



DEVELOPING FAIR NON-DISCRIMINATION EU LEGISLATION

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*Commission of the Bishops' Conferences
of the European Community*

DEVELOPING FAIR
NON-DISCRIMINATION
EU LEGISLATION

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Since all men possess a rational soul and are created in God's likeness, since they have the same nature and origin, have been redeemed by Christ and enjoy the same divine calling and destiny, the basic equality of all must receive increasingly greater recognition. True, all men are not alike from the point of view of varying physical power and the diversity of intellectual and moral resources. Nevertheless, with respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, colour, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent. (Gaudium et Spes, 29)

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EXECUTIVE SUMMARY

Equality and non-discrimination are ambiguous and contested ideas which are built around a multitude of definitions and concepts and therefore having several possible meanings. Obviously the EU law is not a forum which provides comprehensive answers to all questions brought up in philosophy, theology or law. Nevertheless, there are grounds for assuming that in EU law there is an established general principle of equal treatment. The mere acknowledgement of this principle neither leads to the emergence of a directly effective right, nor establishes the legislative competence of the EU to adopt legislation pertaining to the prohibition of discrimination beyond the legal grounds as codified in the Treaties.

Law must allow for legitimate differences to be accommodated. Differences of opinion, belief and practice are at the heart of the democratic concept. In framing legislation it is, therefore, essential that provisions designed to promote equality do not have the unintended consequence of removing or unjustly limiting other fundamental rights and freedoms.

The right not to be discriminated against is only one reflection of the acknowledgment of human dignity. The manifestation and implementation of this right cannot be pursued in separation from other principles, rights and freedoms pertaining to each human being. Among those rights freedom of religion and freedom of expression take prominent place. Ignoring other human rights and freedoms while focusing exclusively on the right not to be discriminated against does not do justice to the legal or moral evaluation of relationships between people. In a situation of conflict between different human rights or freedoms a solution has to be found, a solution that takes all the rights of all persons involved into account and reconciles them. Obviously, there cannot be an automatic, general and unconditional precedence of some rights over the others. Consequently, also the right not to be discriminated against cannot in principle be unconditionally treated as superior to other rights.

In the areas where the EU has legislative competence the way to ensure a fair balancing of human rights and freedoms is to accommodate the manifestation of the freedom of religion, and freedom of expression by the way of exempting certain areas of application from the non-discrimination measures. Fair non-discrimination legislation requires respect for the self-determination of Churches and religious organisations in defining their own set of ideas, organising their



structures, manifesting religious performance in daily life, etc. Legal measures aimed at prohibiting discrimination should therefore explicitly provide for legally sound exceptions in areas where the exercise of other human rights is clearly concerned.

The same is true for areas where the EU does not have competence, such as for the pastoral activities of Churches or the regulation of State-Church relationships in the Member States. Legal measures aimed at prohibiting discrimination must be sufficiently clear about the scope of their application so as not to imply that the status and activities of Churches would come under EU competence by the means of referring to the principle of equal treatment.

INTRODUCTION

In common perception, discrimination is often taken as treating one person worse than others and is related to the subjectively felt distress. However, despite the fact that such an attitude towards other people is morally and socially unacceptable, it is not always prohibited by law. Additionally, in certain situations law not only allows for differentiated treatment, but even demands it. When there is no clarity about the scope of prohibited behaviour, people often tend to cling to schematic thinking: difference is put on the same level as unequal, a notion further put in comparison with conduct which is disapproved of, for various reasons, as discriminatory. Oversimplification and schematic perception of equality and non-discrimination as well as the language used in the political, legal and media discourse is therefore a concern.

The idea of equality and non-discrimination in European Union legislation has gone through a long process of development to reach the form it has today. It is a complex idea, not only restricted to mere equality before the law, which requires that all persons, regardless of their characteristics, are to be treated in the same way before the law, but is enriched by various other approaches such as positive action. In principle, EU law lacks a general and solid theoretical foundation and this absence might lead to tensions, in situations where various rights and freedoms are confronted with the right not to be discriminated against. Law should therefore be clear enough to provide answers on how to resolve these conflicts.

The Catholic Church has a substantial interest in questions of equality, equal treatment and non-discrimination. From her long-standing experience she has an important contribution to make to the development of legislation that promotes just and fair behaviour between people. Drawing from her Social Doctrine, the Church wishes to engage with the European institutions in the task of enriching and supporting the process of building EU non-discrimination legislation through the development of a conceptually sound legal approach. To help that process, the Secretariat of the Commission of the Bishops Conferences of the European Community (COMECE) puts forward this document as a contribution to the ongoing debate.



HUMAN DIGNITY AS A SOURCE OF EQUALITY

True justice means to respect and value the true nature of each human person and to treat them accordingly. Therefore respect for the dignity of a human person is manifested through the recognition and respect for differences in people, their strengths and weaknesses.

In the EU legal framework human dignity is recognised as the principal concept encompassing all other rights and freedoms. It is unquestionable that if rights or freedoms come into collision, the fair balance between them must always take into account and ensure respect for human dignity.

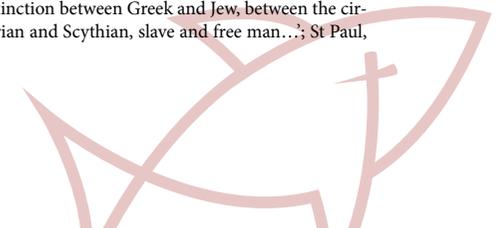
1.1. HUMAN DIGNITY AND EQUALITY IN CHRISTIAN THOUGHT

The belief in the equal, unconditional and inherent dignity of every human person is at the heart of Christian belief and teaching. Dignity is bestowed upon the human person as a creature who has been made in God's image. It derives from there, whatever the person's particular characteristics, and is the source of his or her inalienable rights. This is the foundation of the Church's understanding of the fundamental equality of all mankind.

Two thousand years ago the dominant social pattern was defined by the groups that people belonged to: Roman citizen or non-citizen; Greek or barbarian; Jew or gentile; slave or free. Rights, privileges and duties were tied to the collective group. But what was new and distinctive about Christianity was its focus on the human person. By his words and his actions, Jesus overturned the social conventions of his day and scandalised the leaders of his society. The sick, the disabled, the despised tax collector, and the woman taken in adultery: all received his attention and concern as human beings.¹

This truly revolutionary idea of the equal worth of every human person, whatever their characteristics, was central to Christ's teaching and is manifested in the works

¹ In the Christian society '... there is no room for distinction between Greek and Jew, between the circumcised or the uncircumcised, or between barbarian and Scythian, slave and free man...'; St Paul, Col. 3, 12.



of the Church. The steady development of the social teaching of the Church has aimed at translating those concepts into concrete actions. In the social structures which she has put in place, particularly hospitals, schools, and charitable organisations, the Church has never selected the people to benefit. By her own choice and self-determination, she has never reserved her care and her support just for her own members, but has opened her institutions to everybody.

The Church and secular authorities share a fundamental concern for the marginalised, the weak and the threatened. However, for the Church this concern is based on religious motivation. Indeed, the treatment of minorities is often recalled as a test of a successful democracy and rule of law. From the Christian point of view, the motivation for this social concern, for this care for 'the other', is clear: it is the recognition of and respect for the inherent dignity of the human person. The respect for the equal dignity of all human beings goes further than caring for the weak and threatened as it aims at embracing a human person in their wholeness. Being made in the image and likeness of God confers dignity to a person in his or her whole being, including individual particularities and uniqueness. To respect the dignity of a human person, therefore, means to recognise and respect differences in people, their strengths and weaknesses, talents and shortcomings. Only such an inclusive and holistic vision of a human person can build the concept of fair and equitable treatment as being an expression of justice. Thus, justice in this perspective does not mean treating everyone the same, but to value the true nature of each human person and to treat them accordingly.

1.2. HUMAN DIGNITY IN THE EU LEGAL FRAMEWORK

In the framework of EU primary law there are explicit references to human dignity. The Treaty on the European Union recalls in Article 2 that '*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*'. It is additionally complemented by the wording of the Preamble to this Treaty, which places the source of human rights in culture, religion and humanism. A similar formula can be found in the Preamble to the Charter of Fundamental Rights, which stipulates that '*the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity*'. It is further affirmed in the first Article of the Charter that '*human dignity is inviolable and that it must be respected and protected*'. This reiteration implies that human dignity plays a double role: it serves as an underlying basis for all the fundamental rights and it is recognised as one of

these rights. The official interpretation of the Charter² confirms that perspective by saying that '*the dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights*'. It develops this further by adding that '*none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted*'.³

The Court of Justice of the European Union has mentioned human dignity several times. However, only in 2001 did it expressively acknowledge that the fundamental right to human dignity and integrity must be observed.⁴ In a later judgment, the Court has stated that the respect for human dignity is a general principle of law.⁵

The secondary law framework contains many references to human dignity. They usually appear in the recitals of Directives or Regulations and provide interpretative guidelines to the legislative instruments. In the Non-Discrimination Directives, which set out the 'equal opportunities' framework and which are the focus of interest of the present document, the reference to dignity appears expressly only in the context concerning the definition of harassment.

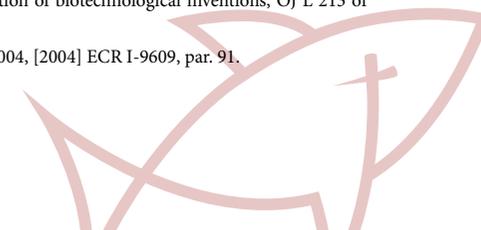
It seems to be clear in the EU legal framework that human dignity is the principal concept encompassing all other rights and freedoms. It is also unquestionable that when rights or freedoms come into collision, the fair balance between them must always take into account and ensure respect for human dignity.

² Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJEU C 303/17, 14.12.2007.

³ The Explanations refer to a judgement of the Court of Justice of the European Union, Case C-377/98 Netherlands v European Parliament and Council of 9 October 2001, [2001] ECR I-7079, par. 70 -77, in which the Court confirmed that a fundamental right to human dignity is part of EU law.

⁴ Case C-377/98, the Netherlands v Parliament and Council, judgment of 9 October 2001, [2001] ECR I-07079, par. 70. The judgment concerned Directive 98/44/EC of 6 July 1996 of the European Parliament and of the Council on the legal protection of biotechnological inventions, OJ L 213 of 30.07.1998, par. 13.

⁵ Case C-36/02, OMEGA, judgment of 14 October 2004, [2004] ECR I-9609, par. 91.



UNDERSTANDING OF EQUALITY, EQUAL TREATMENT AND DISCRIMINATION IN EU LAW

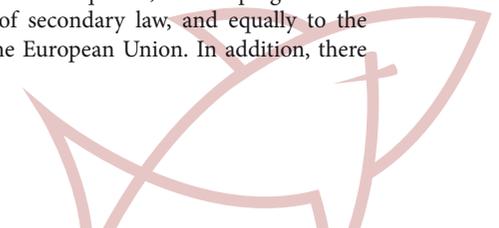
Due to terminological ambiguity in the EU legislation and sometimes lack of clear distinctions between the notions of equality, equal treatment, and non-discrimination it is not possible to draw categorical conclusions on what exactly these notions mean. It seems, however, that compared to equality, non-discrimination and equal treatment are somewhat narrower concepts strictly related to specific grounds, such as race and ethnic origin, age, disability, sex, religion or belief and sexual orientation. That leads to the conclusion that EU law is not as such aimed at ensuring equality in abstract and general terms pertaining to all areas of life and all grounds, but is rather oriented towards combating discrimination based on specific grounds.

The mere acknowledgement of a principle of equal treatment does not provide for an EU competence to adopt legislation pertaining to the prohibition of discrimination outside the framework of the EU competences. Nor does it lead to the emergence of directly effective rights for individuals.

2.1. APPROACHES TO EQUALITY AS REFLECTED IN THE EU LEGAL FRAMEWORK

Equality is an ambiguous and contested idea which has been built around a multitude of definitions and concepts thereby acquiring several possible meanings. The notion of equality, its value and its relationship to justice, its material measure (equality of what?) and its scope (equality among whom?) has been debated in philosophy, theology and law since the early days of humanity. Obviously the EU legal framework is not a forum to provide comprehensive answers to all questions brought up in these disciplines. On the contrary, it seems to reflect, sometimes without too much of precision or coherence, various theories.

There are several sources of EU law in which the reference to equality, equal treatment and non-discrimination appears. However, neither of the primary law provisions defines these notions. As a consequence, the shaping of their understanding has been left to the acts of secondary law, and equally to the jurisprudence of the Court of Justice of the European Union. In addition, there



exist ‘soft law’ instruments which, despite the lack of legally binding force, may also have impact on the understanding of the said notions.⁶ These further reflections attempt to find common denominators, intersections and interdependencies between these notions.

The up-to-date secondary EU legal framework in the area of non-discrimination has been based on Article 19 of the Treaty on the functioning of the EU (ex Art 13 of the Treaty establishing European Community)⁷ which authorises the Council to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. On the basis of this provision two Directives were adopted in 2000: Directive 2000/43/EC “implementing the principle of equal treatment between persons irrespective of racial or ethnic origin”⁸ and Directive 2000/78/EC “establishing a general framework for equal treatment in employment and occupation”.⁹ They both have a similar format and introduced minimal standards of equal treatment in all aspects of employment and vocational training as regards all grounds and also beyond as regards ethnic origin or race. Many of the definitions and concepts used in the two Directives have been inspired by legislation pertaining to equality between men and women and the case law of the European Court of Justice in this area.¹⁰ In 2004 the Council adopted Directive 2004/113/EC “implementing the principle of equal treatment between men and

⁶ See Annex at the end of the document.

⁷ Numeration amended by the Treaty of Lisbon.

⁸ Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000.

⁹ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000.

¹⁰ C-149/77, Defrenne v SABENA, 15 June 1978; C-14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, 10 April 1984; C-177/88, Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus, 8 November 1990; C-208/90, Theresa Emmott v Minister for Social Welfare and Attorney General, 25 July 1991; C-271/91, M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority, 2 August 1993; C-109/00, Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK), 4 October 2001; C-342/01, María Paz Merino Gómez v Continental Industrias del Caucho SA, 18 March 2004; C-380/01, Gustav Schneider v Bundesminister für Justiz, 5 February 2004; C-256/01, Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment, 13 January 2004; C-117/01, K.B. v National Health Service Pensions Agency and Secretary of State for Health, 7 January 2004; C-4/02 and Case C-5/02, Hilde Schönheit v Stadt Frankfurt am Main (C-4/02) and Silvia Becker v Land Hessen (C-5/02), 23 October 2003; C-77/02, Erika Steinicke v Bundesanstalt für Arbeit, 11 September 2003; C-25/02, Katharina Rinke v Ärztekammer Hamburg, 9 September 2003; C-187/00, Helga Kutz-Bauer v Freie und Hansestadt Hamburg, 20 March 2003; C-186/01, Alexander Dory v Bundesrepublik Deutschland, 11 March 2003.

women in the access to and supply of goods and services”.¹¹ An extensive range of Directives ensuring equality between men and women in the area of pay and social security has been adopted since the 1970s.¹² This set of legislative measures was, however, not based on Article 19 of the Treaty on the functioning of the EU, but on Article 157 of the Treaty on the functioning of the EU (previously Article 141 of the Treaty establishing European Community)¹³ providing for a specific EU competence to legislate in the area of equality between men and women. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the “implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)” is a prominent example of the legislation adopted to date. All of the above mentioned Directives are further referred to as Non-Discrimination Directives.

The EU legal framework has not been based on a single vision of equality. On the contrary, various approaches and philosophies have been merged. Given this amalgam, the following analysis aims at shedding some more light on the notion of equality and on what it intends to convey.

2.1.1. Formal equality - equality before the law

Formal equality requires that if two people are being treated differently, this should be based on a relevant difference between them. Otherwise, in the absence of a relevant differentiating feature, it would be legally wrong not to treat them in the same way. Thus, formal equality establishes very little because, given the variety of human personal characteristics, differences between people which are relevant enough to justify a difference of treatment, are easy to be found. Formal equality does not as such provide any criteria of what a relevant difference is.

Transposed to a system of law, the idea of formal equality is very close to the concept of the right to equality before the law. The latter is a basic principle of

¹¹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37, 21.12.2004.

¹² Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L225/40; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood [1986] OJ L359/56; Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1997] OJ L14/13.

¹³ Numeration amended by the Treaty of Lisbon.



justice, the rule of law and the main category of fundamental rights. It means that the law should apply to all persons in a consistent and impartial manner and those responsible for its enforcement should not have regard to arbitrary decisions. The concept of equality before the law refers to a vertical dimension, i.e. its basic assumption is to protect people from unfair and unjustified treatment by State authorities.

The right to equality before the law for all persons constitutes a universal right recognised by many international instruments such as the Universal Declaration of Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁴ to which all EU Member States are signatories. In the EU legal framework the concept of formal equality has found expression in the Charter of Fundamental Rights, which explicitly proclaims that everyone is equal before the law.¹⁵

Equality before the law does not imply that the law cannot draw distinctions between people. Quite the contrary, it even sometimes requires to distinguish between people, provided that the distinction is based on relevant criteria. In fact, often the most fervent debates pertaining to the non-discrimination legislation are related to the criteria of relevance: what some people think is relevant, is disregarded by others.¹⁶ The general principle that like cases should be treated alike, and unlike cases should not be treated the same¹⁷ has been understood to require more than just consistency in the application of the law; it demands a rational and justifiable basis for differential treatment where the law requires that people are to be treated differently.

¹⁴ See also the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

¹⁵ According to the Explanations to the Charter, *ibidem*, this is a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law: Case 283/83, *Racke*, judgment of 13 November 1984, [1984] ECR 3791; Case C-15/95, *EARL*, judgment of 17 April 1997, [1997] ECR I-1961; and Case C-292/97, *Karlsson*, judgment of 13 April 2000, [2000] ECR 2737.

¹⁶ H. Bedau, *Against Equality*, ed., Justice and Equality, Prentice-Hall, 1971, pp.138-151.

¹⁷ C-442/00, *Caballero v Fogusa*, 12 December 2002; C-810/79, *Peter Überschär v Bundesversicherungsanstalt für Angestellte*, 8 October 1980; C-117/76 and C-16/77, *Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. vs Hauptzollamt Hamburg-St. Annen, Diamalt AG v Hauptzollamt Itzehoe*, 19 October 1977.

2.1.2. Substantive equality

While the idea of equality before the law is not necessarily aimed at ensuring equality in substantive terms, the concept of substantive equality seeks to highlight significant social obstacles to equal access to, for example, education, employment, goods and services. The substantive equality concept has been accommodated in the Non-Discrimination Directives by means of provisions referring to equality of opportunity and equality of outcome.

