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Unit D1: Non Discrimination: LGBTIQ, Age, Horizontal Matters
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Introduction on the state of play

The *European equality law review* is produced by the European network of legal experts in gender equality and non-discrimination (EELN/the network). The aim of the EELN is, and has been since 2015,[1] to provide the European Commission and the general public with independent information regarding gender equality and non-discrimination law and, more specifically, on the transposition and implementation of the EU equality and non-discrimination directives. From 2015 to 2022, the network produced two issues of the European equality law review each year. From 2023 onwards, the network will be producing one issue per year, providing an overview of one full year of legal and policy developments in European and national gender equality and non-discrimination law. The current issue reflects, as far as possible, the state of affairs from 1 July 2022 to 30 June 2023.

In this issue

This issue opens with four in-depth articles. The first article, by Dolores Morondo Taramundi from the University of Deusto, explores the introduction of rights regarding menstrual health in Spain. The second article, by Panos Kapotas from the University of Portsmouth, provides an overview of the state of play on the use of comparators and comparisons in EU gender equality law, as reflected in the case law of the Court of Justice of the European Union. The third article, by Sébastien Van Drooghenbroeck of UC Louvain-Saint-Louis-Bruxelles, explores the level of protection against discrimination on the ground of non-religious beliefs in EU law. The final article, by Roma activist and scholar Iulius Rostas, examines the protection provided in Bulgaria, Greece and Romania against Roma segregation in education, through an assessment of national legislation, case law and policies.

As in previous issues of this publication, the following section provides an overview of the relevant case law of the CJEU and of the European Court of Human Rights. The final section on national developments contains brief summaries of the most important developments in legislation, case law and policy at the national level in the 36 countries covered by the network.

Recent developments at the European level

Ten years after its proposal by the European Commission, the European Parliament finally formally adopted the new EU directive on gender balance on corporate boards on 22 November 2022.[2] Directive 2022/2381 aims to break the glass ceiling of listed company boards, by setting targets for companies of having 40 % of the underrepresented sex among non-executive directors or 33 % among all directors by 2026. Companies must ensure that board appointment procedures are clear and transparent, and that applicants are assessed objectively based on their individual merits, irrespective of gender. Women remain underrepresented in high-level positions including on corporate boards in the EU.[3] Although various initiatives have been taken in this regard, the adoption of this directive is an important instrument as progress in this field has been very slow. The directive entered into force on 27 December 2022, and Member States will have two years to transpose its provisions into national law.

1 Until 2014, these aims were pursued by two separate networks: the European network of legal experts in the non-discrimination field and the European network of legal experts in the field of gender equality.

2 European Commission (2022) 'Gender Equality, the EU is breaking the glass ceiling' press release of 22 November 2022, Brussels.

3 Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, OJ L 315/44, 7.12.2022.

On 30 March 2023, another important piece of legislation was adopted by the European Parliament: EU Directive 2023/970 on pay transparency.[4] The aim of this directive is to combat pay discrimination and help close the gender pay gap in the EU. The gender pay gap has largely stagnated over the last decade, and women in the EU still earn on average 13 % less than their male counterparts. Although various factors contribute to this difference, pay discrimination has been identified as one of the key obstacles to achieving gender pay equality. Under the new rules, EU companies will have to share information regarding salaries openly, will be required to report on their gender pay gap annually, and will have to take action if their gender pay gap exceeds 5 %. The directive also includes provisions on compensation for victims of pay discrimination and penalties, including fines, for employers who break the rules. Another important element and innovation of this directive is the inclusion of intersectional discrimination in the scope of the new rules. The directive also contains provisions ensuring that the needs of workers with disabilities are taken into account. EU countries have three years to transpose the directive into their national legal order. In addition, the requirement to report gender pay information every three years will be extended to companies employing over 100 workers. Initially, the reporting obligation was envisaged to apply only to companies with 150 or more employees.[5]

In addition to these new directives adopted during the reporting period, on 7 December 2022, the European Commission issued its highly anticipated equality bodies package,[6] proposing two new directives to strengthen, in particular, the independence, resources and powers of equality bodies across the EU. The aim of the proposed legislation is to set binding standards for the equality bodies in all EU Member States. Its adoption would bring crucial improvements for many of the national equality bodies, by extending the (minimum) scope of their competences, setting (minimum) requirements regarding independence as well as resources and accessibility for all victims, and by demanding an enhanced set of (minimum) powers, including with regard to litigation and amicable settlements of discrimination cases. Last but not least, the proposals set out the establishment of common indicators to allow the Commission to monitor formally the effects of the proposed measures and to ensure comparability of data collected at national level.

Finally, in addition to these new legislative developments, the Commission's efforts to enforce existing EU legislation are also noteworthy, notably with regard to infringement proceedings in the non-discrimination field. Hungary has for instance been referred to the Court of Justice of the EU due to its legislation that singles out and targets content for persons aged under 18 that 'promotes or portrays' what is referred to as 'divergence from self-identity corresponding to sex at birth, sex change or homosexuality'.[7] In addition, the infringement procedure that had been initiated in 2015 against Slovakia, for its failure to sufficiently tackle the issue of Roma segregation in education, finally resulted in the decision to refer Slovakia to the Court of Justice.[8]

4 Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, OJ L 132/21, 17.5.2023.

5 Council of the European Union (2023) 'Gender pay gap: Council adopts new rules on pay transparency', press release of 24 April 2023, Brussels.

6 European Commission, Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC (COM/2022/689 final); and Proposal for a Directive of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (COM/2022/688 final).

7 European Commission (2022) 'Commission refers Hungary to the Court of Justice of the EU over violation of LGBTIQ rights', press release of 15 July 2022.

8 European Commission (2023) 'The European Commission decides to refer Slovakia to the Court of Justice of the European Union for not sufficiently addressing discrimination against Roma children at school', press release of 19 April 2023.

Network publications and activities

After two years of online annual legal seminars due to the COVID-19 pandemic, we were thrilled to host a (partially) live annual seminar on 2 December 2022 in Brussels. It brought together almost 200 representatives of the European Commission, EU Member State Governments, equality bodies, EU umbrella organisations, academics from across Europe and members of the network itself. During the period covered by this issue of the *European equality law review*, the network published a total of four thematic reports, its annual comparative analyses of non-discrimination law in Europe 2022 and of gender equality law in Europe 2022, as well as the second edition of the *European equality law review 2022*. The first report, *To name and address the underlying problem: Structural discrimination on the ground of racial or ethnic origin*, was written by equality and human rights expert Niall Crawley and the second report, *Indirect discrimination under Directives 2000/43 and 2000/78*, was written by Christa Tobler from the University of Basel. Miguel de la Corte-Rodríguez from KU Leuven is the author of the third thematic report, *The Transposition of the Work-Life Balance Directive in EU Member States: A long way ahead*. The fourth thematic report, *Promotion of gender balance in political decision-making*, was written by Biljana Kotevska from Queen's University Belfast. In addition to these publications, the network publishes flash reports on the most important developments in legislation, case law and policy at the national level in the countries covered by the network on a continuous basis. As always, please check the network's website – www.equalitylaw.eu – for the full text of all reports and the various contributions to the legal seminar.

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The introduction of rights regarding menstrual health in Spain

Dolores Morondo Taramundi*

Introduction

The topic of menstruation has entered the debate on women's sexual and reproductive health (SRH) relatively recently. Despite its role in human reproduction, the fact that menstruation affects 1.8 billion people around the world[1] and its impact on the life of women, girls and people who menstruate, there is a broad lack of awareness, information and public discussion about the issue. For example, a 2017 Council of Europe report on *Women's sexual and reproductive health and rights in Europe* mentions menstruation only twice in 78 pages.[2]

Women's sexual and reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education, and last but not least, the right to equality and the prohibition of discrimination.

The International Conference on Population and Development (ICPD) in Cairo (1994) and the IV World Conference on Women in Beijing (1995) developed the concept of SRH in terms of rights. The ICPD introduced a definition of reproductive health as:

> 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so (...). It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.'[3]

The Beijing Declaration established that:

> 'the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.'[4]

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1 UNICEF figures in *Menstrual hygiene: Gender inequality, cultural taboos and poverty can cause menstrual health needs to go unmet*, available at: https://www.unicef.org/wash/menstrual-hygiene.

2 Council of Europe, *Women's sexual and reproductive health and rights in Europe*, December 2017, available at: https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead.

3 International Conference on Population and Development (1994), Programme of Action, paragraph 7.2, available at: https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf.

4 Fourth World Conference on Women (1995), Beijing Declaration and Platform for Action, paragraph 96, available at: https://archive.unescwa.org/sites/www.unescwa.org/files/u1281/bdpfa_e.pdf.

The Guttmacher-*Lancet* Commission produced a joint definition of SRH as a 'state of physical, emotional, mental, and social well-being in relation to all aspects of sexuality and reproduction, not merely the absence of disease, dysfunction, or infirmity'.[5] The Commission reaffirmed the conclusion of the Beijing Declaration that the achievement of sexual and reproductive health relies on the realisation of sexual and reproductive rights, and it includes therein the rights to bodily integrity and personal autonomy; to define one's own sexuality and gender identity; to decide whether, when and with whom to be sexually active, to marry, and to have children; and to have the information, resources, support, and self-esteem necessary to fulfil those rights.

However, menstruation did not have a place in those documents or in the policy field that they produced. The list of SRH topics on the World Health Organization (WHO) website, for example, does not include menstrual health, and most sexual and reproductive health rights (SRHR) programmes supported by global funders and organisations do not address menstrual health.[6] The standard of protection for SRHR that has developed worldwide – albeit with enormous differences on the ground – is mostly concerned with maternal health, contraception and family planning, abortion, and sexually transmitted infections.

Menstruation, on the other hand, has been an important focus for international agencies such as the United Nations Population Fund and UNICEF. Under the label of 'menstrual hygiene', menstruation as a policy topic has been associated with WASH, the acronym that development cooperation organisations use for 'water, sanitation and hygiene' in developing countries, and which comprises issues such as access to clean water; to safe and clean toilet facilities; and to menstrual hygiene products. Cooperation programmes by these agencies include training and education to battle the stigma, shame and discrimination attached to menstruation in many societies.

Although it is acknowledged that menstruation, in combination with other menstrual-related challenges such as pain, stigma and social restrictions, can have profound and detrimental impacts on health, education, economic opportunities, social engagement and overall wellbeing.[7] The lack of visibility of menstruation in public debate and political agendas has led to a paucity of provisions and measures that would deal with those impacts. In Europe, the stigma associated with menstruation does not translate in social practices as restrictive as those experienced in other parts of the world;[8] nonetheless, it has been treated as a social taboo, relegated to the private and intimate dimension of women's and girls' lives, and frequently associated with feelings of shame or disgust. Access to menstruation management products in Europe has not raised concerns about (public) hygiene, and decisions on these products have been left largely to the initiative of private firms.

Menstrual activism[9] has brought the debate on the menstruation to the fore, contesting its association with 'hygiene'; highlighting its impact in the enjoyment of both rights and opportunities; and shifting its policy framework to the wider debate on SRH and related rights.

In Spain, the debate around menstruation has, for a long time, been limited to unsuccessful claims to cut the amount of VAT on menstrual management products. However, in February 2023, the Spanish

5 Starrs, A.M; Eze, A. et al., 'Accelerate progress – sexual and reproductive health and rights for all: report of the Guttmacher-*Lancet* Commission', *The Lancet* 391, 2018, pp. 2642-2692, June 2018, doi: 10.1016/S0140-6736(18)30293-9.

6 Geertz A, Iyer L., Kasen P., Mazzola, F. and Peterson, K. (2016), *An opportunity to address menstrual health and gender equity*, available at: https://www.fsg.org/publications/opportunity-address-menstrual-health-and-gender-equity.

7 Sommer, M., Hirsch, J.S., Nathanson, C., Parker, R.G., 'Comfortably, Safely, and Without Shame: Defining Menstrual Hygiene Management as a Public Health Issue', *American Journal of Public Health* 105(7), 2015, pp. 1302-1311, doi:10.2105/AJPH.2014.302525.

8 The UN Population Fund has collected extended myths and taboos about menstruation that affect the status of women, as well as ways in which women's and girls' human rights are affected in the section 'Menstruation and Human Rights – Frequently Asked Questions' of its webpage: https://www.unfpa.org/menstruationfaq.

9 Bobel, Ch., Fahs, B., 'From Bloodless Respectability to Radical Menstrual Embodiment: Shifting Menstrual Politics from Private to Public', *Signs: Journal of Women in Culture and Society*, 45(4), 2020, pp. 955-983; Crawford, B., Johnson, M., Karin, M., Strausfeld, L. and Waldman, E.G., 'The ground on which we all stand: A conversation about menstrual equity law and activism', *Michigan Journal of Gender & Law* 26, (2019), pp. 341-388.

Parliament adopted a law, strenuously promoted by the Ministry of Equality, that introduced new rights and guidelines for action by public administrations regarding menstruation, including them in the legislation on sexual and reproductive rights, with an explicit basis in the principle of equality and non-discrimination. Among the more controversial of the measures introduced by this law is a new paid leave for workers suffering from painful menstruation.

This article examines the introduction of menstruation within the framework of sexual and reproductive rights in Spain, as an issue affecting both specific rights (especially health, education and working conditions) and equality between women and men (Section I). Next, the specific policy of work leave for painful menstruation will be assessed in the context of the new Spanish legislation, and by comparison with different experiences regarding menstrual leave policies in other countries (Section II). Finally, some of the arguments that have come into play against more extensive measures will be presented (Section III). The contribution ends with some conclusions.

I Menstrual health in the new Spanish legislation as an equality issue

In February 2023, Spain adopted Organic Law 1/2023, reforming the law that regulates the voluntary termination of pregnancy and sexual and reproductive rights.[10] The new Law made some important reforms to Organic Law 2/2010 on sexual and reproductive health,[11] including new provisions aimed at guaranteeing the right to menstrual health as part of sexual and reproductive rights.[12]

Until the adoption of this Law, menstruation did not appear in the Spanish legislation on sexual and reproductive rights, which focused mainly on the regulation of the voluntary interruption of pregnancy, with brief references to contraceptive methods and the fight against sexually transmitted infections; access to sexual and reproductive health services; and the right to sexual and affective education.[13]

The 2023 reform addresses the protection and guarantee of rights regarding sexual and reproductive rights in an integral manner and provides for the adoption of a set of actions and measures in both the health and educational fields. It adopts the WHO definitions of SRH as 'integral states of well-being' and, along the same lines, it includes a definition of 'health during menstruation' in Article 2.4 as 'an integral state of physical, mental and social wellbeing, and not merely the absence of disease or infirmity, in relation to the menstrual cycle'.

Beyond the changes in social culture that can be traced in the evolution of the advertising of menstrual management products,[14] menstruation and related problems have not had a place in public debate in

10 Organic Law 1/2023, modifying Organic Law 2/2010 on sexual and reproductive health and voluntary termination of pregnancy (*Ley Orgánica por la que se modifica la Ley Orgánica 2/2010 de salud sexual y reproductiva y de la interrupción voluntaria del embarazo*), 28 February 2023, https://www.boe.es/buscar/act.php?id=BOE-A-2023-5364.

11 Organic Law 2/2010 on sexual and reproductive health and voluntary termination of pregnancy *(Ley Orgánica 2/2010 de salud sexual y reproductive y de la interrupción voluntaria del embarazo*), 3 March 2010, https://www.boe.es/buscar/act.php?id=BOE-A-2010-3514.

12 For a wider overview of the scope of the reform, especially regarding the right to abortion, see Morondo Taramundi, D. (2023), *Introduction of new rights on sexual and reproductive health*, EELN Flash Report, available at: https://www.equalitylaw.eu/downloads/5837-introduction-of-new-rights-on-sexual-and-reproductive-health.

13 On all these issues, Organic Law 2/2010 established general principles of action that had to be subsequently developed for their guarantee and implementation. For example, access to sexual and reproductive services depends fundamentally on their inclusion in the basic portfolio of health services of the National Health System, which has caused single women or lesbian couples to have their rights de facto denied under more conservative administrations. See: 'The Government retrieves assisted reproduction for lesbian and single women and includes trans people' (*El Gobierno recupera la reproducción asistida par mujeres lesbianas y sin pareja e incluye a las personas trans*), *El Diario*, 5 November 2021, available at: https://www.eldiario.es/sociedad/gobierno-recupera-reproduccion-asistida-mujeres-lesbianas-pareja-e-incluye-personas-trans_1_8460673.html. Likewise, the right to sexual and affective education depends for its implementation on the legislation on education (which sets the curricular content) and is, even today, a subject of bitter controversy. Lameiras Fernández, M. (2022), 'The (lack of) sexual education in Spain' (*La [falta de] educación sexual en España*), *The Conversation*, 26 April 2022, available at: https://theconversation.com/la-falta-de-educacion-sexual-en-espana-171862.

14 Bell, J., 'What advertising teaches us about periods', *Clue Encyclopedia*, 12 September 2017, https://helloclue.com/articles/culture/what-advertising-teaches-us-about-periods.

Spain. The only appearance of menstruation in parliamentary debate before the 2023 reform involved a non-discrimination claim regarding the so-called 'pink tax' of menstrual management products, which are taxed at the basic VAT rate of 10 % instead of the reduced rate (4 %) that applies to basic necessities. This claim – despite its almost insignificant impact on state revenue – has been constantly rejected by successive Ministries of Finance and, although it was originally included in the draft Organic Law 1/2023, the reduction was, in the final instance, not achieved on this occasion either.

The 2023 reform has, nevertheless, effectively changed the framework of the discussion on menstruation. It has, first of all, included menstrual health in the regulatory scope of SRH and its related rights. Secondly, it must be noted that the reform has subjected the entire regulatory device of Organic Law 2/2010 on sexual and reproductive health to a robust anti-discrimination principle. Thirdly, a change in the framework has been achieved through the content on, and references to, menstrual health in the Law.

The report on the Law presented to the Parliament already situated the reform in the framework of the international regulation of women's human rights, specifically the guidelines of the Office of the United Nations High Commissioner for Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as well as the European Parliament Resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the Union. Consequently, during the presentation of the law to Parliament, emphasis was placed on the various reports monitoring Spain's international obligations that urged the Government to improve the protection of women's sexual and reproductive rights or at least some specific aspects.[15]

It is true that this international framework does not pay much attention to menstrual health; to the problems that inequality and poverty in relation to menstruation pose for the enjoyment of the human rights of women and girls; or to issues regarding the prohibition of discrimination. However, to frame SRH within the international human rights framework, specifically in relation to sexual equality and women's rights, and to include the right to menstrual health in that same legislation, allows this issue to be placed squarely in the field of equality and non-discrimination, and of women's fundamental rights.

Following the 2023 reform, Article 3 of the Law on sexual and reproductive rights widens this perspective on the guarantee of fundamental rights, gender and non-discrimination. The anti-discrimination clause in Article 3 follows from the standard set up by the recent horizontal Anti-discrimination Law of July 2022,[16] and it therefore includes the grounds of sex, gender, racial or ethnic origin, nationality, religion or belief, health, age, social class, sexual orientation, gender identity, disability, marital status, immigration status and any other personal or social condition or circumstance. In addition, Article 3.2 explicitly establishes that all references to women related to reproductive rights will be applicable to transgender people with the capacity to gestate, which includes the provisions in relation to health during menstruation.

With such a broad scope for the anti-discrimination clause, Article 3 commands the public administration to pay special attention to intersectional and multiple discrimination, understood as special consideration for overlapping factors of discrimination such as racial or ethnic origin, nationality, disability, sexual orientation, gender identity, health, social class, the administrative situation of foreigners or other circumstances that imply disadvantageous positions. The recent Anti-discrimination Law of 2022 also introduced an explicit prohibition on multiple and intersectional discrimination in the Spanish legal system. However, Article 3 does not repeat this prohibition on multiple and intersectional discrimination, but rather establishes a positive obligation for public powers in the application of the law on sexual and reproductive rights so that special attention is paid to situations in which various discrimination factors overlap, creating groups of particularly disadvantaged people or circumstances that imply disadvantaged positions.

15 ESCR Committee (2015), *Concluding observations on the 6th periodic report of Spain, 2018; Human Rights Council, Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice: Mission to Spain*.

16 Comprehensive Law 15/2022 on equal treatment and non-discrimination (*Ley 15/2022 integral para la igualdad de trato y la no discriminación*), 12 July 2022, https://www.boe.es/buscar/act.php?id=BOE-A-2022-11589.

Finally, it is important to highlight that Article 3 sets out a gender perspective based on the understanding of stereotypes and gender relations as a guiding principle for action by public administrations. The gender perspective as a guiding principle was first introduced by Law 3/2007 on effective equality between women and men:[17] Article 4 introduced an obligation to integrate the principle of equality in the interpretation and application of legal norms, and Article 15 an obligation to mainstream the principle of equal treatment and equal opportunities between women and men in the activity of all the organs of the state. In the work of some jurists, such as the judge in the Higher Court of Justice of Galizia, Fernando Lousada, adjudication with a gender perspective is fundamentally associated with the identification and dismantling of stereotypes and stereotypical or predetermined gender relations.[18]

Specifically in the field of menstrual health, the inclusion of the gender perspective as a guiding principle, which is based on the identification and neutralisation of gender stereotypes and gendered relations, allows public action to be directed to the fight against the stigma associated with menstruation. To this end, a series of objectives and general guarantees of action are introduced to address health during menstruation. First, Article 5-*bis*, which establishes that health during menstruation is an inherent part of the right to sexual and reproductive health, contains a second paragraph which directs the Inter-territorial Council of the National Health System to set minimum standards of health care in menstruation health, 'promoting the elimination of discrimination based on menstrual stereotypes'.[19] Secondly, public administrations, in the deployment of health, education and training and social policies, are required to guarantee the effective generation and dissemination of quality information on menstrual education and menstrual management products (Article 5.1.j). Specifically, educational administrations are directed by Article 10-*ter* to guarantee that both formal and informal education address menstrual health from a gender, intersectional and human rights-based perspective. It emphasises that education should pay 'special attention to the elimination of myths, prejudices and gender stereotypes which create menstrual stigma'. Article 10-*quarter* pursues a similar objective for public programmes for adult non-formal education, making specific reference to 'age groups in which climacteric and menopause processes occur'.

Finally, the reform places menstrual health in direct relation to inequality and women's autonomy. Completely detached from vocabulary relating to hygiene, Article 2.4 defines 'menstrual management' as 'the way in which women decide to approach their menstrual cycle, and can use various menstrual products for such management, such as pads, tampons, menstrual cups and similar items'. It is this ability, or the lack thereof, to decide for oneself how to manage one's own menstruation that is related to menstrual poverty and inequality. Period poverty or menstrual inequality – when women, girls or other people who menstruate miss school, do not go to work or do not participate in social activities because they cannot afford menstrual management products[20] – has, for a long time, been considered a problem confined to developing countries. However, a report from New Zealand established that nearly 95 000 girls aged between nine and 18 stayed at home during their periods because they could not afford pads, leading the New Zealand Government to provide free sanitary products in schools across the country.[21] In Spain, a pioneering study showed, through a survey of 22 000 women and menstruating persons, that menstrual poverty affected 22 % of respondents and that almost 40 % had to buy cheaper products or use products beyond their normal duration to cut down costs. Period poverty was found to be more prevalent among socioeconomically vulnerable groups, including migrant persons in irregular

17 Organic Law 3/2007 on Effective Equality between Women and Men (*Ley Orgánica 3/2007 para la igualdad efectiva de mujeres y hombres*), 22 March 2007, http:www.boe.es/buscar/doc.php?id=BOE-A-2007-6115.

18 Lousada Arochena, J.F. (2020), *El enjuiciamiento de género* (*Gender Adjudication*), Dykinson, Madrid.

19 Even in European societies, there are persistent myths and stereotypes around menstruation that might affect women's daily life and opportunities, such as wrong ideas about things that women should not do while menstruating (bathing, strong physical exercise or having sexual relations) or stereotyped representations on menstruation – for example, associations with high emotional instability, mood swings and irrational responses.

20 Michel, J., Mettler, A., et al. 'Period poverty: why it should be everybody's business' *Journal of Global Health Reports* 6, 2022, doi:10.29392/001c.32436.

21 Regan, H., 'New Zealand to provide free sanitary products in schools to fight period poverty', *CNN*, 4 June 2020, https://edition.cnn.com/2020/06/04/asia/new-zealand-period-poverty-schools-intl-hnk/index.html.

situations.[22] Organic Law 1/2023 thus establishes the free distribution of menstrual management products in educational centres, in situations where it is necessary, and also in prison settings and social centres so that women in vulnerable situations can access them. The public authorities will also promote, in accordance with this Organic Law, the use of menstrual management products that are respectful of the environment and of women's health (Article 5-*quarter*).

II Menstrual leave and the right to work without pain

The most discussed element among the new provisions regarding menstrual health is the introduction of a specific regulation for painful menses, technically called dysmenorrhea.

Dysmenorrhea is the medical term for pain associated with menstruation. Pain experienced includes abdominal cramps, nausea, fatigue, feeling faint, headache, back pain, malaise, diarrhoea and migraines. In medical literature, a distinction is made between primary and secondary dysmenorrhea.[23] Primary dysmenorrhea refers to recurrent pain with no identifiable cause. Most medical publications consider it 'normal', associate it with younger women and assure that it improves with time or after giving birth. Secondary dysmenorrhea results from a medical condition or an infection of the reproductive organs. Medical conditions causing dysmenorrhea include: endometriosis, adenomyosis, fibroids, pelvic inflammatory disease, cervical stenosis, congenital conditions such as an irregularly shaped uterus and other conditions affecting the ovaries or fallopian tubes.

Data regarding the prevalence of dysmenorrhea is scarce, and the methodologies for data collection are contested.[24] It is estimated that up to 90 % of women and menstruating persons are affected, and that between 10 % and 40 % have regular painful periods.[25] Many doctors, women and even menstrual activists normalise menstrual pain: around 34 % of those contacted in a Spanish study thought that pain, even severe pain, was normal in menstruation, and did not consult a doctor or health professional on that account.[26] A 2019 study in the Netherlands stated that almost 14 % of participating women reported absenteeism during their menstrual periods.[27] Data from Spain indicated a 20 % rate of work absenteeism.[28] Most women and girls experiencing painful menstruation maintain their daily activities, self-medicating with anti-inflammatory drugs (such as ibuprofen). This has led to attempts to assess levels of 'presenteeism', i.e. going to work or school despite menstrual symptoms, and the related loss of productivity. The 2019 Netherlands survey found that women perceived themselves to be less productive, estimating that they completed one third of a normal day's work.[29]

Article 5-*ter* of Organic Law 1/2023 introduces a right to a special type of sick leave (*incapacidad temporal*) in relation to secondary dysmenorrhea. Both the Preamble to the Law and Article 5-*ter* declare

22 Medina-Perucha, L., López-Jiménez, T., et al., 'Menstrual inequity in Spain: A cross-sectional study', *European Journal of Public Health*, 2022, doi: 10.1093/eurpub/ckac129.307.

23 Jones, A.E., 'Managing the pain of primary and secondary dysmenorrhea', *Nursing Times* 100(10), 2004, pp. 40-43; Grandi, G., Ferrari, S., et al., 'Prevalence of menstrual pain in young women: what is dysmenorrhea?' *Journal of Pain Research* 5, 2012, pp. 169-174. doi: 10.2147/JPR.S30602.

24 King, S., 'Menstrual Leave: Good Intention, Poor Solution', in Hassard, J. and Torres, L.D. (eds.) (2021), *Aligning Perspectives in Gender Mainstreaming,* Springer, Cham, pp. 151-176. The author contests that the prevalence of menstrual pain is 'highly exaggerated' because studies fail to differentiate between mild, moderate and debilitating pain and because there is a confusion between the 'occurrence' and the 'prevalence' of menstrual experiences (p. 158).

