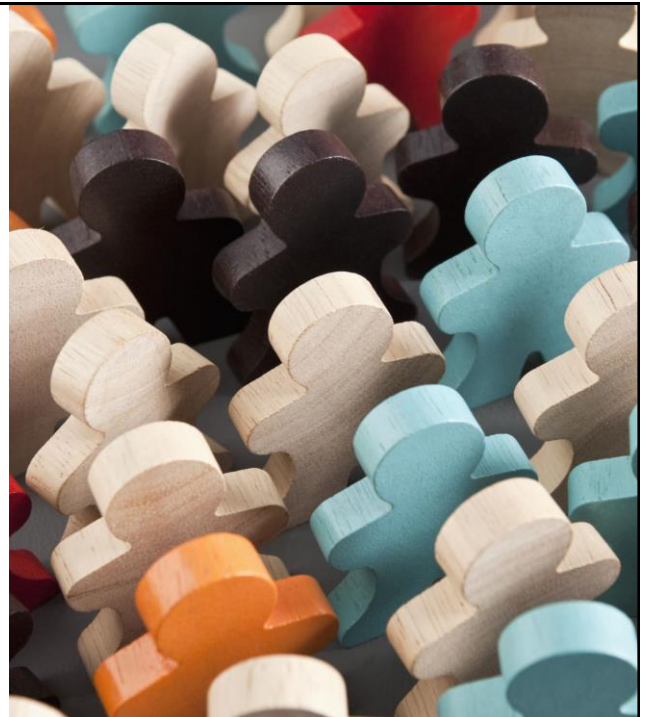
TFEU

- Article 19 (ex Article 13 TEC)
- 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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Discrimination - definition

- **Discrimination is the unfair or prejudicial treatment of people** and groups based on characteristics such as race, gender, age, or sexual orientation.
- **ILO** definition: any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment
- **UN** definition (CEDAW): any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.,,
- **EU** law – 1970s – first robust directives – no real definition (no even of discrimination)
 - Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of(sex) in ... (workplace)



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Direct discrimination – EU law definition

2000 's directives

2006/54 'direct discrimination': where one person is **treated less favourably** on grounds of sex than another is, has been or would be treated in a **comparable situation**;

2000/78 - direct discrimination shall be taken to occur where one person is **treated less favourably** than another is, has been or would be treated in a **comparable situation**, on any of the grounds

2000/43 - direct discrimination shall be taken to occur where one person is **treated less favourably** than another is, has been or would be treated in a **comparable situation** on grounds of racial or ethnic origin

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CJEU case law

C-356/21 TP (Audiovisual editor for public television) - Directive 2000/78 must be interpreted as precluding national legislation which, excludes from the protection against discrimination to be granted under that directive the refusal to conclude or renew a contract with a person, based on sexual orientation

C- 344/20 S.C.R.L. - an internal business rule which prohibits only the wearing of prominent bulky symbols, in particular of religious or philosophical beliefs, may constitute direct discrimination in cases where that criterion is inextricably linked to one or more specific religions or beliefs. An internal rule of a private undertaking prohibiting the wearing in the workplace of any visible symbol of political, philosophical or religious beliefs does not constitute direct discrimination 'on grounds of religion or belief' within the meaning of that provision, since it applies without distinction to any expression of such beliefs and treats all workers of the undertaking in the same way, imposing on them, generally and without distinction, in particular the obligation to wear neutral clothing and preventing them from wearing them of such symbols.

C-16/19 Babiński Clinical Hospital - the practice of an employer of paying a pay supplement to disabled workers who have submitted a certificate of recognition of disability after the date chosen by that employer, and not to disabled workers who submitted that certificate before that date, may constitute direct discrimination if it is shown that that practice is based on a criterion inextricably linked to disability, since it is such that a clearly identified group of workers of all workers with disabilities whose disability the employer necessarily knew when the practice was introduced, it is definitively impossible to meet this time condition.

C-450/18 National Institute of Social Security - Council Directive 79/7/EEC precludes national legislation, which provides for the right to a pension contribution for women who have had at least two children of their own or adopted and who receive a permanent invalidity pension under a national social security scheme, men in the same situation, on the other hand, are not entitled to such a pension contribution.

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Indirect discrimination



- 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;
- 2000/78 indirect discrimination shall be taken to occur where an **apparently neutral** provision, criterion or practice **would put persons** having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation **at a particular disadvantage compared with other persons unless**:
- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
- (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice
- 2000/43 - indirect discrimination shall be taken to occur where an **apparently neutral** provision, criterion or practice would put persons of a racial or ethnic origin at a **particular disadvantage compared with other persons, unless** that provision, criterion or practice is objectively justified by a **legitimate aim** and the **means** of achieving that aim are **appropriate and necessary**

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CJEU case law

- Legitimate aim – financial and budgetary reasons (C-625/20 – INSS, C328/20 – EC vs. Austria - indexation of benefits)
- Statistics – usable (C-130/20 – INSS), different treatment – part-time, full-time workers (C-841/19, C-486/18 – Praxair, C-274/18 Schuch-Ghannadan, C-161/18 Villar Laiz),
- Means - appropriate and necessary (C-830/18 – Landkreis Süd. Weinstr., C-802/18 Caisse pour l'avenir des enfants – frontier workers treated less favourably)



