



# Reflections on the Principle of Equal Treatment in EU Law and the Jurisprudence of the Court of Justice of the European Union and the European Convention on Human Rights

Marija Daka

PhD student, University of Pécs (Pécs, Hungary)

E-mail: marijadaka@gmail.com

**Abstract.** The paper presents some of the most relevant aspects of European non-discrimination law established through European Union law and the European Convention on Human Rights, looking also at the evolution of the norms and milestones of case-law on equal treatment within the two systems. The paper gives an overview of the non-discrimination concept as interpreted by the Court of Justice of the European Union and by the European Court of Human Rights. We examine the similar elements but also give insight into conceptual differences between the two human rights regimes when dealing with equal treatment. The differences mainly stem from the more complex approach taken by EU law although, based on analysed norms, cases, and provisions, the aspects of equal treatment in EU law are largely consistent with the practice of the ECtHR. Lastly, the paper briefly places the European non-discrimination law within the multi-layered human rights system, giving some food for thought for the future potential this concept brings.

**Keywords:** equal treatment, non-discrimination, European Union Law, European Convention on Human Rights

## Introductory Remarks

The necessity of the legal protection of equality and equal treatment has philosophical roots dating back centuries.<sup>1</sup>

Given its nature, the question of equality and equal treatment – a rather complex phenomenon – can be examined from various angles and levels. The criterion of equality can be found likewise in vast number of international agreements from

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1 Mohay 2016. 1.

general multilateral treaties to bilateral ones. Those general documents<sup>2</sup> served as grounds for adopting regional documents with similar content.

The question of equal treatment is too broad to be examined in one paper, but in the regional context, especially bearing in mind the characteristics of EU law and the emerging tendency of a fundamental rights-based approach, it is more worth focusing on the regional perspective, exploring and comparing the layers and manner of protection granted by the Court of Justice of the European Union (hereinafter: CJEU) as well as the practice of the European Court of Human Rights (hereinafter ECtHR, or ‘the Court’) taken as a measure of last resort in our regional context under the auspices of the Council of Europe.

Reiterating the regional context, the term European non-discrimination law suggests that a single Europe-wide system of rules relating to non-discrimination exists; however, it is in fact made up of a variety of contexts,<sup>3</sup> a multi-layered regime which consists of a national level, a European Union level, and a Council of Europe (hereinafter CoE) level. Of course, the provisions existing in national law are usually at least partly meant to ensure fulfilment of international or supranational obligations of the state in question. Certainly, the national level serves as a starting point, given the fact that the claimants in cases of potential violation of their rights will first seek material and procedural protection on that level. However, the national level of protection in equal treatment goes far beyond the scope of this paper.

Therefore, in this multi-layered regime, the paper will focus on the two-level system established by the European Union (EU) and CoE, giving some food for thought for further analyses – thereby not meaning, of course, to discount the efforts

2 The Charter of the United Nations explicitly refers to equality on several occasions. The UN Charter Preamble states: ‘the people of the United Nations are determined to reaffirm faith in fundamental rights (...) in the equal rights of men and women and of nations large and small. Afterwards the governing principle of the Charter is to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.’ As for the Universal Declaration of Human Rights, the enjoyment of rights is guaranteed by the UDHR Article 2, while the mentioned UDHR Article states that ‘everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ (<http://www.un.org/en/universal-declaration-human-rights/>). The wording of the International Covenant on Civil and Political Rights is similar, at Part II, Article 2 (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>). It obliges each State Party ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

3 European Union Agency for Fundamental Rights, European Court of Human Rights – Council of Europe 2010. 12, 16. See also: European Union Agency for Fundamental Rights, European Court of Human Rights – Council of Europe 2018.

made by other regional international organizations such as the OSCE.<sup>4</sup> However, within the EU and the CoE systems, various important players granting institutional protection or expertise have to be noted such as the European Committee of Social Rights (ECSR) and the Fundamental Rights Agency of the EU (FRA) – however, those are not in the focus of this paper. Furthermore, I should briefly note that under the CoE system there is a vast number of international regional agreements which in some form and to some extent safeguard some angles of the prohibition of discrimination, e.g., the Framework Convention for the Protection of National Minorities<sup>5</sup> or the European Social Charter. It is, however, quite undisputed that the most effective (even if not perfect) control mechanism is the one established under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and its Court, the European Court of Human Rights (ECtHR).

Analysing the interference between the ECtHR and CJEU as well as their leading documents, the European Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as the ECHR, and the Charter of Fundamental Rights, we could possibly distinguish at least three layers of connection.

The first one would be the procedural one, meaning the interference between various procedures before the ECtHR and the CJEU, the second would be the interference with regard to the principles – this would mean the actual analysis of the equal treatment measures before the two courts –, and, lastly, the interference between the two courts could be analysed from the prospective of a certain right safeguarded both by the ECtHR and the CJEU.