Equality of opportunity means an equal chance of participation in any activity, public or private in the area of, for example, employment and vocational training, education, housing, access to goods and services or to social protection without arbitrary restrictions based on personal characteristics such as race and ethnic origin, sex, sexual orientation, religion or belief, age or disability.¹⁸ The focus of the equality of outcome is put at the end result and has found expression in the provisions pertaining to positive action, also referred to as affirmative action.¹⁹ It is a term used to describe measures aimed at preventing or compensating previously experienced disadvantages linked to certain personal characteristics. These actions could be scholarships, preferential employment or quotas for under-represented or disadvantaged social or ethnic groups, accessibility to public spaces and workplaces to persons with disabilities. All Non-Discrimination Directives²⁰ contain provisions accommodating positive action without, however, prescribing measures to be taken, instead leaving them up to the Member States. While acknowledging that the application of positive action measures leads to ensuring 'full equality', the Directives do not elaborate on what full equality is and what its measures are. In fact the mention of the idea of full equality appears in these Directives only in the reference to positive action. The aim of redressing a previous state of disadvantage has been accepted as a legitimate objective of differential treatment. However, affirmative action has also been contested as leading to 'reverse discrimination' and causing undesirable side effects, especially in situations when it is applied automatically and unconditionally.²¹

¹⁸ Article 15.2 of the Directive 2000/78/EC, Article 1 of Directive 2006/54/EC.

¹⁹ C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, 6 July 2000; C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen*, 17 October 1995; C-476/99, *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, 19 March 2002; C-158/97, *Georg Badeck and Others*, 28 March 2000.

²⁰ Article 7 of the Directive 2000/78/EC, Article 6 of the Men and Women Directive, Article 5 of the Directive 2000/43/EC and Article 3 of the Men and Women Employment Directive.

²¹ Case C-158/97, *Georg Badeck and Others*, 28 March 2000.



While equality of opportunity attempts to provide the same starting conditions in access to various goods and services, equality of outcome attempts to ensure that everyone receives the same. In a consequence there is a difference between the ideal dimension represented by the equality of outcome, and between reality represented by the equality of opportunity.

2.1.3. Vertical and horizontal dimensions

Equality before the law and the right not to be discriminated against are concepts which apply in a relationship between an individual and the State. This dimension is described as vertical and as such has been generally accepted.

There has, however, been the criticism that the right not to be discriminated against is extended by means of legal measures to relationships between individuals or between individuals and legal persons and other entities. Concerns as to whether individuals may and should be required to treat everyone alike without regard to their personal preference are still subject to debate. Imposing that requirement on relations between individuals or between individuals and other entities may, in some cases, unavoidably lead to tensions with other fundamental rights and freedoms. As a result, the balancing between rights and freedoms, or even prioritizing one of them, becomes a problematic necessity and gives ample grounds for ideological debate. This horizontal dimension, the right of one individual not to be discriminated against by another individual or an entity has already been extensively taken up in EU law. The Non-Discrimination Directives are not restricted merely to the vertical dimension, but they also provide for measures which cover the horizontal relationships. That concerns mainly the prohibition of discrimination in the provision of goods or services (expressed in the 2000/43/EC Directive and the 2004/113/EC Directive) or prohibition of discrimination in occupation or employment where the employer is a private person or a private institution (2000/78/EC Directive).

It seems that the core of EU law has been based on the concept of formal equality. Little by little, it has been enriched by measures aimed at ensuring substantive equality. Additionally, a horizontal dimension has been introduced.

2.2. TERMINOLOGY IN EU LAW

Before proceeding with further reflections, some terminological clarifications seem necessary. As highlighted earlier, EU law refers to equality, equal treatment and non-discrimination, but it neither defines these concepts nor makes a clear distinction between them.

2.2.1. Reference to equality and discrimination in the primary law

The Treaty on the Functioning of the European Union contains several references to equality, but almost exclusively with regard to equality between men and women in general²² and in matters of employment and occupation.²³ The reference to the prohibition of discrimination appears in a different context, which might allude to the fact that it is perceived as a narrower concept, i.e. restricted to specific contexts, such as, for example, free movement of goods and services, freedom of movement of workers, transport, state aid, and others.²⁴ This Treaty also introduces a whole new section titled ‘Non-discrimination and citizenship of the Union’, where it prohibits discrimination based on nationality, and empowers the EU institutions to adopt measures combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. It also guides the policy orientation towards the objectives of non-discrimination.²⁵

The Treaty on the EU makes reference to equality, also predominantly in the context of sex and citizenship.²⁶ Furthermore, equality is mentioned in Article 2 as one of the fundamental values on which the Union is founded. Interestingly, later in this provision there appears another reference to equality as well as to non-discrimination: the Treaty affirms that the ‘*values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and*

²² Article 8 TFEU, ex Article 3(2) Treaty establishing the European Community.

²³ Article 153 TFEU, ex Article 137 Treaty establishing the European Community and Article 157 TFEU, ex Article 141 Treaty establishing the European Community.

²⁴ A non-exhaustive list: Article 36 TFEU, ex Article 30 Treaty establishing the European Community; Article 45.2 TFEU, ex Article 39 Treaty establishing the European Community; Article 107.2 TFEU, ex Article 87 Treaty establishing the European Community; and others.

²⁵ Article 19 TFEU and Article 10 TFEU.

²⁶ Article 2, Article 3.3. and Article 9 TFEU.



equality between women and men prevail.²⁷ The usage of these two notions in one provision is a proof that equality and non-discrimination are not synonyms in the framework of the EU primary law.

The Charter of Fundamental Rights refers to equality in the Preamble and further affirms that everyone is equal before the law (Article 20). It also expands the understanding of equality between men and women to all areas of life (Article 23). Furthermore, it prohibits any discrimination based on any grounds 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 (Article 21).²⁸ Article 21 of the Charter only addresses the prohibition of discrimination in the vertical dimension, but not in relations between individuals. This follows from its systematic closeness to Article 20 of the Charter affirming the principle of equality before the law. This vertical dimension is also confirmed by the fact that the Charter only addresses the EU institutions and the Member States when they apply or implement EU law (Article 51).

2.2.2. The jurisprudence of the Court of Justice of the EU relating to equal treatment

Before the adoption of the Non-Discrimination Directives, there were no encompassing legislative definitions of equality, equal treatment or non-discrimination, even though there were indications early on in the case law of the European Court of Justice. The Court started to interpret the concept of discrimination – at that time on the grounds of nationality - in the early 1970s.²⁹ However, the Court of Justice of the EU has not developed in its jurisprudence a significant differentiation between the notion of equal treatment and non-discrimination. Discrimination, according to the Court *‘can arise only through the*

²⁷ Full wording of this Article is as follows: “*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.*”

²⁸ According to Article 14 of the European Convention for the Protection of Fundamental Rights and Freedoms (ECHR) “*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.*”

²⁹ One of the landmark cases in that regard was Sotgiu (C-152/73, in 1974), where workers employed away from their place of residence were entitled to a higher allowance if they had lived in Germany at the time of their initial employment.

application of different rules to comparable situations or the application of the same rule to different situations.³⁰ The principle of equal treatment, on the other hand, requires that which is like (comparable) shall be treated alike, whereas that which is different shall be treated differently according to the degree of difference, unless there is objective justification³¹. Consequently, according to the ECJ, the ‘principle of equal treatment’ or the ‘principle of non-discrimination’ are simply two labels for a single general principle of EU law, which prohibits both treating similar situations differently and treating different situations in the same way unless they are objectively justified,³² that is to say based on objective considerations and proportionate to the legitimate objective sought.³³

2.2.3. Definitions of equal treatment and discrimination in the secondary law

The approach adopted by the secondary law framework to the definition of discrimination and equal treatment is two-pronged. In the framework of the 2000/43/EC Directive and the 2000/78/EC Directive the ‘principle of equal treatment’ is defined as ‘no direct or indirect discrimination’ whatsoever on any of the grounds to which the respective Directives apply. Harassment, although it is defined as a form of discrimination, is not as such explicitly mentioned in the definition of the ‘principle of equal treatment’, which might imply that it should not necessarily be linked to the notion of equal treatment, but rather to the notion of discrimination. The 2004/113/EC and 2006/54/EC Directives concerning equal treatment between men and women do not contain a general definition of the ‘principle of equal treatment’, but explicitly provide definitions of direct and indirect discrimination as well as of harassment. Any instruction to discriminate and any less favourable treatment of a woman related to pregnancy or maternity leave³⁴ also qualify as discrimination. The understanding of direct and indirect

³⁰ C-157/02, Rieser, par. 39.

³¹ C-390/06, Nuova Agricast, 15 April 2008, par. 66

³² Case C-422/02 P, Europe Chemi-Con (Deutschland) GmbH v Council of the European Union, 27 January 2005, par. 33; C-442/00, Rodríguez Caballero, 12 December 2002, [2002] ECR I-11915, par. 32.

³³ C-106/83, Sermid, 1984, ECR 4209, par. 28; Case C-146/91, KYPED v Council and Commission, 1994, ECR I-4199; C-157/02, Rieser, 5 February 2004, par. 39; C-390/06, Nuova Agricast, 15 April 2008, par. 66; Case 283/83, Racke v Hauptzollamt Mainz, judgment of 13 November 1984; case C-189/01, Jippes and Others, 2001, ECR I-5689, par. 129, and Case C-149/96, Portugal v Council, 1999, ECR I-8395, par. 91; Case C-148/02, Garcia Avello, 2003, par. 31; Case C-15/9, EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux, 17 April 97, par. 35; Case 203/86, Spain v Council, 1988, ECR 4563, paragraph 25.

³⁴ This definition appears in 2006/54/EC Directive.



discrimination and of harassment presented in the Directives is as follows.

