

Reconceptualising European Equality Law

Current Reflections on EU Anti-Discrimination
Law

Dr. Johanna Croon-Gestefeld, LL.M. (EUI)



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

Reconceptualising European Equality Law Introduction

1. Inconsistencies in European Equality Law
2. Alternative Framework for Conceptualisation: Comparative Institutional Analysis
3. Three Examples:
 - Level of Scrutiny
 - Affirmative Action
 - *CHEZ* (Case C-83/14)

Reconceptualising European Equality Law

1. Inconsistencies

- EU equality law often criticised for its incoherence or inconsistency
- Reasons for this perceived incoherence:
 - Incompletely theorised agreement on what equality means
 - Economic origins of the EU general principle of equality and its transformation into an autonomous value
 - Vast scope of application of the general principle of equality

3

Reconceptualising European Equality Law

2. Comparative Institutional Analysis

- Common perspective from which EU equality law is analysed:
Dogmatik-perspective
- Additional perspectives:
 - E.g. feminist theory, critical race theory
 - Comparative institutional analysis

4

Reconceptualising European Equality Law

2. Comparative Institutional Analysis

„Who decides is really a decision of *what* decides.“

- Neil Komesar, *Imperfect Alternatives*, 1994, p. 3

Core Elements of Comparative Institutional Analysis:

- Institutions are decision making processes.
- The choice of institution matters.
- The task is to identify the institution that is able to perform the least imperfect decision making in a given situation.
- The least imperfect institution is the one that may ensure the most adequate representation of interests under straining circumstances.

5

Reconceptualising European Equality Law

2. Comparative Institutional Analysis and EU Law

Deciding Factors:

- Numbers
- Complexity
- Interest Representation (according to *Maduro*):
 - *Vertical majoritarian bias* → big MS at the expense of small MS
 - *Vertical minoritarian bias* → small MS at the expense of big MS
 - *Horizontal majoritarian bias* → inordinate power of the majority throughout the EU
 - *Horizontal minoritarian bias* → inordinate power of a minority throughout the EU

6

Reconceptualising European Equality Law

Three Examples: Level of Scrutiny

1. Low scrutiny:

Is the differential treatment arbitrary?

2. Intermediate scrutiny:

Are there substantial reasons for the differential treatment?

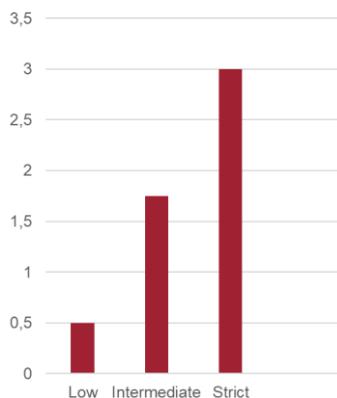
3. Strict scrutiny:

Is the differential treatment justified by the existence of substantial differences?

7

Reconceptualising European Equality Law

Three Examples: Level of Scrutiny



- The different levels of scrutiny do not only stand for a gradual shift.
- They also stand for different testing standards.
- Low scrutiny: *comparative/non-comparative*
- Intermediate scrutiny: *non-comparative*
- Strict scrutiny: *comparative*

8

Reconceptualising European Equality Law

Three Examples: Level of Scrutiny

	adequate representation of interests in the political process	misrepresentation of interests in the political process
high numbers and complexity	¹ low scrutiny	² intermediate scrutiny
low numbers and complexity	³ intermediate scrutiny	⁴ strict scrutiny

9

Reconceptualising European Equality Law

Three Examples: Affirmative Action

- EU Legislation:
 - Art. 157(4) TFEU
 - Art. 23 CFEU
 - Art. 2(4) Dir. 76/207 (Equal-Pay Directive)
 - Art. 5 Dir. 2000/43 (RED)
 - Art. 7 Dir. 2000/78 (Framework-Directive)

- EU Legislative Proposals:
 - Art. 5 Dir. on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM [2008] 426)
 - Dir. on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (COM [2012] 614)

10

Reconceptualising European Equality Law

Three Examples: Affirmative Action

- Case Law by the CJEU:
 - *Kalanke* (Case C-450/93)
 - *Marschall* (Case C-409/95)
 - *Badeck* (Case C-158/97)
 - *Abrahamsson* (Case C-407/98)
- Position of the CJEU in Summary:

Preference may be granted to women with substantially equivalent merit, if the decision is based on an objective, individual assessment.

11

Reconceptualising European Equality Law

Three Examples: Affirmative Action

- Comparative Institutional Analysis:
 - Numbers: Amount of potential cases reaching the CJEU's docket?
 - Complexity: Diversity in affirmative action schemes?
 - Interest representation: If a majority wants to discriminate against itself, no majoritarian bias detectable
- Institutional comparison argues in favour of less strict review

12

Reconceptualising European Equality Law

Three Examples: CHEZ – Case C-83/14

- Facts of the Case:
 - Energy company installed electricity meters at great heights in a district inhabited mainly by persons of Roma origin
 - A resident and energy recipient, who does not belong to the Roma community, challenges the practice
- Question: Can the resident claim direct discrimination?

13

Reconceptualising European Equality Law

Three Examples: CHEZ – Case C-83/14

- Answer by the CJEU:

“Discrimination on the grounds of ethnic origin ... [is] intended to apply in circumstances such as those at issue before the referring court ... irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure.” (para. 60)

“A measure such as the practice at issue constitutes *direct discrimination* within the meaning of that provision *if* that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned.” (para. 91)

14

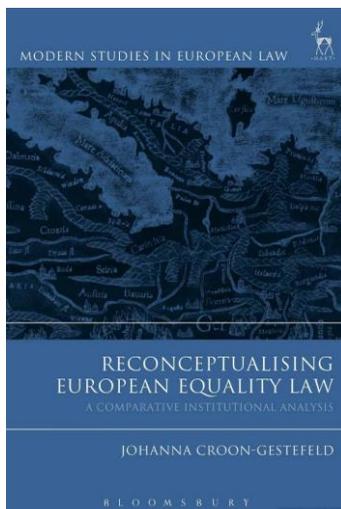
Reconceptualising European Equality Law

Three Examples: CHEZ – Case C-83/14

- Comparative Institutional Choice Reading:
 - Numbers
 - Complexity
 - Interest Representation:
Signs of majoritarian bias detectable

15

Reconceptualising European Equality Law



Thank you for your attention!

For further questions, please contact:

Johanna.croon@law-school.de

or

Dr. Johanna Croon-Gestefeld
Bucerius Law School
Jungiusstr. 6
20355 Hamburg
Germany

16