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KEY CONCEPTS: DIRECT & INDIRECT DISCRIMINATION & HARASSMENT IN EU LAW

Marjolein van den Brink

m.vandenbrink@uu.nl

Utrecht University School of Law (SIM & UCERF)

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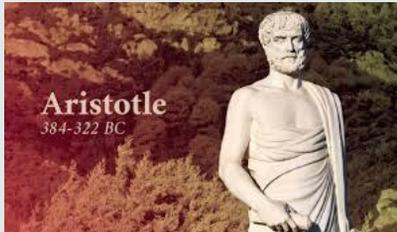
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KEY CONCEPTS: OUTLINE

- formal & substantive equality + direct and indirect discrimination
- (differences in) the scope of protection
- direct discrimination: what is and what isn't
 - *including attention for the concepts of intersectional discrimination & reasonable accommodation*
- indirect discrimination: what is and what isn't
- harassment

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FORMAL & SUBSTANTIVE EQUALITY

equality:

- **formal** equality: treating likes alike
- **substantive** equality: treating unalikes unlike relative to the difference
 - to achieve equality of **opportunity**, or
 - to achieve equality of **result**

discrimination:

- **direct** discrimination: treating people less favourably because of a protected ground
- **indirect** discrimination: a seemingly neutral rule or policy disparately impacts people because of their religion, race, etc., as compared to others

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APPLICABLE EU LAW

- **Charter of Fundamental Rights (CFR)**: general principles; Chapter III: equality
- **Treaty of the Functioning of the European Union (TFEU)**
 - Art. 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.*
 - Part II: *non-discrimination and citizenship*:
 - Art. 18: nationality
 - Art. 19: Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
 - [Art. 157: equal pay & sex equality]
- **Directives**: esp. 2000/43 (race and ethnicity) and 2000/78 (general framework directive on sexual orientation, religious belief, age and disability)

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DIRECTIVES: PATCHWORK PROTECTION

	employment	goods & services	education	social protection
race (2000/43)	√	√	√	√
sex (2006/54, 2004/113 ao)	√	√	-	√
religion (2000/78)	√	-	-	-
age (2000/78)	√	-	-	-
disability (2000/78)	√	-	-	-
sx. orientation (2000/78)	√	-	-	-

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DIRECT DISCRIMINATION: DIR2000/43 & 2000/78

art. 2:

1. there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 / racial or ethnic origin.
2. For the purposes of paragraph 1:
 - a) **direct discrimination:** where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on ... grounds ... referred to in Article 1

unless legally prescribed exception:

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DIRECT DISCRIMINATION

closed system: 2000/43

art. 4: genuine and determining occupational requirements

art. 5: positive action

dir. 2000/78:

art. 4: occupational requirements (all grounds / religion & faith-based)

art. 5: reasonable accommodation (disability)

art. 6: justification of differences of treatment on grounds of age (e.g., social policy)

art. 7: positive action (all grounds / disability)

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DIRECT AGE DISCRIMINATION

- Prigge (2011):
- direct age discrimination due to automatic dismissal at 60
 - possible justifications:
 - art. 2(5) 2000/78 : public safety: prohibition is not necessary
 - art. 4(1) : occupational requirement: disproportionate measure
 - art. 6(1): legitimate objectives such as social policy: not at issue in this case



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DIRECT RACE DISCRIMINATION:

CHEZ (C-83/14, 2015):

- electricity meters at very high poles in Roma neighbourhood:
- stigmatising and cumbersome
- applies to all regardless of payment history etc.
- shopkeeper complains
- CJEU:
 - only done in Roma districts: direct discrimination
 - but: even if proven that measure was taken exclusively because of safety concerns and completely unrelated: *indirect* discrimination
 - fact that Nikolova was not / did not identify as a member of the Roma community irrelevant

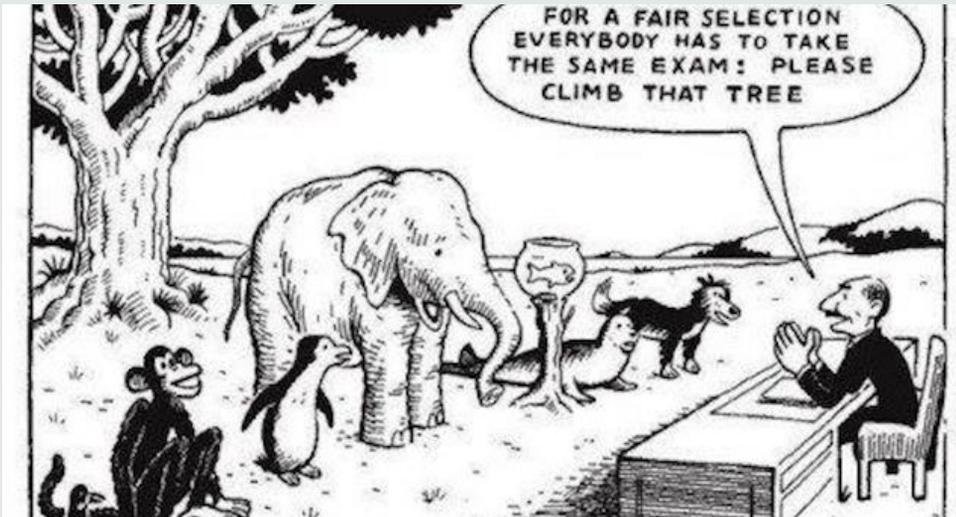
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DIRECT DISCRIMINATION: EXAMPLES