The scope and the manner of the interference on a principle level, i.e. pertaining to equal treatment, will be analysed in the upcoming sections. It should already be stated that the source of the interference mainly stems from the concept of *equal treatment* itself, but the multiple EU sources of law referring *expressis verbis* to the ECHR, and even sharing the minimum meaning and scope of rights (especially bearing in mind the provisions of articles 52 and 53 of the Charter)<sup>6</sup> and case-law of the Court of Justice of the European Union (CJEU), should not be underestimated either. The opposite is also true: the ECtHR has dealt also with the issue of human rights protection in connection with European Union Law,<sup>7</sup> and the ECHR also contains an *expressis verbis* reference to the European Union.<sup>8</sup>

4 See, e.g., ODIHR publications on the subject matter, e.g., Anti-Semitic Hate Crimes (<https://www.osce.org/odihr/430859>) and the Guide to Addressing Hate Crime at the Regional Level (<https://www.osce.org/odihr/402536>).

5 Convention text and explanatory report available in Hungarian at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c1308>.

6 OJ C 202.

7 For more information on the topic, see: Mohay 2015. 327–337.

8 ECHR Article 59 (2) provides that ‘The European Union may accede to this Convention’.

# 1. The European Union Law-Based Perspective

In the law of the European Union, the requirement of equal treatment has several facets; it exists as a value,<sup>9</sup> a general principle, a fundamental principle,<sup>10</sup> and a fundamental right,<sup>11</sup> permeating the complete institutional mechanism of the EU in different forms. Given the fact that equal treatment within the EU legal order has multiple sources, the principle of equality can be found in numerous provisions of EU law at different levels and in different policy fields. I will refer only to the most relevant ones by which we can draw conclusions relating to the nature of equal treatment within the EU legal order and CJEU jurisprudence.

The fundamental-rights-based equal treatment provisions developed over time parallel to the development of the EU (and previously the Communities) itself. In the Rome Treaty, the equal treatment principle meant only the equal pay for equal work principle,<sup>12</sup> mainly focusing on employment and the internal market; it also included provisions against discrimination based on citizenship.<sup>13</sup> The CJEU developed the relevant law via method of interpretation – as it had done in relation to other fundamental rights and their violations – and found the source of protection for equal treatment in the general principles of EU law. As stated in the *Überschär* case, ‘the general principle of equality, of which the prohibition on discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of community law’.<sup>14</sup>

Following the adoption of the Maastricht,<sup>15</sup> Amsterdam,<sup>16</sup> and Lisbon treaties,<sup>17</sup> the notion of equal treatment has been broadened by introducing a more fundamental-rights-centred approach.

9 TEU OJ C 326, Article 2.

10 Peter *Überschär v Bundesversicherungsanstalt*, C-810/79, ECLI:EU:C:1980:228. However, this stance is also reiterated – *inter alia* – in Recital (4) of the 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, 21.12.2004, 37–43. This is also called the Goods and Services Directive.

11 Charter of Fundamental Rights, Chapter III, OJ 2000/C 364/01.

12 Article 119 of the Rome Treaty (<http://data.europa.eu/eli/treaty/teec/sign>).

13 Article 7 of the Rome Treaty (<http://data.europa.eu/eli/treaty/teec/sign>).

14 Peter *Überschär v Bundesversicherungsanstalt*, para. 16.

15 The Treaty of Maastricht – *inter alia* – amended Article 2 and introduced Article F, which provides safeguards for the Union to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law ([https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty\\_on\\_european\\_union\\_en.pdf](https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf)).

16 The Treaty of Amsterdam enhances the concept of equal treatment by adding several further provisions on equality. The Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts is available at: <http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf> (see e.g. Articles 2, 118, 119).

17 See, e.g., Preamble, Article 1a, Article 2, Article 8 (OJ C 306). However, the Charter of Fundamental Rights, which became legally binding by the Treaty, should not be underestimated either and is addressed at later stages of the paper.

With regard to primary law as it stands today, the Treaty on European Union<sup>18</sup> (TEU) contains numerous provisions relating to equality. If we take as example the preamble, articles 2,<sup>19</sup> 3, 4, and 9, they all refer to equality in some form, and an *expressis verbis* prohibition on discrimination is apparent also from those articles.