Direct discrimination occurs when one person is treated less favourably than another is, or has been or would be, treated in a comparable situation, i.e. a group of persons is targeted for unfair differential treatment.³⁵ Direct discrimination assumes that the treatment was explicit and intentional. The concept of direct discrimination does not allow for any general justification of exceptions or differences of treatment, unless there are specific clauses built into the Directives providing for explicit justifications.³⁶

The definition of indirect discrimination is one of the most important contributions made by European law.³⁷ It occurs when an apparently neutral provision, criterion or practice would put persons of certain characteristics 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. Thus, without necessarily intending to, indirect discrimination does disproportionately and adversely affect members of a particular group. In contrast to direct discrimination, indirect discrimination will not be unlawful if it can be justified, which in the Non-Discrimination Directives usually manifests itself as a general justification clause built into the operative section of the Directive. To justify it, a legitimate aim must be demonstrated and that the conduct is proportionate to that aim.³⁸

Harassment is a concept distinctive from the previous ones, their connection being unclear. It occurs when any unwanted conduct 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. As distinct from direct and indirect discrimination, harassment neither requires less favourable treatment, nor comparison with the situation of another person. The only prerequisite is whether

³⁵ Article 2(2)(a) of the Council Directive 2000/78/EC and of the Council Directive 2000/43/EC.

³⁶ C-177/88, Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus, 1990, ECR I-3941.

³⁷ As early as case 96/80 *Jenkins v Kingsgate (Clothing Productions) Limited*, 1981, ECR 911 and Case 170/84, *Bilka Kaufhaus GMBH v Weber von Hartz*, 1986, ECR 1607.

³⁸ See further: M. Finlay, *Indirect discrimination and the Article 13 Directives*, in: *Equality in diversity, The new Equality Directives*, ed. C. Costello & E. Barry, Irish Centre for European Law, 2003, pp. 135-147.

dignity was or was intended to be violated and a negative environment created.³⁹ There are no further indications about what constitutes a violation or intended violation of dignity or what is a hostile or offensive environment. The definition does not give enough indications for precisely determining when the expression of opinion can be classified as harassment. Therefore, what may be an acceptable statement to one person may be deeply offensive to another.

2.2.4. Application of the definitions and concepts - the specificity of harassment

The concept of harassment is particularly complex as it is very closely linked to subjective perceptions oriented around notions such as intimidating, hostile, degrading, humiliating or offensive. Furthermore, this concept is difficult to grasp as its possible manifestations occur in very different forms and contexts. Therefore, the question arises whether very different conducts based on very different grounds in very different contexts can and should be evaluated in a single standard evaluation pattern in order to qualify as 'harassment'. For example: harassment based on disability at a work place and harassment based on religion in the area outside of employment, such as access to goods or services, will not necessarily be manifested in the same way. Discrimination based on disability predominantly refers to infrastructure and physical barriers and is often manifested through denial of reasonable accommodation. Discrimination based on religion or belief is different as it is related to the feelings, thoughts, and conscience of a person. Furthermore, harassment in an employment context takes place in the form of relationships between people characterised by financial and social dependencies, subordination and superiority as well as continuous contact within a potentially hostile environment. Such a close involvement gives a specific weight, meaning and importance to the behaviour exhibited in that context. The transposition of the concept of harassment from the sector of employment to the area outside of employment remains debatable. In the area of provision of goods and services the situation is different as often no continuing contacts between a supplier and a customer are established but only single or accidental contacts are made. In such a context, it might be particularly ambiguous to determine what constitutes a violation of dignity, which would amount to harassment. Not only has the conduct to be interpreted on the basis of maybe just a single encounter; but, in addition,

³⁹ I. Bacik, *Harassment*, in: *Equality in diversity, The new Equality Directives*, ed. C. Costello & E. Barry, Irish Centre for European Law, 2003, pp. 151-176, R. Holtmaat, *Discrimination based on religion, Case study on the exclusion based on religion*, Conference: *Fight against discrimination, The race and framework employment directives*, ERA - Trier, 4-6 March 2004, p. 6, I. Leigh, *Harassment, Why this is an important issue*, Conference on EU Goods and Services Directive, *A threat to religious freedom*, organized by the Christian Institute, London, 23.10.2008.



the potential victim of harassment has an alternative: if a customer dislikes some aspect of the service, he or she can often turn to another provider thereby avoiding any further contact. Such flexibility is not the case in the employment relationship.

Harassment on one ground may be easier to identify than harassment on another. Where, for example, religion or belief are concerned, it might happen that a conduct is deemed as discriminatory, not because it was intended to be offensive, but due to the lack of sufficient knowledge or sensitivity as to what might upset someone and create a negative environment. Furthermore, even determining the objective characteristics of harassment might become very difficult, if not impossible. What is offending and humiliating for one religion might not be as such for another one. That concern is especially legitimate in the context of persisting and general ignorance as regards various religions and beliefs.

2.3. EQUALITY, EQUAL TREATMENT AND NON-DISCRIMINATION IN EU LAW

The overview of EU law shows that the notions of equality, equal treatment and non-discrimination might not be entirely synonymous. Reference to equality appears in the primary law and this notion seems to be associated almost entirely with equality between men and women and also with equality before the law. Reference to discrimination appears in the primary as well as in secondary law and in the jurisprudence of the Court of Justice. In all of these sources it is associated with a variety of specific grounds and contexts. Finally, reference to equal treatment appears only in the secondary law and the jurisprudence of the Court of Justice, and similarly discrimination is associated only with treatment based on specific grounds.

The Non-Discrimination Directives show a rather ambiguous and far from coherent picture, where the notions of equal treatment or discrimination simply appear as a set of various ideas but do not seem to reflect a comprehensive vision or concept. The single definitions of direct and indirect discrimination and harassment do not seem to be strongly linked with the idea of equal treatment or discrimination. In addition, all Non-Discrimination Directives contain an indication that full equality might be ensured through the application of positive action measures, but do not provide answers as to what equality is or how to achieve it. Furthermore, the jurisprudence of the Court of Justice does not clarify the picture but rather makes it more ambiguous and complex by not significantly differentiating between the notion of equal treatment and non-discrimination, but treating them as two labels

for a single principle.

It is clear that the EU non-discrimination legislation is in a process of dynamic development, accompanied by the often progressive and far reaching jurisprudence of the Court of Justice of the EU. Due to the often terminological ambiguity and sometimes lack of clear distinctions between the notions of equality, equal treatment, and non-discrimination, it is not possible to draw categorical conclusions as to what exactly these notions mean. It seems, however, that compared to equality, non-discrimination and equal treatment are somewhat narrower concepts strictly related to specific grounds, such as race and ethnic origin, age, disability, sex, religion or belief and sexual orientation. That leads to the conclusion that EU law is not as such aimed at ensuring equality in abstract and general terms pertaining to all areas of life and all grounds, but is rather oriented towards combating discrimination based on specific grounds. Legal accuracy would therefore demand a certain measure of prudence in referring to these notions. Consequently, when referring to specific grounds such as sex, race or ethnic origin, disability, age, religion or belief, or sexual orientation it is more accurate to refer to non-discrimination legislation, and not to equality legislation.

2.4. REFLECTIONS ON THE PRINCIPLE OF EQUAL TREATMENT IN EU LAW

One of the highly debated questions in the context of EU non-discrimination legislation is whether in the EU legal framework there is an overarching and all penetrating principle of equal treatment, and if so what are its consequences.

The Court of Justice has acknowledged that the general principle of equal treatment in respect of sex as established in Directive 76/207/EEC is part of the fundamental rights of Community law. Since this principle finds a clear expression in the provisions of primary law, such an acknowledgement has not been contested or extensively debated. Historically speaking, as early as 1957, Article 141 (former Article 119) of the Treaty establishing European Community laid down the principle that men and women should receive equal pay for equal work. Since then a series of directives have broadened the principle to cover access to employment, training and career progression, the aim being to eliminate all forms of discrimination at work. In 1978 the European Court of Justice stated that the 'fundamental personal human rights' guaranteed in the Community legal order included the 'elimination



of discrimination based on sex.⁴⁰

The secondary EU legislation seems to offer only a limited perspective on what equal treatment and non-discrimination is; this perspective being neither clear nor convincing. For example, the titles of all Non-Discrimination Directives refer to ‘implementing the principle of equal treatment’ which suggest that there exists a general principle of equal treatment. A closer look at the texts of the Directives, however, makes it clear that their purpose is merely to lay down the framework for combating discrimination based on specific grounds, but not to ensure equality as such. Furthermore, the Non-Discrimination Directives leave no doubt that the principle of equal treatment is defined only for the purpose of the respective Directives, and there is no mention of any general concepts. This might suggest that a general applicability of this principle simply does not exist. The secondary legislation did not apply the principle of equal treatment as an overall and general principle prohibiting all discrimination on all grounds, but instead it rather concentrated on only some selected aspects of it. For example, the 2000/78/EC Directive applies only to employment and vocational training, the 2000/43/EC Directive applies to areas beyond employment such as education, access to goods and services and housing but only as regards race and ethnic origin. Therefore, discrimination based on other grounds and in other contexts cannot be regarded as coming within the ambit of the EU legislation.⁴¹ Only the 2004/113/EC Directive explicitly affirms in its operative section that its purpose is to ensure the implementation of the principle of equal treatment and of equal opportunities. However, that takes place only in employment and occupation (Article 1).

In its recent jurisprudence the Court of Justice has now also acknowledged the existence of a general principle of non-discrimination on grounds of age. The Court, sitting in judgement in the highly contested case of *Mangold*,⁴² derived the principle from common constitutional traditions of the Member States, despite the fact that at the time of the judgement only two Member States made provision for constitutional prohibition of discrimination based on age. The Court of Justice acknowledged the existence of a principle of non-discrimination on grounds of age, as a general principle of European Union law which constitutes a specific application of the general principle of equal treatment. The Court in a fundamental way referred to the direct applicability of directives laying down a (supposedly)

⁴⁰ C-149/77, *Defrenne v SABENA*, 15 June 1978.