25 Girls and young women tend to report a higher prevalence of painful menstruation; see: Grandi, G., Ferrari, S., et al., 'Prevalence of menstrual pain in young women: what is dysmenorrhea?', *Journal of Pain Research* 5, 2012, pp. 169-174. doi: 10.2147/JPR.S30602.

26 Medina-Perucha, L., López-Jiménez, T., et al., 'Menstrual inequity in Spain: A cross-sectional study', *European Journal of Public Health*, 2022, doi: 10.1093/eurpub/ckac129.307.

27 Schoep, M.E., Adang, E.M., et al., 'Productivity loss due to menstruation-related symptoms: a nationwide cross-sectional survey among 32 748 women', *BMJ Open* 9(6), 2018, doi: 10.1136/bmjopen-2018-026186.

28 Medina-Perucha, L., López-Jiménez, T., et al., 'Menstrual inequity in Spain: A cross-sectional study', *European Journal of Public Health*, 2022, doi: 10.1093/eurpub/ckac129.307.

29 Schoep, M.E., Adang, E.M., et al., 'Productivity loss due to menstruation-related symptoms: a nationwide cross-sectional survey among 32 748 women', *BMJ Open*, 9(6), 2018, doi: 10.1136/bmjopen-2018-026186.

that the objective of the new leave is to reconcile the right to health with employment, and to realise a 'right to work without pain'.[30] To establish the new leave, the Organic Law introduces a modification to the General Law on Social Security,[31] including a new paragraph in Article 169.1, which states that 'Special situations of temporary disability due to common contingencies shall be considered as those in which the women may find themselves in case of a secondary disabling menstruation (…).'

Article 2.6 of Organic Law 1/2023 defines 'secondary disabling menstruation' as the situation of disability (*incapacidad*) resulting from dysmenorrhea caused by a previously diagnosed pathology. This definition, therefore, greatly limits the potential scope of people covered by the menstrual leave, compared with other experiences, as it does not cover 'menstruation' in general and not even 'painful menstruation' as such, but only those that result from a pathology (thus excluding primary dysmenorrhea). Furthermore, it is required that the pathology is already diagnosed. It must be borne in mind that pain is so normalised in relation to menstruation, and self-medication is such an extensive practice, that in the case of some pathologies, such as endometriosis, it might take years before a diagnosis is established.

With this limitation in mind, the special sick leave for secondary dysmenorrhea consists of paid leave, the duration of which will be established case by case by a doctor. The leave for secondary dysmenorrhea improves protection for the worker in comparison with regular sick leave for common contingencies on three accounts.

In the first place, the leave is paid by Social Security, not by the employer, and it is paid from the first day.[32] Sick leaves for common contingencies (that is, not labour accidents or professional illness) distribute the cost of the leave in the following manner: from day 1 to day 3, the sick leave is unpaid (unless collective agreements or labour contract establish otherwise); from day 4 to day 15, it is paid by the employer; and from day 16 onwards, it is paid by Social Security. As most time off work for menstrual symptoms amounts to one or two days at a time, the result is that women and menstruating workers suffering from recurrent dysmenorrhea repeatedly incur the unpaid portion of the sick leave (or they go to work in pain).

Another specificity of the leave for secondary dysmenorrhea is that each process will be considered 'new without computing for the purposes of the maximum period of duration of the temporary disability situation, and its extension'.[33] With regular sick leave, when there is a new medical leave within the following 180 calendar days on the same grounds, it is considered a relapse of the same previous process, thus working towards the maximum period of duration of the temporary disability, which is established in 365 days; that can be extended in 180 days, to a total of 545 days.

Finally, the new leave for secondary dysmenorrhea does not require minimum periods of prior contribution.[34]

The regulation regarding the special leave for secondary dysmenorrhea entered into force on 1 June 2023.

30 Guamán, A., 'Menstruación y trabajo: el derecho a trabajar sin dolor' (Menstruation and work: the right to work without pain), *TalCual*, 3 June 2022, available at: https://talcualdigital.com/menstruacion-y-trabajo-el-derecho-a-trabajar-sin-dolor-por-adoracion-guaman/.

31 Royal Legislative Decree 8/2015 on the General Law of Social Security (recast) (*Real Decreto Legislativo 8/2015 por el que se aprueba el texto refundido de la Ley General de la Seguridad Social*), 30 October 2015, https://www.boe.es/buscar/act.php?id=BOE-A-2015-11724.

32 Article 173.1 of the General Law on Social Security.

33 Article 169.2 of the General Law on Social Security.

34 Article 172 a) of the General Law on Social Security.

Legislative provisions establishing menstrual leave exist in few other countries.[35] The rationale for, and content of, these leaves vary greatly. In some cases, they are the continuation of work leaves based on mistaken beliefs on the relationship between working during the menstruation and decreased fertility rates, or on similar measures to 'protect' weaker menstruating workers, normally working under harsh labour conditions. Japan introduced menstrual leave in 1947 for those workers who find it 'extremely difficult' to work during menstruation.[36] The law does not stipulate whether the leave is paid. Indonesia, which first introduced menstrual leave in 1948, gives a two-day leave to workers who feel pain during their menstrual period. Menstrual leave is excluded from the guarantee of full wages, leaving its implementation to be regulated by employment contracts, enterprise rules or collective negotiation.[37] In Taiwan, the Law of Gender Equality in Employment of 2002[38] established menstrual leave of one day per month for female employees having difficulties in performing their work. Initially, the menstrual leave counted as a day off for sick leave and was paid as sick leave. However, the provision was reformed in 2013, so that menstrual leave up to three days per year shall not be counted as days off for sick leave,[39] and in 2014, it was established that menstrual leave, as with sick leave, shall be paid half the regular wage.[40] In some other cases, the leave does not seem to require that there is any pain. South Korea has a one-day per month leave for female employees, without further indications.[41] In Vietnam, the leave consists of a 30-minute break in every day during the menstruation period (with no reference to pain). There is no indication regarding payment, unlike for the time off for childcare provided by the same provision, entitled 'Maternity protection'.[42] Finally, outside Asia, the Employment Code in Zambia establishes, under the section 'Minimum Employment Benefits', a right for female employees to one day's absence from work each month without having to produce a medical certificate or give a reason to the employer. The law refers to this leave as 'Mother's Day'.[43]

In the European Union, the Spanish menstruation leave is a pioneering measure, and the only similar legislative measures at national level are an unsuccessful law proposal introduced in the Italian Parliament in 2016[44] and the current proposal of February 2023.[45] The 2016 proposal, similar to the Spanish case, was not a 'menstruation leave' but a 'dysmenorrhea leave', as in fact it was available to 'women workers who suffer from dysmenorrhea, in a form that prevents them from carrying out ordinary daily work tasks'. The provision established paid leave of three days per month and required a medical certification that had to be renewed annually. The current proposal at the Italian Parliament, not yet tabled, establishes leave for students as well as for workers. The workers' leave has the same structure as the one in the 2016 proposal but is reduced from three to two days. The leave for students, which

35 Menstrual leaves also exist at sub-national level (for example, in several Chinese provinces such as Anhui, Shanxi and Hubei, or in local administrations in the Catalonian region of Spain), as well as in companies that have decided to establish this possibility without any legal obligation to do so. Baird, M., Hill, E., Colussi, S., 'Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labor Entitlement to Reinforce, Remedy, or Revolutionize Gender Equality at Work?', *Comparative Labor Law & Policy Journal* 42, 2021, pp. 187-225; Levitt, R.B., Barnack-Tavlaris, J.L., 'Addressing Menstruation in the Workplace: The Menstrual Leave Debate' in Bobel et al. (eds.) (2020), *The Palgrave Handbook of Critical Menstruation Studies*, Palgrave-Macmillan, Singapore, pp. 561-575. doi: 10.1007/978-981-15-0614-7_43.

36 Article 68 of the Act No. 49 Labour Standards Law, of 7 April 1947, translation available at: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/27776/62934/F596394466/JPN27776 Eng.pdf.

37 Article 81 of Law 13/2003 Concerning Manpower, of 25 March 2003, unofficial English translation available at: https://www.ilo.org/dyn/natlex/docs/SERIAL/64764/56412/F811830039/IDN64764 New.pdf.

38 Article 14 of the Gender Equality in Employment Act, of 16 January 2022, available at: https://laws.mol.gov.tw/Eng/FLAWDAT0701.aspx?id=FL015149&fldate=20020116.

39 Article 14 of the Act of Gender Equality in Employment, of 11 December 2013, available at: https://laws.mol.gov.tw/Eng/FLAWDAT0701.aspx?id=FL015149&fldate=20131211.

40 Article 14 of the Act of Gender Equality in Employment, of 11 December 2014, available at: https://laws.mol.gov.tw/Eng/FLAWDAT0701.aspx?id=FL015149&fldate=20140618.

41 Article 73 (Monthly Menstrual Leave) of the Labour Standards Act, of 13 March 1997, available at: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/46401/74081/F-1959592377/KOR46401.pdf.

42 Article 137.4 of the Labour Code (Act No. 45/2019/QH14), of 20 November 2019, unofficial English translation available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/110469/137416/F-1864718830/VNM110469%20Eng.pdf.

43 Article 47 of the Employment Code Act (Act No. 3/2019), of 11 April 2019, available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/108714/134550/F144869431/ZMB108714.pdf.

44 The Law proposal by initiative of Parliament members Mura, Sbrollini, Iacono and Rubinato, all of them in the Democratic Party and Italia Viva (formed from a breakaway faction of the Democratic Party), was presented on 27 April 2016, https://www.senato.it/leg/17/BGT/Schede/Ddliter/46803.htm.

45 See: http://documenti.camera.it/leg19/pdl/pdf/leg.19.pdl.camera.898.19PDL0024840.pdf.

is also subject to medical certification, consists of two days of absence that would not count for the purposes of calculating the attendance obligation necessary for sitting the exams.[46] The Italian proposed leaves, in contrast to the Spanish leave, are not limited to secondary dysmenorrhea and do not require the previous diagnosis of a health condition.

III Discrimination controversies around the introduction of a specific menstrual leave

The introduction of the leave for secondary dysmenorrhea in Spain has raised some criticism, similar to criticism aimed at other menstrual leaves.

On the one hand, some of the criticism of the Law is due to problems that have been left unresolved. As has been noted, the Spanish menstrual leave covers only secondary dysmenorrhea resulting from a previously diagnosed health condition, which excludes both primary dysmenorrhea (which is the most frequent) as well as dysmenorrhea resulting from conditions that are being investigated or assessed but for which a diagnosis has not yet been established. The reform has not considered either the possibility of covering conditions affecting menstruation at the moment of menopause, which might also have an impact on the ability of working women and people who menstruate, or stop menstruating, to conduct their daily activities. Some have criticised the one-size-fits-all approach to the measure, with the introduction of a single mechanism, i.e., the leave, and have argued that more ground could have been covered if other measures such as working time adaptation or possibilities for remote working had been made available.[47]

However, most of the criticism is directed not at the limited coverage of the leave, but at the (unintended but) potentially negative effect that the existence of menstrual leave might have on sex equality and on the situation and opportunities of women in the labour market.

With regard to this kind of criticism, it must be noted that it is a recurring argument whenever labour rights or anti-discrimination rights are introduced, but there is no scientific evidence of its correctness. In the Spanish case, the scope of the leave is too restricted to think that it could be understood as a leave available to women or people who menstruate in general.[48]

The experience of some Asian countries, where menstrual leaves are seldom used, has been presented as evidence of their counterproductive effect.[49] However, those experiences show that women might not take menstrual leave for very different reasons: sometimes due to the stigma associated with menstruation and the embarrassment of having to discuss menstrual pain with (often male) superiors, or because the leaves are not paid, or for fear that it will be considered a privilege, especially when the employer puts the workload of the absentee on the shoulders of colleagues instead of having a replacement, which could lead to resentment; women might also think that taking menstrual leave might damage their professional image, making them look 'weak' and thus ineffective or not suited to leadership positions or promotion.

46 There is a third article in the proposal regarding the inclusion of hormonal contraceptives in the basic level of healthcare and their free distribution in pharmacies under medical prescription. Hormonal contraceptives are frequently prescribed to mitigate menstrual pain, especially in the case of teenagers and young women.

47 Widiss, D., 'Time off work for menstruation: A good idea?', *Legal Studies Research Paper Series*, Maurer School of Law, 505, 2023, available at https://ssrn.com/abstract=4457653.

48 Although there has, especially in conservative media, been a tendency to speak of it as 'menstrual leave' without remarking on its limited scope, and agitating on the danger of women in general taking this leave fraudulently. A similar misleading representation of the Italian proposal in 2016 was denounced by the measure's proponents; see: https://www.corrieredelleconomia.it/2017/02/13/congedo-dismenorrea-la-proposta-alla-camera-dei-deputati-mura-facciamo-chiarezza/.

49 King, S., 'Menstrual Leave: Good Intention, Poor Solution', in Hassard, J. and Torres, L.D. (eds.) (2021), *Aligning Perspectives in Gender Mainstreaming*, Springer, Cham, pp. 151-176.

What those findings point out clearly is that women (and workers in general) need to feel protected to use their rights, and that a general environment of precariousness in labour conditions, lack of guarantees against retaliation and low levels of legal awareness lead workers not to use their rights. It is clear that rules do not stand on their own outside a legal culture or a culture in general, and the introduction of menstrual leaves need to consider the different dimensions of education and social change in relation to menstruation and women's rights in the labour market.

However, the leave for secondary dysmenorrhea introduced by Organic Law 1/2023 is not an isolated provision that has not taken into account the conditions for enjoying the right. The scope of the leave is targeted at a very specific group of workers, who were most likely already taking sick days to deal with their symptoms, or working in debilitating pain with an associated toll on their productivity.[50] In addition, it is the Social Security system that assumes the financial cost of the leave. Menstruation in Spain is not yet freely discussed, and it is still associated with feelings of embarrassment and stigma. In fact, only 20 % of the women who took time off work to deal with dysmenorrhea in the aforementioned Spanish study disclosed the reason to their superiors.[51] However, in Spain, workers are not obliged to reveal the motivation for taking sick leave. The employer receives a notification from the doctor directly, with an initial prognosis of the duration of the leave; it can be subsequently extended by the doctor, and the employer notified of the extension. Workers do not need to discuss menstrual pain with their superiors or disclose any information regarding their health condition that could raise privacy concerns. Arguments which maintain that women suffering from a cyclical persistent condition could use regular sick leave or take 'their ibuprofen'[52] do not take into account how unfit regular sick leave is under the circumstances: the special sick leave introduced by Organic Law 1/2023 aims specifically to address the disadvantage experienced by these workers, who would otherwise incur month after month the unpaid part of the regular sick leave, and accumulate relapse periods towards the maximum sick leave established by the law. By giving a specific answer to these workers, the Law brings to the fore a discussion on the problem of working in menstrual pain, which has become silently normalised.

A final important piece of the framework for the painful menstruation leave is constituted by the larger corpus of anti-discrimination law, the content of which was recently enhanced in Spain to include 'illness and health condition'.[53] Therefore, under the Spanish legislation, actions taken against a worker who needs or has used the 'menstrual leave' would fall into the category of direct sex discrimination and/or discrimination on the ground of illness or health condition (given the fact that it is recognised only for secondary dysmenorrhea). It is, in fact, an intersectional case of discrimination. The recent horizontal Anti-discrimination Law 15/2022 has also introduced an explicit prohibition on multiple and intersectional discrimination. Legal acts (such as dismissal) which constitute or produce discrimination against workers suffering from secondary dysmenorrhea are null, according to Article 26 of Law 15/2022, and the employer is obliged to make reparation by providing compensation and returning the victim to the situation that existed prior to the discriminatory incident, where possible. Once discrimination is proven, the existence of moral damage will be presumed.

50 A study by the Spanish Ministry of Health on the prevalence of endometriosis and the cost it incurs for the National Health System found that pain is related to significant losses in functional capacity and work productivity, both in terms of absenteeism and presenteeism. Sarría Santamera, A., Asúnsolo del Braco, A. (2020), 'Estudio para conocer la prevalencia, morbilidad atendida y carga que supone la endometriosis para el Sistema Nacional de Salud' (Study of the prevalence, comorbidities and burden that endometriosis represents for the National Health System), available at: https://www.sanidad.gob.es/organizacion/sns/planCalidadSNS/pdf/equidad/Estudio_Endiometrosis._Accesible.pdf.

51 Medina-Perucha, L., López-Jiménez, T., et al., 'Menstrual inequity in Spain: A cross-sectional study', *European Journal of Public Health*, 2022, doi: 10.1093/eurpub/ckac129.307.

52 King, S., 'Menstrual Leave: Good Intention, Poor Solution', in Hassard, J. and Torres, L.D. (eds.) (2021), *Aligning Perspectives in Gender Mainstreaming*, Springer, Cham, pp. 151-176.

53 Comprehensive Law 15/2022 on equal treatment and non-discrimination (*Ley 15/2022 integral para la igualdad de trato y la no discriminación*), 12 July 2022, https://www.boe.es/buscar/act.php?id=BOE-A-2022-11589.

Conclusion

It is too soon to make any assessment on the impact that the new leave might have either on the wellbeing at work of women and persons who menstruate, or on the stigmatisation of women as 'costly and inefficient' workers. However, the new Spanish legislation has so far managed to introduce menstruation in the legal and policy framework of sexual and reproductive health, and at the same time, has subjected the whole legislation on sexual and reproductive rights – including menstrual health – to a strong anti-discrimination principle. Both issues have a positive impact on sex equality. On the one hand, addressing menstrual health within the framework of sexual and reproductive rights brings the discussion on menstruation to public attention in a framework of protection of rights, with an integral approach that links rights and policies over a number of areas. On the other hand, it is fundamental for a topic as stigmatised as menstruation that it has been subjected to a strong antidiscrimination principle based on the gender perspective, which is aimed at the identification and neutralisation of stereotypes and gendered relations. In line with recent changes in Spanish anti-discrimination law, i.e., the horizontal anti-discrimination law and the law on gender identity and LGBTQI rights, the provisions of the Law apply to women, girls and persons who menstruate, and policies for the promotion of menstrual health have a positive obligation towards intersectionality. The more controversial measure, the work leave for painful menstruation, is a special form of sick leave (*incapacidad temporal*), which applies to a very restricted group of workers suffering painful menstruation due to a previously diagnosed health condition. For these cases, the new leave modifies the regulation of regular sick leave, preventing these workers from repeatedly incurring the unpaid portion of the sick leave and exempting these leaves from the regular calculation of maximum sick leave time. The introduction of this leave seeks to realise a right to 'work without pain' and to make the right to work compatible with the right to health; it also gives visibility to a stigmatised problem that has been silenced and pushed to the individual sphere of self-medication and endurance. Its main limitation in relation to this aim is its restricted personal scope, which excludes workers with primary dysmenorrhea and workers with secondary dysmenorrhea whose condition has not yet been diagnosed.

Comparators and comparisons in EU gender equality law

Panos Kapotas*

1 Introduction

The use of comparators and comparisons is an endemic feature of the doctrinal architecture of EU anti-discrimination law. Identifying an individual 'in a comparable situation' to a claimant against whom to measure (alleged less favourable) treatment is part and parcel of the conceptualisation of direct discrimination. But even in the context of indirect discrimination, where no individual comparator as such is required, a comparison is still necessary. The impact that an apparently neutral provision or practice has on a group defined by a shared protected characteristic can only be (identified as) disproportionately disadvantageous, if measured against the impact of that same provision or practice on those who do not belong to that group. Over the years, the CJEU has developed and expanded the notion of the comparator, often using this as an opportunity to delineate the conceptual boundaries between direct and indirect discrimination.

It is an understatement to say that pinpointing the correct comparator or making the correct comparisons is a judicial task fraught with difficulties. It is equally clear that these interpretative difficulties arise in particular when it comes to gender discrimination claims. The fragmentation of secondary EU equality law, with protected characteristics scattered across different Equality Directives, as well as the interpretative cautiousness with which the Court often – but not always – approaches 'hard' questions, make for a rather complex picture. The Court has often driven legal developments towards enhanced protection from gender discrimination, with progressive judgments that were instrumental in reshaping national laws and practices. More recently, however, a growing tension between maintaining doctrinal consistency and achieving the aim of substantive gender equality has become apparent, particularly in cases involving intersectional discrimination and religious dress in the workplace. Much of this tension arises from impossible or inaccurate comparisons that fail to capture the multifaceted and nuanced reality of gender discrimination.

This article aims to provide an overview of the state of play on the use of comparators and comparisons in EU gender equality law, as reflected in CJEU case law. After this introduction, Section 2 will offer a detailed examination of the modus operandi of comparators in direct gender discrimination claims, mapping the interpretative evolution over the years and exploring what lies outside the conceptual boundaries of direct discrimination, namely a priori non-comparable situations and positive action. Section 3 will move on to briefly examine how comparisons play out in the context of indirect gender discrimination claims, considering specifically their role in establishing the definitional components of indirect discrimination, that is the 'apparent neutrality' of the provision and the 'particular disadvantage' it generates for one gender. Section 4 will focus on the 'hard' questions that have emerged in recent case law and offer some thoughts on how the difficulty (and, at times, impossibility) of identifying comparators in gender identity discrimination and intersectional discrimination can be managed. The final section provides some brief conclusions.

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2 Comparators in direct discrimination: from ensuring equal pay to eliminating gender stereotypes

The conceptualisation of direct (gender) discrimination as an inherently comparative concept has its historical roots in the famous Aristotelian proposition that equality means 'treating likes alike'.[1] Treating persons in similar situations the same irrespective of their personal characteristics is considered to be the essence of formal equality,[2] so much so that the second part of the maxim – treating different situations differently – is often overlooked.[3]

Before delving into the details of the EU legal landscape, it is important to make a terminological clarification. The interchangeable use of 'sex' and 'gender' in this article is reflective of the absence of a clear doctrinal demarcation in EU gender equality law between the (narrower, biological) concept of sex and the (broader, societal) concept of gender.[4] Since the late 1990s the CJEU[5] has been moving in the direction of recognising some protection from gender discrimination, including in cases of gender identity and sexual orientation.[6] Although the text of the EU Equality Directives refers to sex rather than gender, the CJEU has confirmed that 'sex discrimination cannot be confined simply to discrimination based on the fact that a person is of one or other sex'.[7] This interpretative move from sex to gender was a way of opening up the personal scope of EU gender equality law,[8] but was also part of a broader shift in CJEU case law towards endorsing a more substantive conception of equality.[9] The interpretative shift has not gone so far as to liberate the concept of direct discrimination from the constraints of formalism,[10] some of which are an integral part of the architecture of EU gender equality law. Still, one cannot deny the symbolism of substituting the term sex with the term gender even in cases unconnected to gender identity or reassignment.[11]

2.1 The doctrinal landscape: protecting persons in comparable situations

Direct sex (or gender) discrimination occurs when 'one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'.[12] According to this

1 Aristotle (1975), *Nicomachean ethics*, Athens, Papyrus, V.3. 1131a10–b15; Aristotle (1975), *Politics* (Athens, Papyrus, III.9.1280 a8–15, III. 12. 1282b18–23.
2 See Kapotas, P. (2014), 'The EU accession to the ECHR as an opportunity for conceptual clarity in European equality law: The new European paradigm of "full equality"' in Kosta, V., Skoutaris, N. and Tzevelekos, V. (eds.), *The EU accession to the ECHR*, Hart, *Modern Studies in European Law*, 291-308, at 293.
3 Fortunately, not by the CJEU. See Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker*, 14 February 1995, ECLI:EU:C:1995:31, [30].
4 Böök, B., Burri, S., Senden, L. and Timmer, A. (2023), *A comparative analysis of gender equality law in Europe*, European network of legal experts in gender equality and non-discrimination, January 2023, pp. 12-14.
5 See C-13/94, *P. v S. and Cornwall City Council*, 30 April 1996; C-117/01, *K.B. v National Health Service Pensions Agency, Secretary of State for Health*, 7 January 2004; C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, 27 April 2006.
6 Bell, M. (2012) 'Gender identity and sexual orientation: alternative pathways in EU equality law', *The American Journal of Comparative Law*, 2012, 60(1), 127-146.
7 Case C-13/94, *P. v S. and Cornwall City Council*, 30 April 1996, [20].
8 For a more detailed discussion of the concepts of sex and gender in EU gender equality law and the CJEU case see also Lembke, U. (2016), 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European equality law review* No. 2/2016, pp. 46-55; available at: https://www.equalitylaw.eu/downloads/3938-european-equality-law-review-2-2016.
9 This shift is also evident in CJEU case law on positive action. See Kapotas, P. (2014), 'A tale of two cities: positive action as "full equality" in Luxembourg and Strasbourg' in Dzehtsiarou K., Konstadinides T., Lock T. and O'Meara N. (eds.) *Human rights law in Europe: The influence, overlaps and contradictions of the EU and the ECHR*, 2014, London, Routledge, *Research in Human Rights Law*, 188-214.
10 See contra De Vos, M. (2020) 'The European Court of Justice and the march towards substantive equality in European Union antidiscrimination law', *International Journal of Discrimination and the Law* 2020, Vol. 20(1) 62-87.
11 See, for instance, Joined Cases C-804/18 and C-341/19 *IX and MH Müller Handels GmbH v WABE eV and MJ*, 15 July 2021, ECLI:EU:C:2021:594, [56] and [58]. The Court appears to be adopting the term gender as standard even outside the context of its gender reassignment case law.
12 Article 2(a), Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Article 2(a), 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.

standardised definition across EU gender equality instruments, the comparator is one of the three doctrinal components of direct sex (or gender) discrimination, the other two being the (less favourable) treatment and the causal link between treatment and detriment.[13] In fact, in the mechanics of direct discrimination identifying the correct comparator is arguably the most complex part of the legal equation.[14]

In a nutshell, the comparator is a person of a different sex[15] who is in a comparable situation to the claimant in the present ['is'],[16] the past ['has been'][17] or even in a hypothetical context ['would be'].[18] Direct discrimination will, therefore, arise 'through the application of different rules to comparable situations or the application of the same rule to different situations'.[19] Arguably, the archetypal scenario of comparison arises when a woman (or a man) is paid less than a male (or female respectively) counterpart performing the same job for the same employer in a single establishment. This was the comparison at the heart of the Defrenne litigation,[20] with a female applicant being paid less than her 'male colleagues who were doing the same work as "cabin stewards"'.[21]

With *Defrenne* begins a long line of equal pay judgments through which the CJEU developed and crystalised the conceptual and doctrinal position in EU gender equality law with regard to the comparator and its modus operandi. An important question that arose soon after *Defrenne* was whether the pool of potential comparators for equal work or work of equal value claims can extend beyond a single employer. Although the Court initially found that the comparator does not need to work for the same employer as the claimant,[22] this position was later reversed with the establishment of the single source of employment test.[23] This narrower interpretation of the scope of Article 157 TFEU is premised on a pragmatic reasoning: '[W]here the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment'.[24] According to the Court, a cross-employer comparison of pay or working conditions is outside the scope of Article 157 TFEU,[25] which effectively means that the gender equality obligation of employers is restricted to – literally – 'minding their own business'.

Determining work of equal value has proved even more fertile ground for fine-tuning the role of comparators in direct gender discrimination. In principle, the rules for assessing whether workers perform equal work or work of equal value are the same. National courts are expected to carry out the comparison[26] and in doing so they are required to consider 'a range of factors including the nature of the work and training and working conditions'.[27] In practice, the evaluation of equal value claims often requires a complicated

13 This is not necessarily the case at the national level, as many EU Member States do not require a comparator to find direct gender discrimination. See Böök, B., Burri, S., Senden, L. and Timmer, A. (2023), *A comparative analysis of gender equality law in Europe*, European network of legal experts in gender equality and non-discrimination, 34-35.

14 On the significance of comparators and comparisons especially in reversing the burden of proof see Halmos, S. (2022), '"It's all relative?" Role of comparison in terms of equality in employment under EU law' in Carby-Hall, J. Góral, Z. and Tyc, A. (eds), *Discrimination and employment law: International legal perspectives*, Routledge, 17-22.

