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## The impact of the ECHR on the equality principle

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*Trier 2-3.6.2014, Current Reflections on EU*

*Gender Equality Law*



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## *The content of Article 14*



### *"Prohibition of discrimination*

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."

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## *Starting points*



- ❑ Non exhaustive list
- ❑ Some typical grounds are not mentioned (disability, age, sexual orientation, trade union affiliation), but the openness "or other status" guarantees the broad application of the Article
- ❑ Limited scope of application to the "enjoyment of rights and freedoms set forth in the Convention". The Article is "parasitic", it has no independent existence.

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## Starting points 2



The required linkage to a substantial right under the Convention:  
If the State Party guarantees some rights under the ambit of the Articles in the Convention, the prohibition of discrimination becomes relevant. For example if a State establishes a right to parental leave, it falls under the ambit of Article 8 and its duty not to discriminate becomes relevant.

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## The concept of discrimination



- ❑ No definition in the Convention
- ❑ Article 14 not a core Article
- ❑ Demir and Baykara methodology used:

The understanding of the concept of Discrimination imported from other human rights instruments.

OPUZ v. Turkey (CEDAW-Convention)

- ❑ The Due Diligence obligation can also be relevant regarding health and safety & harassment in the workplace
- ❑ Istanbul Convention strongly influenced by this practice

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## *The concept of discrimination 2*



- ❑ No requirement for comparator (even hypothetical)
- ❑ Direct and indirect discrimination
  - Horvat and Kiss v. Hungary

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## *Case law*



- ❑ Danilenko and others v. Russia (app. No 67336/01)  
Discrimination of trade union activists (cf. Demir & Baykara)
- ❑ I.B. v. Greece (app. No. 552/10)  
Dismissal of HIV-positive employee in response to pressure from other employees in the company.

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### **Inconsistent European practice (CJEU and ECHR)?**

- Relevance of intention to discriminate
- Burden of proof
- Indirect discrimination
- Margin of appreciation for Member States  
- See also Protocol No 15 amending the ECHR (2013)
- Limits for positive Action

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- Discrimination or not???
- Article x taken together with Article 14 in conjunction with Articles Article x in conjunction with Article 14
- The future of Protocol 12 and the risk of a huge amount of future discrimination cases.
- The recommendation of the author: Emphasis should lie in discrimination related to the core articles of the Convention (2-4,6,8 and 11),
- The approach towards "burden of proof" and "indirect discrimination" should be consistent, the national margin of appreciation limited.

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