⁴¹ Gavin Barret, *The concept and principle of Equality in European Community law – pouring new wine into old bottles?* in: *Equality in diversity. The new Equality Directives*, ed. C. Costello & E. Barry, Irish Centre for European Law, 2003, p. 125.

⁴² Case C-144/04, *Werner Mangold v Rüdiger Helm*, judgement of 22 November 2005, par. 74 – 78.

general principle of EU law, even in relationships between private parties, i.e. in a horizontal situation.⁴³ Such an approach raises serious concerns in relation to legal certainty as it might be perceived as an example of the expansion of the scope of EU law through ECJ jurisprudence without a sound legal basis. This calls into question the division of competence between the EU and the Member States.⁴⁴

The *Mangold* case only relates to non-discrimination on grounds of age, but arguably such reasoning could also be transferred to other grounds of discrimination. Even if the Court were to refrain from such an endeavour, its line of argument has already been widely explored in political discourse, where the notions of equality, equal treatment and non-discrimination are commonly confused and treated as synonyms. This lack of sharp differentiation between equality, equal treatment and non-discrimination often leads to a widespread assumption that there exists a generally applicable, all-encompassing principle of equality or equal treatment irrespective of the grounds which would confer general legislative competence in the area of non-discrimination. In fact this assumption is based on oversimplification and misconception.

The general principle of equal treatment, as developed by the Court of Justice, has become a tool to be used against legislative and administrative acts perceived as arbitrary and unjust as well as private conduct in a variety of fields and contexts. However, the scope of the legislative application of such a principle is subject to a range of limitations. General principles of EU law only serve as interpretive guidelines and as standards of review of the legislative and administrative acts of EU law. A general principle most certainly does not provide for an EU competence to adopt legislation pertaining to the prohibition of discrimination outside the framework of Article 19 of the Treaty on the functioning of the Union. The effect of these limitations leads to the conclusion that the principle of equal treatment is not a free standing and independent legal basis for undertaking legal action by individuals nor does it confer a right on an individual.

⁴³ According to the established EU law doctrine, individuals can derive from a directive, enforceable rights against the State or emanation of the State (vertical direct effect) but not against private parties (horizontal direct effect). However, a directive can be applied directly against an individual if it has not been properly implemented into national law.

⁴⁴ Advocate General Mazak in Case C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, 16 October 2007.



EQUALITY, NON-DISCRIMINATION AND JUSTICE - FINDING A PROPER BALANCE

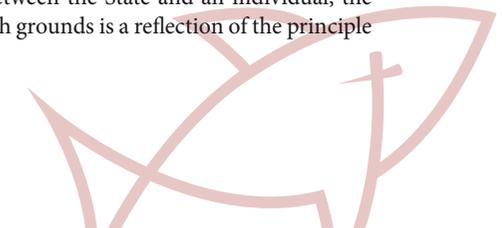
The right not to be discriminated against is only one of many reflections which acknowledge human dignity. Therefore focusing exclusively on respect for this right does not always and necessarily lead to just, fair, and equitable treatment. For that to occur, all applicable human rights of all the persons involved, such as the right to religious freedom or freedom of expression, have to be taken into account and a just solution for all must be found.

It is essential that provisions designed to promote equality do not have the unintended consequence of removing or unjustly limiting other fundamental rights and freedoms. Therefore, when the non-discrimination legislation provides means for accommodating and reconciling the exercise of other human rights and freedoms, such acts should provide for legally sound exceptions in their manifestations and exempt certain areas of application from the non-discrimination measures.

3.1. DISTINCTION, DISCRIMINATION AND JUSTICE

People have the right to be different and to distinguish themselves from other people. Recognising these differences and treating them differently must not automatically be equated with discrimination. Respect for the equal dignity of a person means to recognise and respect their individual particularities, and to embrace this person in his or her whole personality. Distinction is thus not synonymous with discrimination. Quite the contrary, not to distinguish between people by ignoring their characteristics such as age, sex, or disability or particular situation and treating them the same in all circumstances might lead to inequality.

Nevertheless, there are grounds, deemed to be morally and legally unacceptable; among them are the grounds enumerated in Article 19 of the Treaty on the functioning of the Union (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation), which cannot serve as a criterion of distinction in differential treatment. In a relationship between the State and an individual, the prohibition of discrimination based on such grounds is a reflection of the principle



of equality before the law. But what is true in the relations between the State and an individual is not necessarily true where relationships between individuals are concerned. In these horizontal relationships all parties have human rights, all have the same dignity and the corresponding rightful claim to be respected in their whole personality. The right not to be discriminated against is only one right among other human rights.

The right not to be discriminated against has seen its development from a right against the State to a behavioural and legal rule between individuals. What about the other human rights? Is it fair to measure, criticise or even morally or legally judge a relationship between individuals from the exclusive angle of a non-discrimination scrutiny? This depends on the aim of the non-discrimination legislation, and on what it seeks to accomplish.

The aim of non-discrimination legislation is to provide for just and fair behaviour between individuals. This aim can be deduced from the underlying basic assumptions of that legislation: that to treat someone differently because of a specific ground and without justification is presumed to be wrong. On the other hand, equal treatment irrespective of those specific grounds is supposed to be morally right, equitable, fair, and just. But is that the right equation? Is respecting the right not to be discriminated against on the grounds of specific characteristics the same as equitable, fair and just treatment?

The right not to be discriminated against is only one reflection of the acknowledgment of human dignity. It protects a person from being treated differently for a certain reason deemed morally unacceptable and therefore unfairly. However, there are other human rights, such as the right to religious freedom or freedom of expression, that have a differently constructed scope of protection. Ignoring other human rights, while focusing exclusively on the right not to be discriminated against, does not bring justice. It also risks creating a faulty perspective by viewing a relationship between individuals only from one specific angle.

From a legal perspective, discrimination refers to disadvantageous treatment for a prohibited reason without justification. In this sense, not all distinctions are prohibited, and not all of them amount to discrimination. That happens only when they are unlawful.⁴⁵ Therefore, individuals can be treated differently in a manner that is permissible. More specifically, discrimination is not merely a matter of unequal treatment, as differential treatment may even be unjustified and yet

⁴⁵ D. Lochak, Reflections on the Concept of Discrimination, A. Lester, British Anti-discrimination Legislation, *Droit social*, Paris, 1987, p.778 and p.791.

still not amount to discrimination. For a conduct to be deemed discriminatory, several conditions must be met, i.e. when disadvantageous differential treatment is unjustified and when it is not proportionate and based on a criterion which the law prohibits from using when making legal distinctions.⁴⁶ The understanding of the notion of equal treatment and non-discrimination is crucial for determining whether conduct is discriminatory. It is therefore crucial to understand when conduct, even if it is seen as socially undesirable and in the common perception could be seen as discriminatory, is in fact legally permissible.

In conclusion, the right not to be discriminated against by the State has to be acknowledged without any reservation, for it respects the principle of equality before the law. In a horizontal relationship, however, focusing exclusively on respect for the right not to be discriminated against does not necessarily lead to just, fair and equitable treatment. For that to occur, all applicable human rights of all the persons involved have to be taken into account and a just solution for all must be found.

3.2. OTHER RIGHTS AND FREEDOMS

Every human right enjoyed by one person may potentially create a conflict with the human right of another person. There are, however, certain rights that tend to be in tension with the right not to be discriminated against.

3.2.1. Freedom of expression

Freedom of expression has been guaranteed by Article 11 of the Charter of Fundamental Rights, which corresponds with Article 10 of the ECHR. This right reflecting a fundamental principle of democratic governance encompasses freedom to hold opinions and to receive impartial information without interference by public authorities. In the EU non-discrimination framework, several potential conflicts with the right not to be discriminated against on certain grounds come into play: in some cases the application of the provisions on harassment might lead to inhibiting free speech and have a 'chilling effect'; people may feel inhibited from expressing their opinions on politics or religion; they might fear that it may be seen by some people as violating their feelings and thus taken as violating their dignity. In the absence of clear boundaries people will be uncertain about what

⁴⁶ Michel Miné, Concepts of direct and indirect discrimination, Revised text of a presentation delivered at the conference on The Fight Against Discrimination. New Directives of 2000 Concerning Equality, 31 March to 1 April, Trier, p. 1.



might or might not qualify as harassment and they will be censored or, in order to avoid a potential claim, they will censor their own speech on a precautionary basis. Moreover, the definition of harassment does not give many indications for precisely determining when the expression of opinions can be classified as harassment.

3.2.2. Freedom of thought, conscience and religion

Article 10 of the Charter of Fundamental Rights provides for freedom of thought, conscience and religion. This provision corresponds with Article 9 of the European Convention of Human Rights (ECHR). Like freedom of expression, freedom of thought, conscience and religion constitutes one of the foundations of a pluralistic society. Religious freedom comprises different dimensions: an *individual* dimension, i.e. the right to choose one's system of beliefs; the *collective* dimension, or the right to associate with others to live according to one's faith; and the *institutional* dimension, meaning the recognition that religious faith communities are also social actors in their own right, but differing in a specific way from other actors in civil society. Taken together they refer to one of the crucial features that make up the identity of believers and their concepts of life.⁴⁷

Article 9 of the Charter of Fundamental Rights as well as Article 10 ECHR primarily protect the *internal* dimension of freedom of religion, that is the sphere of individual conscience, personal beliefs and religious creeds. Religion, however, is not just a set of ideas and beliefs, it is also a set of activities such as worship, teaching, practice, observing dietary restrictions or respecting days of rest. Religious freedom therefore also covers an external dimension, the '*forum externum*', which comprises the right to manifest one's religion and act according to religious rules and convictions in daily life as well as to establish religious institutions. That also encompasses the right to express moral and ethical judgements resulting from religious beliefs. Freedom of religion can be exercised alone and in private, as well as in public and in community with others, within the circle of those whose faith one shares. The importance of this collective dimension of religious freedom has been regularly emphasised by the European Court of Human Rights.⁴⁸

Some dimensions of the freedom of religion guaranteed in Article 10 of the Charter of Fundamental Rights and Article 9 ECHR are, however, subject to

⁴⁷ K. Warchałowski, *Prawo do wolności myśli, sumienia i religii w Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności*, Lublin 2004.