15 On how the comparator plays out for trans or non-binary persons see Lembke, U. (2016), 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European equality law review* No. 2/2016, pp. 46-55; available at: https://www.equalitylaw.eu/downloads/3938-european-equality-law-review-2-2016. See also infra Section 4.1.

16 Case C-43/75 *Defrenne v Sabena* [Defrenne II], 8 April 1976, ECLI:EU:C:1976:56.

17 Case 129/79 *Macarthys Ltd v Wendy Smith*, 27 March 1980, ECLI:EU:C:1980:103.

18 Case C-136/95 *Thibault*, 30 April 1998, ECLI:EU:C:1998:178.

19 Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker*, 14 February 1995, ECLI:EU:C:1995:31, [30].

20 For a detailed discussion of the Defrenne litigation and its impact on the development of equal pay law see Carlson, L. (2007), *Searching for equality: Sex discrimination, parental leave and the Swedish model with comparisons to EU, UK and US law*, IUSTUS FÖRLAG, 58 et seq.

21 Case C-43/75 *Defrenne v Sabena* [Defrenne II], 8 April 1976, ECLI:EU:C:1976:56, [2].

22 Case C-129/79 *Macarthys Ltd. v Wendy Smith*, 27 March 1980, ECLI:EU:C:1980:103, [15].

23 Case C-320/00 *Lawrence*, 17 September 2002, ECLI:EU:C:2002:498.

24 Case C-320/00 *Lawrence*, 17 September 2002, ECLI:EU:C:2002:498 [18].

25 Case C-256/01 *Allonby*, 13 January 2004, ECLI:EU:C:2004:18, [46].

26 Case C-381/99 *Brunnhofer*, 26 June 2001, ECLI:EU:C:2001:358, [49].

27 Recital 9, Recast Directive.

and highly contextual comparison,[28] with national courts sometimes finding it more useful to examine the question of the objective justification of the difference in pay before comparing the jobs at issue.[29] What the CJEU has insisted on, however, is that the comparison is carried out on the basis of '*concrete appraisals of the work actually performed*' by the claimant and the comparator.[30]

Job classification systems are a means of providing such concrete appraisals, as they determine pay structures either at the enterprise level or at a sectoral or industry level. The Recast Directive introduces a requirement that comparisons of jobs carried out in this way should be based on 'the same criteria for both men and women' and be drawn up in such a way 'as to exclude any discrimination on grounds of sex'.[31] To be clear, an inequality in pay between men and women will breach equal pay law regardless of the mechanism that produced it, including situations in which the claimant and the comparator are classified in the same grade of the same job category under a collective agreement.[32] The Court has explored the meaning and effect of Article 4(2) of the Recast Directive in the case of *Rummler*,[33] which involved a job classification system in the printing industry that used 'muscular demand' or 'muscular effort' and 'heaviness of work' as criteria to determine rates of pay. The Court found that the use of such criteria is permissible in principle, but the potential of discriminatory effects must be considered in the context of the system as a whole and the use of 'values reflecting the average performance of workers of one sex' will render the system indirectly discriminatory.[34]

The Court has not been oblivious to the wider practical difficulties in identifying an appropriate comparator when the employer is the gatekeeper of relevant information, especially with regard to individual salaries and company pay structures. Revealing information that contains personal data of potential comparators raises privacy concerns and the Court has resorted to an *effet utile* type of argument with a view to finding an appropriate balance between the competing interests at play. The Court recognised that, although applicants do not have a right of access to information per se,[35] a defendant's refusal to disclose information that may be relevant to establishing comparability of situations could compromise the objective of gender equality and deprive the relevant Directive of its effectiveness.[36] Such a refusal, therefore, may be one of the factors that national courts will take into account[37] in establishing facts from which less favourable treatment (or disproportionately detrimental impact) can be presumed.[38] Realistically, national courts cannot be expected to compare 'all the various types of consideration granted [...] to men and women', as this would render judicial review difficult and it would diminish the effectiveness of Article 157 TFEU.[39] Given the 'fundamental importance' of genuine transparency[40] for ensuring compliance with the principle of equal pay, in cases where individual pay systems are 'completely lacking in transparency', the applicant can rely on a difference in average pay between men and women to shift the burden of proof on to the employer.[41]

More broadly, the lack of transparency may obfuscate the type(s) of gender discrimination. This possibility of direct and indirect discrimination overlapping or occurring in parallel is a recurring theme underlying the crucial impact of identifying the correct comparator or carrying out the appropriate comparison. Delineating the conceptual boundaries between direct and indirect discrimination is not a matter of doctrinal integrity, but one of vast practical importance for the outcome of a case. Under the EU Equality

28 Especially as many such cases involve indirect discrimination. See infra section 3.
29 Case 127/92 *Enderby*, 27 October 1993, ECLI:EU:C:1993:859, [11].
30 Case C-129/79 *Macarthys Ltd. v Wendy Smith*, 27 March 1980, ECLI:EU:C:1980:103, [2].
31 Article 4(2), Recast Directive.
32 Case C-381/99 *Brunnhofer*, 26 June 2001, ECLI:EU:C:2001:358, [24] and [30].
33 Case 237/85 *Rummler*, 1 July 1986, ECLI:EU:C:1986:277.
34 Case 237/85 *Rummler*, 1 July 1986, ECLI:EU:C:1986:277, [14], [15] and [25].
35 Even if the applicant can plausibly claim to meet the requirements for a job as listed in a job advertisement. See Case C-415/10 *Meister*, 19 April 2012, ECLI:EU:C:2012:217, [46].
36 Case C-104/10 *Kelly*, 21 July 2011, ECLI:EU:C:2011:506, [34].
37 Case C-104/10 *Kelly*, 21 July 2011, ECLI:EU:C:2011:506, [39].
38 Case C-415/10 *Meister*, 19 April 2012, ECLI:EU:C:2012:217, [47].
39 Case C-262/88 *Barber*, 17 May 1990, ECLI:EU:C:1990:209, [34].
40 Case C-262/88 *Barber*, 17 May 1990, ECLI:EU:C:1990:209, [33].
41 Case 109/88 *Danfoss*, 17 October 1989, ECLI:EU:C:1989:383, [13].

Directives, direct (gender) discrimination is not subject to objective justification,[42] unlike indirect (gender) discrimination, which can be justified as a proportionate means of pursuing a legitimate aim.[43] One of the more obvious instances falling on the borderline arises when an ostensibly neutral rule[44] negatively affects a category of persons that is exclusively composed of members of one gender. Consider, for instance, a situation where a collective agreement excludes a certain category of part-time workers (cleaning staff) from the possibility of being appointed as 'established' (i.e. permanent) members of staff at the company covered by this agreement. If all members of that category of excluded part-time workers are women, then the ostensibly neutral criterion of 'part-time work' in fact constitutes less favourable treatment of a woman claimant compared to a male comparator and, as such, amounts to direct (rather than indirect) gender discrimination.[45]

Another issue relates to differences in treatment of men and women by employers or service providers that are the result of underlying statutory choices. The Court found an opportunity to start untying that knot early in its jurisprudence with the case of *Birds Eye Walls*,[46] which involved an employer's bridging occupational pension scheme paid to employees who had taken early retirement on grounds of ill health as a supplement until they reached state pension age. When women retirees started receiving their state pension at the age of 60, the amount they received from the bridging pension scheme reduced accordingly. That reduction only kicked in for men retirees at the age of 65, when they reached state pension age. The CJEU explains when situations of men and women are comparable and when they are not with remarkable clarity:

> '[A]lthough until the age of 60 the financial position of a woman taking early retirement on grounds of ill health is comparable to that of a man in the same situation, neither of them as yet entitled to payment of the State pension, that is no longer the case between the ages of 60 and 65 since that is when women, unlike men, start drawing that pension.'[47]

The apparent difference in treatment of men and women between the ages of 60 and 65, therefore, cannot amount to direct discrimination because their respective situations are not comparable.

A similar question arose in relation to Article 5(2) of the Goods and Services Directive, as originally enacted, which enabled Member States to permit gender-specific risk differences in the calculation of premiums and benefits of insurance services. In its famous *Test-Achats* judgment, the Court reiterated that the overall purpose of the Directive was to introduce unisex rules in the calculation of insurance premiums and benefits precisely because 'the *respective situations of men and women* with regard to insurance premiums and benefits contracted by them *are comparable*' [emphasis added].[48] In order to arrive at this conclusion the Court invokes Articles 21 and 23 of the EU Charter and the principle of equal treatment for men and women. In doing so, it seems to send a subtle but firm message to national courts that the 'technical' work of identifying comparators in direct discrimination claims should not frustrate the overarching aim of achieving gender equality.

42 Article 2(a), Recast Directive; Article 2(a), 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. See also Case C356/09 *Kleist*, 18 November 2010, ECLI:EU:C:2010:703.

43 Article 2(b), Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Article, 2(b) 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.

44 In other words, a provision, criterion or practice that makes no reference to gender and, as such, appears to fit into the definitional schema of indirect discrimination.

45 Case C-196/02 *Nikoloudi*, 10 March 2005, ECLI:EU:C:2005:141, [35] and [36].

46 Case C-132/92 *Birds Eye Walls*, 9 November 1993, ECLI:EU:C:1993:868.

47 Case C-132/92 *Birds Eye Walls*, 9 November 1993, ECLI:EU:C:1993:868, [20].

48 Case C-236/09 *Test-Achats*, 1 March 2011, ECLI:EU:C:2011:100, [30].

2.2 Non-comparable situations

Under EU gender equality law, not all types of prohibited conduct are subject to an assessment of comparable situations. Harassment because of gender, sexual harassment and victimisation are established without the need for a comparator or a comparison.[49] It also goes without saying that not every difference in the treatment of men and women will automatically amount to less favourable treatment of one sex. Again, the key is whether the two persons of different sexes – the claimant and the potential comparator – are, in fact, in comparable situations. Under the Goods and Services Directive, for instance, comparability of situations cannot be established in cases where the difference in treatment occurs in the pursuit of a legitimate public interest goal, such as the establishment of single-sex shelters for victims of violence against women or domestic violence or the organisation of single-sex sporting events.[50] It is important to note, however, that single-sex facilities are permissible on the proviso that 'they are not provided more favourably to members of one sex'.[51]

The most important category of non-comparable situations, both historically and symbolically, is that of biological conditions connected to a specific sex. Comparing a pregnant woman to a man – any man, in any situation – is a logical impossibility.[52] Accepting this proposition leads to two conclusions that have shaped the position of EU gender equality law on the matter.[53] First, direct discrimination on grounds of pregnancy cannot be contingent upon identifying a comparator and, as such, it should be defined as *unfavourable* (rather than *less favourable*) treatment because of pregnancy.[54] Second, discrimination on grounds of pregnancy automatically amounts to direct sex discrimination, because of the intrinsic connection between pregnancy and a woman's sex. As the CJEU succinctly put it in the seminal case of *Dekker*, 'only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex'.[55]

The Recast Directive consolidates the pre-existing interpretative position of the Court and explicitly recognises that the provisions designed to protect a woman's biological condition during pregnancy and maternity are 'a means to achieve substantive equality'.[56] The choice of language is illuminating here. Substantive gender equality may require the adoption of asymmetrical measures that are not subject to comparisons and, as such, are immune to direct discrimination challenges. Maternity leave is a case in point, as it is intended to protect not only a woman's 'biological condition during and after pregnancy', but

49 For a discussion see Halmos, S. (2022), '"It's all relative?" Role of comparison in terms of equality in employment under EU law' in Carby-Hall, J. Góral, Z. and Tyc, A. (eds), *Discrimination and employment law: International legal perspectives*, Routledge', 24-25.

50 Recital 16, 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. The full list of examples included in Recital 16 is as follows: '[…] the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events) […]'.

51 Recital 17, 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.

52 The CJEU has explicitly ruled out the possibility of comparing a woman who has recently given birth to a man or a woman on sick leave. See Case C-32/93 *Webb*, 14 July 1994, ECLI:EU:C:1994:300, [25].

53 The two most significant secondary EU law instruments on the protection of pregnancy and maternity in employment are: Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers.

54 Recital 23, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Article 2(2)(c) of the Recast Directive still refers to 'any less favourable treatment of a woman related to pregnancy or maternity leave', but the CJEU has consistently found that unfavourable treatment will suffice, as there is no comparator. See Case C-411/96 *Boyle and Others* [1998] ECR I-6401, [53].

55 Case C-77/88, *Dekker*, 8 November 1990, ECLI:EU:C:1990:383, [12]. See also C-179/88 *Hertz*, 8 November 1990, ECLI:EU:C:1990:384, [13].

56 Recital 24, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

also 'the special relationship between a woman and her child over the period which follows pregnancy and childbirth'.[57] Women on maternity leave, therefore, are 'in a *special position* which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work' [emphasis added].[58]

2.3 Between positive action and gender stereotypes

Policies that aim to improve the position of women – and often of working mothers in particular – in the labour market are often associated with the umbrella term positive action.[59] Typically, positive action encompasses measures that allocate 'specific advantages'[60] to members of the under-represented sex to help them 'pursue a vocational activity' or 'to prevent or compensate for disadvantages in professional careers',[61] with a view to achieving 'full equality in practice between men and women in working life'.[62] These advantages may range from support in order to achieve better work-life balance, such as providing subsidised nursery places,[63] to flexible result quotas in favour of equally qualified female candidates for a job.[64]

In principle, measures that qualify as positive action are exempt from the scope of direct gender discrimination rules.[65] Although such measures may be discriminatory in appearance,[66] beneficiaries of positive action are not in a comparable situation to members of the opposite gender who have not been subject to gender-related disadvantages. However, the use of comparators in the context of positive action can still be challenging in two ways. First, unlawful positive action[67] will amount to direct gender discrimination because gender is explicitly used as a criterion for different, more favourable treatment of the beneficiary – comparator. Take the example of *Briheche*,[68] where a national rule exempted certain categories of women, including widows who have not remarried, from the maximum age limit of 45 years for obtaining access to public sector employment. Given that widowers who have not remarried are in the same situation as widows who have not remarried,[69] the rule is, in fact, directly discriminatory on grounds of gender.

The second challenge arises with measures that are intended to help working mothers achieve a better work-life balance but, in doing so, contribute in fact to the perpetuation of a stereotypical distribution of parental roles.[70] In one of its most interesting judgments on this matter, the Court had to consider a Spanish rule that provided for paid breastfeeding leave for all women employees, with employed fathers only entitled to this leave if the child's mother was also an employee.[71] The Court observes that the leave

57 Case 184/83 *Hofmann*, 12 July 1984, ECLI:EU:C:1984:273, [25].
58 Case 342/93 *Gillespie*, 13 February 1996, ECLI:EU:C:1996:46, [17].
59 For a detailed analysis of the current state of play on positive action in EU gender equality law see Xenidis, X. and Masse-Dessen, H. (2018), 'Positive action in practice: some do's and don'ts in the field of EU gender equality law', *European equality law review* No. 2/2018, pp. 36-62; available at: https://commission.europa.eu/system/files/2018-11/law_review_2018_2.pdf.
60 Article 23, EU Charter of Fundamental Rights.
61 Recital 22, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
62 Article 157(4) TFEU. Positive action is also permissible in the access to and supply of goods and services, under Article 6 of 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.
63 Case C-476/99 *Lommers*, 19 March 2002, ECLI:EU:C:2002:183.
64 Case C-158/97 *Badeck*, 28 March 2000, ECLI:EU:C:2000:163.
65 Article 3, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). See also Recital 21, Recast Directive.
66 Case C-409/95 *Marschall*, 11 November 1997, ECLI:EU:C:1997:533, [26].
67 On the conditions of legitimacy of positive action according to CJEU case law see Kapotas (2014), 'A tale of two cities: positive action as "full equality" in Luxembourg and Strasbourg' in Dzehtsiarou K., Konstadinides T., Lock T. and O'Meara N. (eds.) *Human rights law in Europe: The influence, overlaps and contradictions of the EU and the ECHR*, 2014, London, Routledge, *Research in Human Rights Law*, 193-198.
68 Case C-319/03 *Briheche*, 30 September 2004, ECLI:EU:C:2004:574.
69 Case C-319/03 *Briheche*, 30 September 2004, ECLI:EU:C:2004:574, [27] and [28].
70 Case C-222/14 *Maistrellis*, 16 July 2015, ECLI:EU:C:2015:473, [50].
71 Case C-104/09 *Roca Álvarez*, 30 September 2010, ECLI:EU:C:2010:561, [15].

in question has been detached from the biological fact of breastfeeding and is considered as time devoted to the child.[72] This entails that working fathers requesting such leave are in a comparable situation to working mothers, unless the rule in question constitutes lawful positive action. The Court elects to give a negative answer to this question because excluding from this leave employed fathers solely because of their child's mother's employment status could have the effect of putting self-employed mothers – as the claimant's spouse in this case – at a significant disadvantage.[73] At the heart of this conclusion, therefore, lies an intricate comparison that involves not only working fathers and working mothers as parents, but also employed and self-employed mothers.

The CJEU is not alone in adopting an anti-stereotyping approach to the interpretation of gender equality rules,[74] although courts in other systems have perhaps been quicker in appreciating the importance of this approach in tackling structural gender inequality.[75] It is interesting, however, that the Court missed an opportunity to grapple with this issue quite early on in its gender equality jurisprudence.[76] In *Commission v France*,[77] the first judgment to consider the positive action exception under the original Equal Treatment Directive,[78] the Court found that a French law permitting collective agreements to include provisions 'granting special rights to women' was direct sex discrimination against men. This difference in treatment, according to the Court, could not qualify as positive action, because 'some of the special rights preserved relate to the protection of women in their capacity as older workers or parents – categories to which both men and women may equally belong'.[79] The validity of this claim depends, of course, on the nature of the special rights and on whether these could actually offset the inequalities women suffer throughout their working lives because of their gender. Clearly, this is not the case when providing for 'daily breaks for women working on keyboard equipment or employed as typists or switchboard operators'[80] but not for men performing the same tasks.

3 Comparisons in indirect gender discrimination: apparent neutrality and particular disadvantage

Although protection from indirect gender discrimination was already established with the original Equal Treatment Directive,[81] the development of the concept through CJEU case law has signalled a step change in the reach and effectiveness of EU gender equality law. In its seminal *Bilka* judgment[82] the CJEU recognised that the exclusion of part-time employees[83] from an occupational pension scheme amounts to indirect gender discrimination, if a much higher proportion of women than men work part-time.[84] By doing so, the Court started aligning EU legal doctrine with the realities of a gendered labour market, in

72 Case C-104/09 *Roca Álvarez*, 30 September 2010, ECLI:EU:C:2010:561, [28].
73 Case C-104/09 *Roca Álvarez*, 30 September 2010, ECLI:EU:C:2010:561, [37].
74 On an anti-stereotyping approach as an interpretation method particularly in the context of the ECtHR see Timmer, A. (2011), 'Toward an anti-stereotyping approach for the European Court of Human Rights', *Human Rights Law Review* 11:4, pp. 707-738.
75 Timmer, A. (2011), 'Toward an anti-stereotyping approach for the European Court of Human Rights', *Human Rights Law Review* 11:4, at 709.
76 For a detailed analysis see Kapotas, P. (2014), 'A tale of two cities: positive action as "full equality" in Luxembourg and Strasbourg' in Dzehtsiarou K., Konstadinides T., Lock T. and O'Meara N. (eds.) *Human rights law in Europe: The influence, overlaps and contradictions of the EU and the ECHR*, 2014, London, Routledge, *Research in Human Rights Law*, pp. 191-192.
77 Case 312/86, *Commission v France* [1988] ECR 6315.
78 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
79 Case 312/86, *Commission v France*, 25 October 1988, ECLI:EU:C:1988:485, [14].
80 Case 312/86, *Commission v France*, 25 October 1988, ECLI:EU:C:1988:485, [8].
81 Article 2, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
82 Case 170/84 *Bilka-Kaufhaus*, 13 May 1986, ECLI:EU:C:1986:204.
83 Discrimination against part-time workers (compared to full-time workers) was prohibited by the Part-time Work Directive (Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC). For a discussion and further references to literature and case law see Carlson, L. (2007), *Searching for equality: Sex discrimination, parental leave and the Swedish model with comparisons to EU, UK and US law*, IUSTUS FÖRLAG, at 70 et seq.
84 Case 170/84 *Bilka-Kaufhaus*, 13 May 1986, ECLI:EU:C:1986:204, [29].

which treating women less favourably than a male comparator is only the tip of the inequality iceberg.[85] Comparing the impact of national rules or business practices on men and women remains, perhaps, the most critical interpretative operation for the present and future of EU gender equality law. Decades after *Bilka*, national rules that treat full-time and part-time workers differently without objective justification continue to generate indirect gender discrimination[86] and provide for new preliminary references to the CJEU.

3.1 Apparent neutrality

Indirect gender discrimination occurs when an ostensibly neutral provision in terms of treatment has the *effect* of putting 'persons of one sex at a particular disadvantage *compared with persons* of the other sex' [emphasis added] without objective justification.[87] The simplicity of this definition is somewhat deceptive.[88] Although the neutrality of the treatment eliminates the need for an *individual comparator*, a *group comparison* is required to identify 'particular disadvantage' suffered by members of one sex. Carrying out such comparisons is not always straightforward. This is partly because the comparison will involve both establishing the impact of the apparently neutral rule on the two groups that are unconnected to gender (e.g. full-time workers and part-time workers) and assessing how this impact translates for men and women.

Unsurprisingly, much of the doctrinal fine-tuning has once again taken place in the context of equal pay case law. Even before *Bilka*, the CJEU had found that a difference in the hourly pay rates for full-time and part-time workers would amount to indirect pay discrimination, if the part-time workers affected were exclusively or predominantly women.[89] Similarly, the use of length of service[90] or seniority as apparently neutral but de facto gendered criteria to reward workers have been subject to the Court's scrutiny. The balance that must be struck here is a delicate one. On the one hand, the experience workers acquire through length of service generally enables them to perform their duties better[91] and, as such, said experience may put them in a different position compared to workers without such experience. On the other hand, generalisations around experience and (better) performance are neither objective nor unrelated to gender.[92] If the use of such criteria, therefore, has a greater impact on workers of one sex, this will constitute indirect gender discrimination unless the employer can offer a detailed objective justification.[93]

The apparent neutrality of certain rules, such as a minimum height requirement for admission to the police force,[94] is relatively easy to upend, given that common knowledge suffices to gauge the disproportionate impact on women. In other cases, however, cracks in the gender-neutral façade are not immediately obvious, especially when part-time workers are treated identically to full-time workers. An interesting example is a national rule that makes the entitlement of part-time workers to overtime remuneration conditional on them having worked the same number of additional hours (three) as full-time workers.[95] In comparing the two groups of workers the CJEU effectively suggests that the national rule treats them the

85 This is not to say that the CJEU has always been on point with its comparisons in its indirect gender discrimination case law. Examples of judgments where the comparison is carried out in a problematic way include Case C-399/92 *Stadt Lengerich and Others v Helmig and Others* [1994] ECLI:EU:C:1994:415, paras 23-25; Case C-249/97 *Gabriele Gruber v Silhouette International Schmied GmbH & Co. KG.* [1999] ECLI:EU:C:1999:405, paras 26-33.
86 See for instance Case C-385/11 *Elbal Moreno*, 22 November 2012, ECLI:EU:C:2012:746, esp. [35].
87 Article 2(1)(b), Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
88 For a discussion of a plural and an individual interpretation of 'particular disadvantage' see Tsipriotis, I. (2019), 'Religious freedom and religious antidiscrimination', *Modern Law Review* 82(5), 864–896, at 882.
89 Case 96/80 *Jenkins*, 31 March 1981, ECLI:EU:C:1981:80, [15].
90 Case C-17/05 *Cadman*, 3 October 2006, ECLI:EU:C:2006:633.
91 Case 109/88 *Danfoss*, 17 October 1989, ECLI:EU:C:1989:383, [24].
92 Case C-184/89 *Nimz*, 7 February 1991, ECLI:EU:C:1991:50, [14].
93 Case C-17/05 *Cadman*, 3 October 2006, ECLI:EU:C:2006:633, [36].
94 Case C-409/16 *Kalliri*, 18 October 2017, ECLI:EU:C:2017:767.
95 Case C-285/02 *Elsner-Lakeberg*, 27 May 2004, ECLI:EU:C:2004:320.

same when they are not in similar situations, because 'three additional hours is in fact a greater burden for part-time teachers than it is for full-time teachers'.[96]

3.2 Particular disadvantage

In practice, the outcome of indirect discrimination claims will often depend on what counts as *particular disadvantage* and how this can be measured. As a matter of law, there is no requirement stemming from the Equality Directives to determine the precise level of the disparate impact, so long as a detrimental effect on a specific group can be identified.[97] Similarly, there is no requirement as to how disadvantage can be demonstrated, with qualitative reasoning[98] being the *altera pars* of statistical evidence, which is the standard, if often challenging, method usually at play.[99] This apparent doctrinal flexibility has perhaps done more harm than good, with the relevant case law lacking in clarity.

One component of assessing particular disadvantage consists of identifying whether an adequate number of women or men are affected by the apparently neutral rule. What precisely is an adequate number is not entirely clear. The Court has helpfully recognised that particular disadvantage can be established even when statistical evidence revealed a '*lesser but persistent and relatively constant disparity over a long period* between men and women [...]' [emphasis added].[100] But the language it has used to describe the degree of the disparate impact required as a matter of principle has been quite varied. In different judgments the Court has required that the ostensibly neutral measure has an impact on 'substantially more members of one or other sex',[101] on 'a far greater number of women than men',[102] on 'a considerably smaller percentage of men than women'[103] or on 'far more women than men'.[104] The Court has provided little practical guidance on what is the baseline figure required,[105] stating that comparability of situations must be assessed in the light of the subject-matter and purpose of the measure at issue.[106]

Perhaps the closest the CJEU has got to quantifying these generic descriptors came with *Brachner*, where pensioners were excluded from an exceptional increase in pensions, if their income exceeded a certain amount.[107] Although the Court reiterated that it is for the national courts to draw concrete conclusions on the basis of the facts,[108] it went on to find that a disparity of 28 percentage points in the impact of the rule on male and female pensioners – with 75 % of male pensioners and only 43 % of female pensioners eligible to benefit from the increase – is large enough to constitute a 'significant indication' of women being placed at a particular disadvantage.[109]

96 Case C-285/02 *Elsner-Lakeberg*, 27 May 2004, ECLI:EU:C:2004:320, [17].
97 Tobler, C. (2022), *Indirect discrimination under Directives 2000/43 and 2000/78*, European network of legal experts in gender equality and non-discrimination, pp. 97-98 and 60-61.
98 Mulder, J. (2021), *Indirect sex discrimination in employment*, European network of legal experts in gender equality and non-discrimination, p. 87.
99 Tobler, C. (2022), *Indirect discrimination under Directives 2000/43 and 2000/78*, European network of legal experts in gender equality and non-discrimination, p. 99.
100 Case C-167/97 *Seymour-Smith*, 9 February 1999, ECLI:EU:C:1999:60, [61].
101 Case 127/92 *Enderby*, 27 October 1993, ECLI:EU:C:1993:859, [14].
102 Case 171/88 *Rinner-Kühn*, 13 July 1989, ECLI:EU:C:1989:328, [16].
103 Case C-184/89 *Nimz*, 7 February 1991, ECLI:EU:C:1991:50, [15].
104 Case C-343/92 *De Weerd*, 24 February 1994, ECLI:EU:C:1994:71, [33].
105 Fredman, S. (2011), *Discrimination law*, Oxford University Press, p. 183.
106 See e.g. Case C-236/09 *Test-Achats*, 1 March 2011, ECLI:EU:C:2011:100, [29].
107 Case C-123/10 *Brachner*, 20 October 2011, ECLI:EU:C:2011:675.
108 Case C-123/10 *Brachner*, 20 October 2011, ECLI:EU:C:2011:675, [63] and [104].
109 Case C-123/10 *Brachner*, 20 October 2011, ECLI:EU:C:2011:675, [63].