The Treaty on the Functioning of the European Union (TFEU) addresses also some specific issues of equal treatment, dedicating to it an entire chapter.<sup>20</sup>

Article 18 of TFEU states that any discrimination on grounds of nationality shall be prohibited.<sup>21</sup> In order to secure that aim, under paragraph 2, the European Parliament and the Council may adopt rules by the ordinary legislative procedure. Article 19 of TFEU empowers the Council to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Many secondary norms relevant for this paper stem from this legal basis, such as Directive 2000/78 establishing a general framework for equal treatment in employment and occupation<sup>22</sup> and Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation<sup>23</sup> (hereinafter: Employment Equality Directives). Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>24</sup> (hereinafter: Racial Equality Directive) should also be mentioned, just as EC Directive 2004/113 on implementing the principle of equal treatment between men and women in the access to and supply of goods and services<sup>25</sup> (hereinafter: Gender Goods and Services Equality Directive).

The relevant provisions of the Charter of Fundamental Rights – binding since the entry into force of the Lisbon Treaty – can be outlined as follows: the preamble itself proclaims that equality is a universal value of the Union.<sup>26</sup> In addition, an entire chapter (III) is dedicated to equality, a standalone right in this situation, and articles 20 to 26 contain specific prohibitions with regard to several aspects of equality.<sup>27</sup>

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18 OJ C-326.

19 OJ C-326.

20 TFEU Part Two, non-discrimination and citizenship of the Union.

21 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – Tables of equivalences (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>) OJ C 326.

22 OJ L 303.

23 OJ L 204.

24 OJ L 180.

25 OJ L 373/37.

26 OJ 2000/C 364/01.

27 Those are: equality before the law, non-discrimination, cultural, religious, and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly, and, last but not least, integration of persons with disabilities – OJ 2000/C 364/01.

Furthermore, other articles which similarly safeguard protection for equal treatment related to enjoyment of rights could be easily identified.

In this context, we cannot forget about Article 52 granting similar meaning and scope to Charter rights as those in the ECHR – including equality and non-discrimination – or, alternatively, a higher standard of protection. This wording regarding more extensive protection serves as a further basis for possible interference between the two human rights systems, although in this case intended for the benefit of the rights holders.

When it comes to deficiencies and limits of application, it is well known that all the elaborated provisions oblige EU institutions and bodies with due regard for the principle of subsidiarity and the Member States only when they are implementing Union law, so the application of EU fundamental rights alone correlates strictly to the implementation of EU law. Furthermore, with regard to the given secondary norms, besides the fact that they are only applicable when implementing EU law, other deficiencies were also stated, *inter alia*, in the joint report by the Commission to the Council on the application of Racial Equality Directive and Employment Equality Directive.<sup>28</sup> Despite the 20-year gap, some statements are still not outdated such as the issue of access to justice, underreporting, not harmonized sanctions and remedies as well as varying standards of national case-law.<sup>29</sup> In order to address the abovementioned deficiencies, the Commission drafted a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation – a so-called horizontal directive. However, after 12 years, it is still at the proposal stage.<sup>30</sup>

## 2. The Relevant Provisions of the ECHR

Unlike EU law, under the ECHR, the source of equal treatment protection is more limited, having rather unitary source. Although equal treatment can be tackled

28 COM/2014/02 final.

29 Report from the Commission to the European Parliament and the Council – Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive') COM/2014/02 final <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0002>.

30 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation [L2008/0140]. <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52008PC0426> COM/2008/0426 final – CNS 2008/0140/.

through the prism of ECHR rights, Article 14 of the ECHR<sup>31</sup> *per se* guarantees non-discrimination only in conjunction with substantive rights, i.e. the rights set forth in the Convention. Even if the application of Article 14 does not presuppose a breach of those provisions<sup>32</sup> – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of them.<sup>33</sup>

Albeit Article 14 enumerates examples of protected rights, it can be seen from the practice that the ECtHR interprets the scope of application of the provision rather extensively. These characteristics give Article 14 an ancillary nature.

In particular, Article 8 of ECHR and Article 1 of Additional Protocol 12 serve as door openers for the application of the equal protection guarantee. With this extensive interpretation, almost any fact has some kind of connection to a convention-based right. Furthermore, as an additional example, if we take harassment: it may fall under the right to be free from inhuman or degrading treatment or punishment under Article 3, while instruction to discriminate may be caught by other Articles such as freedom of religion or assembly under Article 9 or 11 of ECHR depending on the context.<sup>34</sup> Therefore, from that angle, one could conclude that Article 14 of ECHR does not differ much from a general prohibition of discrimination as established by Additional Protocol 12.<sup>35</sup>

Article 1 of Protocol 12 provides a general non-discrimination clause and thereby affords a scope of protection, which extends beyond the enjoyment of the rights and freedoms set forth in the Convention. The Protocol was ratified by 20 states to date;<sup>36</sup> unsurprisingly, the low number of ratifications – out of which only 10 EU Member States – undermines the practical applicability and relates to the inability or unwillingness of the vast number of CoE States to grant extensive protection for everyone within their jurisdiction. I believe that the ratification of the Protocol has a potential to be a ‘Trojan Horse’ of sorts.