⁴⁸ See EComHR, *X. v. Denmark*, decision of 8 March 1976, Appl. No. 7374/76; see also Walter, *Religions- und Gewissensfreiheit*, in: Grote/Marauhn [ed.], *EMRK/GG Konkordanzkommentar*, Mohr Siebeck, Tübingen, 2006, p. 817, § 92.

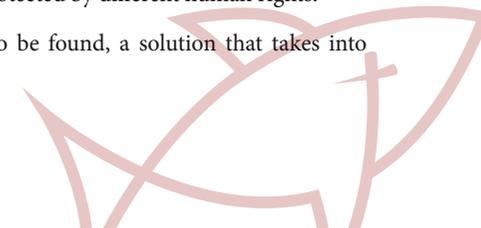
possible limitations. While the internal dimension of freedom of religion is guaranteed without further restrictions, the 'freedom to manifest one's religion' is subject to possible limitations. These limitations, according to Article 9(2) ECHR, must be prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. The fact that only the external dimension of freedom of religion can be restricted by the State reflects the fundamental importance of that right for a democratic society where various religions and convictions coexist. While thoughts, religious convictions and beliefs are by their nature completely free, it is their manifestations that sometimes need to be reconciled with other rights and the interests of various groups protected in order to ensure that everyone's beliefs are respected. However, no limitations other than those clearly prescribed by law may be imposed on the exercise of freedom of religion, even by a referral to other rights and freedoms.

In the context of the non-discrimination legislation, freedom of thought, religion and opinion are at stake. Therefore, due attention should be given to the question of exercising the right to conscientious objection. This right is commonly associated with a form of legally permitted exemption from certain obligations or prohibitions with which one may disagree on religious, ethical, humanitarian, or allied grounds. Article 10(2) of the Charter of Fundamental Rights explicitly provides that '*the right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right*'. Such provision indicates that the EU recognises the importance of the right to conscientious objection but leaves it up to the Member States to regulate these matters. Despite the fact that conscientious objection is commonly associated with the demand for exemption from military service, it does not exclude that the possible scope of the application of this right also extends beyond the field of military service.

3.3. CONFLICT OF RIGHTS

The personal characteristics that EU law qualifies as prohibited grounds of discrimination reflect a complex picture. Some of us are born with our sex, race and ethnic origin, as well as in some cases disability. Some characteristics we develop through life, like age or disability. Some are the result of a personal choice such as religion. In relationships between individuals, all of these characteristics play an important role; and all are linked to and protected by different human rights.

In a situation of conflict a solution has to be found, a solution that takes into



account all rights of all persons involved and reconciles them. Obviously, there cannot be an automatic, general and unconditional precedence of some rights over others, as neither the Charter of Fundamental Rights nor the ECHR provide for a formal hierarchy of rights. None of the provisions of the Treaty on the Functioning of the European Union, nor the Treaty on the European Union, indicate that the right not to be discriminated against should in principle be treated as superior to other rights. In situations where the human rights of different persons collide, a fair balance, which takes into account several factors such as the importance of the personal attributes goods concerned or the intensity of the interference, needs to be found.

Therefore, where the Non-Discrimination Directives provide means for accommodating and reconciling the exercise of other human rights and freedoms they should provide for legally sound exceptions in their manifestations.

Firstly, this follows from the logic of the Non-Discrimination Directives. Direct discrimination, that is differentiation directly linked to one of the prohibited grounds, such as, for example, religion or belief, can be justified only if it were explicitly provided for in the Directive. This behaviour may be a legitimate exercise of the right to religious freedom and be therefore protected by the corresponding provisions of other legal measures, such as, for example, the Charter of the Fundamental Rights or the ECHR. This would concern for example, the establishment of confessional teaching in public schools or access to confessional schools; but also where religious organisations admit only their own members to participate in some of their activities; or where they require their members to act according to their ethos. A similar situation arises where a publisher chooses a person whose political convictions he or she wants to publish or give advertising space. These are only some examples with regard to which another person could feel excluded and feel discriminated against.

In these examples a direct distinction is drawn on the grounds of religion or opinion while at the same time a legitimate expression of the freedom of religion or freedom of expression is accommodated. According to the non-discrimination legislation, differentiation is allowed only if explicitly provided for in the legislative instrument. Without such an explicit exception such behaviour is generally prohibited. In such conditions, the right not to be discriminated against takes a general, uncompromising precedence establishing a formal hierarchy with it being accorded superiority over other human rights. This, however, leads to a violation of another principle expressed in the ECHR, according to which *'nothing in this Convention may be interpreted as implying for any State, group or person any right to*

engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. An unconditional prohibition of a behaviour protected by freedom of religion within the framework of non-discrimination legislation is in violation of the ECHR.

Secondly, within the framework of Non-Discrimination Directives there is already a general preference and therefore precedence established in favour of the right not to be discriminated against on the listed grounds. These Directives establish a framework of equal treatment in their respective scope of application. Nevertheless, they fail to outline a clear and unambiguous understanding of equality, equal treatment and non-discrimination. Under those circumstances, a mere reference to other human rights and freedoms only in a recital of a legal act, such as directive or regulation, is not sufficient. As recitals only count as vague interpretative guidelines, they do not change the establishment of a systemic superiority of the right not to be discriminated against in relation to other rights and freedoms. In the best-case scenario it only leads to a transferral of the responsibility from the legislator to a court. However, even if the courts in the proceedings were to depart from the expressed legislative preference towards the right not to be discriminated against and were to accord in individual cases a fairer weight to all the human rights and freedoms of the persons concerned, this would only qualify as damage control.

Increasingly cases arise where the requirements of non-discrimination law lead to conflicts between the right not to be discriminated against and other human rights, protected under EU law and international legal instruments. Among those rights the freedom of expression, freedom of religion and the right to conscientious objection take prominent positions. Law must allow for legitimate differences to be accommodated. Differences of opinion, belief and their manifestations are at the heart of the democratic concept. In framing legislation it is essential that provisions designed to promote equality do not have the unintended consequence of removing or unjustly limiting other fundamental rights and freedoms. The legislation adopted in the area of non-discrimination has to encompass the holistic concept of the human being, not only covering the right not to be discriminated against, but also respecting other rights and freedoms such as those deriving from freedom of expression and religion.



TOWARDS A CLEAR LEGAL FRAMEWORK

The Treaty on the Functioning of the Union in Article 19 gives the Council of the EU competence to adopt measures to combat discrimination based on race or ethnic origin, age, disability, sex, religion or belief and sexual orientation, but only to the extent that another article in the Treaty confers upon the Union legislative competence in the area concerned. These competences cannot be drawn from a general principle of equal treatment, because such a principle does not confer a self-standing competence to the EU to adopt non-discrimination measures.

In a fair legal framework concerning non-discrimination the specificity of the Church has to be taken into account. In the areas where the EU is not competent to adopt non-discrimination measures, such as the areas pertaining to the scope of Article 17 of the Treaty on the functioning of the Union, the delimitation of their scope of application has to be clear cut. Where the EU is competent, those measures have to accommodate the manifestations of religious freedom, including the activities of Churches and their institutional and organisational specificities.

4.1. THE COMPETENCE AND CONSEQUENCE

The competence of the EU to legislate in the area of non-discrimination is rather limited. It cannot be drawn from a general principle of equal treatment. The general principle of non-discrimination on the grounds of age does not confer an independent and general competence to the EU institutions to adopt non-discrimination measures either.

According to Article 5(2) of the EU Treaty, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to



attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. Neither Article 19 of the Treaty on the functioning of the Union, which gives the Council competence to adopt measures in the area of non-discrimination, nor Article 10 of the Treaty on the functioning of the Union, which orientates policies and activities of the Union towards combating discrimination, confer independent and general competence to the EU institutions to adopt non-discrimination measures. On the contrary, these provisions co-exist with other provisions of the Treaty and the legislation adopted on their basis may cover actions of Member State authorities, as well as relations between private individuals, only in the area within the limits of the Union's powers. Therefore it may not limit the effects or scope of other Treaty provisions.

Neither Article 19 of the Treaty on the functioning of the Union, nor Article 10 of the Treaty on the functioning of the Union, can be legitimately used as a general legal base to extend Union competence, by the means of referring to the principle of equal treatment. Consequently measures taken on the basis of Article 19 of the Treaty on the functioning of the Union cannot interfere with Member States' competence in areas such as, for example, education, cultural and linguistic diversity, the organisation and delivery of health and medical services, the organisation and financing of national systems of social security, family law, nor the wearing or display of religious symbols. In each of these areas the Treaties do not confer a general competence on the EU to adopt legislation and policies. On the contrary, given the social and cultural diversity, as well as the legal traditions, they leave these areas to be regulated predominantly by the Member States. In particular, the EU is not competent to determine the content of teaching or the organisation of educational systems, which remain regulated by the Member States. Even the harmonisation of the laws and regulations of the Member States in this area is explicitly excluded by primary law (Article 165 of the Treaty on the functioning of the Union). Member States in fact are entitled to preserve the traditional and diverse character of their educational landscape, within which religious organisations can uphold the unique character of their educational activities according to national law. Similar concerns appear in the area of family law where the EU does not have any direct legislative competence to harmonise the substantive laws of the Member States. The Treaty on the functioning of the EU only provides for a very limited competence to adopt measures concerning family law with cross-border implications.⁴⁹ In addition, it also provides a legal basis to adopt measures in some aspects of civil law and civil

⁴⁹ Article 81.3 TFEU.

procedure.⁵⁰ However, even given these provisions, the principle of equal treatment cannot and should not be recalled in order to interfere with the Member States' competence in the area of family law. Even the Court of Justice⁵¹ acknowledged that the area of family law belongs to the competence of the Member States,⁵² despite further indication that in the exercise of their competence Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination. Finally, also the display and the wearing of religious symbols and communication of religious messages cannot become a subject for the EU non-discrimination measures by a referral to the principle of equal treatment. Firstly, because there is no EU competence to do so and secondly, because it might infringe the freedom of religion beyond the level of limitations prescribed in the ECHR.