4 Comparators, comparisons and hard questions: how (far) can the CJEU (re)shape gender equality law?

The role of the CJEU as the sole authoritative interpreter of EU legal norms on gender equality is hard to overstate. It is evident from the analysis so far that the jurisprudence of the Court has been one of the main drivers behind the development of EU gender equality law since the 1970s. At the same time, it is useful to recall that the CJEU is not omnipotent. The Court is bound by procedural constraints, most notably within the confines of the preliminary reference procedure, that are not always easy to negotiate. There are also doctrinal boundaries that the Court cannot exceed or redraw. Direct gender discrimination is by definition a comparative concept, at least as a matter of EU legal texts. As such, it cannot exist in the absence of a comparator against which applicants must position themselves.

One would be right in thinking, of course, that the notion of hypothetical comparator is intended to act as an important counterweight to some of these constraints. The possibility of relying on a hypothetical comparator does seem to create the potential to substantiate a wider range of direct gender discrimination claims. In practice, however, this potential remains hitherto largely unfulfilled. It is quite telling that the Court has used the term 'hypothetical comparator' only once in its judgments to date in the context of anti-discrimination law,[110] with this or the equivalent phrase 'hypothetical employee', 'worker' or 'person' appearing sparingly in a handful of Opinions of Advocates General.[111] Scholarship often cites the famous *Firma Feryn* judgment as an example of the use of hypothetical comparators, but this is not an entirely accurate depiction of what was actually a question of finding direct discrimination in the absence of an identifiable complainant.[112] The recently adopted Pay Transparency Directive explicitly mandates the use of hypothetical comparators,[113] so hopefully the CJEU and national courts will increasingly use this option in the future.

With these constraints in mind, what follows is an attempt to sketch out the new territory that the Court has already started treading and the challenges that lie ahead.

4.1 The challenge of gender identity discrimination

As already explained, the CJEU has played an important role in gradually shifting the emphasis of EU equality law from a narrow conception of sex to a broader conception of gender. A milestone in that journey was the confirmation that the dismissal of a person because they have undergone gender reassignment constitutes direct gender discrimination.[114] Identifying the correct comparator[115] as a person of the sex to which the claimant 'was deemed to belong before undergoing gender reassignment' is of critical importance here.[116] The CJEU has generally dealt successfully with the discrepancies of biological sex, gender identity and legal recognition arising in cases involving sex reassignment surgery.[117] In its recent *MB* judgment, the Court found that the situation of a person who changed gender after marrying and

110 A search of the CJEU Curia database (last accessed: 5 November 2023) for the phrase 'hypothetical comparator' returns a total of 43 cases (and 47 documents), out of which the term 'hypothetical male worker' has been used only once to acknowledge the claimant's own description. See Case C-129/79 *Macarthys*, 27 March 1980, ECLI:EU:C:1980:103, [14].

111 Opinion of Advocate General Trstenjak, Case C-63/08 *Pontin*, 31 March 2009, ECLI:EU:C:2009:211, [72]; Opinion of Advocate General Stix-Hackl, Case C-196/02 *Nikoloudi*, 29 April 2004, ECLI:EU:C:2004:272, [36] (see also [35] and [37]); Opinion of Advocate General Geelhoed, Case C-320/00 *Lawrence*, 14 March 2002, ECLI:EU:C:2002:173, [39] and [47] (both referring to earlier CJEU case law); Opinion of Advocate General Lenz, Case C-127/92 *Enderby*, 14 July 1993, [57] (see also [56]); Opinion of Advocate General Capotorti, Case C-129/79 *Macarthys*, 28 February 1980, ECLI:EU:C:1980:103, [3].

112 Case C-54/07 *Firma Feryn*, ECLI:EU:C:2008:397, [23].

113 Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, Recital 28.

114 Case C-13/94 *P. v S.*, 30 April 1996, ECLI:EU:C:1996:170.

115 The Court's analysis in this regard is not without criticism. See Bell, M. (2021), 'EU anti-discrimination law: Navigating sameness and difference' in Craig, P. and De Burca, G. (eds), *The evolution of EU law*, OUP (3rd ed), 651-677.

116 Case C-13/94 *P. v S.*, 30 April 1996, ECLI:EU:C:1996:170, [21].

117 Lembke, U. (2016), 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European equality law review* No. 2/2016', at 52.

the situation of a person who has retained his or her birth gender and is married are comparable for the purposes of determining their pensionable age for a State retirement pension, and the difference in their treatment amounts to direct gender discrimination.[118]

A more challenging comparison may be one that involves intersex and non-binary persons or transgender persons who do not undergo any process of reassignment. Although the Court has not yet had an opportunity to consider this scenario,[119] it seems logical that gender identity discrimination in all its guises falls within the scope of existing EU gender equality law,[120] despite the fact that the language in which the relevant rules are couched is that of a binary understanding of biological sex.[121] Identifying the appropriate comparator in such cases may require some interpretative flexibility in order to move away from this binary understanding. There is strong evidence in the Court's existing case law that such interpretative flexibility is already in place. The approach the Court has adopted since *P v S*, whereby it recognised that the reference to 'men and women' in the law is actually intended to establish a prohibition of any 'discrimination whatsoever on grounds of sex',[122] is a good starting point for extending protection to disadvantaged non-conforming sexes or genders.[123] The Court has also confirmed that discrimination because of a protected characteristic, such as disability[124] or race and ethnic origin,[125] can be established even if the claimant is not themselves a member of the group that is being treated less favourably or put at a particular disadvantage.

There is no doctrinal reason why this latter proposition cannot apply to gender discrimination against intersex or non-binary claimants. Given that comparability of situations must be assessed in the light of all the elements which characterise these situations,[126] there is nothing to prevent the Court from introducing men *or* women as *alternate comparators*. If an intersex or non-binary person has been directly discriminated against because of their non-conforming gender, then the treatment they have been subject to would be less favourable compared to that of either a male or a female comparator.[127] This approach would be compatible with the current position in law regarding non-comparable situations and it would not undermine legislative choices regarding single-sex spaces, voluntary bodies or sports events.[128] It would also be possible to adopt this approach in relation to indirect gender discrimination, although the group comparison required might be more difficult to carry out in practice. In order to determine what are the appropriate groups to compare, the Court might need to draw inspiration from one of its recent disability discrimination judgments,[129] in which it found that it is possible to make a

118 Case C-451/16 *MB v Secretary of State for Work and Pensions*, 26 June 2018, EU:C:2018:492, [39] and [48].
119 Bell, M. (2021) 'EU anti-discrimination law: Navigating sameness and difference', Craig, P. and De Burca, G. (eds), *The evolution of EU law*, OUP (3rd ed), at 674.
120 Bell, M. (2021) 'EU anti-discrimination law: Navigating sameness and difference', Craig, P. and De Burca, G. (eds), *The evolution of EU law*, OUP (3rd ed), at 674, where further references to Agius, S. and Tobler, C. (2012) *Trans and intersex people— Discrimination on the grounds of sex, gender identity and gender expression*, Office for Official Publications of the European Union, 77; Van Den Brink, M. and Dunne, P. (2018), *Trans and intersex equality rights in Europe— A comparative analysis*, Publications Office of the European Union, 46.
121 See, for instance Articles 2, 3(3) and 157 TFEU, as well as the provisions of the Recast Directive, including the definition of indirect discrimination in Article 2(1)(b) of the Recast Directive that refers to 'persons of the other sex'.
122 Case C-13/94 *P. v S.*, 30 April 1996, ECLI:EU:C:1996:170, [17].
123 For a detailed analysis of this issue, including a discussion of the very interesting Opinion of AG Tesauro in *P. v S.* see Lembke, U. (2016) 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European equality law review* No. 2/2016, at 50-52.
124 Case C-303/06 *Coleman*, EU:C:2008:415, [38] and [50].
125 Case C-83/14 *CHEZ*, ECLI:EU:C:2015:480, [56] et seq.
126 Case C-83/14 *CHEZ*, ECLI:EU:C:2015:480, [89].
127 If that were not the case, in other words if there was a difference in the treatment of men and women, then there would be three possibilities: i) The difference in treatment would amount to direct gender discrimination against one sex, with which the claimant would align themselves for the purposes of the comparison. ii) There would be a non-gender-related reason for the difference in treatment, which would presumably also apply to intersex and non-binary claimants. iii) The difference in treatment would fall within one of the exemptions from direct gender discrimination, which should also explain the treatment of intersex or non-binary claimants.
128 See supra Section 2.2.
129 Case C-16/19 *Szpital Kliniczny*, 26 January 2021, ECLI:EU:C:2021:64.

comparison within the group of workers sharing the same protected characteristic.[130] If gender, like disability, is no longer understood as a homogeneous black-box, then finding the appropriate combination of gender expressions, preferences and traits that make up the gender identity of a particular sub-group would allow for a more accurate comparison for the purposes of identifying particular disadvantage.

4.2 The intersectionality conundrum

Undoubtedly, one of the main gaps in current EU gender equality law is its failure to recognise and adequately deal with intersectional discrimination.[131] According to the newly-minted Pay Transparency Directive, intersectional gender discrimination is 'discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directives 2000/43/EC or 2000/78/EC'.[132] It is the fact that these characteristics 'operate and interact with each other at the same time in such a way as to be inseparable'[133] that renders the experience of intersectional discrimination distinct from that of multiple discrimination, which assumes that each of the grounds cause discrimination independently of one another.[134] Whether or not such nuance is normatively significant is debatable, especially as there was an explicit reference to multiple discrimination but not to intersectional discrimination in the EU gender equality law,[135] up until the recent Pay Transparency Directive. It seems, therefore, logical to assume that a principal reason why such claims have not yet been entertained by the CJEU lies in the current fragmented architecture of EU anti-discrimination law, which is often mirrored at the national level.[136]

The CJEU has explicitly rejected the possibility of a distinct, self-standing intersectional claim under the Equality Directives. The following excerpt from its judgment in *Parris* summarises what remains the position on the matter: '[N]o new category of discrimination resulting from the combination of more than one [...] grounds [...] may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established'.[137] The requirement to establish discrimination on each of the intersecting grounds in isolation has two consequences. First, it renders a potential intersectional claim effectively redundant, as a finding of discrimination on more than one ground or a combination of grounds is unlikely to have a significant material impact on the outcome of the case. Second, it disregards the problem with intersectional claims, which is precisely that direct discrimination in relation to each of the intersecting grounds in isolation is very difficult to establish because of the inevitably skewed comparisons involved.[138]

There is no better illustration of the doctrinal incongruity the second consequence may lead to than the recent line of cases around neutral dress codes in the workplace. All these cases involve Muslim

130 As things stand, this line of interpretation seems to be intrinsically connected with disability and not extended to gender. See Kullman, M. (2022) 'Broadening the comparator group in the context of discrimination based on disability', *European Labour Law Journal*, Vol. 13(3) 466-468, at 467.

131 The term intersectionality was coined by American jurist Kimberlé Crenshaw as a means of describing the distinct experience of discrimination suffered by black women in the United States. See Crenshaw, K. (1989), 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *University of Chicago Legal Forum*, 1989, 1, Article 8, available at: http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8.

132 Article 3(2)(e)) Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

133 European Institute for Gender Equality (2019), *Intersectional discrimination*, European Union, https://eige.europa.eu/thesaurus/terms/1492, accessed 25 August 2023.

134 Atrey, S. (2019), *Intersectional discrimination*, Oxford University Press, p. 84.

135 Xenidis, R. (2022), 'Intersectionality from critique to practice: Towards an intersectional discrimination test in the context of "neutral dress codes"', *European equality law review* No. 2/2022, pp. 21-37, esp. 23; available at: https://www.equalitylaw.eu/downloads/5816-european-law-review-2-2022-pdf-1-189-kb.

136 Xenidis, R. (2022) 'Intersectionality from critique to practice: Towards an intersectional discrimination test in the context of "neutral dress codes"', *European equality law review* No. 2/2022, at 27; available at: https://www.equalitylaw.eu/downloads/5816-european-law-review-2-2022-pdf-1-189-kb.

137 Case C-443/15 *Parris*, 24 November 2016, ECLI:EU:C:2016:897, [80].

138 Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European Network of legal experts in gender equality and non-discrimination and European Commission, May 2016, p. 65.

women who were prevented from wearing the Islamic headscarf in their workplace as a result of their employer's dress code which prohibited the wearing of clothing or symbols that may reflect political, philosophical or religious beliefs. In *Achbita*, the first case involving discrimination on grounds of religion under Directive 2000/78/EC, the Court found that a neutral policy or practice cannot amount to direct discrimination, as long as it is applied in the same way to the applicant compared to any other worker with different religious or philosophical beliefs.[139] This idea that strict neutrality automatically precludes direct discrimination is a doctrinal constant confirmed in subsequent judgments[140] and, in the Court's view, renders the search for comparators unnecessary.

Although this may hold true when considering the grounds of religion or gender in isolation, this is, however, not the case for the sub-group[141] comprised of persons belonging to a specific gender *and* a specific religion. If it is indeed Muslim women who appear to be almost exclusively affected by the neutral dress codes, one would expect the Court to perform a *Nikoloudi*-style analysis[142] in order to determine whether direct discrimination can be uncovered under a façade of neutrality. By the same token, it is the sub-group of Muslim women which should occupy one side of the comparison required to establish indirect gender discrimination. But in the absence of an intersectional lens, identifying the correct comparator or carrying out the correct comparison in *Achbita* and *Bougnaoui*[143] was next to impossible. This is not to say that an intersectional comparison would have *necessarily* produced a different outcome insofar as direct discrimination is concerned, as the strict neutrality of an employer's dress code provides the Court with a range of actual or hypothetical comparators against whom there is no less favourable treatment.[144] Indirect discrimination, however, is a different story, as it would have been possible to qualitatively or statistically demonstrate that persons belonging to the 'Muslim women' sub-group are far more likely to suffer from a particular disadvantage because of the neutral dress code policy compared to the generic comparator group that comprises 'employees who are neither Muslim nor women'.

Although both judgments rightly attracted severe criticism from several commentators,[145] the Court appears to have made a conscious choice to stick with *Parris*, emphasising the limitations of its own mandate in view of the fragmented architecture of the EU Equality Directives. In the joint cases of *WABE* and *Müller Handels*, however, the 'blame' seems to be shifted onto the referring national court, with the CJEU refusing to examine the question of possible indirect gender discrimination because 'that ground of discrimination does not fall within the scope of Directive 2000/78, which is *the only EU law measure to which this question relates*' [emphasis added].[146] Taken at face value, this statement implies that the Court would entertain the possibility of looking for comparators (and comparisons) at the intersection of religion and gender, if only the framing of the preliminary question had been different.[147] In the most

139 Case C-157/15 *Achbita*, 14 March 2017, ECLI:EU:C:2017:203, [18] and [31].

140 Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594, [52] and [53].

141 On sub-groups as a possible solution to the interpretative challenges posed by intersectional discrimination see Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European Network of legal experts in gender equality and non-discrimination and European Commission, 66 et seq.

142 Case C-196/02 *Nikoloudi*, 10 March 2005, ECLI:EU:C:2005:141, esp. [35] and [36].

143 Case C-188/15, *Bougnaoui*, 14 March 2017, ECLI:EU:C:2017:204.

144 This is why intersectionality theory is generally at odds with a comparative approach to identifying discrimination. See Goldberg, S. (2011), 'Discrimination by comparison' 120 *Yale Law Journal* 728-812.

145 For some examples see: Weiler, J. (2017), 'Je suis Achbita' (I am Achbita) *European Journal of International Law* 28; Hennette-Vauchez, S. (2017), 'Equality and the market: the unhappy fate of religious discrimination in Europe: CJEU 14 March 2017, Case C-188/15, Asma Bougnaoui & ADDH v Micropole SA; CJEU 14 March 2017, Case C-157/15, Samira Achbita & Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV', *European Constitutional Law Review*, 13; Vickers, L. (2017), 'Achbita and Bougnaoui: One step forward and two steps back for religious diversity in the workplace', *European Labour Law Journal*, 8; Howard, E. (2017), 'Islamic headscarves and the CJEU: Achbita and Bougnaoui', *Maastricht journal of European comparative law*, 24; Schiek, D. (2018), 'On uses, mis-uses and non-uses of intersectionality before the European Court of Justice (CJEU): The CJEU rulings Parris (C-433/15), Achbita (C-157/15) and Bougnaoui (C-188/15) as a Bermuda Triangle?', *International Journal of Discrimination and the Law*, 18.

146 Joined Cases C-804/18 and C-341/19 *IX and MH Müller Handels GmbH v WABE eV and MJ*, 15 July 2021, ECLI:EU:C:2021:594, [58].

147 On the importance of framing and the evolution of framing strategies by litigants from *Achbita* to *WABE* see Xenidis, R. (2022), Intersectionality from critique to practice: Towards an intersectional discrimination test in the context of "neutral dress codes"', *European equality law review* No. 2/2022, at 26 et seq; available at: https://www.equalitylaw.eu/downloads/5816-european-law-review-2-2022-pdf-1-189-kb.

recent case of *L.F. v S.C.R.L*, however, the specific issue is not raised and the Court reiterates the mantra that strict neutrality precludes the relevance of comparability of situations.[148]

Regardless of whether this is an accurate reading of the CJEU's intentions, the heavy reliance on the EU Charter in *WABE* is a stark reminder, if ever one was needed, that the doctrinal rigidity of *Parris* is problematic in more ways than one. If the Court is using the EU Charter as its interpretative baseline for determining comparability of situations on grounds of religion under the Framework Directive,[149] then it could also utilise the open architecture of Article 21(1) of the Charter to extend the search for appropriate comparators and comparisons beyond a single ground. Given the horizontal effect of the EU Charter[150] and the status of gender equality as a general principle of EU law since *Defrenne*, this approach would not encroach upon national competences, nor would it unnaturally extend the scope of protection under existing law. Without underestimating the practical challenges that the Court will need to tackle,[151] if the normative priority is to achieve the aim of gender equality, then more flexibility in identifying the appropriate comparator is a step in the right direction.

The EU legislator is already moving in that same direction, explicitly providing for intersectional discrimination in the new Pay Transparency Directive. It is notable that the Directive is intended to 'remov[e] any doubt that may exist in this regard under the existing legal framework' and to 'enabl[e] national courts, equality bodies and other competent authorities […] to *decide on the appropriate comparator*' [emphasis added].[152] One is tempted to assume that this choice of phrasing is a nod to the interpretative possibilities open to the CJEU with regard to reading the older Equality Directives more expansively.

5 Conclusion: comparators, comparisons and the road to substantive gender equality

The quest for appropriate comparators and accurate comparisons in EU gender equality law is not a purely academic endeavour, but one of substantial practical significance. Although comparators are not a party to the legal proceedings, they are nonetheless active agents in the adjudicative process and often the decisive factor in the outcome of direct gender discrimination cases. This is, of course, a reflection of an understanding of discrimination as an inherently comparative concept. Despite the inevitable formalism that this conceptualisation entails, the CJEU has managed, for the most part, to walk the line between respecting doctrinal orthodoxy and gradually expanding the scope of protection through a careful mapping of comparable situations.

If the development of EU gender equality law over the last few decades has taught us anything, however, it is that the road to substantive gender equality is long and difficult. New challenges posed by gender identity discrimination and intersectional discrimination have not been adequately met yet, with the complexities around comparators and comparisons being one of the main stumbling blocks. Some of these challenges can perhaps best be met through legislative action, with the Pay Transparency Directive offering a useful roadmap for the future. Still, as long as the basic architecture of EU secondary equality law remains as it is currently, most of the work in answering hard questions will continue to fall on the Court.

148 Case C-344/20 *L.F. v S.C.R.L*, 13 October 2022, ECLI:EU:C:2022:774, [33] and [58].
149 Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594, [49].
150 See generally Frantziou, E. (2019), *The horizontal effect of fundamental rights in the European Union,* Oxford University Press.
151 Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European Network of legal experts in gender equality and non-discrimination and European Commission, at 70.
152 Recital 25, Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

Protection against discrimination on the grounds of non-religious beliefs

Sébastien Van Drooghenbroeck*

Introduction: the football fan and Directive 2000/78/CE[1]

In *McClung v. Doosan Babcock (*2022),[2] a Scottish employment tribunal had to determine whether the claimant's support of a certain football club amounts to a 'philosophical belief' within the meaning of section 10 of the Equality Act 2010 (which implemented *a.o* Directive 2000/78/EC in UK Law), and can therefore be relied upon as a protected characteristic under the relevant sections of the Equality Act under which his claim was brought.

At the end of a very detailed motivation, the employment tribunal ruled, however, that support for a football club is not tantamount to a religious or philosophical belief. Therefore, dismissal in connection with it is not automatically unfair. According to the decision, Mr McClung's football support did not satisfy four of the five tests under *Grainger v. Nicholson* (2010)[3] so as to be considered a true 'philosophical belief' protected under the law. Instead, Mr McClung's support for Rangers was found to be 'akin to support for a political party', and previous cases had made clear that a particular political affiliation does not constitute a philosophical belief. Section 10 of the Equality Act 2010 was therefore not applicable: Directive 2000/78/EC thus offered no help to Rangers fans.

This case may seem perfectly unimportant, but it is nonetheless illustrative of the conceptual embarrassment that can arise from the application of anti-discrimination law, both European and national. Certain concepts that define the scope of protection under this law – in this case, the concepts of 'religion' and 'belief' – are used without being defined, as if they were self-evident, and therefore leave the interpreter largely and pragmatically to his or her own intuition. Such pragmatism does not really pose any difficulties when we are on familiar territory: no one will dispute that Islam, Christianity, Judaism, Buddhism or Humanism are among the 'religions or beliefs' protected by Directive 2000/78/EC.

The difficulty arises in the presence of less well-known or even atypical convictional (religious or non-religious) movements.[4] If we may use such a metaphor, the difficulty can be understood in terms of 'borders' – both 'external' and 'internal'. By 'external borders', we mean the separation between 'opinions' or 'preferences' that will be protected by the Directive as 'religion or belief', and those that will not. For

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1 Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, hereafter 'Directive 2000/78/EC'.

2 *McClung v. Doosan Babcock Ltd & Others* [2022], Case No: 4110538/2019.

3 *Grainger plc v. Nicholson* 2010 IRLR 4. The five criteria are the following: (i) The belief must be genuinely held. (ii) It must be a belief and not an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

4 Vickers, L. (2006) *Religion and Belief Discrimination in Employment – the EU law*, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, p. 25.

example, we can say that the claim of *McClung,* in the aforementioned case, falls outside the 'external borders' of the Directive. By contrast, 'internal borders' will concern the distinction among the 'beliefs' protected by the Directive. The very text of the Directive – 'religion or belief' – suggests that there are 'non-religious' 'beliefs' that would still be protected by it.[5] What are these? This question would be important if the nature of the protected belief – religious or non-religious? – had, or could have, an impact on the intensity of the protection regime set up by the Directive, or the national legislation transposing it.

This contribution will examine first the various sources to which it is relevant to turn for useful clarification of the concepts concerned and, consequently, of the drawing of the above-mentioned borders. We will start by looking at 'direct' sources: the preparatory works of the Directive, the Explanations to the Charter and the case law of the Court of Justice **(I)**. In line with what these first sources suggest, we will then turn to indirect sources **(II)**. The case law of the European Court of Human Rights will first be taken into consideration as an 'indirect' source **(1)**: the conceptual link between the notions of 'religion' and 'belief' in EU law and the notions of 'religion' and 'belief' in the sense of the ECHR[6] was indeed made by the CJEU in the *G4S Secure Solutions* case.[7] The legislation of the Member States will also be taken into consideration. The latter may indeed reveal 'common constitutional traditions' that may be relevant for the interpretation of the Charter and, indirectly, of the Directive. The legislation transposing the Directive may also bring to light conceptual differences that are useful for understanding the Directive itself **(2)**.

In a further development, it will be examined whether and how, outside the external borders of the Directive, EU law can offer protection to 'non-religious beliefs'. Can a non-religious belief that is not protected by the Directive still be protected by the Charter against acts of the Union or acts of the Member States implementing Union law? **(III)**

Finally, it will be examined, in the light of the *S.C.R.L.* judgment,[8] whether Directive 2000/78/EC makes a difference in the respective regime applicable to discrimination based on 'religion' and discrimination based on non-religious 'beliefs' and/or allows the Member States to make such a difference **(IV)**.

I 'Beliefs', 'religious belief', 'non-religious beliefs': back to the direct 'sources' of elusive concepts

International, regional and constitutional human rights law contain numerous guarantees of freedom of conscience, religion and belief. However, none of the instruments concerned contain a precise definition of the concepts that shape their scope of application,[9] even in the case of specialised soft law instruments on the subject, such as the Declaration of 25 November 1981 on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[10] European Union law does not present a distinct picture; it must therefore be interpreted on the basis of various 'sources'. The following sections look first at direct sources.

5 See Schiek, D., Waddington, L. and Bell, M. (2007), *Non Discrimination Law. Cases, Material and Text* Oxford, Hart Publishing, p. 103.
6 See, *a.o.*, Sudre, F., *et al.* (2023), *Droit européen et international des droits de l'Homme,* 16th ed., Paris, PUF, pp. 804-805.
7 Case C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV,* 14 March 2017, ECLI:EU:C:2017:203.
8 Case C-344/20, *S.C.R.L. (Vêtement à connotation religieuse)*, 13 October 2022, ECLI:EU:C:2022:774.
9 Velaers, J. and Foblets, M-C. (1997), 'L'appréhension du fait religieux par le droit – À propos des minorités religieuses', *Revue trimestrielle des droits de l'Homme*, *Numéro spécial. La protection des minorités,* p. 273 ff; Gunn, J. (2003), 'The Complexity of Religion and Definition of "Religion" in International Law', *Harvard Human Rights Journal*, p. 189 ff.
10 A/RES/36/55. On this declaration, see Van Drooghenbroeck, S, (2015), 'A propos de "Le Projet de Convention des Nations Unies sur l'élimination de toutes les formes d'intolérance religieuse" de Marcel Laligant. 50 ans après: utilité et opportunité d'un nouvel instrument international de protection contre l'intolérance et la discrimination fondées sur la religion et les convictions', *Revue Belge de Droit International*, Vol. 1/2, pp. 497-513.

Neither the text of Directive 2000/78/EC, nor its Preamble, offer a definition – or even the beginnings of a definition – of what is meant by 'religion' or 'belief' within the meaning of Article 1 of the Directive.[11] Preparatory works of the Directive,[12] and, behind these, the preparatory work for what was then Article 13 of the EC Treaty, are scarcely more enlightening. It should be remembered that the original draft that gave rise to the latter included only a reference to 'religious' convictions.[13] It was only at a later stage that the formulation referring to the diptych 'religion or belief' was adopted. According to G. Pitt, 'It is likely, not least from the absence of recorded discussion, that the inclusion of belief was in order to make clear that non-religious beliefs, such as atheism, were covered as well as religious beliefs (…) rather than to widen the protection to all kinds of beliefs or opinions, which would have been a substantial change from what has been agreed hitherto'.[14]

Since Directive 2000/78/EC must be interpreted in the light of the Charter of Fundamental Rights of the European Union (hereafter: 'the Charter'),[15] it would be legitimate to have regard to the relevant provisions of it (Articles 10 and 21), in so far as they also refer to 'religion or belief'. However, the conceptual clarification obtained will be rather modest. These terms are not defined by the Charter, and the Explanations to the Charter merely refers to what is said about them in the European Convention on Human Rights and the case law of the European Court of Human Rights[16] (*see below*).

It should be noted, however, that a systematic analysis of Article 21 of the Charter leads to the conclusion that the notion of 'religion or belief' does not logically include 'political or any other opinion', since the latter is explicitly mentioned *in addition* to the former, and seems therefore conceptually distinct from it.