The relationship between Article 14 and Additional Protocol 12 is also summarized in the case of *Sejdić and Finci v Bosnia and Herzegovina*,<sup>37</sup> whereas

31 According to ECHR, Article 14: ‘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.’

32 See, e.g., *Carson and Others v United Kingdom*, Application no. 42184/05, ECLI:CE:ECHR:2010:0316JUD004218405, para. 63: ‘The ECtHR held that the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention.’

33 *Molla Salli v Greece*, Application no. 20452/14, ECLI:CE:ECHR:2018:1219JUD002045214, para. 127.

34 Handbook on European Non-Discrimination Law – 2018 edition, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-handbook-non-discrimination-law-2018\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf), 67.

35 Petersen 2018. 130.

36 [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p\\_auth=aRs5LrIw/](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=aRs5LrIw/).

37 The case considered applicants Mr Sejdić and Mr Finci, complained of their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina on the

Article 14 of the Convention prohibits discrimination in the enjoyment of the rights and freedoms set forth in the ECHR, and Article 1 of Protocol No 12 extends the scope of protection to ‘any right set forth by law (...) Reiterating once again that it thus introduces a general prohibition of discrimination’.<sup>38</sup>

### 3. Addressing Common Elements

The first connection stems from the concept of non-discrimination itself. In general, this concept refers to less favourable treatment of a subject that is determined through an *in concreto* comparison between the alleged victim and another person who does not possess the protected characteristic in a similar situation.<sup>39</sup> The wording is in line with the ECtHR’s interpretation as elaborated in the *Nachova and Others v Bulgaria* case, where the Court summed up that discrimination meant treating differently, without an objective and reasonable justification, persons in relevantly similar situations.<sup>40</sup>

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ground of their Roma and Jewish origin. They relied on articles 3, 13, and 14 of the Convention, Article 3 of Protocol no. 1, and Article 1 of Protocol no. 12. 15. Under the current Constitution in the BiH, the Parliamentary Assembly is bicameral, consisting of the House of Representatives and the House of Peoples. The 42 delegates of the House of Representatives are directly elected, two-thirds by the Federation and one-third by the Republika Srpska (Art. IV Paragraph 1 of the Constitution). The number of mandates is not defined based on ethnic criteria but is divided between the two entities on a territorial basis. The House of Peoples consists of fifteen members: five Bosniak, five Croat, and five Serb delegates. While the five Serbian delegates are elected by the National Assembly of the Republika Srpska, the Bosniak and Croat members are elected by the Bosniak and Croat members’ delegates of the House of the Peoples of the Federation (Art. IV, Paragraph 1 of the Constitution). Thus, the formation and election of the two chambers are based on the principle of parity, namely the parity of the entities (both chambers) and peoples (House of Peoples). Similar to the presidential elections, the election for the House of Peoples excludes Serbs from the Federation and Croats and Bosniaks from the Republika Srpska as well as all Others (such as the applicants) from both entities. As stated by Judge Bonello in his dissenting opinion, it might be said that all of the weak features of Bosnia and Herzegovina’s statehood, visible but ignored at the moment of its accession to the Council of Europe, have shown themselves to their full extent in the case of *Sejdić and Finci* 13, which *prima facie* might look as the simplest the ECtHR has dealt with, but they may be amongst those most insidious cases. Given the fact that this judgement was not implemented so far, other similar cases arose before the ECtHR such as *Zornic v Bosnia and Herzegovina* (Application no. 3681/06) and *Pilav v Bosnia and Herzegovina* (Application no. 41939/07). The Court and Council of Ministers also expressed on several occasions their frustration with the non-execution of the judgment in the case of *Sejdić and Finci*, encouraging the speediest and most effective resolution of the situation in a manner which complies with the Convention’s guarantees.

38 *Sejdic and Finci v Bosnia and Herzegovina*, application nos. 27996/06, 34836/06, ECLI:CE:ECHR:2009:1222JUD002799606, para. 53.

39 Handbook on European Non-Discrimination Law (2018 edition) 43; Schabas 2015. 564.

40 *Nachova and Others v Bulgaria*, Application nos. 43577/98, 43579/98, ECLI:CE:ECHR:2005:0706JUD004357798, para. 145.