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... no indirect discrimination



CJEU C-154/18 Horgan and Keegan a measure, which fixes, when new teachers are recruited from a certain date, a salary scale and grading steps, which are less favourable than those which, under the rules in force prior to that measure, applied to teachers recruited before that date **do not constitute indirect discrimination on grounds of age**



C-49/18 Escibano Vindel – EU law does not preclude national legislation, which, in the context of general salary reduction measures relating to the elimination of the excessive budget deficit, provided for different percentages of reduction in the basic salaries of career judges and their allowances, which, according to the referring court, ultimately resulted in the salaries of career judges belonging to the two pay brackets for the lower categories of career judges being reduced in proportion more significantly than salaries career judges in the pay bracket for a higher category of career judges, although the former receive lower salaries, are generally younger and generally have fewer seniority than the latter.



C-457/17 Maniero the fact that a private foundation established in a Member State reserves the award of scholarships intended to support legal research or study projects abroad to candidates who have successfully passed in that Member State a legal examination such as that at issue in the main proceedings, **it shall not constitute indirect discrimination** based on racial or ethnic origin within the meaning of this provision.

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Harassment

- 2006/54 harassment: where **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**
- 2000/78 - **unwanted conduct** related to any of the grounds referred to in Article 1 takes place with the **purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment**. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
- 2000/43 - **unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment**. **In this context**, the concept of harassment may be defined in accordance with the national laws and practice of the Member States

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Sexual harassment

- 2006/54 - 'sexual harassment': **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**

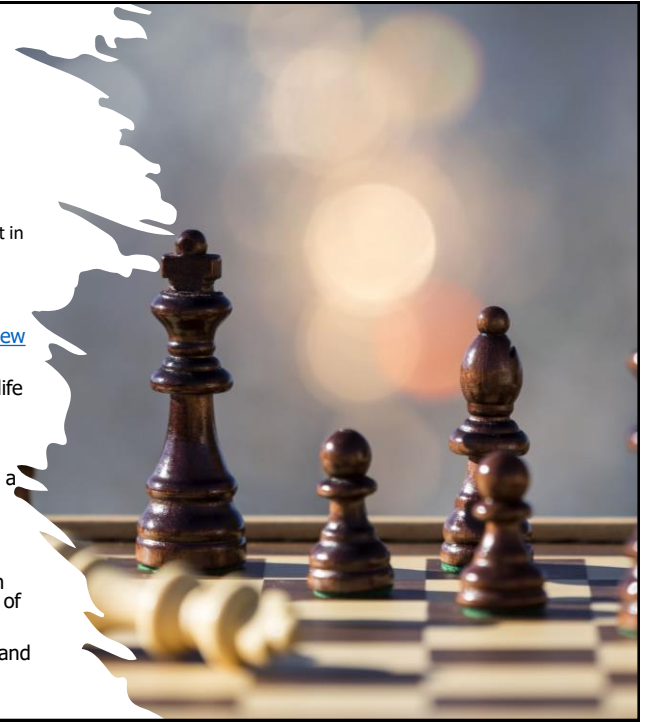
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Other institutions

- Council of Europe Convention on preventing and combating violence against women and domestic violence (The Istanbul Convention)
- ILO Convention Concerning the Elimination of Violence and Harassment in the World of Work
- EQUINET - [The Persistence of Discrimination, Harassment and Inequality for Women. The Work of Equality Bodies informing a new European Commission Strategy for Gender Equality](#)
- Mainstreaming led initiatives: focus on issues of equal pay, work-life balance and policy-making.
- Litigation led initiatives: focus on issues of pregnancy-related discrimination, harassment on the ground of gender and sexual harassment, and goods and services. Litigation led work included a focus on under-reporting of discrimination.
- Communication led initiatives: focus on addressing gender stereotypes.
- Activities in relation to men: focus on litigation, the role of men in gender equality, breaking stereotypes, and equality in the sphere of caring work.
- Activities in relation to trans people: focus on litigation, research and legal recognition of trans people.



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Some statistics and numbers

- Globally, 17.9% of employed men and women said they had experienced psychological violence and harassment in their working life, and 8.5% had faced physical violence and harassment, with more men than women experiencing this. 6.3% reported facing sexual violence and harassment, with women being particularly exposed.
- 31% of sexual harassment or assault victims felt anxious or depressed afterward.
- **52% have not felt psychologically safe at work.**
- 37% of harassed women claimed harassment negatively affected their career advancement.
- **34% have left a job because of unresolved harassment issues.**
- Women who reported experiencing both sexual assault and workplace sexual harassment had the highest risk of developing high blood pressure, with a 21% increase.

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? Conclusions

- Key concepts well developed and well-known
- It's up to us to apply them in a right way
- It's up to us to prevent any form of discrimination, as lawyers, as human beings