Law must be also clear and unambiguous about its scope of application. A particular difficulty concerns the regularly used expression 'without prejudice'. Recent jurisprudence of the Court of Justice⁵³ suggests that the wording that a directive 'is without prejudice' to a specific area of law does not indicate an exception to the application of the directive concerned but only serves to point out the competence to legislate in conformity with the directive in question. Thus, the contested expression 'is without prejudice' is not synonymous with the expression 'shall not apply' or 'does not cover'. When the latter expressions are used it is clear that the areas concerned are not only within the competence of the Member States, but fall outside the scope of application of a legal measure, such as for example a directive.

In conclusion, Article 19 of the Treaty on the functioning of the EU gives the Council of the EU competence to adopt measures to combat discrimination based on race or ethnic origin, age, disability, sex, religion or belief and sexual orientation, but only to the extent that another article in the Treaty confers upon the Union legislative

⁵⁰ Such as conflict of law rules concerning law applicable and jurisdiction (private international law), access to justice, mutual recognition of judgments and of decisions in extrajudicial cases, development of the alternative methods of dispute resolution (mediation) and ensuring proper functioning of civil proceedings.

⁵¹ Case C-267/06, *Tadao Maruko v Versorgungsanstalt der Deutschen Bühnen (Vd dB)*, judgement of 1 April 2008, par. 59.

⁵² "Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence." Par. 59 of the judgement *T. Maruko case C-267/06*.

⁵³ This reading of the term "without prejudice" can be inferred from several judgements of the ECJ, such as: Case C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, 16 October 2007 [par. 44], Case C 388/07, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, 5 March 2009 [par. 25], Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, 1 April 2008 [par. 59].



competence in the area concerned. These competences cannot be drawn from a general principle of equal treatment, because such a principle does not confer a self-standing competence on the EU to adopt non-discrimination measures. The general principles of EU law are limited by the scope of the EU law. Where there is no EU competence, the general principles have no relevance.

4.2. THE SPECIFICITY OF THE CHURCH

In a fair legal framework concerning non-discrimination the specificity of the Church, her status, her self-understanding and her activities come into play with regard to various aspects. Bearing in mind that the international human rights instruments, such as ECHR, provide that no limitations other than those clearly prescribed by law may be imposed on the exercise of the freedom of religion (Article 9(2) ECHR), it is of crucial importance that proper respect for the exercise of this freedom and consequently for the status and activities of the Church must also be accommodated in EU legislation.

First of all, the European Union in Article 17 paragraph 1 of the Treaty on the functioning of the European Union has explicitly recognised that it respects and does not interfere with the status of Churches and religious associations or communities under the national laws in the Member States. In addition, their identity and specific contribution have been explicitly recognised (Article 17 paragraph 3 Treaty on the functioning of the European Union). The EU has neither a competence for pastoral activities of the Churches, nor for regulating State-Church relationships in the Member States. As a consequence of this lack of competence, the wording of the provisions needs to be clear about the delimitation of the scope of the legal measures.

Secondly, in the area where the EU is competent to adopt the non-discrimination measures, the specificity of the Church is relevant with regard to the scope of the right to freedom of religion and its corresponding need for legally sound exceptions.

As Churches and religious communities traditionally exist in the form of organised structures, the right to self-determination is a part of Church autonomy and forms an integral element of the freedom of religion.⁵⁴ The Church comprehends her activities such as running hospitals, helping the poor and hungry, taking care of

⁵⁴ Supreme Holy Council of the Muslim Community v Bulgaria, judgment of 16 December 2004, Appl. No. 39023/97, § 93; ECHR, Church of Scientology Moscow v Russia, judgment of 5 April 2007, Appl. No. 18147/02, § 58.

the elderly, running adoption agencies, schools or universities as manifestations of her mission and religious practice. Non-discrimination legislation, in serving its purpose, must not by itself violate the right to religious practice by being poorly drafted in prohibiting, impeding or defining the religious activities of religious institutions or individuals. While guaranteeing the right not to be discriminated against because of one's religion, legislation must ensure that the right to believe and to act accordingly to one's religion is also guaranteed.

Finally, the Catholic Church accords religious significance to her organised structure and internal organisation; both therefore fall within the scope of the protection of freedom of religion provided for in Article 10 of the Charter of Fundamental Rights and Article 9 ECHR.⁵⁵ It therefore also follows that the internal structure and organisation of a Church or a religious community falls within the scope of the freedom of religion protected by the Convention.⁵⁶ It encompasses for example the right to self-determination, the right to organise her activities including the developing and keeping of an internal organisational structure, the choice of her employees and providing the religious principles which should be the basis of all her activities.

In conclusion, in the areas where the EU enjoys legislative competence the only way to ensure a fair balancing of human rights and freedoms is to exempt manifestations of religious freedom from the non-discrimination measures. Furthermore, fair, non-discrimination legislation requires respect for the self-determination of Churches and religious organisations in defining their own set of ideas, organising their structures, as well as manifesting religious activities and performance in daily life.⁵⁷ This approach takes account of respect for the freedom of religion and is best manifested through clearly delimited exceptions from the scope of the application of non-discrimination measures adopted in the areas where the EU enjoys legislative competence.

Furthermore, given the importance of legal clarity, it is not enough to accommodate respect for freedom of expression or freedom of religion by a mere and general reference to these rights and freedoms in a recital of a directive or regulation. Legal instruments should be explicit in defining in their operative sections the scope of

⁵⁵ ECHR, Hasan and Chaush v. Bulgaria, judgment of 26 October 2000, Appl. No. 30985/96, § 86.

⁵⁶ See C. Grabenwarter, comments on Article 9, in: Karl von Wolfram [ed.], Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Carl Heymanns Verlag, Köln-Berlin-München, 2007, §§ 64-65.

⁵⁷ G. Robbers, Key issues in tackling discrimination on the grounds of religion, Joint Hearing The Fight Against Discrimination: New Perspectives Under Art. 13 European Parliament, 23 May 2000.



their application and provide for a clear listing of exceptions making allowances for full and proper exercise of the freedom of religion as freedom protected under human rights instruments such as the Charter of Fundamental Rights or ECHR.

That line of argument, although outside the framework of the non-discrimination legislation, has, for example, already been accepted in Council Directive 93/119/EC further reinforced by Council Regulation (EC) No 1099/2009 on the protection of animals at the time of killing.⁵⁸ This Regulation gives explicit recognition to respect for freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the Charter of Fundamental Rights of the European Union. As a consequence, it therefore effectively excludes from the scope of its application particular methods of slaughter prescribed by religious rites thereby giving full acknowledgement to the manifestation of freedom of religion. Otherwise compliance with animal welfare requirements would adversely affect the very nature of the event concerned.

There is an even more direct example of accommodating respect for freedom of religion in the non-discrimination legislation. The 2000/78 Directive in Article 4 provides an explicit and specific exemption⁵⁹ to the principle of equal treatment by referring to genuine occupational requirements.⁶⁰ The Directive in fact distinguishes between two kinds of exemptions. In Article 4 (1) it provides for a general exemption based on genuine occupational requirements. This provision is applicable to all employers and to all grounds of discrimination; and therefore also to religion or belief. In this case a difference of treatment which is based on religion or belief shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. This exemption applies only when it is possible to prove a relationship between the job in question and the required characteristics such as religion or belief.

⁵⁸ Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing repealing Directive 93/119/EC.

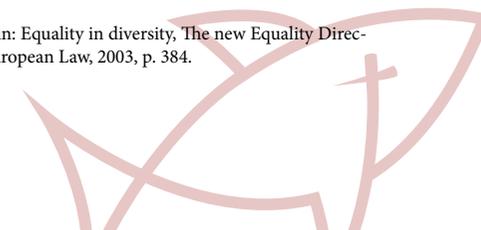
⁵⁹ It has been questioned whether Article 4 provides for an 'exception' or 'exemption'. See I. Leigh, Clashing rights, exemptions and opt-outs: religious liberty and 'homophobia', in: *Law and Religion, Current Legal Issues* 2001, vol. 4, p. 263; J. Rivers, Law, gender and gender equality, *Ecclesiastical Law Journal*, 2007, vol. 9, p. 42.

⁶⁰ An in-depth analysis of the exceptions provided in Article 4 can be found in M.F. Fernández López, F.J. Calvo Gallego, M.F. Fernández López, F.J. Calvo Gallego, *Directive 2000/78/EC and the prohibition of discrimination based on religion*.