From the CJEU case-law perspective, an opposite situation is also relevant: the principle of equality is violated also in instances where different cases are treated equally.<sup>41</sup>

However, there is a relevant procedural distinction, namely that before the ECtHR, as a court allowing direct applications from private individuals, the person has to be able to prove his or her direct involvement in order to qualify for victim status. Before the CJEU, such a possibility does not exist; therefore, the question of victim status will probably be decided at an earlier stage of proceedings before a national court. In general, ‘for long time pointed out by the scholar, the access of individuals to the ECJ is still poor and insufficient, leading sometimes towards a procedural labyrinth involving two or three jurisdictional levels which can hardly comply with the principle of effectiveness of the judicial system’.<sup>42</sup>

Although discrimination might have different forms, such as direct, indirect, multiple, and intersectoral discrimination, harassment, positive actions undertaken, etc., I will restrict myself to looking only at direct and indirect discrimination.

According to the wording of EU directives, direct discrimination occurs when one person is treated less favourably on the basis of protected grounds.<sup>43</sup> Less favourable treatment was also identified in one of the first cases of the CJEU on direct discrimination – much earlier than in directives –, in the case of *Defrenne*,<sup>44</sup> where the CJEU underlined the principle that men and women should receive equal pay for equal work. This wording is consistent with the ECtHR findings as elaborated, inter alia, in the case of *Carson and Others v United Kingdom*.<sup>45</sup>

Indirect discrimination – as the other type of discrimination to be discussed – occurs in cases where persons with different protected grounds are treated equally. This is where indirect discrimination differs from direct discrimination ‘as it moves the focus away from differential treatment to look at differential effects’.<sup>46</sup>

One of the earliest cases related to indirect discrimination, the *Schönheit* case before the CJEU, concerned a retirement pension paid under a scheme such as the one established by the German law, which may entail a reduction in the pension of civil servants who have worked part-time for at least a part of their working life, where that category of civil servants includes a considerably higher number of

41 *Hoche GmbH v Bundesanstalt für Landwirtschaftliche Marktordnung*, C-174/89, ECLI:EU:C:1990:270, para. 25.

42 Galera Rodrigo 2015.

43 See Racial Equality Directive Article 2, Services Equality Directive Article 2, and Employment and Occupation Directive Article 2.

44 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, C-43/75, ECLI:EU:C:1976:56.

45 *Carson and Others v United Kingdom*, para. 61.

46 Handbook on European Non-Discrimination Law (2018 edition), 56.

women than men unless the legislation is justified by objective factors unrelated to any discrimination on grounds of sex.<sup>47</sup>

In the ECHR, there is no *expressis verbis* regulation on indirect discrimination – it has evolved through the court’s case-law. It was outlined in the case *D. H. and others v the Czech Republic*, where indirect discrimination without objective and reasonable justification was ascertained: the applicants were treated less favourably than non-Roma children in a comparable situation, and this amounted in their case to indirect discrimination.<sup>48</sup> These two decisions rendered by the two courts clearly demonstrate that the two judicial bodies have a common approach when deciding upon the issue of indirect discrimination.

When it comes to protected grounds, under the EU legal order, they exist in parallel in primary and secondary law.

In the directives, the protected grounds vary covering racial and ethnic origin (racial directive), sex with regard to access and supply of goods and services, religion or belief, disability, age, sexual orientation, as regards the Employment and Occupation Directive. With regard to gender, as a protected ground, the protection is safeguarded even more broadly. As stated above, protected grounds exist in primary and secondary law, but in the case of gender equality protection has also another layer: it also exists as a fundamental principle of the European Union.<sup>49</sup> I believe gender equality, with its different layers of sources for protection, qualifies thus as one of the most recognizable aspects of equal treatment. The same goes for the prohibition based on nationality, which is safeguarded by multiple primary<sup>50</sup> and secondary law sources. Not undermining the importance of other protected grounds, in the EU context, gender, age, and nationality portray the most important cornerstones of equality. Nationality has specific characteristics within the EU legal order that should not be forgotten, bearing in mind the four freedoms and the purpose of establishment of the Communities and the Union itself.

Under Article 14 of ECHR protected grounds are, according to the non-exhaustive list, sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. With regard to the protected grounds, in *Clift v UK*, the ECtHR held that Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective, or personal characteristic, or ‘status’, by which persons

47 *Hilde Schönheit v Stadt Frankfurt am Main*, C-4/02, ECLI:EU:C:2003:583.

48 *D. H. and Others v the Czech Republic*, Application no. 57325/00, ECLI:CE:ECHR:2007:1113JUD005732500, para. 183.

49 This statement is enshrined also in 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.

50 See, e.g., TFEU articles 18, 45, 61, and 77.

or groups of persons are distinguishable from one another.<sup>51</sup> This interpretation seems to be a stringent one.