It is precisely this conclusion to which the Court of Justice has come. In its judgment *IX v. WABE eV and MH Müller Handels GmbH v. MJ* of 15 July 2021, the Court states that 'Article 1 of Directive 2000/78 refers to religion and belief together, as does Article 19 TFEU, according to which the EU legislature may take appropriate action to combat discrimination based on, inter alia, "religion or belief", and Article 21 of the Charter, which refers, among the various grounds of discrimination which it mentions, to "religion or belief". It follows that, for the purposes of the application of Directive 2000/78/EC, the terms "religion" and "belief" must be analysed as two facets of the same single ground of discrimination. As is apparent from Article 21 of the Charter, the ground of discrimination based on religion or belief is to be distinguished from the ground based on "political or any other opinion" and therefore covers both religious beliefs and philosophical or spiritual beliefs'.[17] In its judgment of 13 October 2022 in the *S.C.R.L.* case, the Court added that 'the protection against discrimination guaranteed in Directive 2000/78 covers only the grounds which are exhaustively listed in Article 1 thereof, so that that directive does not cover political or trade union belief; nor does it cover artistic, sporting, aesthetic or other beliefs or preferences'.[18] The concepts of 'religion' or 'belief' are, therefore, not supposed to include the latter elements.

The *negative* definition thus formulated by the Court – what 'beliefs' or 'convictions' *are not* – is accompanied by a *positive* definition with 'exogenous' contours, as borrowed from the law of the European Convention on Human Rights, in the line of what the Explanations to the Charter prescribe. The terms of

11 Pitt, G. (2007), 'Religion or belief: aiming at the right target?', *Equality Law in enlarged Union. Understanding the Article 13 Directive,* Meenan, H. (eds), Cambridge University Press, p. 205 ff.

12 Nor is there an exhaustive definition in Council of European Union (2013), EU Guidelines on the promotion and protection of freedom of religion or belief.

13 See Dubout, E. (2006), *L'article 13 du traité CE. La clause communautaire de lutte contre les discriminations*, Bruxelles, Bruylant, p. 72.

14 See Pitt, G., 'Religion or belief: aiming at the right target?', *op. cit.*, p. 206.

15 Joined Cases C-804/18 and C-341/19, *IX and MH Müller Handels GmbH v. WABE eV and MJ*, 15 July 2021, ECLI:EU:C:2021:594, § 48.

16 See Explanation ad Article 10 (OJ 2007 C 303): 'The right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the Convention, which reads as follows: 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

17 Joined Cases C-804/18 and C-341/19 *IX and MH Müller Handels GmbH v. WABE eV and MJ*, judgment of 15 July 2021, ECLI:EU:C:2021:594, 47.

18 Case C-344/20, *S.C.R.L. (Vêtement à connotation religieuse)*, 13 October 2022, ECLI:EU:C:2022:774, paragraph 28.

the judgment of 14 March 2017 in the *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* case may be recalled on this point:

> 'As regards the meaning of "religion" in Article 1 of Directive 2000/78, it should be noted that the directive does not include a definition of that term.
>
> Nevertheless, the EU legislature referred, in recital 1 of Directive 2000/78, to fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ("the ECHR"), which provides, in Article 9, that everyone has the right to freedom of thought, conscience and religion, a right which includes, in particular, freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> In the same recital, the EU legislature also referred to the constitutional traditions common to the Member States, as general principles of EU law. Among the rights resulting from those common traditions, which have been reaffirmed in the Charter of Fundamental Rights of the European Union ("the Charter"), is the right to freedom of conscience and religion enshrined in Article 10(1) of the Charter. (...) As is apparent from the explanations relating to the Charter of Fundamental Rights (...), the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope.'[19]

The result is that, in order to positively circumscribe the protection afforded by Union law to religious and non-religious convictions, we have to turn to the law of the 'other' Europe. In theory, this approach is perfectly justifiable and even necessary. It is not certain, however, that it will not lead to practical tensions with the Court's desire, expressed at the same time in the *WABE* and *S.C.R.L* judgments referred to above, to assign clear-cut – dare one say: discriminating ... – boundaries to that protection.

II Indirect sources of definition: the European Convention on Human Rights and the 'common grounds' revealed by national legislation

1 The 'other' Europe

Ms de Wilde is a so-called 'Pastafarian', a follower of the 'Church of the Flying Spaghetti Monster'. It is her position that the precepts of her religion require her to wear a colander, a perforated bowl of a type more generally used as a kitchen utensil, on her head at all times and everywhere, except at home. In 2016, the applicant applied to the mayor of the municipality of Nijmegen for a new driving licence and a new identity card. She submitted an identity photograph that showed her wearing a colander on her head. The administrative authority refused, and its decision was upheld on appeal, including by the Dutch Council of State. She then lodged an application with the European Court of Human Rights, on the basis of Article 9 of the European Convention on Human Rights:

> 'Article 9
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for

19 Case C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, 14 March 2017, ECLI:EU:C:2017:203, 25-28.

> the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

In its decision of 9 November 2021,[20] the Court declared the following:

> '50. The Court is mindful that the right enshrined in Article 9 would be highly theoretical and illusory if the degree of discretion granted to States allowed them to interpret the notion of religious denomination so restrictively as to deprive a non-traditional and minority form of a religion of legal protection. Such limitative definitions have a direct impact on the exercise of the right to freedom of religion and are liable to curtail the exercise of that right by denying the religious nature of a faith (...).
>
> 51. Although the concept of 'religion or belief' in the sense of being protected by Article 9 must be interpreted broadly, that does not mean that all opinions or convictions are to be regarded as such (...). The Court has held that the right to freedom of thought, conscience and religion denotes only those views that attain a certain level of cogency, seriousness, cohesion and importance. However, provided this condition is satisfied – and when it has thus been established that Article 9 applies –, the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (...)'.[21]

Turning to the specific circumstances of the case, the Court held that 'in view of the very aims for which the Pastafarian movement was founded' (a parody of a religion), Pastafarianism could not be considered as a 'religion' or 'belief' within the meaning of Article 9 of the Convention, and the Court thus concluded that the applicant's complaint did not fall within the scope of this provision.

> '"Cogency, seriousness, cohesion and importance" are therefore the minimum "markers" of the beliefs protected by Article 9, whether "religious" or "non-religious".[22] In older case law, the European Commission of Human Rights also referred to the existence of a "coherent view on fundamental problems"'.[23]

Although particularly open – it will all be a question of case by case – these definitional elements are not without any external borders. As the European Court of Human Rights emphasised in its *Pretty v. United Kingdom* judgment, 'not all opinions or convictions constitute beliefs in the sense protected by Article 9 § 1 of the Convention'.[24] In addition, and as recalled this time by *Eweida and others v. United Kingdom, '*(e)ven where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1'.[25] Finally – but this is only a specific application of the rule set out in Article 17 of the Convention – beliefs (religious or non-religious) that run directly counter to the fundamental values underlying the European Convention on Human Rights cannot benefit from the protection set out in Article 9 of the Convention. The old *Campbell and Cosans* judgment referred in this respect, in particular, to the convictions that are not compatible 'with human dignity'.

Within these borders, the scope of protection of Article 9 of the Convention – and therefore, by transitivity, of the protection of religious or non-religious convictions by EU law – is particularly broad. As the European Court has pointed out on numerous occasions, the Convention is designed to guarantee rights that are

20 ECtHR, No. 76202/16, 9 November 2021.
21 See also ECtHR, *Sager and others v. Austria*, No. 61827/19, 22 November 2022.
22 ECtHR, *Gough v. United Kingdom*, No. 49327/11, 28 October 2014, 188.
23 E. Com. HR, *X. v. Germany*, No. 8741/79, 10 March 1981.
24 ECtHR, *Pretty v. United Kingdom*, No. 2346/02, 29 April 2002, 82.
25 ECtHR, *Eweida and others v. United Kingdom,* No. 48420/10, 15 January 2013, 82.

not theoretical or illusory but practical and effective: 'The right enshrined in Article 9 would be highly theoretical and illusory if the degree of discretion granted to States allowed them to interpret the notion of religious denomination so restrictively as to deprive a non-traditional and minority form of a religion of legal protection. Such limitative definitions have a direct impact on the exercise of the right to freedom of religion and are liable to curtail the exercise of that right by denying the religious nature of a faith'.[26] Provided that the criterion of 'cogency, seriousness, cohesion and importance' is satisfied, the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.[27] Therefore, the Court rules that it is not its task 'to enter into any controversy in that sphere or to determine what principles and beliefs are to be considered central to any given religion or to enter into 'any other sort of interpretation of religious questions'.[28] According to the judgment in the *Ancient Baltic Religious Association 'Romuva' v. Lithuania* case, 'a debate among religious scholars concerning the historical foundations of a given religion and the merits of the demands of its followers does not suffice to deny the religious nature of those beliefs'.[29]

The results of this interpretative approach have so far been particularly 'welcoming'. The following conceptions have indeed been considered – explicitly or implicitly – as 'religious' beliefs eligible for protection under Article 9: Alevism;[30] Buddhism;[31] the different Christian denominations;[32] the various forms of Hinduism, including the Hare Krishna movement;[33] the various forms of Islam,[34] including Ahmadism;[35] Judaism;[36] Sikhism;[37] Taoism;[38] Aumism of Mandarom;[39] the Bhagwan Shree Rajneesh movement, known as the Osho movement;[40] the Reverend Sun Myung Moon's Unification Church;[41] Mormonism, or the Church of Jesus Christ of Latter-Day Saints;[42] the Raëlian Movement;[43] Neo-Paganism;[44] Falun Gong, or Falun Dafa;[45] the 'Santo Daime' religion, whose rituals include the use of a hallucinogenic substance known as 'ayahuasca';[46] and the Jehovah's Witnesses.[47]

The conceptual openness thus demonstrated is no less spectacular in the case of 'non-religious' convictions, provided that the common criteria of 'cogency, seriousness, cohesion and importance' are met. Article 9 therefore covers the following beliefs: pacifism;[48] principled opposition to military service;[49] veganism and opposition to the manipulation of products of animal origin or tested on animals;[50] opposition to abortion;[51] a doctor's opinions on alternative medicine, constituting a form of manifestation of medical philosophy;[52] the conviction that marriage is a lifelong union between a man and a woman

26 ECtHR (GC), İzzettin *Doğan and Others v. Turkey*, No. 62649/10, 26 April 2016, § 114.
27 ECtHR, *Eweida and others v. United Kingdom,* No. 48420/10, 15 January 2013, § 81.
28 ECtHR, *Kovaļkovs v. Latvia*, No. 35021/05, 31 January 2012, § 60.
29 ECtHR, *Ancient Baltic religious association 'Romuva' v. Lithuania*, No. 48329/19, 8 June 2021, § 119.
30 ECtHR (GC), İzzettin *Doğan and Others v. Turkey,* No. 62649/10, 26 April 2016.
31 ECtHR, *Jakóbski v. Poland*, No. 18429/06, 7 December 2010.
32 ECtHR, *Savez crkava 'Riječ* života*' and Others v. Croatia*, No. 7798/08, 9 December 2010.
33 ECtHR, *Genov v. Bulgaria*, No. 40524/08, 23 March 2017.
34 ECtHR, *Hassan and Tchaouch v. Bulgaria [GC]*, No. 30985/96, 28 October 2000.
35 ECtHR, *Metodiev and Others v. Bulgaria*, No. 58088/08, 15 June 2017.
36 ECtHR, *Francesco Sessa v. Italy*, No. 28790/08, 3 April 2012.
37 ECtHR, *Jasvir Singh v. France*, No. 25463/08, 30 June 2009.
38 E. Com. HR, *X. v. the United Kingdom*, No. 6886/75, 18 May 1976, DR 5.
39 ECtHR, *Association des Chevaliers du Lotus d'Or v. France*, No. 50615/07, 31 January 2013.
40 ECtHR, *Mockutė v. Lithuania*, No. 66490/09. 27 February 2018.
41 ECtHR, *Nolan and K. v. Russia*, No. 2512/04, 12 February 2009.
42 ECtHR, *The Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, No. 7552/09, 4 March 2014.
43 ECtHR, *F.L. v. France*, No. 61162/00, 3 November 2005.
44 ECtHR, *Ancient Baltic religious association 'Romuva' v. Lithuania,* No. 8329/19, 8 June 2021.
45 ECtHR, *A.O. Falun Dafa and Others v. Moldova*, No. 29458/15, 29 June 2021.
46 ECtHR, *Fränklin-Beentjes and CEFLU-Luz da Floresta v. the Netherlands*, No. 28167/07, 6 May 2014.
47 ECtHR, *Jehovah's Witnesses of Moscow and Others v. Russia*, No. 302/02, 10 June 2010.
48 E. Com. HR, *Arrowsmith v. the United Kingdom*, No. 7050/75, 12 October 1978, DR 19.
49 ECtHR, *Bayatyan v. Armenia [GC],* No. 23459/03, 7 July 2011.
50 E. Com. HR, *W. v. the United Kingdom*, No. 18187/91, 10 February 1993.
51 E. Com. HR, *Van Schijndel and Others v. the Netherlands*, No. 30936/96, 10 September 1997.
52 E. Com. HR, *Nyyssönen v. Finland*, No. 30406/96, 15 January 1998.

and rejection of homosexual union,[53] and attachment to secularism.[54] By contrast, in *Vavřička and Others v. the Czech Republic*, the Court ruled that 'objection to vaccination' which was 'primarily health-related' – philosophical or religious aspects were 'secondary', to use the terms of the judgment – did not attract the protection of Article 9.[55]

According to the case law of the Court of Justice, the 'religion' and 'beliefs' referred to in Directive 2000/78/EC and in Articles 10 and 21 of the Charter should be based on the same definitional elements. No less: the intention of the European legislator and the authors of the Charter are opposed to a more restrictive approach. No more? In the light of the principles embodied in Article 52(3) of the Charter, there would be nothing to prevent the Court of Justice from being even more generous and 'welcoming' in its qualifications than the European Court of Human Rights. However, this is apparently not the path that has been followed.

Several observations need to be made at this stage.

First of all, there is an additional 'transitivity' in the definition given to the concepts of 'religion' and 'belief' in EU law. In defining the terms of Article 9, the European Court of Human Rights itself seems to refer to the 'case-law' of the UN Human Rights Committee interpreting Article 18 of the International Covenant on Civil and Political Rights.[56] The approach potentially leads to a further extension of the concepts involved.[57] Although in terms of results it seems to be in line with the approach adopted in the EU Guidelines on the promotion and protection of freedom of religion or belief adopted by the Council in 2013,[58] this new transitivity produces a surprising paradox. The Court of Justice is thus placed *indirectly* under the influence of UN jurisprudence, while it has also demonstrated, on several occasions, its reluctance to take this same jurisprudence *directly* into consideration.[59]

Second, one must also underline that, if the reference to the case law of the European Court of Human Rights is undoubtedly instructive with regard to the delineation of the *external borders* of the protection afforded by European Union law, it is by contrast of more limited interest with regard to the *internal borders* separating 'religious' and 'non-religious' beliefs. The case law of the European Court of Human Rights does not provide a very detailed elaboration of what does or does not confer a 'religious' character on certain beliefs. This is understandable from a strictly pragmatic point of view: in the Convention system, the question is largely academic, since it grants the same protection to both types of belief, provided that the common condition of 'coherence, seriousness, cohesion and importance' is met.

The same pragmatic considerations sometimes result in blurring the *external borders* of Article 9 of the Convention – and, singularly, the difference that is supposed to exist between 'religious' and 'philosophical' beliefs protected by Article 9 of the Convention, on the one hand, and 'political opinions' covered by Article 10 of the Convention, on the other. There is indeed not much at stake in drawing a very clear dividing line between the two, since if Article 9 is not applicable, Article 10 may apply, and *vice versa*. Now, the protection afforded on both sides is very similar, if not identical (at least as far as the external forum

53 ECtHR, *Eweida and others v. United Kingdom,* No. 48420/10, 15 January 2013.
54 ECtHR, *Lautsi and Others v. Italy [GC],* No. 30814/06, 18 March 2011, § 58.
55 ECtHR, *Vavřička and Others v. the Czech Republic,* No. 47621/13, 8 April 2021, §§ 334-335. See, regarding the objections to the collective healthcare system, ECtHR, *Cedric Anakha De Kok v. Netherlands*, No. 1443/19, 26 April 2022.
56 ECtHR, *Ancient Baltic religious association 'Romuva' v. Lithuania,* No. 48329/19, 8 June 2021, 115. This reference to the 'case law' of the Human Rights Committee is, however, not systematic. See Van Drooghenbroeck, S. (2023), 'Existe-t-il une communauté de sources de la liberté de religion?', *Revue de droit public,* vol. 3, pp. 650-654.
57 See Human Rights Committee, General observation No. 22 (1993): 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community'.
58 Council of European Union (2013), EU Guidelines on the promotion and protection of freedom of religion or belief.
59 See Van Drooghenbroeck, S. (2023), 'Existe-t-il une communauté de sources de la liberté de religion?', *Revue de droit public,* vol. 3, pp. 650-654.

is concerned). The border can therefore easily remain blurred, and the intersections are in no way, from a strictly pragmatic point of view, a source of difficulties: for example, 'communism'[60] or 'pacifism' can, without difficulty for the application of the Convention, be described either as 'philosophical convictions' within the meaning of Article 9, or as 'political opinions' protected by Article 10. The same can be said of 'trade union beliefs'. This is where the difficulty lies: such indifference cannot be allowed in the case law of the European Court of Justice, which on the contrary very clearly affirms, as we have seen, the existence of watertight partitions between the 'religion and belief' referred to in Directive 2000/78/EC, on the one hand, and 'political opinions' and 'trade union beliefs', on the other. The case law of the Court of Justice, which needs clear borders, is therefore poorly served, in some cases, by mimicking the case law of the European Court of Human Rights, which, for its part, can live with a certain degree of conceptual approximation.

As an extension of the above, a final remark may be made. The reference to the case law of the European Court of Human Rights may come into tension with the preservation of the conceptual autonomy that should characterise the interpretation of Directive 2000/78/EC. Logically, the scope of protection offered by the Directive should not vary according to the legal qualifications of the Member State concerned. There should, in other words, be only one 'European' definition of the concepts of 'religion' and 'belief' within the meaning of the Directive, the contours of which are set out in the case law of the Court of Justice. At first sight, the conclusion should not be different in the case law of the European Court of Human Rights, since the concepts of 'belief' and 'religion' are terms used by the Convention. In practice, however, the European Court of Human Rights sometimes abdicates its role as interpreter and sacrifices the conceptual autonomy of the Convention on the altar of pragmatism.

This was the case when it came to determining whether or not Scientology could claim protection under Article 9. In its *Kimlya and others v. Russia* judgment, the European Court of Human Rights stated:

> 'The Court observes that the question whether or not Scientology may be described as a "religion" is a matter of controversy among the Member States. It is clearly not the Court's task to decide in abstracto whether or not a body of beliefs and related practices may be considered a "religion" within the meaning of Article 9 of the Convention. In the absence of any European consensus on the religious nature of Scientology teachings, and being sensitive to the subsidiary nature of its role, the Court considers that it must rely on the position of the domestic authorities in the matter and determine the applicability of Article 9 of the Convention accordingly'.[61]

The concept of 'religion' was involved here. However, there is nothing to prevent this reasoning from being applied in the same way to the hard cases of protected 'non-religious beliefs'. Now, this ultra-pragmatic reasoning – however practical – is not logical for the European Court of Human Rights and, in our view, it is not at all conceivable for the Court of Justice: reference to the case law of the Court of Human Rights must therefore be subject to limits on this point.

2 Member States' legislation

As the *G4S* judgment points out, the preamble to Directive 2000/78/EC refers to the constitutional traditions common to the Member States. In accordance with Article 52(4) of the Charter, consideration of these traditions is relevant to the interpretation of its Articles 10 and 21.

It is therefore not absurd to seek, in the common denominators revealed by the legal frameworks of the Member States, elements of interpretation that are useful in drawing the external and internal borders of the protection of religious and non-religious convictions provided by Union law.

60 See E. Com. HR, *N.H., G.H., R.A. v. Turkey,* No. 16313/90, 11 October 1991, implicit solution.
61 ECtHR, *Kimlya and others v. Russia,* No. 76836/01, 1 October 2009, § 79. See also ECtHR, *Ancient Baltic religious association 'Romuva' v. Lithuania*, No. 48329/19, 8 June 2021, § 116.

This approach, however, will not bring great gains in terms of clarity.

On the basis of the annual country reports produced by the European network of legal experts in gender equality and non-discrimination,[62] we observe the existence of a general feature: definitional aporia. In the vast majority of cases, national texts – and in particular those transposing Directive 2000/78/EC – fail purely and simply to define the terms 'religion' or 'belief', or related terms, that they use.[63] Only in exceptional cases will the preparatory work of the legislation concerned, or the national case law applying it, provide more substantial information – often inspired by the case law of the European Court of Human Rights – on what should be included under the concepts of 'religion' or 'belief'. Concerning the concept of 'philosophical belief' used by the Equality Act 2010 (which implemented *a.o* Directive 2000/78/EC in UK Law), the British precedent of *Grainger plc v. Nicholson*,[64] already mentioned, is certainly worthy of interest from a scientific point of view,[65] even if the UK is no longer an EU Member State. According to this precedent, a conviction will be protected by the Equality Act 2010 only if it is worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others. In *Maya Forstater v. CGD Europe and Others*,[66] the question was raised as to whether this was the case for gender critical beliefs, including the belief that sex is immutable and should not be conflated with gender identity, and that trans women are not women. The Tribunal answered in the affirmative: 'The Claimant's belief might well be considered offensive and abhorrent to some, but the accepted evidence before the Tribunal was that she believed that it is not "incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender" (…). That is not, on any view, a statement of a belief that seeks to destroy the rights of trans persons. It is a belief that might in some circumstances cause offence to trans persons, but the potential for offence cannot be a reason to exclude a belief from protection altogether'.

In Austria,[67] the explanatory notes to the amended Equal Treatment Act state the following:

> 'Also the terms "religion or belief" are not defined by European law. Regarding the aims of the "framework-directive" they must be interpreted in a broad manner. Especially "religion" is not restricted to churches and officially recognised religious communities. Nevertheless, it has to be noted that for a religion there are minimum requirements concerning a statement of belief, some rules for the way of life and a cult. Religion is any religious, confessional belief, the membership of a church or religious community. Brockhaus (…) defines Religion formally as a system to address in its dogma, practice and social manifestations the last questions of human society and individual life and to find answers to these. According to the respective basic philosophy of salvation and in relation to the respective "experience of mischief" every religion has got its own goal of salvation and its way to salvation. This exists in close relation to the "unavailability" which is perceived as a personal (god, gods) and impersonal (rules, cognition, knowledge) transcendence. Also the wearing of religious symbols and clothes is covered by the scope of protection, as the membership to a specific religion can be assumed by these or these are perceived as an expression of a certain religion. It constitutes an infringement of the prohibition of discrimination, if the employer acknowledges the wishes of a specific group while not acknowledging those of another group. (…) The term "belief" is tightly connected with the term "religion". It is a classification for all religious, ideological, political and other leading perceptions of life and of the world as a construction of sense, as well as for an orientation of the personal and societal position for the individual understanding of life'.

62 See https://www.equalitylaw.eu/.
63 See Pitt, G. 'Religion or belief: aiming at the right target?', *op. cit.,* p. 209, with reference to J. Cormack and M. Bell.
64 *Grainger plc v. Nicholson*, 2010 IRLR 4.
65 See Edge, P. and Vickers, L., 'Review of Equality and Human Rights Law Relating to Religion and Belief', Equality and Human Rights Commission, Research Report 97, 2015, pp. 15-17; Vickers, L. (2022), *Country report on non-discrimination (United Kingdom),* pp. 16-17, available at https://www.equalitylaw.eu/.
66 UKEAT/0105/20/JOJ, 10 June 2021.
67 Quoted by Schindlauer, D. (2022), *Country report on non-discrimination (Austria),* pp. 19-20, available at: https://www.equalitylaw.eu/.

With regard specifically to the concept of 'belief', the same Austrian explanatory notes[68] states:

> 'In the context of this law, "belief" means non-religious belief as the religious part is fully covered by the term "religion". Belief is a system of interpretation consisting of personal convictions concerning the basic structure, modality and functions of the world; it is not a scientific system. As far as beliefs claim completeness, they include perceptions of humanity, views of life, and morals. In regard to recruitment conditions it must not be regarded as important whether a (potential) employee is, for example, atheist, as long as there is no justification for this stated by law.'

But let us repeat: such conceptual elaboration, even on the fringes of the text of the law, remains quite exceptional. As a rule, most state authorities stick to a more intuitive, pragmatic approach.

It should also be noted that national legal frameworks do not shape clear-cut 'common grounds' as regards the protection, by European anti-discrimination law, of 'non-religious beliefs', in terms of both 'internal borders' and 'external borders'. For example, the Irish legislation transposing Directive 2000/78/EC does not refer to philosophical beliefs.[69] According to J. Walsh, 'it appears from the wording of the provisions concerning discrimination on the religion ground that the belief in question must be a religious one, and so the provisions do not adequately prohibit discrimination on the grounds of religion *or* belief'.[70] Nor are the borders between 'convictions' protected under the Directive and 'political opinions' unanimously located where the Court of Justice sees them. In several states, such as Belgium for example, 'political opinions' may be protected by legislation, but in addition to the 'beliefs' referred to in the Directive.[71] This pattern corresponds to that envisaged by the Court of Justice. In other Member States, on the other hand, 'political opinions' are included among the 'convictions' referred to in the Directive: here, we are no longer on the conceptual line drawn by the *S.C.R.L.* judgment. This seems to be the situation in Lithuania. According to the Lithuanian Constitutional Court, indeed, 'Convictions are a broad and diverse constitutional notion, including political, economic convictions, religious feelings, cultural disposition, ethical and esthetical views etc.'.[72] In Italy, and again contrary to what the Court of Justice itself advocates, the notion of 'belief' laid down by Directive 2000/78/EC has been interpreted by the case law as including 'trade union membership'.[73]

3 Conclusions

'Religion' and 'beliefs' are typically notions with 'open texture'. This situation is, on the one hand, positive: any 'definition' implies necessarily a 'limitation', and drawing the borders is a very delicate exercise in which the authority in general, and the judge in particular, risks at any moment compromising the impartiality and neutrality that respect for the freedoms at stake, and for democratic pluralism in general, requires to observe. On the other hand, however, borders remain indispensable: without conceptual limits to its scope, protection against discrimination on grounds of 'religion or belief' could call into question any legal obligation. This necessary task of definition is not, however, an easy one: the direct sources (the texts of EU law and their preparatory work) are silent, and the indirect sources – the case law of the European Court of Human Rights and the 'common grounds' exhibited by the national legal frameworks – draw blurred lines which the interpretation of EU law and its harmonising aim cannot accommodate. Until now, the Court of Justice has not really been confronted with *hard cases* of qualifications: the 'convictions' put forward in the cases brought before it, in the context of the interpretation of Directive 2000/78/EC, were

68 Quoted by Schindlauer, D. (2022), *Country report on non-discrimination (Austria),* pp. 19-20, available at: https://www.equalitylaw.eu/.
69 See Walsh, J. (2022), *Country report on non-discrimination (Ireland),* p. 16, available at https://www.equalitylaw.eu/.
70 See Walsh, J. (2022), *Country report on non-discrimination (Ireland),* p. 16, available at https://www.equalitylaw.eu/.
71 See Pitt, G., 'Religion or belief: aiming at the right target?', *op. cit.,* p. 212. This is the case for: Belgium, Albania, Bulgaria (political affiliation), Croatia, Cyprus, Denmark, Finland, France, Germany, Hungary, Latvia, Luxembourg, Malta, Montenegro, Netherlands, North Macedonia, Poland, Portugal, Slovakia, Turkey, Northern Ireland.
72 Quoted by Andriukaitis, G., and Guliakaitė, M. (2022), *Country report on non-discrimination (Lithuania),* p. 21, available at: https://www.equalitylaw.eu/.
73 Favilli, C. (2022), *Country report on non-discrimination (Italy),* p. 17, available at https://www.equalitylaw.eu/.

notorious ones. However, there is nothing to prevent the situation from becoming more complicated in the future. On the initiative of a Pastafarian football fan, for example...