In Article 4 (2) the Directive 2000/78 makes a specific reference to the professional activities of Churches and other public or private organisations whose ethos is based on religion or belief. In such cases the criterion of religion or belief may serve as the basis for differential treatment if such a criterion is considered to be a genuine, legitimate, and justified occupational requirement. Article 4 (2), however, does not establish a general exemption and provides that the differences of treatment, which could be justified by referring to a genuine, legitimate and justified occupational requirement, will depend on the context or the nature of the job. However, in this case the difference in treatment will be permitted where by reason of the nature of these activities or the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. Contrary to Article 4 (1) this requirement does not have to be determining, though it must be legitimate and justified, as well as genuine and occupational. It will be also necessary to consider the nature of the work and the context in which it is carried out. Article 4 (2) does not require proof of the need to discriminate against a person on grounds of religion in order to maintain or prevent the undermining of the organisation's ethos, but simply proof that their religion or belief is a genuine, legitimate and justified occupational requirement having regard to that ethos. The Directive does not, however, clarify the concept of occupational requirement in justifying discrimination on grounds of religion.

Another dimension of the exception and the respect for freedom of religion is provided in the second part of Article 4 (2), which allows Churches, and other faith based organisations, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos. Limited permission was given for conditions concerning lifestyles, which concern obligations put on individuals to act in good faith and with loyalty to the organisation's ethos. In justifying differentiated treatment on grounds of religion as an occupational requirement it will be necessary to show that a person's religion is a determining factor in their ability to discharge the duties of the job, rather than simply showing the employer's perception that such religion or belief is fitting in the light of the organisation's ethos.⁶¹ Member States may maintain legislation that allows for difference in treatment or they may adopt legislation to incorporate the existing practices. The difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of EU law.

⁶¹ M. Bolger, Discrimination on grounds of religion, in: *Equality in diversity, The new Equality Directives*, ed. C. Costello & E. Barry, Irish Centre for European Law, 2003, p. 384.



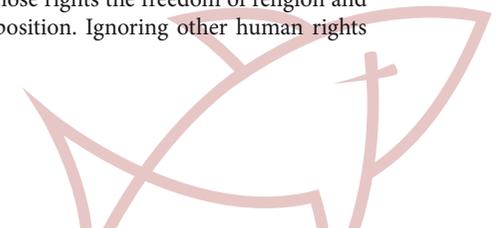
CONCLUSIONS

Over recent decades there has been a steady development of law at national and EU level with the aim of putting an end to differences in treatment perceived as unjustified. This has grown organically, rather than as a concerted and planned programme. Different grounds for discrimination such as race and ethnic origin, sex, religion or belief, sexual orientation, age or disability and different contexts, such as employment and vocational training, housing, access to goods and services, health care and social care have been addressed individually in various EU directives and in the legislation of the Member States. This area of legislation continues to develop. Therefore, in the further process of development the EU should strive to provide a clear legal framework which would accommodate the right not to be discriminated against with respect for other rights and freedoms protected under human rights instruments. The consideration of what are the most appropriate legal instruments to cover various types of discriminatory conduct in relation to various contexts and very diverging grounds remains one of the principal concerns in the context of this legislation.

The acknowledgement of the existence of the principle of equal treatment does not automatically lead to the emergence of a directly enforceable and directly effective right which would lay down a free standing legal basis for undertaking legal action by individuals. Nor does it allow to assume that the existence of this principle may lead to conferring legislative competence to adopt legislation pertaining to the prohibition of discrimination beyond the legal grounds as codified in the Treaties.

The European Union in the Treaty on the functioning of the European Union has explicitly recognised that it has no competence to regulate State-Church relationships in the Member States. It also has no competence for pastoral activities of Churches. Therefore legal measures aimed at prohibiting discrimination must be sufficiently clear about their scope of application so as not to imply that the EU could interfere with the status and activities of Churches by the means of referring to the principle of equal treatment.

The right not to be discriminated against is only one reflection of the acknowledgment of human dignity. The manifestation and implementation of this right cannot be pursued in isolation from the other principles, rights and freedoms pertaining to each human being. Among those rights the freedom of religion and freedom of expression take a prominent position. Ignoring other human rights



and freedoms while focusing exclusively on the right not to be discriminated against does not do justice to the legal or moral evaluation of relationships between individuals. In a situation of conflict between different human rights or freedoms a solution has to be found, a solution that takes all the rights of all persons involved into account and reconciles them. Obviously, there cannot be an automatic, general and unconditional precedence of some rights over the others. Consequently, the right not to be discriminated against cannot be always unconditionally treated as superior to other rights. In the areas where the EU enjoys legislative competence, the only way to ensure a fair balancing of human rights and freedoms is to exempt certain areas of application from the non-discrimination measures. Fair, non-discrimination legislation requires respect for the self-determination of Churches and religious organisations in defining their own set of ideas, organising their structures, manifesting religious performance in daily life, etc.

The essential role of the State and its legislation should be to protect all persons from the violation of their human rights but also to educate and create the conditions to allow people to be different and act better towards others. Legal measures can be effective tools in delimiting the boundaries of prohibited behaviour, but they cannot be the only tools to tell people how to behave and feel towards others. Since law cannot eradicate or outlaw prejudices, it cannot be seen a tool to solve all the problems. Non-discrimination legislation has more impact when it is accompanied by a process of policy development and practice, and public awareness. Education, morality, religion, should be the points of orientation.

Coordination - COMECE Secretariat: Dr. Joanna Lopatowska

ANNEX I

SELECTED LEGAL NORMS

The Treaty on European Union

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.

Article 5 (ex Article 5 of the Treaty establishing European Community)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

The Treaty on the functioning of the European Union

Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.



5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 19 (ex Article 13 of the Treaty establishing European Community)

1. 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.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

COUNCIL DIRECTIVE 2000-78-EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Article 4

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason

of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.



ANNEX II

SOFT LAW IN THE AREA OF NON-DISCRIMINATION AND EQUAL TREATMENT

1. In addition to the various legislative and judicial instruments a reference must be made to the soft law instruments. The term soft law is associated with measures adopted by the EU institutions, which are neither legally binding nor directly enforceable, in contrast to legally binding instruments, often referred to as hard law, such as e.g. directives or regulations. In the context of the EU the soft law instrument, in contrast to hard law are not published in the Official Journal. Examples of soft law include communications and guidelines of the European Commission, non-legislative resolutions of the European Parliament, or conclusions of the Council.
2. Soft law instruments play a role in the development of EU law and their potential impact on policy development and practice should not be underestimated. In the EU framework soft law is often used where the EU lacks competence to adopt legally binding measures, or when Member States are reluctant or unable to agree on the use of a legally binding measures. In this respect the EU institutions suggest policy programmes, strategies, guidelines or recommendations, at the same time leaving Member States free hand as regards their implementation. Soft law, therefore, is seen as a more flexible instrument in achieving policy objectives. It also has considerable influence on the interpretation of the hard law instruments, thereby increasing efficiency and legitimacy of the legally binding instruments. As it has impact on the practice of the Member States, in the in the long term, it might lead to creating legally binding norms, either on the EU or national level. Additionally, soft law can have more direct and rapid influence on the practice of the Member States and may provide more immediate reaction and therefore have a more visible impact. While the adoption and the transposition of directives usually take years, soft law instruments are not often restrictive in their format.



3. Also the opinions of the Fundamental Rights Agency play an important role. The Agency within its competences shall, among others, formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the member states when implementing EU law, either on its own initiative or at the request of the Parliament, the Council or the Commission. Certainly, none of the provisions envisages that these conclusions and opinions would have any legally binding value. Similarly to the opinions of the EU Network of Independent Experts, which despite the lack of legally binding value played important role, the opinions of the Agency might be used as interpretative guidelines. Firstly because there is a considerable authority deriving from the fact that these opinions were commissioned by the EU institutions and secondly because the Agency has an official EU status.

A non-exhaustive selection of the soft law instruments

I. Communications from the European Commission

1. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions A Roadmap for equality between women and men 2006-2010 [COM(2006) 92 final
2. Communication from the Commission, to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Non-discrimination and equal opportunities for all - A framework strategy COM(2005)224 final
3. Green Paper: Equality and non-discrimination in an enlarged European Union COM(2004)379 final
4. Communication from the Commission, of 7 June 2000 - Towards a Community framework strategy on gender equality (2001-2005) [COM(2000) 335 final
5. Communication from the Commission: contribution to the world Conference against racism, racial discrimination, xenophobia and related intolerance (Durban, South Africa, 31 August - 7 September 2001) COM(2001)291 final
6. Decision 2001/51 of the European Commission Action Programmes to promote equality between women and men in the workplace adopted by the European Commission and based on a Council decision establishing a programme on gender equality for 2001-2005.

II. Documents of the Council

1. Council conclusions on Human Rights and Democratisation in Third Countries 16795/2/09
2. Council conclusions on combating violence against women, particularly in the ESDP framework, and all forms of discrimination against them 16520/08
3. Council Decision establishing a Community action programme to combat discrimination (2001-2006) 12618/00

III. Non-legislative resolutions of the European Parliament

1. European Parliament resolution of 3 February 2009 on non-discrimination based on sex and intergenerational solidarity (2008/2118(INI))
2. European Parliament resolution of 20 May 2008 on progress made in equal opportunities and non-discrimination in the EU (the transposition of Directives 2000/43/EC and 2000/78/EC) (2007/2202(INI))
3. European Parliament resolution on educational discrimination against young women and girls (2006/2135(INI))
4. European Parliament resolution on non-discrimination and equal opportunities for all - a framework strategy (2005/2191(INI))
5. European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI))

IV. Opinions of the European Union Agency for Fundamental Rights

1. FRA Contribution to the European Parliament Public Hearing „Progress made in equal opportunities and non-discrimination in the European Union“, 20.11.2007
2. Proposed Council Framework Decision on Combating Racism and Xenophobia. Views of the European Monitoring Centre on Racism and Xenophobia, 13.07.2010