Analysing the case-law of the ECtHR, it is easy to conclude that most anti-discrimination cases relate to gender identity issues,<sup>52</sup> racial origin,<sup>53</sup> or sexual orientation issues,<sup>54</sup> mostly homosexuality cases.<sup>55</sup> However, besides those classic protected grounds, we cannot forget other relevant statuses either such as discrimination based on parental status<sup>56</sup> or, as a recent example showed, a case<sup>57</sup> concerning the application of Sharia law by the Greek courts. So, the above-mentioned stringency seems to have some flexibility. That is why I consider this Article as a forever inspirational source.

The scope of protected grounds evolved and will evolve in the future because of rapid changes in society. Thanks to the living instrument approach of the ECtHR, this will serve as a basis to adapt to newly identified protected grounds.

Needless to say, in none of the cases are those grounds protected *per se*: there always has to be a clear nexus between the discrimination and the protected characteristic.

Prohibition of discrimination is not an absolute right. Both systems allow justified differential treatment.

The ECtHR will analyse in a step-by-step fashion whether difference in treatment occurred between persons in a comparable situation, meaning that there must be a difference in the treatment of persons in analogous or relevantly similar situations<sup>58</sup> or, conversely, whether not equally positioned persons were treated in the same manner. As a next step, the Court will decide on the lack of objective and reasonable justification afterwards on the legitimate aim of the provision. As stated, in the *Molla Salli v Greece* case, a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality’ between the means employed and the aim sought to be realized.<sup>59</sup> As stated by the ECtHR in the case of *Burden v United Kingdom*: ‘there must be a difference in the treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable

51 *Clift v the United Kingdom*, Application no. 7205/07, ECLI:CE:ECHR:2010:0713JUD000720507.

52 *P. V. v Spain*, Application no. 35159/09, ECLI:CE:ECHR:2010:1130JUD003515909.

53 *Nachova and Others v Bulgaria*.

54 *Identoba and Others v Georgia*, Application no. 73235/12, ECLI:CE:ECHR:2015:0512JUD007323512.

55 *Dudgeon v United Kingdom*, Application no. 7525/76, ECLI:CE:ECHR:1981:1022JUD000752576.

56 *Weller v Hungary*, Application no. 44399/05, ECLI:CE:ECHR:2009:0331JUD004439905.

57 *Molla Sali v Greece*, Application no. 20452/14, ECLI:CE:ECHR:2018:1219JUD002045214.

58 *Molla Sali v Greece*, para. 133.

59 *Molla Sali v Greece*, para. 135.

relationship of proportionality between the means employed and the aim sought to be realised'.<sup>60</sup>

Under EU Law, directives allow for specific limitations in the case of direct discrimination such as the genuine occupational requirement<sup>61</sup> or age,<sup>62</sup> while the general justification is examined only in the context of indirect discrimination.<sup>63</sup>

We see here a differing approach: 'EU law provides only for specific limited defences to direct discrimination and a general defence only in the context of indirect discrimination. In other words, under the non-discrimination directives, direct discrimination will only be justified where it is in pursuit of particular aims expressly set out in those directives'.<sup>64</sup>

With regard to addressing common procedural elements, I wish to emphasize the issue of the burden of proof. To 'address the difficulty of proving that differential treatment has been based on a protected ground, European non-discrimination law allows the burden of proof to be shared'.<sup>65</sup> This basically means that if the claimant is able to present enough evidence to raise the question that discriminatory treatment occurred, then it will be up to the defendant to prove the contrary. Under EU Law,<sup>66</sup> directives – building on the evolutionary interpretation of the CJEU – contain specific rules for Member States for *prima facie* cases of discrimination, and the burden of proof must shift back to the respondent when evidence of such discrimination is brought.<sup>67</sup>

Under the ECHR, this procedural quasi-principle evolved through the case-law of the ECtHR contrary to the generally applied *affirmanti incumbit probatio* principle.<sup>68</sup> Unlike in EU directives, there is no written obligation; however, analysing the ECtHR case-law, we see steps taken towards the shifting of the burden of proof notwithstanding the lack of such a written obligation. In *Nachova and Others*, the Court adopted conclusions that are:

60 *Burden v United Kingdom*, Application no. 13378/05, ECLI:CE:ECHR:2008:0429JUD001337805, para. 60.

61 This requirement allows employers to differentiate against individuals on the basis of a protected ground where this ground has an inherent link with the capacity to perform or the qualifications required of a particular job. (E.g. a role has to be played by a young artist, a dancer has to be in a good physical shape, etc.) See: Gender Equality Directive, Art. 14; Racial Equality Directive, Art. 4; Employment Equality Directive, Art. 4.

62 See Employment Equality Directive.

63 See Employment Equality Directive.

64 Handbook on European Non-Discrimination Law (2018 edition), 92.

65 Handbook on European Non-Discrimination Law (2018 edition), 231.

66 On the application of burden of proof in certain Member States, see, e.g., Ringelheim 2019. 49. <https://www.equalitylaw.eu/downloads/5005-european-equality-law-review-2-2019-pdf-3-201-kb>.

