



The Future of Equality Law in the EU

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1. What lessons can be drawn from the contribution of the Council of Europe to the fight against discrimination?

Recommendations of the Committee of Ministers

Protocol No. 12 (2000) to the European Convention on Human Rights

Article 14 ECHR – in the context of accession

The European Social Charter

2. What is the state of international human rights law?

The Human Rights Committee

The Committee on Economic, Social and Cultural Rights

3. Positive duties to protect from discrimination and the allocation of competences between the EU and the Member States

Protocol No. 12 (2000) to the European Convention on Human Rights

■ Article 1 – General prohibition of discrimination

- 1 The enjoyment of any right set forth by law 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.
- 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

■ Explanatory Report, para. 26

- it cannot be totally excluded that the duty to "secure" under the first paragraph of Article 1 might entail positive obligations. ...this question could arise if there is a clear lacuna in domestic law protection from discrimination. Regarding more specifically relations between private persons, a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of the Protocol could come into play (see, mutatis mutandis, the judgment of the Court of 26 March 1985 in the case of X and Y v. the Netherlands, Series A, No 91, paragraphs 23-24, 27 and 30).

Protocol No. 12 (2000) to the European Convention on Human Rights

■ **Explanatory Report, para. 27**

- ...any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc). The precise form of the response which the state should take will vary according to the circumstances. It is understood that purely private matters would not be affected. Regulation of such matters would also be likely to interfere with the individual's right to respect for his private and family life, his home and his correspondence, as guaranteed by Article 8 of the Convention.

■ **Positive obligations under Article 14 ECHR**

- Eur. Ct. HR (GC), D.H. and Others v. the Czech Republic (Appl. no. 57325/00), judgment of 13 November 2007

- **Positive obligations under Article 14 ECHR**
- **Eur. Ct. HR (GC), D.H. and Others v. the Czech Republic, judgment of 13 November 2007**
- **Eur. Ct. HR, Opuz v. Turkey, judgment of 9 June 2009**
- « ...general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women... the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women” (paragraph 200).

- **European Social Charter (Revised) (1996), Article E :**
- The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

- **Human Rights Committee, General Comment No. 18: Non-discrimination (1989)**
- 9. ... When reporting on articles 2 (1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.

- **Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination (2009)**
- 11. Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.
- 37. Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. ...

- **Committee on Economic, Social and Cultural Rights, General Comment No. 20 (continued)**
- ... Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.

- **Positive obligations / a duty to protect as a key component of non-discrimination – within existing competences**
- **Final Report of Working Group II “Incorporation of the Charter/Accession to the ECHR” (22 Oct. 2002, CONV 354/02)**
- The Group agrees on the central importance of the fact that accession by the Union to the ECHR - like incorporation of the Charter - will in no way modify the allocation of competences between the Union and the Member States. According to the Group's common understanding, the legal "scope" of the Union's accession to the ECHR would be limited to issues in respect of which the Union has competence; it would thus not lead to any extension of the Union's competences, let alone to the establishment of a general competence of the Union on fundamental rights. Accordingly, "positive" obligations of the Union to take action to comply with the ECHR would arise only to the extent to which competences of the Union permitting such action exist under the Treaty.

- **Positive obligations / a duty to protect as a key component of non-discrimination – within existing competences**
- **The ECJ on positive obligations derived from the duty to comply with fundamental rights : Case C-540/03, European Parliament v. Council (action for annulment of the Family Reunification Directive)**
- ... while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights (para. 102)

- **Conclusion**
- Under Article 19 TFEU, the EU has the competences required to put an end to the “hierarchy of discriminations” and to improve the protection against discrimination
- As a result of the EU Charter of Fundamental Rights and following accession of the EU to the ECHR, such competences may have to be exercised were the protection against discrimination to be insufficient in one Member State – ‘positive obligations’ may be imposed on the EU
- However, (1) the ECJ remains reluctant to impose such positive obligations on the basis of the Charter of Fundamental Rights; and (2) it shall not be the role of the European Court of Human Rights to identify whether measures to combat discrimination should be adopted at the level of the EU or at the level of the Member States

- **Conclusion (continued)**
- Moving towards protection from discrimination also on the basis of sexual orientation, age, disability, religion or belief, (1) would be in conformity with the understanding of non-discrimination under international human rights law; (2) would facilitate the exercise of free movement rights; (3) would avoid an artificial separation between work and employment and other integration factors (social protection and social advantages ; access to goods and services which are available to the public, incl. housing and transport ; education)