



# Discrimination on Grounds of Race and Sexual Orientation: *Main Features and CJEU Case Law*

A guest lecture for the Academy of European Law (ERA),

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Today



- 1) “Race” and “sexuality” as discrimination grounds in EU law
- 2) Relevant secondary EU law: “Race Equality” and the “Framework Equality” Directives (2000)
- 3) Relevant CJEU case law on the grounds of:
  - (a) Race;
  - (b) Sexual orientation;
  - (c) Relevant cases outside the scope of secondary law
- 4) What are the limits, failures, and prospects?

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“Race” and “sexuality”

Relevant secondary law

Relevant CJEU case law

Limits, failures, prospects

## “Race” & “sexual orientation” as discrimination grounds in EU law

### • “Race” and “racism” in European context:

- Jews & Roma;
- Colonial heritage (concept of *Euroafrique* in the 1950s);
- Transformation of colour perceptions in Europe after WWII;
- “Nationality” as commercial ground for non-discrimination in EU law

### • Sexuality / sex identity in European context:

- Judeo-Christian repression of sexuality, Renaissance, Enlightenment and Modernity;
- Setting up a secular medicalized “homosexual” subject;
- WWII and post-war period: from criminalization to same-sex marriages.

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“Race” and “sexuality”

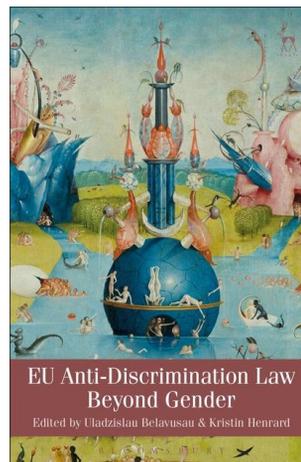
Relevant secondary law

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Limits, failures, prospects

## “Race” & “sexual orientation” as discrimination grounds in EU Law

- Rome, 1957 – EEC Treaty: European integration was meant to serve exclusively a commercial purpose;
- The only exception is “sex equality” (Art. 119 EEC), which laid down an activist way for the CJEU to foster gender equality;
- While the Court has been episodically engaged into other grounds, shaping EU anti-discrimination law (embracing “race” & “sexuality”) became possible only after the Treaty of Amsterdam (1997).



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Limits, failures, prospects

## Relevant secondary EU law: introducing the 2000 Equality Directives

- *Sex:*

**Directive 2006/54/EC** (a.k.a. “Equal Treatment” or “Gender/Sex Equality” Directive);

- *Racial and ethnic origin:*

**Directive 2000/43/EC** (a.k.a. “Race Equality Directive”, or RED)

- *Religion, disability, age, and sexual orientation:*

**Directive 2000/78/EC** (a.k.a. “Framework Equality Directive”, or FED)

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## Forms of discrimination

As of 2000 a new generation of Directives:

- ✓ Direct discrimination;
- ✓ Indirect discrimination;
- ✓ Harassment;
- ✓ Instruction to discriminate.

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Limits, failures, prospects

## Unequal material scope of the Equality Directives (RED & FED)

Grounds Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes	Yes	Yes	Yes	Yes	Yes
Education	Yes	No	No	No	No	No
Goods and services	Yes	No	No	No	No	Yes
Social protection	Yes	No	No	No	No	Yes

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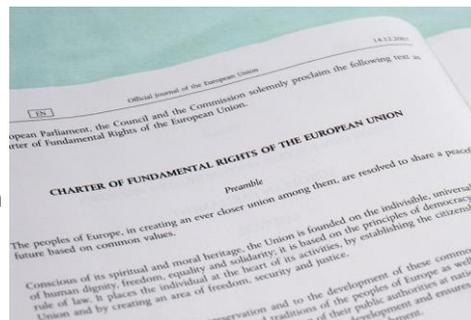
Relevant secondary law

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Limits, failures, prospects

## Race in EU anti-discrimination law

- Beyond discrimination on the grounds of “nationality” (see also Recital 13 & Art. 3(2) in RED)
- Art. 19 TFEU – Race Equality Directive 2000/43/EC (Recital 6 on the use of the term “race”)
- EU Charter of Fundamental Rights
- European Parliament Resolution of 26 March 2019 on Fundamental Rights of People of African Descent in Europe



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## Late & modest opening of the CJEU's jurisprudence: Case C-54/07 *Feryn* [2008]