67 Racial Equality Directive Recitals 21–22 and Art. 8, Employment and Occupation Directive Recitals 31–32 and Article 10.

68 Schabas 2015. 570.

supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.<sup>69</sup>

In the case of *Timishev v Russia*, the Court drew a similar conclusion by reiterating that: 'Once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified.'<sup>70</sup> This evolution, I believe, can be thanked to the concept of living instrument applied, as we see, through this example, also in procedural terms.

## 4. Concluding Remarks

The paper presented some key aspects as regards the nature and regulation of equal treatment law in Europe by examining the relevant provisions on equal treatment in the case-law of the ECtHR and the CJEU, underlining some similarities and differences.

Speaking of interference, the aim and purpose of fundamental rights is not to foster harmonization or uniformity; they concern the empowerment of individuals and the protection of liberty primarily against state authorities. The European multilevel system of rights protection is composed of layers that complement each other, instead of layers that are neatly separated according to their origin (constitutional, EU, or international). Agreeing with Polakiewicz, uniformity is neither required nor desirable in a Europe composed of nation-states, each with its own distinctive traditions of fundamental rights protection.<sup>71</sup>

Under EU Law, equal treatment exists in parallel ways: as a value of the European Union, a general principle, a fundamental principle, and a fundamental right. If we take as an example age discrimination, prohibition exists simultaneously in relevant sources, in the Employment Equality Directive and, as described in Mangold<sup>72</sup> and Küçükdeveci<sup>73</sup> rulings, also as a general principle of non-

69 *Nachova and Others v Bulgaria*, para. 147.

70 *Timishev v Russia*, Application nos. 55762/00, 55974/00, ECLI:CE:ECHR:2005:1213JUD005576200, para. 57.

71 Polakiewicz 2016.

72 *Werner Mangold v Rüdiger Helm*, C-144/04, ECLI:EU:C:2005:709, para. 75.

73 *Seda Küçükdeveci v Swedex GmbH & Co. KG*, C555/07, ECLI:EU:C:2010:21, para. 21.

discrimination. However, the relationship of the principle of non-discrimination as safeguarded by the directive as opposed to a general principle was further elaborated on in the case of *Dansk Industri*,<sup>74</sup> where the ECJ – arguably by judicial activism – concluded that the principle of non-discrimination is applicable even if the directive is not applicable, providing it with a subsidiary direct effect. Now it is clear that even if the directive establishing the obligation of non-discrimination is not applicable, the general principle can be applied.<sup>75</sup> This opens up then the question of *Drittwirkung* before both courts, which has a tremendous potential in the context of equal treatment.

The parallel coexistence raises several questions such as: should the same value be granted to all protected grounds as established by the Charter and TFEU? Some protected grounds reach the level of general principle – in those cases, like gender, age, and nationality, the layers of safeguards grant higher and more extensive levels of protection. Will they be considered as a source of inspiration for other protected characteristics?

As demonstrated in the paper, not all protected grounds under EU non-discrimination law receive an even measure of protection. The directives prohibit sectoral discrimination, e.g., the Racial Equality Directive prohibits discrimination on the basis of racial or ethnic origin in the context of employment, the Employment Equality Directive prohibits discrimination on the basis of disability, sexual orientation, religion or belief, and age only in the context of employment. “This has been described as a “hierarchy of grounds” and sits uncomfortably with the very essence of the guarantee of equal treatment contained in international human rights law.”<sup>76</sup>

As already outlined above, the differences stem from the more complex approach taken by EU law, which derives from the nature of equal treatment under EU law, which is more than a mere right. In the EU law context, equal treatment has a complex spectrum which runs through the entire legal system of the EU, from economic freedoms to European Parliament electoral rights.

There are some conceptual differences based on the elaboration above. Whilst the ECHR was established as a general bill of rights, including also the prohibition of discrimination under Art. 14 of ECHR as a particular human rights aspect with the function of a minimum guarantee within a larger system of the same type, the original European Community law was essentially economic in nature.<sup>77</sup>

Furthermore, speaking of the development the two human rights regimes have undergone, especially with regard to the scope of the law, again, there are

74 *Dansk Industri (DI)*, acting on behalf of *Ajos A/S v Estate of Karsten Eigil Rasmussen*, C-441/14, ECLI:EU:C:2016:278.