III The protection of 'non-religious' beliefs by EU Law beyond the scope of Directive 2000/78/CE

Although they are difficult to draw, there exist well and truly external borders to the protection offered to 'beliefs' by Directive 2000/78/EC, and it should therefore be assumed that, among all the 'non-religious beliefs' theoretically conceivable, some will fall outside its scope. In accordance with the lessons of the *S.C.R.L.* judgment, one can mention as examples 'political or trade union beliefs', as well as 'artistic, sporting, aesthetic or other beliefs or preferences'.

However, the fact that Directive 2000/78/EC does not apply does not mean that there is no protection whatsoever under European Union law. Subsidiary protection is in fact possible, within the scope of the Charter (Article 51,[74]) on the basis of Articles 11 or 21 of this instrument. Article 11 of the Charter (freedom of expression) provides protection in a wide range of fields,[75] including asylum cases. In this area, for example, the Court of Justice recently ruled that '(the) case-law of the European Court of Human Rights, which is relevant to the interpretation of Article 11 of the Charter, supports a broad interpretation of the concept of "political opinion" within the meaning of Article 10(1)(e) of Directive 2011/95 ([76]). According to that interpretation, the concept of "political opinion" covers any opinion, thought or belief which, without necessarily being directly and immediately political, manifests as an act or omission which is perceived by the actors of persecution mentioned in Article 6 of the directive as part of a matter related to those actors or their policies and/or methods and communicating opposition or resistance thereto'.[77]

However, the subsidiary protection offered by Articles 11 and 21 of the Charter to 'non-religious beliefs' and to victims of discrimination based on such beliefs is not as effective and powerful as that provided by Directive 2000/78/EC, in particular because it is less precise.[78] Moreover, it is confined to the scope of the Charter, as set out in Article 51.[79] Is it conceivable that it could be applied horizontally? There is some uncertainty on this point, linked to the fact that, until now, the Court has *de facto* accepted the horizontal applicability of Article 21 only in the presence of the criteria of discrimination envisaged by Article 19 TFEU.[80]

74 '1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties (…)'.

75 See Wachsmann, P., (2023), 'Article 11', *La Charte des droits fondamentauux de l'Union européenne,* 3rd ed., Picod, F., Rizcallah, C. and Van Drooghenbroeck, S. (eds), p. 308 ff.

76 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

77 C280/21, *P.I. v. Migracijos departamentas prie Lietuvos Respublikos vidaus reikalų ministerijos*, 12 January 2023, ECLI:EU:C:2023:13, 32.

78 See Bribosia, E, Rorive, I and Hislaire, J., (2023), 'Article 21', *La Charte des droits fondamentauux de l'Union européenne,* 3rd ed., Picod, F., Rizcallah, C. and Van Drooghenbroeck, S. (eds,) pp. 630-631.

79 This restriction of the scope of application will leave certain situations that are particularly problematic in terms of undermining the democratic pluralism of opinions 'outside the scope' of the Charter and its protection. See, for example, C-328/04, *Criminal proceedings against Attila Vajnai*, Order of 6 October 2005, ECLI:EU:C:2005:596.

80 See de Vries, S.A. (2019), 'The Bauer et al. And Max Planck judgments and EU citizens' fundamental rights: An outlook for harmony', *European Equality Law Review,* p. 23; Muir, E. (2019), 'The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer', *Review of European administrative law,* vol. 12, nr. 2, 185-215.

In our view, however, the very general terms of the *Egenberger* judgment[81] do not require such a restrictive interpretation.

IV Can religious beliefs and non-religious beliefs protected by Directive 2000/78/EC be 'dissociated'?

As the law currently stands, there are no considerable practical implications in drawing 'internal borders' within the beliefs protected by Directive 2000/78/EC. Religious convictions and non-religious convictions covered by the terms 'religion or belief' are treated in exactly the same way by the Directive, whether in terms of defining prohibited discrimination, formulating exceptions to it (see in particular Article 4(2)), or devising sanctions and remedies.

The question arises, however, as to whether the Member States, in implementing the Directive, are obliged to maintain this unity of regime, or, on the contrary, are authorised – on the basis of Article 8 of the Directive and on condition that they respect the 'floor' imposed by it – to associate a different regime with convictions, depending on whether they are religious or not.

In its conclusions in *S.C.R.L*, Advocate General Medina opted for the second option:

> 'a national legislation is to be considered as more favourable to the protection of the principle of equal treatment, within the meaning of Article 8 of Directive 2000/78, when it concerns, not only the analysis of a justification applicable to indirect discrimination, but also the assessment of the existence of discrimination and, consequently, the finding of direct or indirect discrimination in a specific case. That encompasses national legislation which, upon the implementation of Directive 2000/78, establishes autonomous protection of religion and religious beliefs as a single ground of discrimination. Such an approach does not jeopardize the basis of Directive 2000/78, which, as the Court has recognized, is to be conceived as an instrument allowing Member States to make legitimate choices that concern the place accorded to religion and religious beliefs within their systems. The judgments in *G4S Secure Solutions* and *WABE* are not undermined, nor is the principle of primacy of EU law, given that both judgments refer to the interpretation of Article 1 and Article 2(2) of Directive 2000/78 – which establish minimum requirements for combating discrimination in employment and occupation – and thus do not exclude the possibility of affording, under Article 8 of that same directive, a higher degree of protection against unequal treatment'.[82]

However, the Court's position has been different. It began with pointing out that 'for the purposes of the application of Directive 2000/78, the terms "religion" and "belief" must be analysed as two facets "of the same single ground of discrimination"'.[83] In other words, 'Article 1 of Directive 2000/78 must be interpreted as meaning that the words "religion or belief" contained therein constitute a single ground of discrimination, covering both religious belief and philosophical or spiritual belief.'[84]

81 See C414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, judgment of 17 April 2018, ECLI:EU:C:2018:257: '76. The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C176/12, EU:C:2014:2, paragraph 47).

77 As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals (see, by analogy, C-43/75, *Defrenne*, 8 April 1976, EU:C:1976:56, paragraph 39; C281/98, *Angonese*, 6 June 2000, EU:C:2000:296, paragraphs 33 to 36; C411/98, *Ferlini*, 3 October 2000, EU:C:2000:530, paragraph 50; and C438/05, *International Transport Workers' Federation and Finnish Seamen's Union*, 11 December 2007, EU:C:2007:772, paragraphs 57 to 61).

82 Opinion of Advocate General Medina in Case C-344/20, *S.C.R.L. (Vêtement à connotation religieuse)*, 28 April 2022, ECLI:EU:C:2022:774, 67.

83 Case C-344/20, *S.C.R.L. (Vêtement à connotation religieuse)*, 13 October 2022, ECLI:EU:C:2022:774, 26.

84 Case C-344/20, *S.C.R.L. (Vêtement à connotation religieuse),* 13 October 2022, ECLI:EU:C:2022:774, 29.

The judgment adds:

> 'Article 1 of Directive 2000/78 must be interpreted as precluding provisions of national legislation, which are intended to ensure the transposition of that directive into national law and which are construed as meaning that religious belief and philosophical belief constitute two separate grounds of discrimination, from being taken into account as "provisions which are more favourable to the protection of the principle of equal treatment than those laid down in [that directive]" for the purposes of Article 8(1) thereof.'[85]

The conclusion reached is, in our view, quite astonishing[86] – Advocate General Medina's reasoning on the 'minimal' nature of the harmonisation achieved by the Directive was indeed convincing and coherent, and it might therefore have been expected that the Court would have given more reasoning for its own position.

Concluding remarks

Our initial question was about the protection afforded by European Union law to 'non-religious beliefs'. In the end, the answers are quite modest. The contours of the very notion of 'non-religious belief' are very vague, and the scope of the protection that European Union law grants or allows to be granted to them over and above its own requirements is, on several aspects, subject to controversy.

85 Case C-344/20, *S.C.R.L. (Vêtement à connotation religieuse),* 13 October 2022, ECLI:EU:C:2022:774, 62.
86 Chassin, C-A. and Leclerc, S., 'Le port des signes religieux au travail: convergences européennes', *Revue de droit de l'Union européenne*, p. 212.

School desegregation lessons from Bulgaria, Greece, and Romania

Iulius Rostas*

Since the mid-1990s, Roma school segregation has been documented extensively by non-governmental organisations, scholars and international organisations. In each country with a significant Roma population, Roma rights groups have identified school segregation cases and started to challenge these discriminatory practices before courts and equality bodies. National equality bodies, courts of law and even the European Court of Human Rights (ECtHR) have issued decisions concerning segregation cases, thereby developing a jurisprudence in this field that would, supposedly, guide policymakers and those actors involved in school desegregation. Governments have acknowledged the negative impact of segregation on Roma education and have taken steps to combat Roma school segregation. Hence, policymakers have had access to data and guidelines offered by international law and jurisprudence in designing the most effective policies in combating Roma school segregation. In addition, the European Union has repeatedly encouraged Member States to use its funding instruments and allocate financial resources for the implementation of Roma policies, including those aimed at combating school segregation. However, recent research has indicated that, over the past decade, Roma school segregation has been on the rise in Europe.[1] Policymakers and educational experts continue to have a lack of clarity regarding desegregation and to use a mix of terminologies and conceptual frameworks when tackling segregation.

This article assesses the development of standards in Roma school segregation cases as developed by the European Court of Human Rights, their impact and their potential to provide support for desegregation initiatives in Bulgaria, Greece and Romania. It does so by analysing the relevant ECtHR jurisprudence, national laws, domestic case law, policies and regulations relating to school segregation in these countries, including those aimed at preventing bias and bullying. Regarding methodology, the article is based on legal analysis, secondary analysis of data, a review of the relevant literature, policy analysis and data provided through questionnaires by national experts in the field of non-discrimination from Bulgaria, Greece and Romania.[2]

The article is structured in three parts. The first part contains an analysis of the ECtHR jurisprudence and the policy standards for combating school segregation developed by the Court. The second part investigates the most recent data and the trends regarding Roma school segregation in Bulgaria, Greece and Romania in the past 10 years and analyses the impact the policy standards developed by the ECtHR have had on domestic legislation, national jurisprudence and policies aiming at combating school segregation, including those regarding bullying and bias, in Bulgaria, Greece and Romania. The third part draws conclusions regarding lessons learned from the efforts of the Bulgarian, Greek and Romanian Governments to combat Roma school segregation.

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1 EU Agency for Fundamental Rights (FRA) (2022), *Roma in 10 European Countries. Survey 2021 – Main results*, Vienna, p. 40, https://fra.europa.eu/en/publication/2022/roma-survey-findings.

2 The author would like to thank Dilyana Giteva, Athanasios Theodoridis and Romaniţa Iordache, as members of the European network of legal experts in non-discrimination, for providing data at a national level. Special thanks also go to Catharina Germaine and Isabelle Chopin for their feedback and continuous support during the writing of this article.

I The European Court of Human Rights and Roma school segregation

In liberal democracies, the courts have a significant role in policymaking through what is called the 'judicial policymaking' process.[3] They make or shape policies through the interpretation of the constitutional provisions, laws, institutional regulations and practices.

The section below presents the ECtHR cases in chronological order and an analysis of these cases from the perspective of policy standards for school desegregation.

I.A Jurisprudence

The analysis of the ECtHR jurisprudence starts with the presentation of the facts of the cases, followed by an analysis of the conclusions from the Court. The ECtHR has addressed Roma school segregation in nine cases. These cases are: *D.H. and Others v. the Czech Republic* (2007); *Sampanis and Others v. Greece* (2008); *Oršuš and Others v. Croatia* (2010); *Lavida and Others v. Greece* (2013); *Horváth and Kiss v. Hungary* (2013); *Sampani and Others v. Greece* (2013); *X and Others v. Albania* (2022); *Elmazova and Others v. North Macedonia* (2022); and *Szolcsán v. Hungary* (2023). There were other complaints brought before the ECtHR, but the Court declared them inadmissible: *Horvath and Vadaszi v. Hungary* (2010);[4] *Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány v. Hungary* (2014);[5] and *Kósa v. Hungary* (2017)[6].

As one might notice, only three of the nine Roma school segregation cases directly concern one of the countries included in this analysis – Greece. However, the decisions of the ECtHR in school segregation cases, like any other decisions, should inform the jurisprudence in all other Council of Europe Member States. While not being a fourth instance court, the ECtHR guides national courts and legislators, through the principles identified in its case law, in the application of the European Convention on Human Rights and Fundamental Freedoms.

On 18 April 2000, the ECtHR received the first such case, *D.H. and Others v. the Czech Republic*, filed by 18 applicants of Roma descent from the Czech Republic. The ECtHR delivered its final decision in 2007. The applicants raised concerns regarding their placement in special schools for children with learning difficulties between 1996 and 1999. They argued that this placement had subjected them to a limited curriculum compared with their peers in regular schools. The decision to place them in special schools was based on a test administered by the head teacher. Having exhausted all available domestic remedies, the 18 Roma applicants lodged a complaint with the ECtHR in Strasbourg, alleging violations of multiple articles of the European Convention on Human Rights. These included Article 3, which prohibits degrading treatment; Article 6, which guarantees the right to a fair trial; and Article 2 of Protocol No. 1, which protects the right to education, in conjunction with Article 14, which prohibits discrimination.

The second case of school segregation brought before the ECtHR involved Greece and was initiated in 2005 – *Sampanis and Others v. Greece*. The ECtHR delivered its decision in 2008. The case revolved around 11 children of Roma descent who were unable to enrol in the school year 2004-05. Subsequently, for the academic year 2005-06, they were placed in special classes located in an annexe attached to the main primary school building. Non-Roma parents protested against the admission of Roma children to the primary school and staged a blockade, demanding that the Roma children be moved to a different facility. To prevent mistreatment of Roma children by the protesters, the police intervened. In these circumstances, Roma parents agreed to have their children placed in prefabricated classrooms within the annexe. Later, racial slurs were found on the walls of the building housing the Roma classes, and it

3 Judicial policymaking, as defined by experts, is when the courts' decisions provide 'a choice among alternative courses of action, which choice binds those subject to the policymaker's authority.' Segal, J. A., Spaeth, H.J. and Benesh, S.C. (2005), *The Supreme Court in the American Legal System*, Cambridge University Press: New York, p. 4.
4 Declared inadmissible by the ECtHR due to failure to exhaust of domestic remedies.
5 Declared inadmissible by the ECtHR because of *ratione personae*.
6 Declared inadmissible by the ECtHR due to failure to exhaust domestic remedies.

was alleged that non-Roma protesters had set the building on fire. The applicants in this case claimed that their children had experienced discrimination in the enjoyment of their right to education due to their Roma origin. They relied on Article 14, which prohibits discrimination, in conjunction with Article 2 of Protocol No. 1, which protects the right to education, and Article 13, which guarantees the right to an effective remedy.

The third case concerning school segregation brought before the ECtHR was initiated in 2003, against Croatia – *Oršuš and Others v. Croatia*. The ECtHR delivered its final decision in 2010. This case centred on 15 Roma children from three villages in the northern region of Međimurje. These children were placed predominantly in Roma-only classes throughout most of their primary education, although they were also occasionally placed in mixed classes within a mainstream school. The curriculum in the Roma-only classes was significantly reduced, at approximately 30 % less than the official curriculum that was followed by the mixed classes, resulting in Roma children receiving a lower quality of education. The official justification for establishing Roma-only classes was the perceived weak proficiency of Roma children in the Croatian language. Statistical data indicated a high likelihood that Roma individuals in the Međimurje region would be assigned to Roma-only classes, with a lesser chance for them to complete their education. The applicants claimed that their placement in separate classes based on their ethnicity amounted to racial discrimination, depriving them of their right to education in a multicultural environment. They argued that this separation subjected them to degrading treatment, in violation of Article 3 of the Convention.

The fourth case – *Horvath and Kiss v. Hungary* – pertains to the discriminatory treatment of two Roma children in Hungary's educational system and was brought before the ECtHR in 2011. The Hungarian authorities diagnosed both children as having mental disabilities and transferred them from mainstream schools to a remedial school. István Horváth (IH) was born in 1994 and was initially assessed with a mild mental disability by the county's expert and rehabilitation panel (expert panel) in 2001, when he was seven years old. He was subsequently moved to a remedial primary and vocational school. Interestingly, the expert panel informed IH's parents about the transfer before the assessment had taken place. IH underwent further examinations by the expert panel in 2002, 2005 and 2007, with each assessment confirming the diagnosis. Similarly, András Kiss (AK), born in 1992, was also assessed at a young age with a mild mental disability and transferred to the same remedial school. Despite AK's remarkable achievements in the remedial school, the expert panel consistently upheld the diagnosis. In 2005, both complainants underwent an assessment conducted by independent experts during a summer camp. The findings of the independent experts contradicted the assessments made by the expert panel. IH was assessed as not having a mental disability or being unfit for mainstream education, while AK was identified as having learning difficulties but no mental disability. Following this assessment, the two Roma teenagers, through their appointed representatives, initiated legal proceedings, asserting that they had experienced discrimination based on their Roma origin. Ultimately, they argued before the ECtHR that their placement in the remedial school had violated Protocol 1, Article 2, in conjunction with Article 14 of the European Convention on Human Rights (ECHR), as it unlawfully interfered with their right to education.

The fifth case – *Lavida and Others v. Greece* – concerned the education of Roma children who were restricted to attending a primary school in which the only pupils were other Roma children. The application was lodged with the ECtHR in January 2010 and the Court decided on the case in 2013.The applicants were 23 Greek nationals of Roma origin living in a town with four primary schools and who complained that Roma children from their community were assigned to school No. 4 as a result of the school districting design. School No. 4 was a Roma-only school although school No. 1 was closest to some Roma households. Moreover, no non-Roma child who lived in the catchment area of school No. 4 was educated in that school. The situation complained of by the applicants regarding the 2009-10 academic year had lasted until the 2012-2013 academic year. The applicants complained that placing the Roma children in school No. 4 had deprived the pupils of a proper education.

The sixth case – *Sampani and Others v. Greece* – concerned the provision of education for Roma children at primary school No. 12 in Aspropyrgos. The application was lodged with the ECtHR in October 2009 and the decision of the Court was delivered in December 2013. The applicants were 140 Greek nationals of Roma origin; 98 of them were children and the other 42 were their parents or guardians. Some of them were also applicants in the 2008 case *Sampanis and Others v. Greece*. Following the 2008 *Sampanis* decision, the authorities decided that a new, ethnically mixed primary school (No. 12) was to be opened in Aspropyrgos to replace the annexe to primary school No. 10, which had been attended mainly by Roma children. This decision triggered the reaction of the parents of non-Roma pupils who opposed the integration of Roma children into ordinary classes. During the summer of 2008, the non-Roma parents attacked the premises of school No. 12, damaging and stealing all its equipment. The Ministry of Education and the Ombudsperson emphasised that the solution was to have an integrated school, but the local authorities refused integration, claiming that this would lead to possible social, cultural and educational problems in the Aspropyrgos community. This refusal resulted in the transformation of school No. 12 into a 'ghetto school', since no non-Roma pupils were enrolled there. The applicants complained that they or their children had been enrolled in a segregated school that provided a lower standard of education than other schools. They further complained that they had been unable to raise their grievances in Greece, and that the authorities had refused to abide by the *Sampanis and Others v. Greece* judgment delivered in 2008.

In the seventh case – *X and Others v. Albania* – the application pertains to the alleged segregation of the Naim Frasheri School in Korca. The application with ECtHR was lodged in 2017 and the court delivered its decision in 2022. According to the applicants, in 2016, approximately 99 % of the students enrolled in the school were of Roma or Egyptian descent. The segregated school was a result of the 2012 Government pilot project aimed at improving attendance and progress among Romani and Egyptian students, which resulted in so-called 'white flight', i.e. non-Roma students abandoned the school. On 22 September 2015, the national equality body – the Commissioner for Protection against Discrimination – determined that the situation amounted to indirect discrimination based on race and ethnicity. The Commissioner urged the authorities to take measures to end the segregation of the school and its students. In April 2017, the Ministry of Education sent a letter to the applicants' representative outlining several steps to be taken in order to achieve desegregation of the school. The applicants claimed that the segregation of the school persisted, and that the quality of teaching was sub-par. In October 2017, they lodged a complaint under Article 1 of Protocol No. 12 to the Convention, asserting that they had been subjected to discrimination as a result of the Government's policies.

The eighth case – *Elmazova and Others v. North Macedonia* – revolved around allegations of segregation between students of Roma and Macedonian backgrounds, who were predominantly assigned to separate schools within the same catchment area in Bitola, and allegedly placed in different classes in Shtip. The applicants, consisting of 87 Macedonian citizens of Roma origin, were students attending state-run primary schools in Bitola and Shtip, along with their parents. According to the applicants, during the 2018-19 academic year, those from Bitola were reportedly denied access to their preferred neighbourhood school or, in some cases, transferred to other schools. Consequently, this resulted in the creation of a 'ghetto school' with 80 % Roma students and a non-Roma school. In the former school, ethnic Macedonian students were allegedly placed in separate classes, leading to the claim that the education provided to these children was of inferior quality. In Shtip, between 2017 and 2019, the child applicants were allegedly assigned to Roma-only classes, segregated from their non-Roma peers, while many ethnic Macedonian students were transferred to different schools. The applicants argued that this exclusion from mainstream education had deprived their children of the same opportunities as non-Roma students in terms of future education, employment, and integration into society. Both sets of applicants filed constitutional complaints. In the case of Bitola, the Court found that one school consisted of 83.5 % Roma students while the other was made up of 95.1 % ethnic Macedonian students. However, despite this evidence, the Constitutional Court dismissed the complaint. Regarding the school in Shtip, the relevant constitutional complaint was rejected, with the Court opining that separation into different classes based on ethnicity did not constitute discrimination.

The ninth case – *Szolcsán v. Hungary* – pertained to the applicant's education in a primary school that was attended predominantly by Roma children. In April 2016, the applicant filed a complaint with the European Court of Human Rights, and the ECtHR reached a decision on the case in March 2023. The applicant, a Hungarian national of Roma ethnicity residing in Piliscsaba, Hungary, encountered a situation where the town had only one state school offering a regular curriculum. The other two schools in the town were a German minority school and a Catholic school. In the 2013-14 school year, the applicant was enrolled in the state school in Piliscsaba, where only four pupils were enrolled in Year 1. Despite Roma individuals constituting only 4 % of the town's total population, the school was attended predominantly by Roma children. According to the applicant, the quality of education provided at the school was inadequate, as education data from 2013 indicated that less than 10 % of pupils there continued to a secondary grammar school. In July 2014, the applicant's request for a transfer to another public primary school in a neighbouring town was denied on the grounds that he did not reside within the catchment area of that school. However, a significant portion of the school's students did not live within the school district, and the school that was better suited to the applicant's hearing impairment was easily accessible via public transportation. An appeal to the educational authority regarding the refusal of the neighbouring school was also rejected. In 2015, the applicant filed a complaint with the relevant Administrative and Labour Court, alleging that he had been subjected to segregated education. However, the court dismissed the complaint, stating that the location of the school was the decisive factor in denying his transfer. A subsequent petition for review by the Supreme Court of Hungary was also dismissed, with the determination that the right to choose schooling did not grant admission to a specific school. In December 2015, a constitutional complaint was lodged with the Constitutional Court, but it was refused on the grounds that it did not raise a constitutional issue.

I.B Policy standards

In the 2007 case of *D.H. v. the Czech Republic*, the Grand Chamber of the ECtHR laid down fundamental principles for addressing the segregation of Roma children in public education. Significantly, the ECtHR recognised the admissibility of statistical evidence in establishing a violation (paragraph 187); implemented the reversal of the burden of proof (paragraph 195); underlined that in educational cases there is no need to prove discriminatory intent of the authorities (paragraph 194); emphasised the necessity for the highest level of justification when dealing with discrimination based on nationality or ethnicity; and defined Roma as a disadvantaged and vulnerable minority that needs special protection due to its turbulent history and constant uprooting (paragraph 182). The Court also held that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures' (paragraphs 175-76). In addition, the Court held that 'no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest' (paragraph 204).

In the 2008 case of *Sampanis v. Greece*, the ECtHR found that the applicants had been subjected to indirect discrimination since the Government had failed to show that the allocation to separate classes was based on any criterion and that such classes would facilitate integration into mainstream cases. The ECtHR reiterated the no waiver for discrimination contrary to a public interest is acceptable.

In *Oršuš v. Croatia*, the Grand Chamber of the ECtHR stated that when the difference in treatment is based on ethnicity, a stricter scrutiny test applies (paragraph 149). The ECtHR required that the state had to show that the practice of segregating Roma children had been objectively justified, appropriate and necessary (paragraph 155). The Grand Chamber provided detailed reasons as to why the facts of the case amounted to indirect discrimination: there was no legal basis for assigning Roma pupils in separate classes (paragraph 158); the tests were not assessing language proficiency (paragraph 159); the circumstance in which using a lower-standard curriculum should be provided by law (paragraph 165); assignment to separate classes based on language proficiency could be justified only if there is a specific

programme for improving the language skills (paragraph 166) with a clear timeline regarding skills acquisition and transfer into mixed classes (paragraphs 172 and 173). Procedurally, the novel element expressed by the ECtHR was that segregation could be proven through other means than statistics such as showing that a measure targets or affects only a specific vulnerable group.

In the *Lavida v. Greece* case, the ECtHR stated that 'even in the absence of any discriminatory intent on the part of the State, the Court considers that the position of perpetuating the education of Roma children in a public school attended exclusively by Roma, and the renouncing of effective antisegregationist measures – for example, sending Roma children to mixed classes in other schools in Sofades or proceeding to redistrict the school district map – partially because of the opposition shown by parents of non-Roma students, cannot be considered as objectively justified by a legitimate aim' (paragraph 72). Unlike in previous cases, in this case the ECtHR did not require an additional negative consequence such as a lower-standard curriculum, considering the simple fact of overrepresentation to be discriminatory, although the non-Roma parents' opposition did have a negative consequence for the Roma children's access to inclusive education.

In *Horvath and Kiss v. Hungary* the ECtHR built on previous jurisprudence regarding Roma school segregation by reaffirming the acceptability of statistical evidence in establishing initial indications of discrimination based on ethnicity (paragraph 107); the shifting of the burden of proof (paragraph 108); and that the requirement of proving discriminatory intent for indirect discrimination in education is not necessary (paragraph 106). The novel aspect of the case is that the ECtHR addressed for the first time 'the positive obligations of the State to rectify a legacy of racial segregation in special schools' (paragraph 127). The Court emphasised that, 'the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminatory practices disguised as ostensibly neutral tests' (paragraph 116). In the case, the ECtHR went a step further in developing standards against segregation by emphasising a substantive positive obligation, namely the need to 'undo a history of racial segregation in special schools' (paragraph 127). It also placed the responsibility on the state to demonstrate that the tests employed, as well as their practical implementation, are capable of determining the learning abilities of the applicants in a 'fair and objective' manner (paragraph 117).

In the 2013 *Sampani v. Greece* case, the ECtHR reaffirmed that when differential treatment is rooted in race, colour, or ethnic origin, the concept of objective and reasonable justification should be interpreted with utmost stringency (paragraph 90). The Court also advised that the applicants who were still of school age should be enrolled in another state school, while those who had reached adulthood should be enrolled in 'second chance schools' or adult education institutes established by the Ministry of Education under the Lifelong Learning Programme (paragraph 128).

The *X v. Albania* case brought about significant advancements in the jurisprudence of the ECtHR regarding Roma school segregation. The Court established the 'positive obligation to take steps to correct the applicants' factual inequality and avoid the perpetuation of the discrimination that resulted from their over-representation in the school thereby breaking their circle of marginalization and allowing them to live as equal citizens from the early stages of their life' (paragraph 84). The Government's failure to promptly address the segregation and provide necessary support to students transferring to neighbouring schools, without a valid justification, constituted a violation of the right to inclusive education (paragraph 85). Hence, the overrepresentation of Roma students in a school is unquestionably considered discrimination, even without the need for additional negative consequences for the students as was required in previous cases. The ECtHR also contributed to the clarification of racial segregation in schools by looking into whether 'the ratio between Roma/Egyptian and other pupils was reasonably proportional to the city-wide ratio for elementary schools' (paragraph 86).