- **race:** Feryn (C-54/07, 2008) (speech act)
- **sexual orientation:** Rete-Lenford (C-507/18, 2020) (speech act); Maruko (C-267/06, 2008) (survivor's pension)
- **disability:** Szpital Kliniczny (C-16/19, 2021):
 - withholding an allowance from employees with disability can be direct discrimination if based on a criterion that is inextricably linked to disability
- **religion:** SCRL (C-344/20, 2022) (religious clothing)
 - prohibition of religious dress is direct discrimination if not applied in a general and undifferentiated way

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INDIRECT DISCRIMINATION



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INDIRECT DISCRIMINATION 2000/78 (2000/43 SIMILAR)

art. 2:

1. ... the 'principle of equal treatment': there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
 - a) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
 - i. objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary
 - ii. or to eliminate disadvantages for persons with a particular disability

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INDIRECT DISCRIMINATION – PARTICULAR DISADVANTAGE

- It is for the applicant to **prove prima facie case of indirect discrimination**. This can be very difficult due to lack of statistics or other reasons.
- The definition of direct discrimination speaks of '**less favorable treatment**', whereas the definition of indirect discrimination mentions '**particular disadvantage**': the CJEU has held that there is **no substantial difference** between these two terms (C-83/14, CHEZ (2015), concerning Directive 2000/43/EC on race/ethnicity.)
- No heavier degree of seriousness is required for indirect discrimination (CHEZ, par. 98-102).

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INDIRECT DISCRIMINATION – COMPARISONS

- Generally, a **group** of persons should be put at a disadvantage (definition mentions 'persons of one sex at a particular disadvantage compared with persons of the other sex').
- Approach to comparators similar as with direct discrimination; again difficulties to identify comparator group.

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INDIRECT DISCRIMINATION EXAMPLE



O'Flynn (C-237/94, 1996) [Regulation No 1612/68 on freedom of movement for workers]

- . former Irish migrant worker resident in the UK; son dies in the UK, buried in Ireland
- . applies for financial contribution to support needy people with costs of funeral
- . application denied because not buried in the UK
- . UK authorities: no (indirect) discrimination; only if shown that substantially more difficult for all migrant workers, e.g., because of customs
- ., Court: financial contribution is a social advantage that migrant workers should enjoy just like national workers
 - indirect discrimination
 - not justified: nothing prevents authorities from limiting potential extra costs for transportation, due to longer distances

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INDIRECT DISCRIMINATION EXAMPLE

Commune d'Ans (C-148/22, 28.11.2023):

restrictions on religious dress not directly discriminatory if they apply to all religious signs and not just conspicuous ones.

However, may be indirect discrimination, if not justified by a legitimate aim or where the means of achieving that aim are not appropriate and necessary.

'neutrality' may provide a justification



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INTERSECTIONAL DISCRIMINATION

- when 2 characteristics combined lead to discrimination that would otherwise not have occurred
- coined by: Kimberle Crenshaw
- seminal example: De Graffenreid case (US); lay offs due to budget cuts: black women disproportionately affected
- very little case law, no intersectional discrimination found so far: Parris (C-443/15, 2016): age + sexual orientation
- but: in practice it is dealt with (e.g., headscarves)
- example from ECHR: Carvalho Pinto de Sousa Morais (17484/15, 2016); age + sex

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HARASSMENT



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HARASSMENT



Art. 2(3) 2000/43: harassment = discrimination when:

- **unwanted** conduct
- **related to racial or ethnic origin** takes place
- with the **purpose or effect** of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

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CASE LAW



first case: Coleman (C-303/06, 2008)

- contract termination basically because of the disability of the worker's son
- . discrimination by association
- . Court: harassment on the ground of disability may be suffered by someone who is not disabled themselves, but who is the main care provider for their disabled child, if the treatment is related to that disability

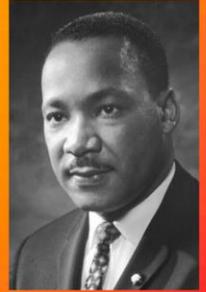
Q v Commission (F-52/05, 2012)

- allegation of isolation from other offices, avoiding talks, no tasks, negative rumours
- CJEU: to constitute harassment, no bad intention needed

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THANK YOU FOR LISTENING

**“IN THE END, WE WILL
REMEMBER NOT THE
WORDS OF OUR
ENEMIES, BUT THE
SILENCE OF OUR
FRIENDS.”**



MARTIN LUTHER KING JR.

Marjolein van den Brink, Utrecht University

m.vandenbrink@uu.nl