75 Zaccaron 2016.

76 The European Union and International Human Rights Law, Office of the High Commissioner, Europe Regional Office 20.

77 Tobler 2014. 524.

conceptual differences. From the beginning, the ECHR has had a very broad material scope, meaning that it has covered many aspects of life. Subsequently, the Convention developed mostly through case-law, in particular through the ECtHR's often applied doctrine of the Convention as a 'living instrument', which must be interpreted in the light of present-day conditions but, I would say, also in procedural terms. This means that much could be achieved through interpretation, making no formal amendments to the ECHR or the adoption of new conventions unnecessary in many areas. This is also true of non-discrimination, where, apart from Protocol 12, there have been no formal changes in the ECHR. Instead, the focus has rather been on the implementation and enforcement of the existing law. In contrast, European Community law and later EU law developed very dynamically through Treaty revisions, the adoption of secondary law and case-law from the CJEU.<sup>78</sup>

An important characteristic of the ECHR is that the protected rights are guaranteed relatively broadly, within the jurisdictions of the State Parties. As seen in ECtHR case-law, in some cases, applicability is even possible in extraterritorial situations.<sup>79</sup> That provision is considerably broader than EU law, given its limited approach as primary and secondary norms only oblige Member States as long as they implement EU law. However, it may raise questions on what to consider as implementation, especially in the case of secondary norms.

But it is not all black or white because, even though it is limited based on the provisions of Article 52(3) of the Charter, the level of protection granted by the EU might be more extensive than safeguards by the ECHR. The introduced secondary norms also foresee the possibility of direct application of the norms between private individuals,<sup>80</sup> which has a tremendous potential. On the ECtHR side, although generally the ECHR obliges Member States and not individuals, bearing in mind the positive obligations of Member States, this positive obligation might potentially evolve.

In the case of *Ärzte für das Leben*, the Court recognized that sometimes Article 11 requires positive measures to be taken, even in the sphere of relations between individuals.<sup>81</sup> Bearing in mind this evolutive approach together with the living instrument concept, it is not excluded in my view that under the ECHR equal treatment will evolve so as to – at least in some dimensions – be secured between private individuals.

<sup>78</sup> Tobler 2014. 525.

<sup>79</sup> The extraterritorial ECtHR application was confirmed in a large group of cases. See: Ryngaert 2012. 57–60.

<sup>80</sup> See, e.g., Article 3 of Employment and Occupation Directive.

<sup>81</sup> Platform 'Ärzte für das Leben' v Austria, Application no. 10126/82, ECLI:CE:ECHR:1988:0621 JUD001012682.

The broader scope of the protected persons might contribute to effective protection of a minimum standard for alleged equal treatment related to violation in European regional context.

As regards convergence, several aspects can be found. First of all, the protected grounds are similar. But, more importantly, the evolutionary interpretation of protected grounds by both courts could positively influence the interpretation by the other court. As portrayed in the case of *Molla Salli*, the protected grounds remain the source of inspiration for future reference of European non-discrimination law.

The justification for less favourable treatment follows a very similar approach even though it is not the same in the two legal orders, given that the scope of differentiation is wider in the relevant provisions of EU law.

A dialogue between the two regimes exists in multiple ways. Besides the institutional dialogue, such as the one based on Article 6(3) of TEU<sup>82</sup> as well as the Charter, the dialogue of courts cannot be underestimated either. The courts – even after the Charter has become binding –, although in limited frequency<sup>83</sup> but in a constant manner, maintain communication. Such concrete interference can be found in the already cited *D. H. and Others v the Czech Republic* case<sup>84</sup> or, the other way around, before the CJEU, in the more recent case of *Dorobantu*. The case concerned the personal space available to each detainee in the absence of minimum standards in that respect under EU law; the CJEU ruled to take account of the minimum requirements under Article 3 of ECHR,<sup>85</sup> resulting thus in the ECHR to be quasi directly applied.<sup>86</sup>

These cases also portray the usual schedule when the protection is granted by EU legal order. In the first round, under European non-discrimination law (not considering the national level), it is up to the CJEU (needless to say when the protection is granted by EU legal order) to decide, while the role of the ECtHR is of subsidiary nature. When it comes to the application of the ECHR, there are two options: the normal level of protection as granted by Article 14 (ancillary although stringent) and the advanced level as per Additional Protocol 12. Needless to say, the higher is the number of ratifications, the stronger the protection of equal treatment within the CoE context.

Reiterating the regional context and the term European non-discrimination law, we could conclude that the introduced aspects of equal treatment in EU law are largely consistent with the ECHR; however, to date, there is still no external

82 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

83 Krommendijk 2015.

84 ECtHR reference to the EC directive 2000/43, para. 61.

85 *Dorobantu*, C-128/18, ECLI:EU:C:2019:857.

86 Mohay 2019.



control mechanism for EU law compliance with fundamental rights. So far, in an indirect manner for the EU and in a direct manner for the EU Member States, the Convention remains the constitutional instrument of European public order and measure of last resort.

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