

THE EVOLUTION OF A 'PAN-EUROPEAN' ANTI-DISCRIMINATION LEGAL FRAMEWORK WITH SPECIFIC REFERENCE TO THE JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EU (CJEU), THE EUROPEAN COURT OF HUMAN RIGHTS (ECHR) AND THE ECSR (EUROPEAN COMMITTEE ON SOCIAL RIGHTS)

Colm O'Cinneide

Reader in Law, University College London

General Rapporteur, European Committee on Social Rights

THE EVOLUTION OF A PAN-EUROPEAN APPROACH TO ANTI-DISCRIMINATION LAW

- It is possible to identify the development of a common interpretative approach to anti-discrimination legal norms across the different European adjudicatory bodies.
- The case-law of the Luxembourg (CJEU) and Strasbourg (ECHR and ECSR) bodies shares certain common characteristics:
 - ❖ recognition of direct and indirect discrimination (with a relatively 'strict' approach to their application);
 - ❖ some openness to positive action;
 - ❖ a broadly consistent cross-ground approach;
 - ❖ non-discrimination acknowledged to be an aspect of a wider equality principle linked to fundamental rights;
 - ❖ some openness to social rights and other 'new generations' of rights, as well as to UN and ILO standards (in particular the CPRD).

FACTORS INFLUENCING THE EVOLUTION OF THIS COMMON ANTI-DISCRIMINATION FRAMEWORK

- National influence (both within and without the EU) – e.g. US civil rights framework transmitted via UK in the 1970s, continues to be influential.
- International influence – see e.g. CJEU judgment in *Ring* making reference to the UN CRPD, but note also its judgment in the surrogacy case of *Z* which viewed the provisions of CPRD as essentially ‘programmatic’.
- ‘Experimental’ approaches at national level developed by national equality bodies, ombudsmen etc. – as discussed by De Búrca.
- Mutual exchange – Luxembourg jurisprudence influences Strasbourg, and vice versa.

UNCERTAINTIES AND OBSTACLES

- The evolving pan-European framework has ‘blind spots’ – e.g. religious discrimination within the EU framework, positive action everywhere.
- The interaction between the pan-European standards remains uncertain, especially the status of the ECSR jurisprudence;
- The ‘reach’ of these standards is subject to certain important constraints – see e.g. the *Belov* and *Runevič-Vardyn* judgments of the CJEU, and the ‘ambit’ test applied in respect of Article 14 ECHR.
- Scepticism and hostility at national level – relating both the function of European anti-discrimination law and its impact on national law.
- Lack of a clear pan-European political consensus on these issues.

The Overall Interpretative Approach of the CJEU - I

- The Court's case-law has established that the anti-discrimination Directives should be interpreted as giving specific expression to a fundamental norm of the EU legal order, namely the general principle of equal treatment – *Schnorbus* (gender), now *Mangold v Helm* (age as aspect of a wider principle).
- This principle is also set out in Articles 21 and 23 of the EU Charter of Fundamental Rights – *Kücükdeveci*; *Test-Achats*.
- EU secondary legislation (including directives) must also be interpreted 'as far as possible' to comply with the provisions of the CPRD, which is now an 'integral part' of the EU legal order – *Ring*, but see also *Z* and possibly *Kaltoft*.

The Overall Interpretative Approach of the CJEU

- II

- The Court has furthermore made it clear that the Directives should not be read in a narrow or excessively formalistic manner.
- Thus, e.g., in the case of *Coleman*, the Court expressly rejected arguments that the provisions of Directive 2000/78/EC should be read as setting minimum standards. Instead, it interpreted the Directive as intended to provide effective and substantive protection against discrimination – see also e.g. *Firma Feryn*, *Meister* and *Odar*.
- Furthermore, in the cases of *Petersen*, *Prigge* and *Experian*, the CJEU concluded that exceptions to the principle of equal treatment must be given a strict and narrow interpretation, in line with its well-established gender equality jurisprudence (see e.g. *Barber*, *Johnston*).