- “Apart from these Moroccans, no one else has responded to our notice in two weeks ...but we aren’t looking for Moroccans. Our customers don’t want them. They have to install up-and-over doors in private homes, often villas, and those customers don’t want them coming into their homes” (*De Standaard*)
- ‘*Centrum voor gelijkheid van kansen*’ – *Arbeidsrechtbank* – ECJ
- “By publically stating this intention[...] the employer is, in fact, excluding those persons from the application process and from his workflow. He is not merely talking about discriminating, he is discriminating. He is not simply uttering words, he is performing a ‘speech act’.”
  - Opinion of AG Maduro
- Direct / indirect discrimination? = Art. 2 (2) RED (2000/43/EC ‘Race Equality Directive’)

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## C-394/11 *Belov* (2013)

- The CJEU found no jurisdiction to rule on a preliminary question referred to by an equality body with no judicial functions (the Commission for the Protection against Discrimination in Bulgaria)



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## C-84/14 CHEZ Razpredelenie Bulgaria v. Nikolova (2015)

- Shift of terminology: “ethnic origin”, “comparable situation”, “less favourable treatment”, “apparently neutral practice”
- Does the indirect action concern only Roma?
- Establishment of indirect discrimination



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## Missed chances for the CJEU to extend the scope of the RED

- Missing case-law on Roma protection
- National identity of MS = Art. 6 EU before Lisbon = Art. 4 (2) TEU?



“The Union shall respect the equality of MS before the Treaties as well as their **national identities**, inherent in their **fundamental structures, political and constitutional, inclusive of regional and local self-government**. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law & order and safeguarding national security. In particular, national security remains the sole responsibility of each MS”

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## The right to a name

- Case C-208/09, [~~von~~] **Wittgensten** (2011)
  - ✓ What's wrong with *Von*? Egalitarianism vs dignitarianism
  - ✓ National identity: a re-discovered avenue for national interests
  - ✓ Prescription as ancestral
  - ✓ Factual error: presumption of embedded identity core + whose identity?
- Case C-391/09, *Runevič-Vardyn and Wardyn* (2011)
  - ✓ Malgožata Runevič-Vardyn v. Małgorzata Runiewicz-Wardyn
  - ✓ Textuality of national identity and malaise of national interests
  - ✓ How's about internal market?
  - ✓ Scope of the Race Equality Directive?

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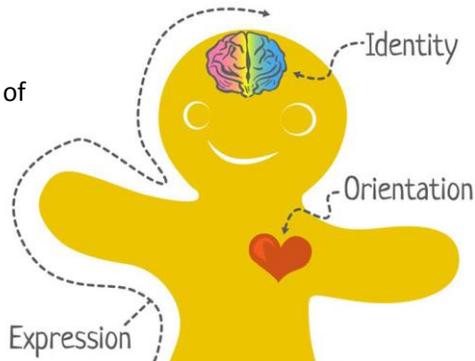
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## Sexual orientation in EU anti-discrimination law

- Sex equality in EEC Treaty (1957)
- Art. 19 TFEU – Framework Equality Directive 2000/78/EC  
Citizenship Directive 2004/38/EC
- Council Directive 2004/83/EC of 29 April 2004 on refugees
- EU Charter of Fundamental Rights



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## Gender & Sexuality in EU Law pre-Amsterdam (before 1997)

C-13/94 *P v S and Cornwall County Council* (1996)

- The case concerned a trans woman from the United Kingdom, referred to as 'P' in court proceedings, who was dismissed from her post after informing her employers that she was undergoing gender reassignment;

C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* (2004)

C-249/96 *Grant v. South-West Trains Ltd.* (1998)

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## Has the FED (Framework Equality Directive 2000) made a difference?

**Moving the dividing line:** C-267/06 *Maruko* (2008):

- The surviving partner of a homosexual partnership registered in Germany is refused a widowers pension because he was not married to his partner.
- Only heterosexual partners can marry in Germany → Indirect discrimination on grounds of sexual orientation?
- CJEU: *direct* discrimination – without any further explanation (probably because the German regulation excluded all homosexuals, i.e. no homosexual could ever marry).