In *Elmazova v. Macedonia*, the ECtHR made it clear that residential segregation does not constitute objective and reasonable justification for school segregation (paragraph 73). Moreover, desegregation places the duty on the state to 'take positive effective measures to correct the applicants' factual

inequality and avoid the perpetuation of the discrimination that resulted from their over-representation' and not on the Roma parents to enrol their children in other schools (paragraph 74). In the view of the ECtHR, school desegregation would ensure equality between Roma and non-Roma by 'breaking the circle of marginalisation and allowing them to live as equal citizens from the early stages of their life' (paragraph 74). In addition, the ECtHR clarified the meaning of desegregation which consists not only of measures to combat ethnic imbalance in a school or redrawing of the school districting map but should include other appropriate measures (paragraph 74). The overrepresentation alone was deemed sufficient by the ECtHR to establish a violation of Article 14. This fact is an indication of the progress towards reducing the required level of evidence needed to demonstrate school segregation as discriminatory according to the Convention.

In the *Szolcsan v. Hungary* case, the ECtHR affirmed that school segregation cannot be justified by school districting practices, a situation that the Kuria, the Hungarian Supreme Court has upheld (paragraph 54). The ECtHR made it clear that 'education of Roma children in segregated classes or schools without taking adequate measures with a view to correcting the inequalities to which they were subjected could hardly be considered compatible with the State's obligation not to discriminate individuals on the basis of their race or ethnic origin' (paragraph 57). The ECtHR also imposed a high standard for states to meet their obligations under the European Convention of Human Rights by stating that whenever pupils are educated in a segregated school, the State had a duty 'to take steps to correct this factual inequality and avoid the perpetuation and discrimination that resulted from the over-representation of Roma pupils at the school' (paragraph 55). Perhaps the most important finding of the ECtHR in this case, however, was the imposition of a duty on the Hungarian state to bring an end to Roma school segregation in the country because 'society living together free from racial segregation was a fundamental value of democratic societies' and the way to translate this into practice is through inclusive education (paragraph 69).

II Assessing the impact

Litigators have defined impact along three dimensions: material, instrumental and non-material.[7] Using this analytical framework, this section assesses the impact of the school segregation cases in these countries, looking into (1) the compensation received by the plaintiffs for their suffering and the consequences for perpetrators and the remedies offered by the ECtHR; (2) the influence on legislation, domestic jurisprudence, policies and institutions in Bulgaria, Greece and Romania; and (3) the changes in Roma communities in these three countries, the narratives around school segregation and the attitudes towards Roma in society.

II.1 The remedies

This section analyses the remedies ordered by the ECtHR and provides several examples of remedies ordered by the national courts. When assessing the remedies ordered by the ECtHR, the question of effectiveness, proportionality and dissuasiveness is highly relevant.[8] Looking at the compensation awarded to the victims by the ECtHR in school segregation cases, it is clear that the amounts are not

7 The Open Society Justice Initiative proposed the following three dimensions for an impact assessment of litigation: (1) Material impacts include direct changes as a result of the litigation, such as monetary restitution, compensation for harm, transfer of land, an order that perpetrators be prosecuted, or disclosure of information. (2) Instrumental impacts include changes in policy, law, jurisprudence, and institutions, including the judiciary itself. Instrumental impacts may be understood as results that are indirect but quantifiable. Much as with the passage of a specific law on a specific date that may come years after a judgment is handed down, the judgment has an impact on the instrument of change. (3) Non-material impacts may be understood as impacts that are indirect and impossible to quantify. These could include changes in the complainants' sense of empowerment and agency; the behavior and attitudes of policymakers, teachers, or police officers toward complainants and the group or movement they represent; the degree of community cohesion; or the direction and contours of public discourse, including through the demonstrative power of the rule of law in action. Open Society Justice Initiative (2018), *Strategic Litigation Impacts: Insights from Global Experience*. New York: Open Society Foundations, pp. 42-3.

8 The Court has the power under Article 41 of the European Convention on Human Rights to award "just satisfaction" to those who have suffered violations of their Convention rights.

effective, proportional and dissuasive, ranging between EUR 1 000 and EUR 8 000, with most of them at EUR 4 500 per applicant.[9] These compensation amounts are rather symbolic and not of a level that would have a deterrent effect on the perpetrators.[10] The ECtHR took several years to reach a decision on the school segregation cases before it. For the victims of school segregation, the effects could not be reversed as the positive decision came too late. From the victims' perspective, therefore, the compensation awards are not just as they cannot compensate for their suffering. Hence, the ECtHR remedies cannot serve as guidelines for judges and national equality bodies to impose adequate sanctions in school segregation cases.

It is important to note that, at national level, courts have at their disposal more options to remedy the situation. Besides compensation, courts could order injunctions to stop discriminatory behaviour; order immediate desegregation of schools; or order specific measures to facilitate educational inclusion such as busing, redesign of school districting or other measures. However, so far, national courts have rarely used such means, if at all, to offer just satisfaction to the victims of school segregation. In Hungary, courts did approve school desegregation plans because of litigation, such as in the case of *Chance for Children Foundation (CFCF) v. Kaposvar* in which the Supreme Court made clear that desegregation could be ordered by a court as long as the desegregation process is 'clear (detailed), realistic and executable'.[11] In the *CFCF v. Nyíregyháza case*, the court ordered busing as a mean to desegregate the school in 2010.[12] In Romania, the national equality body has applied sanctions for discrimination in the form of recommendations, warnings and financial sanctions of up to EUR 1 000 and, exceptionally, has asked schools and county inspectorates to desegregate.[13]

Experts are of the opinion that in cases of discrimination, the types of remedies that are most commonly awarded are civil remedies.[14] From analysing the dynamics of Roma school segregation in Europe, it seems that the types of remedies awarded might be more effective if they were to be combined with administrative and criminal sanctions. Roma school segregation, as in the *Sampanis* case, is often accompanied by other offences such as hate speech, harassment, victimisation, violation of privacy and family life, abuses of power, etc. Considering the effect that school segregation has on the fundamental rights of Roma children and on their development, as well as the impact on non-Roma children and the entire local community and society, it seems obvious that in certain cases, civil, administrative and criminal sanctions should be ideally combined. Such an approach to segregation would allow the victims to receive compensation for the offence against their dignity, but would also enable the perpetrators to be punished, as segregation erodes the very social fabric of the community and represents a structural factor that serves to reproduce inequalities between Roma and non-Roma. While penalising segregation in penal, civil and administrative codes might strengthen the protection against segregation, offering the victims the possibility to choose the avenues to pursue justice, it might also be disproportionate to expect victims of segregation to bring parallel proceedings, considering the challenges that even one such proceeding would entail.

9 The compensation awarded by the ECtHR to each plaintiff in Roma school segregation cases varied: EUR 4 000 in *DH*; EUR 6 000 in *Sampanis*; EUR 4 500 in *Oršuš*; EUR 8 000 in *Lavida*; EUR 4 500 jointly in *Horvath and Kiss*; EUR 1 000 in *Sampani*; EUR 4 500 in *X v. Albania*; EUR 4 500 in *Elmazova*; and EUR 7 000 in *Szolcsan*.

10 These compensation awards are symbolic if they are balanced against the negative influence on victims' life chances and the subsequent social exclusion to which victims were subjected. For example, the victims of school segregation will have lower-quality education. As a result, they have fewer chances to continue their education and to acquire skills and knowledge to compete in the labour market, especially for those jobs that would allow them to have a higher quality of life.

11 Farkas, L. (2014), *Report on discrimination of Roma children in education*, Brussels: European Commission - Directorate-General for Justice, p. 49.

12 Farkas, L. (2014), *Report on discrimination of Roma children in education*, Brussels: European Commission - Directorate-General for Justice, p. 50.

13 See Ivan, C. and Cerasela Bănica, C. (2022), *Report on School Segregation in Romania*, Bucharest: CADO, pp. 15-6, https://cado.org.ro/wp-content/uploads/2023/03/08112022ReportMonitoringSchoolSegregation_En.pdf.

14 For an overview of anti-discrimination sanctions in Europe, see Iordache, R. and Ionescu, I., 'Discrimination and its Sanctions – Symbolic vs. Effective Remedies in European Anti-discrimination Law', *European Anti-Discrimination Law Review*, No. 19, 2014, p. 16: 'Civil remedies are victim-focused and include remedies of a personal nature that benefit the victim of discrimination by bringing discrimination to an end, restoring the status quo antes and ensuring compensation and damages for harm incurred as well as for future loss of earnings. They might also include the victim's reinstatement in his or her position prior to discrimination in cases of discrimination in employment.'

II.2 Influence on the legislation

The second level of impact assessment consists of the influence on legislation, specifically anti-discrimination and education laws. Under the international standards on anti-discrimination, segregation is prohibited through the interpretation of the concept of discrimination or by explicit definition and prohibition. Similarly, national legislation does not necessarily need to explicitly prohibit segregation per se, if it is prohibited through judicial interpretation of legal provisions prohibiting discrimination. However, explicit prohibition may, in the author's opinion, strengthen the protection against segregation.

With regard to, first, specific anti-discrimination laws (ADLs), the Greek and Romanian ADLs cover segregation through the interpretation of the concept of discrimination. The Bulgarian ADL, however, defines racial segregation as the 'issuance of an act, commission of an act, or omission that has the effect of forcibly separating, segregating a person on the basis of that person's race, ethnicity, or colour.' This definition is obviously not in line with the ECtHR jurisprudence on Roma school segregation, as the ECtHR has repeatedly affirmed that intent does not matter in discrimination/school segregation cases. It can thus be argued that the ECtHR decisions have not had any direct impact on specific anti-discrimination laws in these three countries.

Secondly, the ECtHR decisions do not appear to have had any direct impact on national education laws in either Bulgaria, Greece or Romania.

The Bulgarian Pre-School and School Education Act bans kindergartens and schools from segregating children of 'a different' ethnicity in separate groups or classes. As one expert observed, 'there is no ban under that act on segregating children in separate kindergartens or schools', a widespread practice in Bulgaria.[15] The Ministry of Education in Bulgaria has implemented national programmes such as 'Supporting Municipalities for Educational Desegregation' and 'Supporting Municipalities for the Implementation of Educational Desegregation Activities'. However, the impact of these EU-funded programmes has been limited.[16] Some local governments have formulated desegregation strategies to tackle the problem of Roma school segregation. These strategies usually encompass shutting down or converting segregated schools, relocating Roma students to inclusive schools and offering support services to aid their integration. Nevertheless, in executing these plans, the local authorities have encountered diverse obstacles, including opposition from local communities and inadequate resources. School administrators, teachers and local authorities are responsible for enforcing regulations on bullying and bias, including the running of awareness-raising campaigns and the adoption of school safety policies. However, the degree to which these regulations have specifically impacted Roma school desegregation endeavours remains uncertain. As suggested by the national expert, there is a need for more comprehensive and targeted policy interventions to combat Roma school segregation in Bulgaria effectively.

In Greece, despite the influence of the ECtHR decisions on public discourse, the law on education was not amended and no major policy changes have been implemented. The Ministry of Education has issued three internal documents (circulars) aimed at facilitating the enrolment of Roma pupils in schools and the duty of school principals to lead this process.[17] In addition, in response to the ECtHR ruling in *Sampanis and Others*, the Directorate for Primary Education in West Attica made a decision to enforce the aforementioned judgment. This decision entailed enabling the applicants to apply for the enrolment or transfer of their children to any school of their preference within the specified area.[18] The decision

15 Ilieva, M. (2019), *Country report: Non-discrimination – Bulgaria, European network of legal experts in gender equality and non-discrimination*, p. 40.

16 See Government of Bulgaria, Report of the national education development programs for 2022 (*Отчет на националните програми за развитие на образованието за 2022 година*), 20 April 2023, https://web.mon.bg/bg/101106.

17 Greece, Ministry of Education, Circulars No. 116184/Γ1/10-9-2008, No. 3/960/102679/Γ1/20-08-2010 and No. 180644/Γ1/26-11-2013.

18 Greece, West Attica, Directorate of Primary Education, Decision No. 2359/24-04-2013.

was meant to limit the damages incurred by Roma children, taking into consideration that courts may take years to decide school segregation cases, a time period in which children might be out of school, dropping out or graduating.

In Romania, the ECtHR jurisprudence on Roma school segregation had no, or very limited, influence on education laws. The 2011 education law did not even mention school segregation. The recently adopted law on pre-university education does include a section on school desegregation, consisting of three articles.[19] Segregation based on ethnicity; disability involving special educational needs; socioeconomic status of the family; belonging to a vulnerable group; place of residence; or educational performance is banned. (Article 79.3) Segregation is defined as 'the type of discrimination committed within an educational unit, by physically separating preschoolers, or students belonging to a group defined according to paragraph (3) by groups/ classes/ buildings/ structures/ table rows, so that the percentage of preschoolers or students belonging to the respective group from the total number of students in the classroom/class/building is disproportionate in relation to the percentage that the children belonging to the respective group represent in the total age population corresponding to an education cycle, in the respective administrative-territorial unit.' (Article 79.5) In Romania, starting in 2004, the Ministry of Education adopted several internal documents banning school segregation and establishing a commission for school desegregation to supervise and assist with the implementation of school desegregation plans.[20] The challenge was always the implementation of these regulations, as the effectiveness of the mechanisms, the resources allocated and the political will to tackle Roma school segregation were insufficient. Compounded by the lack of ethnic data, the design of school desegregation norms in fact contributed to maintaining the status quo. The lack of ethnic data is mainly due to the lack of a comprehensive methodology on data collection by ethnicity. Without such data, achieving equality is an unrealistic policy objective, as different studies using different methods of data collection might present radically opposing situations. In practice, authorities have used the lack of ethnic data and the challenges to identify who is Roma as an argument in school segregation cases.[21]

II.3 Influence on domestic jurisprudence

The third level of impact evaluation considers the influence on domestic jurisprudence in Bulgaria, Greece, and Romania. Three of the school segregation cases decided by the ECtHR are from Greece, but there are no domestic cases on Roma school segregation in Greece. In Bulgaria and Romania, there are domestic cases before the equality bodies and courts, but no cases before the ECtHR. The ECtHR or domestic jurisprudence on Roma school segregation in Bulgaria, Greece, and Romania cannot be regarded as a sufficiently effective means of addressing Roma segregation in education due to the low number of cases as well as the quality of the case law. There are multiple factors that play a role in the existence of a significant amount of and the quality of the case law, such as the resources available to complainants; the legal representation avenues available to potential victims of segregation; the strength of civil society and the capacity of NGOs to address issues of inequality in society; and the initial and continuous training of legal professionals in the country, to name just a few of the most relevant factors.[22]

19 Law No. 198/2023, published in the *Official Gazette*, Part I No. 613/05.07.2023, entering into force on 3 September 2023. Among the reasons for adopting the law, the initiator does not mention ECtHR jurisprudence on segregation, nor the European Commission infringement against several EU Member States due to segregation of Roma in education.

20 Ivan and Banica offer a good overview of these regulations. See Ivan, C. and Cerasela Bănica, C. (2022), *Report on School Segregation in Romania*, Bucharest: CADO, pp. 14-5, https://cado.org.ro/wp-content/uploads/2023/03/08112022ReportMonitoringSchoolSegregation_En.pdf.

21 See details on the Hajdúhadház Desegregation Case in Farkas, L., 'Limited Enforcement Possibilities Under European Anti-Discrimination Legislation – A Case Study of Procedural Novelties: Actio Popularis Action in Hungary, *Erasmus Law Review*, Volume 3, Issue 3 (2010) p. 191. See also Romania's High Court of Cassation and Justice, decision No. 1015/2020 in *Centrul de Advocacy si Drepturile Omului v. Scoala Gimnaziala Bogdan Petriceicu Hasdeu and Inspectoratul Scolar Judetean Iasi*, case 1067/45/2016.

22 Ivan and Bănica recommend specialised training on school segregation for members of national equality bodies and judges. Ivan, C. and Cerasela Bănica, C. (2022), *Report on School Segregation in Romania*, Bucharest: CADO, p. 20. Lila Farkas suggests several challenges for legal professionals in school desegregation: Farkas, L. (2014), *Report on discrimination of Roma children in education*, Brussels: European Commission - Directorate-General for Justice, p. 57.

According to the national anti-discrimination expert, the influence of the ECtHR case law in Bulgaria is limited. While reference to the ECtHR was made in some decisions by the national equality body and courts, the courts proved to have a limited understanding of the ECtHR jurisprudence. The most important cases on school segregation in Bulgaria, which prove the level of understanding of the ECtHR case law, are a decision of the Supreme Court of Cassation from 2008 and two decisions of the Supreme Administrative Court from 2008 and 2021. In 2008, the Supreme Court of Cassation, citing *DH v. Czech Republic*, found that there had been a violation of the right to inclusive education of Roma pupils, and indirect discrimination, as they were treated less favourably than pupils in other schools attended only by children of Bulgarian or mixed origin.[23] However, the Court did not interpret the separation of pupils based on their ethnic origin as school segregation as there was no act or omission leading to the *forced* ethnic segregation as defined in the ADL. In 2008, the Supreme Administrative Court, invalidating a favourable lower court decision, ruled that the separation of children by classes did not constitute segregation, as the justification by the principal for the separation was based on the children's level of proficiency in the Bulgarian language.[24] In 2021, the Supreme Administrative Court found that a posting on social media by a school principal announcing a refusal to enrol Roma children amounted to harassment and racial segregation, and fined the principal BGN 250 (EUR 125).[25] The Court made reference to European Court of Justice case law[26] but not to the relevant school segregation case law of the ECtHR.

According to the Center for Advocacy and Human Rights, a Bucharest-based NGO, which has monitored school segregation in Romania, the members of the national equality body and the judges, as well as the school and the local authorities, need training to increase their awareness regarding Roma school segregation. The national equality body – the National Council for Combating Discrimination (NCCD) – in its entire 20-year history found that Roma were subjected to racial segregation in 14 cases, either as direct or indirect discrimination, and issued warnings, recommendations and, in the last five decisions, fines ranging from RON 1 000 to RON 4 000 (EUR 230 to EUR 900).[27] It is important to note that there were also other cases in which the NCCD found that there was no segregation. In fact, the NCCD has no internal methodology for investigating school segregation. The sanctions imposed by the NCCD could be questioned from two perspectives: on the one hand, the anti-discrimination law does not provide for a warning and recommendations as sanctions, and on the other hand, it can be questioned whether the sanctions meet the requirements of the European Union Race Equality Directive 43/2000 of being a dissuasive, proportionate and effective remedy. Courts have also decided on Roma school segregation cases, especially in cases in which NCCD decisions had been challenged before administrative courts. In fact, several NCCD decisions in segregation cases were found by these courts not to be substantiated, which highlights one of the main weaknesses of the NCCD in connection with the lack of investigative methodologies: the way in which the law applies to specific facts of cases.[28] The most important decision on school desegregation case was issued by the High Court of Cassation and Justice (HCCJ) in 2020.[29] The HCCJ reversed the decision of the Court of Appeal in this case, making reference to relevant international human rights documents and upholding the NCCD decision, which made reference to ECtHR jurisprudence. In addition, the HCCJ issued several clarifications, which should inform future school segregation cases: (1) public knowledge supersedes the self-identification of Roma; (2) residential segregation cannot justify school segregation; and (3) the inability of the school and school inspectorate to effectively tackle school

23 Bulgaria, Supreme Court of Cassation, decision No. 723 of 1.08.2008 in case No. 3402/2007.
24 Bulgaria, Supreme Administrative Court, decision No. 11566 of 3.11.2008 in case No. 11199/2008.
25 Bulgaria, Supreme Administrative Court, judgment No. 6066 of 19.05.2021 in case No. 8633/2020.
26 CJEU, judgment of 10 July 2008, *Centrum voor de Gelijkheid van Kansen en Racismebestrijding v. Firma Feryn NV*, C-54/07, EU:C:2008:397.
27 See Ivan, C. and Cerasela Bănica, C. (2022), *Report on School Segregation in Romania*, Bucharest: CADO, pp. 15-6.
28 The High Court of Cassation and Justice (HCCJ), in its Civil Decision No. 401 of 28 January 2010, upheld a decision of the Bucharest Court of Appeal obliging the NCCD to substantiate its decision by interpreting the application of the Ministry of Education regulations regarding Roma school segregation to the concrete facts of the case. For additional cases and analysis of NCCD jurisprudence, see Rostas, I., 'Judicial Policy Making: The Role of the Courts in Promoting School Desegregation', in Rostas, I. (ed.) (2012), *Ten Years After: A History of Roma School Desegregation in Central and Eastern Europe*, Budapest: CEU Press.
29 Romania, HCCJ, decision No. 1015/2020 in *Centrul de Advocacy si Drepturile Omului v. Scoala Gimnaziala Bogdan Petriceicu Hasdeu and Inspectoratul Scolar Judetean Iasi*, case 1067/45/2016.

segregation by designing and implementing a school desegregation plan is a factor in assessing the cases. However, the most important contribution of the HCCJ decision concerns the interpretation of the desegregation process: 'It is irrelevant that they are trying to improve the educational conditions in body C, while desegregation has no direct connection with this indicator, but assumes that Roma students, first of all, do not study in schools located near a "compact" Roma neighbourhood.'

II.4 Influence on policies and institutions

The fourth level of impact assessment concerns the influence on educational policies, including those policies regarding bullying and bias. At this level, the commitments of Bulgaria, Greece and Romania under international human rights law, including the European Convention on Human Rights and the ECtHR jurisprudence, are elevated by their European Union membership, which brings with it additional policy standards in combating Roma school segregation. The European Commission, in its EU Strategic Framework for Roma equality, inclusion, and participation, set EU-level objectives and associated quantitative targets as minimum progress to be achieved by 2030. In this sense, the European Commission urged Member States to have 'work[ing] towards eliminating segregation by cutting at least in half the proportion of Roma children attending segregated primary schools' as a priority in the education field, and invited Member States to 'present a plan or set of measures for preventing and fighting antigypsyism and discrimination, segregation in education and housing, and anti-Roma prejudices and stereotypes (including online)'.[30] Through the March 2021 Council Recommendation, the Member States committed to strengthening their efforts to improve the social and economic inclusion of Roma.[31]

The Bulgarian strategy recognises the issue of segregation: 'The share of Roma students attending schools with mixed ethnicities has almost halved. The share of students in schools where there is a concentration of students of Roma origin is increasing – almost every second child of Roma ethnic origin is enrolled in a school where Roma predominate.'[32] (p. 7) Under the 'Education and Training' section, general objective 4, on 'overcoming the processes of segregation in kindergartens and schools located near Roma neighbourhoods, prevention of secondary segregation' (p. 24) and general objective 7, on 'Increasing and upgrading the knowledge, skills and competencies of pedagogical specialists and non-pedagogical staff to work in an environment of diversity and to overcome stereotypes and prevent discriminatory attitudes', are aimed at preventing segregation and bullying. As indicators, the strategy proposes as a target: 'Less than 1 in five Roma children attend schools where most or all of the children are Roma', in contrast to what was reported in the most recent FRA survey. No specific measures on bullying and anti-bias are included in the document.

The Greek Government's strategy identifies school segregation as an issue, and in its pillar 2 aiming at strengthening equal access for Roma to basic services and goods (education, employment, health, social care and housing), it provides for 'eliminating the segregation of Roma children at school and strengthening inclusiveness'.[33] This policy objective is challenging, as the Government recognises the need to address racial attitudes in schools among hostile societal attitudes, with 41 % of the Greek population reporting that they would feel uncomfortable if their child had Roma classmates.[34] Moreover, the goal of eliminating segregation is not translated into specific measures combating segregation such as mixing the cohorts but set out only in declarative statements such as 'supportive interventions in Roma communities to enhance access'.

30 European Commission, EU Roma strategic framework for equality, inclusion and participation for 2020-2030, pp. 5-9.
31 Council Recommendation of 12 March 2021 on Roma equality, inclusion and participation (2021/C 93/01).
32 Bulgaria (2021), *National Strategy of the Republic of Bulgaria for Equality, Inclusion and Participation of the Roma (2021-2030)*, https://commission.europa.eu/system/files/2021-12/national_strategy-_english_google.docx.pdf.
33 Greece (2022), National Roma strategic framework – original version (2021-2030) (*Εκνικι Στρατθγικι και Σχζδιο Δράςθσ για τθν Κοινωνικι Ζνταξθ των ομά 2021-2030*), https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/roma-eu/roma-equality-inclusion-and-participation-eu-country/greece_en#nationalromaintegrationstrategy.
34 European Commission (2019), *Special Eurobarometer 493: Discrimination in the European Union*, p. 136, https://data.europa.eu/data/datasets/s2251_91_4_493_eng?locale=en.

The Romanian Government strategy recognises school segregation as an issue (p. 14), but it does not include combating segregation as a policy priority, and there are no indicators measuring progress in eliminating segregation.[35] In fact, the proposed measures focus on improving the education in the segregated schools and/or establishing or rehabilitating schools in isolated or residential segregated communities. Regarding bullying and bias, it includes, among the indicators for the initial training of primary school teachers, the transformation of curricula to include human rights and antidiscrimination (annex 2). Developing the teaching of Romani language and literature, Roma history and traditions and Romani music is another measure to strengthen the self-esteem of Romani pupils in schools. No other measures aimed at transforming the school environment into an inclusive one are specified.

Another commitment relevant to combating school segregation is the EU Anti-racism Action Plan 2020-2025. Under this Action Plan, EU Member States have had to adopt national action plans against racism and racial discrimination, which should contain targeted measures to combat antigypsyism, including school segregation, racial stereotypes and prejudices. Bulgaria does not have a national action plan against racism. As noted by ECRI, 'since 2014 there has been a mechanism for countering violence in schools, there is no specific system in place to monitor and counter racist incidents.'[36]

Greece has adopted a National Action Plan against Racism and Intolerance 2020-2023, funded by the EU Rights, Equality and Citizenship Programme. The plan does not contain any measures aiming at combating Roma school segregation. Regarding bullying and bias, the plan contains two general objectives: 'Implementation of actions at all levels of education to promote mutual understanding and tolerance of diversity – combating stereotypes' and 'Raising awareness of specific target groups – teachers, members of parliament, police bodies, vulnerable groups – on issues of racism and intolerance', but no concrete measures are spelled out.

As part of the EU anti-racism programme, Romania adopted a national strategy for preventing and combating anti-Semitism, xenophobia, radicalisation and hate speech for 2021-2023, and an action plan. Regrettably, this document does not make any reference to Roma school segregation as it is 'rather a response to the diplomatic pressure related to combating antisemitism and has almost nothing to do with racism and antigypsyism'.[37]

II.5 Impact on Roma communities, narratives, and attitudes towards Roma

The fifth level of impact assessment concerns the changes in Roma communities in Bulgaria, Greece and Romania; the narratives around school segregation; and the attitudes towards Roma in society. The decisions of the ECtHR and of other courts, including the EU pressure on these countries, did not lead to significant changes for Roma communities. Although an important issue for Roma, school segregation did not mobilise Roma on a significant scale, and the fight for school desegregation did not ignite a sustained social movement similar to the civil rights movement in the United States. This fact allows Governments to mimic school desegregation and to postpone as far as possible the implementation of school desegregation policies in line with ECtHR jurisprudence. In fact, recent data show that school segregation has increased in all these countries in the past 10 years. According to the EU Fundamental Rights Agency's series of surveys conducted in 2011, 2016 and 2021, as a general trend within the European Union, the segregation of Roma in schools has increased in the past decade. In Bulgaria, in 2011, the share of Roma aged from seven to 15 who attended regular schools with the majority of

35 Romania (2022), *Strategy of the Romanian Government on the Inclusion of Romanian citizens belonging to the Roma minority for the period 2022-2027*, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/roma-eu/roma-equality-inclusion-and-participation-eu-country/romania_en.