The Overall Interpretative Approach of the CJEU

- III

- The full range of rights protected by the EU Charter of Fundamental Rights must be taken into account – see e.g. *Fuchs* and *Hennigs*, where the Court took into account the right to work set out in Article 15(1) of the Charter and the right to engage in collective bargaining set out in Article 28 respectively.
- Secondary objectives set out in the Recitals of the Directives and other EU standards are also relevant - in *Fuchs*, the Court took account of the aim to promote diversity in the workforce as set out in Recital 25 of Directive 2000/78/EC.
- See also both *Odar* and *Ring*, where the Court refers to the 2000 Helsinki employment strategy guidelines relating to persons with disabilities.

The Overall Interpretative Approach of the CJEU

- IV

- Note also the emphasis placed on the ‘animating’ values of human dignity and autonomy by Maduro AG in his Opinion in *Coleman*.
- ‘Read across’ from the gender equality case-law of the Court is common.
- In general, the non-discrimination jurisprudence of the Court is marked by a cross-ground consistency of application both of principles and of legal standards, and also a purposive orientation.
- Uncertainties exist – especially when it comes to the application of the proportionality approach in the context of age discrimination.

THE ECHR and EU Law: Overlapping Non-Discrimination Norms

- Article 6(3) TEU – ECHR part of ‘general principles of EU law, originally affirmed in *Nold*. See also Art. 53 of the EU Charter.
- Developing ECHR jurisprudence on non-discrimination is therefore very relevant – *Stec v UK*, *DH v Czech Republic*, *Redfearn v UK*, *Eweida v UK* – but it remains a work in progress.
- The *Eweida* judgment is particularly noteworthy: states must established a ‘horizontal’ system of anti-discrimination protection and ensure that it is sufficient to comply with their positive obligations under the ECHR.
- Article 6(2) TEU – accession of the EU to ECHR in train.
- Strasbourg jurisprudence likely to be increasingly influential in the years ahead.

The European Social Charter (ESC) and EU Law – An Uncertain Relationship

- Original or revised ESC ratified by all EU member states, point of reference for CJEU in its case-law.
- The equality jurisprudence of the European Committee on Social Rights is rapidly expanding, especially in the race/age/disability discrimination fields and in particular in relation to housing/health care/social/educational services.
- Some tension exists between EC and EU standards (esp. in field of trade union rights) and also no EU accession to ESC is contemplated
- But social rights provisions of EU Charter are based on ESC provisions, so there is potential for cross-fertilisation.

EXAMPLES OF ECSR COLLECTIVE COMPLAINTS RELATING TO EQUALITY AND NON-DISCRIMINATION (1)

- Complaint 13/2002, *Autism-Europe v France*, Decision of 7th November 2003, the ECSR rejected the complaint's argument that funding for education for autistic children should come from the education rather than the health budget.
- However, the Committee noted that France had made little progress in securing the participation of autistic persons in mainstream education or in providing adequate resources to meet their special educational needs; that use was still being made of a more restrictive definition of autism in educational policy than that adopted by the World Health Organisation; and that there were insufficient official statistics with which to rationally measure progress.
- These deficiencies in French policy taken together as a whole ensured that France was not meeting its Charter obligations under Articles 15 and 17 and the non-discrimination clause Article E of the revised Social Charter.

EXAMPLES OF ESCR COLLECTIVE COMPLAINTS RELATING TO EQUALITY AND NON-DISCRIMINATION (2)

- Complaint No. 58/2009, *Centre on Housing Rights and Evictions (COHRE) v Italy*, Decision of 6 July 2010 – housing provision and security for Roma.
- Complaint No. 46/2007, *European Roma Rights Centre (ERRC) Bulgaria*, Decision of 3 December 2008 – provision of health care services in Roma-majority areas.
- Complaint No. 75/2011, *International Federation of Human Rights (FIDH) v. Belgium*, Decision of 26 March 2013 – services for highly dependant persons with disabilities.
- Complaint No. 74/2011, *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Decision of 5 July 2013 – retirement age for seamen.

Future Developments?

- It remains to be seen how the pan-European legal approach will continue to evolve.
- In particular, it will be interesting to see how the ground-breaking jurisprudence of the ECSR influences the development of legal standards at national and other European levels.
- The role of NEBs and national equality and human rights bodies will be key – *Belov* notwithstanding.
- The background political context in the short-term is likely to be increasingly hostile – it will therefore be crucial for European courts to maintain their legitimacy.