**Similar case law:**

C-147/08 *Römer* (2011) – supplementary benefits

C-267/12 *Frédéric Hay* (2013) – marriage bonus



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## C-81/12 Asociația ACCEPT v. CNCD (2013):

### Parties

#### The Accuser



- an LGBT rights organization
- Major lobbyist for de-criminalization of homosexuality in Romania
- Organizer of LGBT events (GayFest)

#### The Accused



- A populist politician, G. Beccali
- “Patron” of the Steaua Football club
- Involved in shady land-transactions, but also an MP

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## C-81/12 Asociația ACCEPT v. CNCD (2013):

### Events of the case

#### February 2010

*“Not even if I had to close Steaua down could I accept a homosexual on the team. Maybe he’s not a homosexual. But what if he is? There’s no room for gays in my family, and [FC Steaua] is my family. (...) **This isn’t discrimination: no one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose.** Even if God told me in a dream that it was 100 percent certain that the player wasn’t homosexual I still wouldn’t take him. Too much has been written in the papers about him being a homosexual. (...) He could be the biggest troublemaker, the biggest drinker. . . but if he’s a homosexual I don’t want to know about him.”*

#### The player in question was **not** hired by the club

For a detailed analysis of this case, see U. Belavusau, [A Penalty Card for Homophobia from EU Non-Discrimination Law](#), *Columbia Journal of European Law*, 21, 2, 2015.

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## C-81/12 Asociația ACCEPT v. CNCD (2013): Events of the case

March 2010



=> Harassment; Written Warning



=> Direct Discrimination

- ACCEPT: Becali, 'de jure' decision maker
- Steaua: Becali, no employer involvement

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## C-81/12 Asociația ACCEPT v. CNCD (2013): Implications

Even non-de jure representatives can commit direct discrimination

Expanding non-discrimination coverage – Homophobia legally "hate speech"

NGOs can invoke claims of discrimination

"He is not merely talking about discriminating, **he is discriminating**. He is not simply uttering words; he is performing a '**speech act**.'"

-Feryn C-54/07 [2008] (emphasis added)

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## C-443/13 *David Parris* (2016)

- FED's time's scope
- FED's intersectionality - Age + Sexual Orientation?



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## Missed opportunities for the Court based on the material limits of the FED

### Case C-528/13 *Léger* (2015)

- Blood donation for *MSM* (=men who have sex with other men)
- Beyond employment law (FED's *ratione materiae*)
- See U. Belavusau, [Towards EU Sexual Risk Regulation: Restrictions on Blood Donation as Infringement of Active Citizenship](#), *European Journal of Risk Regulation*, 4, 2016.



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## C-637/17 *Coman* (2018)

- Recognition of the same-sex marriage (registered in Belgium) in Romania
- Beyond FED: [EU Citizenship Directive 2004/38 EC](#) – content of the term “spouses”
- Inspiration from US Supreme Court: [Obergefell v. Hodges](#) (2015)
- For concise analysis, see U. Belavusau, [The Federal Rainbow Dream: on Free Movement of Gay Spouses under EU Law](#), *Verfassungsblog* (5 June 2019)



(Key & Peele, US comedians)

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## Influence of Comparative Law on the CJEU’s Jurisprudence

- European Court of Human Rights / Council of Europe
- US Supreme Court
- Emancipation laid down in national legislations



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## Limits, Failures and Prospects of 2000 EU Equality Directives (RED & FED)

### • Race

- Poor number of cases at the CJEU based on RED;
- Confusion of discrimination based on “nationality” and “race / ethnic origin” in the jurisprudence of the CJEU;
- Often intersectional status of race discrimination that is difficult to catch within strict reading of RED;
- Insignificant number and subordinate societal status of active plaintiffs coming from disadvantaged ethnic groups;
- Unequal status and activeness of Equality Bodies (under RED) in Member States;
- Issues affecting the burden of proof, indirect discrimination & access to remedies

### • Sexual Orientation

- Limited material scope of FED;
- Resistance of Member States to implement FED and Citizenship Directives adequately;
- Concealment of sexuality by plaintiffs in Member States with predominant homophobia, evidenced in both a pressing social embarrassment for individuals and groups advancing sexual emancipation, and a climate of physical and verbal violence.
- Unequal status and activities of Equality Bodies (under RED) in Member States.
- Issues affecting the burden of proof, indirect discrimination & access to remedies

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Gràcies per la seva atenció!



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For further references, see:

Ulad Belavusau & Kristin Henrard (eds.),  
[\*EU Anti-Discrimination Law Beyond Gender\*](#),  
Hart (Oxford, 2018)