36 European Commission against Racism and Intolerance (ECRI), *Sixth report on Bulgaria*, October 2022, p. 5.

37 Rostas, I. and Nodis, C. (2022), *Antigypsyism in Romania: Lessons (not) learned*, Brussels: CEPS, p. 57, https://antigypsyism.eu/wp-content/uploads/2023/03/D2.2._CHACHIPEN-National-Research-Report-on-Romania_final_complete_formatted.pdf.

classmates being Roma was 42 %.[38] The share increased to 58 % in 2016, and reached 64 % in 2021.[39] In Greece, the proportion of Roma aged from seven to 15 who attended regular schools with the majority of classmates being Roma increased from 34 % in 2016 to 46 % in 2021. In Romania, the reported figures increased from 27 % in 2011, to 28 % in 2016 and 51 % in 2021.

A significant challenge in assessing the impact is the data collection. Often, data from different sources are not directly comparable due to the different and sometimes unknown data collection methodologies. While the FRA research results might be contested due to the methodology used,[40] the Member States did not object or respond with any data contradicting these results, nor do the Member States themselves collect data on racial segregation in education. Data collected by NGOs for their own project purposes reveal staggering figures on Roma school segregation. In Bulgaria, based on data collected through an unknown methodology and communicated by the Ministry of Education for an EU-funded project, of 1 963 educational institutions, 185 schools segregated Roma pupils, and of 404 vocational schools, 150 segregated Roma.[41] According to ECRI, 'in Bulgaria, the percentage of Roma children up to the age of 15 reported as having attended a special school or class mainly for Roma was 14 %'.[42] In Romania, a recent report monitoring Roma school segregation in 10 counties and two districts of Bucharest found that in 66.4 % of the schools, Roma pupils were segregated in separate classes, and in 27.5 %, Roma pupils were segregated in separate buildings.[43]

As regards attitudes towards Roma, the persistent antigypsyism all over Europe and its wide societal acceptance is acknowledged by international organisations.[44] Moreover, Governments seem to be aware of the situation, but fail to set up institutions; adopt clear norms and procedures; and design and implement comprehensive anti-racist policies or even simple anti-racism action plans.

III Conclusions and lessons learned

The ECtHR has moved into a new phase in addressing Roma school segregation, from recognition of segregation as discriminatory under the Convention to imposing a duty on Member States to desegregate the schools. It did so by clarifying several arguments brought by opponents before courts: overrepresentation as being sufficient to prove discrimination; use of statistics in proving discrimination; proving intent in discrimination cases not being a requirement; no waiver of the right not to be discriminated against; no additional consequence to be demonstrated is necessary; and proving segregation not only through statistics but also through other means, such as showing that a measure targets or affects only a specific vulnerable group. A major challenge is now the implementation of the ECtHR decisions and the guiding power that its rulings have for national courts and policymakers.

The absence of a universally accepted definition for racial segregation in educational institutions poses a significant obstacle to tackling Roma school segregation in Europe effectively. The policy standards

38 Brüggemann, C. (2012), *Roma Education in Comparative Perspective. Analysis of the UNDP/World Bank/EC Regional Roma Survey 2011*, Roma Inclusion Working Papers, Bratislava: United Nations Development Programme, p. 65.
39 FRA (2022), *Roma in 10 European Countries. Survey 2021 – Main results*, Vienna, p. 40.
40 The FRA survey methodology is based on reported cases of segregation by individual. It relies on the individual perception of segregation and not on specific cases of segregation.
41 Kolev, D., *NOSEGREGATION project in Bulgaria: segregation maps and piloting models against segregation*, Center Amalipe, Sofia, October 2022.
42 ECRI, *Sixth report on Bulgaria*, October 2022, p. 20.
43 Ivan, C. and Cerasela Bănica, C. (2022), *Report on School Segregation in Romania*, Bucharest: CADO, p. 51, https://cado.org.ro/wp-content/uploads/2023/03/08112022ReportMonitoringSchoolSegregation_En.pdf.
44 See for example, the Council of Europe Declaration of the Committee of Ministers on the Rise of Anti-Gypsyism and Racist Violence against Roma in Europe, adopted by the Committee of Ministers on 1 February 2012 at the 1132nd meeting of the Ministers' Deputies: 'In many countries, Roma are subject to racist violence directed against their persons and property. These attacks have sometimes resulted in serious injuries and deaths. This violence is not a new phenomenon and has been prevalent in Europe for centuries. However, there has been a notable increase of serious incidents in a number of member States, including serious cases of racist violence, stigmatising anti-Roma rhetoric, and generalisations about criminal behaviour.'

developed by the ECtHR case law on Roma school segregation cases have the potential to offer more effective guidance to Governments than the 1960 UNESCO Convention Against Discrimination in Education.[45] For example, the ECtHR ruled that the right to non-discrimination cannot be waived. The UNESCO Convention provides that parental choice could be a justification for separate educational systems for linguistic or religious purposes (Article 2b). The *DH* and *Oršuš* cases revealed how authorities could abuse parental choice, hence the higher protection against segregation offered by the ECtHR jurisprudence.

There are still some challenges ahead as regards the promotion of more effective guidance to Governments by the ECtHR, domestic courts and national equality bodies. So far, segregation cases have been decided as direct or indirect discrimination and harassment. This inconsistency in interpreting segregation could be addressed by defining segregation as a specific form of discrimination and as an expression of anti-Roma racism/antigypsyism. Another challenge concerns data collection by ethnicity which would allow measuring the disproportionate impact of certain measures on specific groups. There is a need for a European-wide methodology on data collection, including expanding and diversifying means and sources; addressing the problem of scarcity of ethnic data; and/or bypassing some Member States' legal limitations on collecting data by ethnicity, as recommended by the High-Level Group on Non-discrimination, Equality and Diversity of the European Commission and by FRA.[46] The lack of such data remains a significant barrier to the realisation of policy objectives to tackle Roma school segregation and promote equality.

Often policymakers, local authorities, school administrators and teachers seem to lack awareness of the legal consequences associated with segregating Roma children.[47] As of now, most policymakers have failed to communicate clearly to all parties involved what constitutes segregation, and that separating students by ethnicity or race is unlawful. Apart from a few human rights activists, prominent intellectuals and opinion leaders in these countries have not voiced their opposition to Roma school segregation.

Based on the policy standards developed by the ECtHR, the courts and the national equality bodies in Bulgaria, Greece, and Romania, and on the experiences in implementing school desegregation programmes, the concept of segregation has been significantly clarified. To sum up, within education systems, 'segregation' refers to the physical separation of Roma children from non-Roma children in schools, classes, buildings and other facilities. This separation can occur intentionally or unintentionally and is observed whenever there is an imbalance in the proportion of Roma children in these educational spaces as compared with the overall school-age population of a particular city, town or other local administrative unit. Terms such as spatial segregation, self-segregation, unintentional segregation or geographical segregation become redundant in the light of the ECtHR jurisprudence, and they cannot justify Roma school segregation in any way.

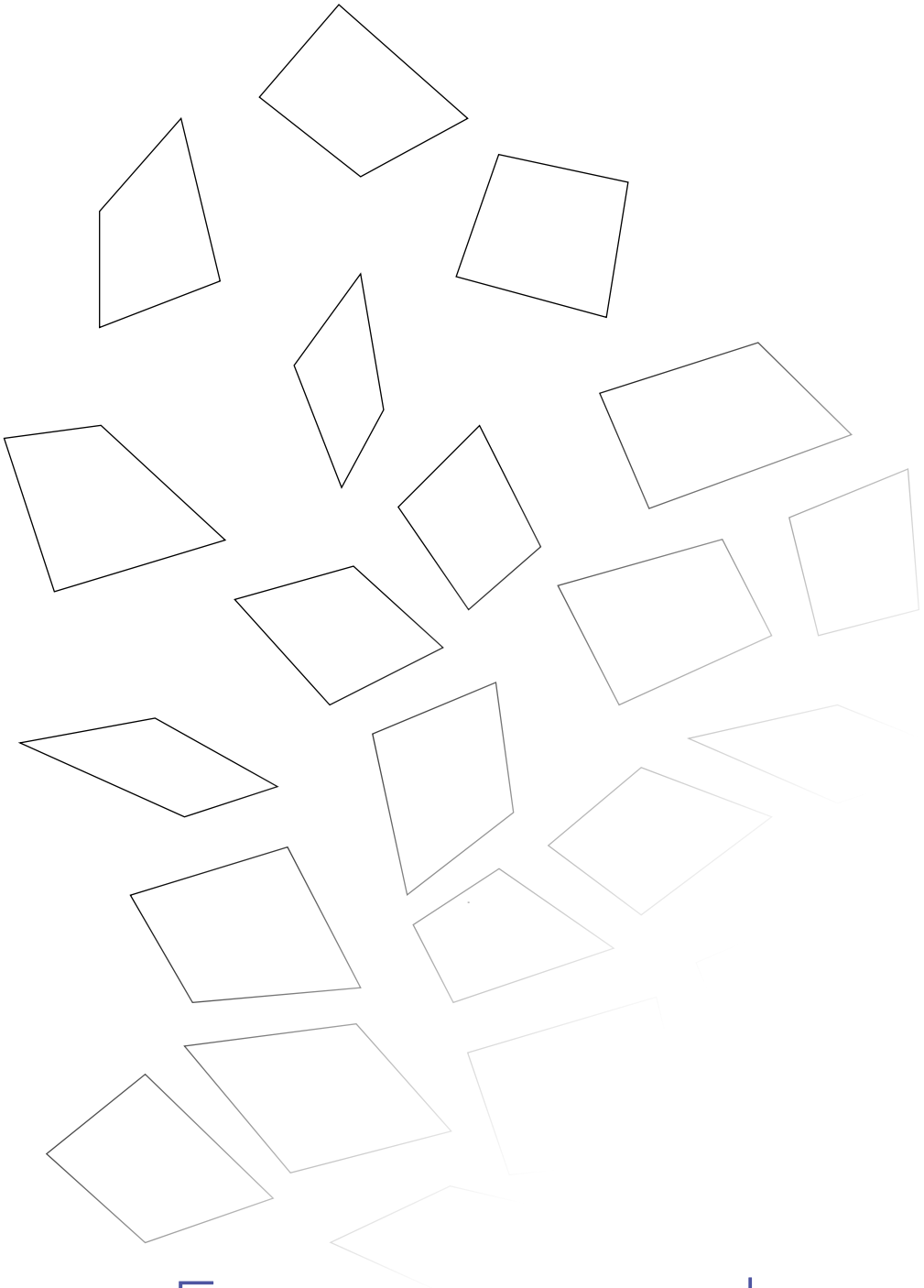
Considering the developments regarding Roma school segregation jurisprudence at the European and national levels, the author is of the opinion that clarification of the EU anti-discrimination legal framework would be beneficial in strengthening the prohibition of segregation in EU law. For Roma civil society organisations and Roma communities, the European Commission plays the role that a kin state plays for national minorities, hence the expectation that the European Commission is the guarantor of their rights and wellbeing. Roma applauded the launching of infringement procedures against Czechia, Hungary and Slovakia, as well as the referral of Slovakia to the European Court of Justice in April 2023 for its failure to effectively tackle Roma segregation in education. Despite revisions of both legislation and policy in these three countries since the infringement proceedings were first initiated, it cannot be said that great

45 For an analysis of the UNESCO Convention Against Discrimination in Education, see Farkas, L. and Gergely, D. (2020), *Racial discrimination in education and EU equality law*, Brussels: European Commission, pp. 29-30.

46 High-Level Group on Non-discrimination, Equality and Diversity (2021), Guidance note on the collection and use of equality data based on racial or ethnic origin, Brussels: European Commission, Directorate-General for Justice and Consumers.

47 For example, the Bulgarian Government objected to the use of the term 'segregation' by ECRI in reference to Roma-only schools resulting from residential segregation. See ECRI, *Sixth report on Bulgaria*, October 2022, p. 39.

progress has been made in practice. Yet, while the Roma communities are eagerly awaiting the CJEU decision on Slovakia, they also expect the European Commission to apply the same procedure against other Member States, such as Bulgaria, Greece, and Romania, that have failed to implement measures to prevent and eradicate segregation, and engage in Roma school desegregation.



European case law update

This section provides summaries of selected cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, as well as the references of other relevant cases, from 1 July 2022 to 30 June 2023.

Summaries of selected cases

Court of Justice of the European Union

Religion or belief

C-344/20, *L.F. v SCRL*, judgment of 13 October 2022, ECLI:EU:C:2022:774

This request for a preliminary ruling was submitted by the Tribunal du travail francophone de Bruxelles (Brussels Labour Court, French-speaking) and concerns the failure of a company to consider the applicant's internship application, due to her refusal to comply with their prohibition on employees manifesting, in particular through their clothing, their religious, philosophical or political beliefs.

The Court first recalled, in response to the referring court's first question, that the words 'religion or belief' constitute a single ground of discrimination, covering both religious belief and philosophical or spiritual belief, but excluding political, trade union or other beliefs or preferences. It further noted that, contrary to the internal regulation at hand in the *WABE* case, the regulation under consideration prohibited not only the wearing of conspicuous, large-scale signs of, *inter alia*, religious or philosophical belief, but any visible sign of political, philosophical or religious belief, which does not amount to direct discrimination on the ground of religion or belief provided that it is applied in a general and undifferentiated way.

The referring court also requested the Court to clarify, in essence, the degree of discretion enjoyed by the Member States when introducing or maintaining more favourable provisions on the protection of the principle of equal treatment than those of the Directive, as referred to in Article 8(1). In this regard, the Court found that this degree of discretion 'cannot go so far as to enable [the Member States] or their national courts to split one of the grounds of discrimination exhaustively listed in Article 1 of Directive 2000/78 into several grounds without calling into question the wording, the context and the intended purpose of that ground and undermining the effectiveness of the general framework for equal treatment in employment and occupation introduced by that directive,' as this would lead, according to the Court, to the creation of subgroups of workers. The Court further specified, in response to an argument presented by the referring court, that 'the existence of a single criterion, encompassing religion and belief, does not prevent comparisons between workers motivated by religious belief, on the one hand, and those motivated by other beliefs, on the other; nor does it prevent comparisons between workers motivated by different religious beliefs.' It is notable that the Advocate General had reached a different conclusion, finding that Member States are indeed allowed to recognise the protection of religion and religious beliefs as an autonomous ground of discrimination.[1]

The Court thus concluded that the Directive must be interpreted as precluding national provisions transposing that Directive into national law that are construed as meaning that religious belief and philosophical belief constitute two separate grounds of discrimination, from being taken into account as more favourable provisions for the protection of the principle of equal treatment than those of the Directive for the purposes of Article 8(1) thereof.

Sexual orientation

C-356/21, *J.K. v TP S.A.*, judgment of 12 January 2023, ECLI:EU:C:2023:92

This request for a preliminary ruling was submitted by the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the capital city of Warsaw in Warsaw, Poland), and concerned the refusal

1 For a summary of the Opinion of Advocate General Medina of 28 April 2022, ECLI:EU:C:2022:328, see *European equality law review* Issue 2022/2, pp. 74-75.

2 See also Opinion of Advocate General Ćapeta of 8 September 2022, ECLI:EU:C:2022:653.

of a public TV station to renew the applicant's contract for the provision of editing services, after seven years of a working relationship based on consecutive short-term contracts on a self-employed basis. In December 2017, two days after the applicant had posted a music video on social media of himself and his partner, to promote tolerance for same-sex couples, the TV station informed the applicant that he would not be required to execute his most recent assignment, for which he was also not paid. No further contract was signed to renew his services.

The Court first examined whether the refusal to conclude a contract because of the sexual orientation of a potential contracting party comes within the scope of the Employment Equality Directive, and more precisely, whether such a contract is a condition 'for access to' self-employment under the Directive. In this regard, the Court notably recalled that 'the activity pursued by the applicant constituted a genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient, enabling the applicant to earn his livelihood, in whole or in part'. Consequently, the question whether the conditions for access to such an activity fall within Article 3(1)(a) of Directive 2000/78 did not depend on 'the classification of that activity as "employment" or "self-employment"', as the scope of the Directive must be construed broadly. Furthermore, for the applicant to be able to pursue his occupational activity effectively, the conclusion of a contract for specific work may constitute an essential factor. The concept of 'conditions for access' to self-employment may thus include the conclusion of a contract such as that at issue.

In addition, the Court was also requested to explore whether the facts of the case could fall within the scope of 'employment and working conditions, including dismissals and pay' under the Directive. In this regard, the Court underlined the comparability between the involuntary termination of the activity of a self-employed person, and the dismissal of an employed worker. It thus concluded that it appears that the refusal to renew the applicant's contract could be assimilated to a 'dismissal' in the meaning of the Directive.

Finally, the Court was also requested to determine whether freedom of contract, as implemented in Polish law, can be understood as a measure necessary for the protection, in a democratic society, of the rights and freedoms of others as stipulated by Article 2(5) of the Directive. In this regard, the Court referred to the Opinion of the Advocate General who noted that the very fact that the Polish Law on equal treatment provides for a number of exceptions to the freedom to choose a contracting party, shows that the national legislature itself 'considered that discrimination could not be regarded as necessary for the purposes of safeguarding freedom of contract in a democratic society.'

The Court thus concluded that 'Article 3(1)(a) and (c) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination to be conferred by that directive, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity.'

European Court of Human Rights

Moraru and Marin v Romania, Applications Nos 53282/18 and 31428/20, judgment of 20 March 2023

Sex

The case concerned the compulsory retirement age for female civil servants in Romania, which was previously set lower than the retirement age for men. The first applicant, Moraru, was a woman who worked for the National Agency for Fiscal Administration (ANAF). As she was approaching the age of retirement for women (60 years), she submitted a request to her employer in which she expressed her desire to continue working until she had reached the retirement age set for men (65 years old). However, the employer did not approve the request and terminated her employment when she had reached the compulsory age for female retirement. The applicant lodged an action with the Vrancea County Court. Her case as well as a similar case of another civil servant, Marin (the second applicant) both reached the Romanian Court of Appeal.

Relying on Article 1 of Protocol No. 12 (general prohibition of discrimination) to the ECHR, the applicants complained that being forced to retire at the compulsory age of retirement for women constitutes discrimination on the basis of sex.

The Court held that automatically ending an employment contract without providing women the option to continue working past the compulsory retirement age for women until they reached the retirement age set for men, was indeed a form of sex-based discrimination that was not objectively justifiable or necessary given the circumstances. The ECtHR reiterated the importance of gender equality and the fact that different treatment based exclusively on sex requires strong justifications despite the wide margin of appreciation that Contracting States benefit from in this regard. The Court noted that references to traditions or national social attitudes are insufficient to account for a difference in treatment on grounds of sex. The maintenance of a distinct retirement age for women perpetuated 'a stereotypical view of gender roles and treats women as a homogenous group deprived of agency, one whose personal situations or desires in terms of professional life and career development as well as their alignment with those of men are completely disregarded'.

The Court thus found a violation of Articles 1 of Protocol No. 12 ECHR. The Court held that Romania was to pay Ms Moraru EUR 7 500 in respect of pecuniary and non-pecuniary damage, and EUR 1 600 to Ms Marin and EUR 400 to Ms Moraru in respect of costs and expenses.

Szolcsán v Hungary, Application No. 24408/16, judgment of 30 March 2023

Racial or ethnic origin

The case concerned the applicant's alleged segregated education in a primary school almost exclusively attended by Roma children although the Roma make up only about 4 % of the total population of the local area. The only two other local schools followed specialised curricula and were run by the Catholic Church and the self-governing German minority, respectively. The applicant requested a transfer to another school, claiming that he was subjected to segregation. His request was denied, allegedly due to the fact that he did not reside in the catchment area covered by the school, although approximately 25 % of the students enrolled in that school reside in the same catchment area as the applicant. He challenged the denial of his request before the courts, but his claims were rejected.

The Court first recalled its standing jurisprudence regarding alleged discrimination of Roma pupils in the enjoyment of their right to education, underlining notably that discrimination may result from a *de facto*

situation and that in cases concerning education it is not necessary to prove discriminatory intent on the part of the relevant authorities. With regard to the specific claim that the applicant's request to transfer to another school was denied due to his Roma origin, the Court concluded that it did not possess any concrete evidence or statistical data, and was thus unable to come to a firm conclusion. With regard to the claim that he had been subjected to segregated education, the Court noted that even if the ethnic structure of the school population had been supported by the population figures of the catchment area (which it was not), it would not be sufficient to objectively justify the segregation of the applicant as a Roma pupil. The applicant's situation at the school, with segregated education of poor quality, thus 'imposed a positive obligation on the State to take steps to correct this factual inequality and avoid the perpetuation and discrimination that resulted from the over-representation of Roma pupils' at the school (paragraph 55). The option of enrolling in either of the other two local schools was not sufficient, as argued by the Government, to conclude that the State fulfilled this positive obligation, as it was not proven that either of the two schools was under an absolute obligation to enrol the applicant. Furthermore, the applicant had a mild learning disability (hearing impairment) which the applicant claimed that the two alternative schools were ill-equipped to accommodate. The State did not refute this claim.

The Court thus concluded that, even in the absence of any discriminatory intent, 'the difference in treatment which the applicant was subjected to in his education cannot be regarded as having been objectively and reasonably justified by any legitimate aim. Nor did the State take adequate measures with a view to correcting the situation and avoiding its perpetuation and resultant discrimination' (paragraph 58). There had thus been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 to the Convention.

A.H. and Others v Germany, Application No. 7246/20, judgment of 4 April 2023

Gender identity

The case concerns a male to female transgender person, A.H. (the first applicant), who requested to be registered in the public German records as the mother of her biological child L.D.H. (the third applicant). However, the Berlin authorities only registered G.H., the birthing parent (the second applicant), as the mother, refusing to also register A.H. as a mother. The applicants, A.H. and G.H. complained that the refusal of the authorities to register them both as mothers was a violation of Article 8 of the ECHR (right to private life), as it fundamentally contradicted their perception of their relationship and meant that A.H. would frequently have to disclose their transgender status. They also complained that this is also a violation of Article 14 of the ECHR (prohibition of discrimination), as a female to male transgender person could by comparison be registered as the father of the child and biological mothers that are not in a relationship with the father can also opt to be registered as the sole parent in public records.

The Court observed that the German authorities had to weigh up a number of private and public interests against various conflicting rights in this case. First, the rights of the parents, and secondly, the child's fundamental rights and interests, namely his right to know his origins and his interest in having a stable legal attachment to his parents. Lastly, these rights have to be weighed against the public interest for whom a coherent legal system and accuracy and completeness of the civil registration records is essential. The Court observed that there is no consensus among European States as to how to indicate in birth registers that one of the parents is transgender. This lack of consensus reflects the fact that gender change combined with parenthood raised sensitive ethical issues, thus confirming that States should in principle be afforded a wide margin of appreciation in this regard. The Court was of the opinion that the courts had struck a fair balance between the rights of the first two applicants, the interests of their children, and the public interests. The parent-child relationship between the transgender parents and their children had not in itself been called into question, and the limited number of scenarios that could lead to the disclosure of the transgender identity of the parents concerned, together with the wide margin of appreciation afforded to the respondent State, led the Court to conclude that there had been no violation of Article 8.

The Court recalled that Article 14 is only applicable in cases where discrimination is present in similar situations. However, according to the Court, the situations the applicants were drawing comparisons to were different. The Court considered that the attribution of the role of mother, within the meaning of the German Civil Code, to the person who had given birth to a child in the birth register, falls within the margin of appreciation of the States, and the situation of the first applicant cannot be compared to that of a woman who has given birth to a child. It judges that the decision to treat the first applicant in the same way as any person who would have contributed to the conception of the child by fertilisation using male gametes, thus allowing A.H. to officially confirm the biological link with the third applicant (the child) by recognising their paternity, also falls within the State's margin of appreciation.

The Court found no violation of Articles 8 and 14 ECHR.

R.K. v Hungary, Application No. 54006/20, judgment of 22 June 2023

Transgender

The applicant, a transgender person, submitted a request in 2018 to change his 'sex/gender marker' and name, having attached medical reports from an expert clinical psychologist, a psychiatrist, and a gynaecologist. He was informed in 2019, by the Budapest Government Office (BGO) that his request had been rejected based on the fact that under the current legislation, no authority had the jurisdiction to issue medical opinions to support this request. The BGO transferred the applicant's file to the competent registrar. The registrar dismissed it on the grounds it did not contain either the BGO's official notification or the supporting expert medical opinion. A year later, the applicant's request for judicial review of that decision was rejected by the Hungarian Supreme Court, which cited the lack of both the above in the applicant's file and held that the medical reports submitted could not be accepted as the required 'supporting expert medical opinion'. Nevertheless, it held that there was a gap in respect of both requirements but that it was not for the administrative authorities or for the courts to fill this gap through interpretation.

Prior to 2016, the procedure to change the 'sex/gender marker' on a person's national identity card was unregulated in Hungary. In practice, the Office of Immigration and Nationality processed requests containing medical reports from a gynaecologist or urologist, a specialist clinical psychologist and a psychiatrist, transmitted them to the Ministry of Human Resources for an expert medical opinion and the local registrar then recorded the necessary changes in the register of births. Section 7 of Government Decree No. 429/2017 on the procedural rules for the registration of birth certificates, which entered into force on 1 January 2018, stipulated that the authority responsible for issuing birth certificates, which was the BGO at that time, had to officially notify the competent registrar of births to record the necessary changes in a petitioner's birth certificate based on an expert medical opinion supporting the request. The amendments to Act No. I of 2010 (the Act) on the civil registration procedure, prohibiting the change of the sex assigned at birth in the register, entered into force on 29 May 2020. Although that Act prescribed the retroactive application of the rules for pending cases, the relevant provision was declared unconstitutional by the Constitutional Court and repealed with effect from 8 April 2021.

The ECtHR found a violation of Article 8 based on a clear lack of a regulatory framework that could protect the applicant's right to a private life. The inconsistencies in the interpretation of national law by the Hungarian authorities were the result of the law being unclear and imprecise. This was especially the case with regard to the absence of any clarification of the nature of the certificate, and the authority competent to certify the change of gender and to issue a supporting medical expert opinion, which constituted a significant obstacle to the exercise of the right to legal gender recognition. The applicant's situation could also not be changed by the new decisions of the Hungarian Supreme Court, which entailed provisions modifying entries in the register of births for requests that had been lodged before the amendments to the Act and were still pending, since those decisions were delivered after the refusal of the applicant's request. Furthermore, the Supreme Court had taken no stance on whether there was a procedure available for cases such as the applicant's, which were considered terminated. This meant that

the applicant had no other means but to submit a new request for the change of his 'sex/gender marker' in the register, which was excluded under the legislation currently in force. The ECtHR thus concluded that there was no established practice of legal gender recognition in Hungary.

The case showed legislative gaps and deficiencies that had left the applicant in a situation of uncertainty regarding the recognition of his identity, and thus negatively affected his right to a private life. That situation, for which the national authorities were responsible, has long-term negative consequences for the applicant's mental health. These considerations led the Court to conclude that the Hungarian legal framework in force at the time failed to provide 'quick, transparent, and accessible procedures' for analysing a request for changing the registered sex of transgender individuals on birth certificates.

Nurcan Bayraktar v Turkiye, Application No. 27094/20, judgment of 27 June 2023

Sex

The applicant in this case, Nurcan Bayraktar, was required by the Turkish Civil Code to wait for 300 days until remarrying after a divorce. The applicant challenged this provision before the Family Court in order to seek an exemption from the requirement. For the exemption to be granted she had been asked to produce a medical certificate to demonstrate that she was not pregnant. The applicant refused to undergo this medical examination and as such her application was dismissed. She appealed the decision but was unsuccessful.

The ECtHR found a violation of Article 8. The Court held that the waiting period imposed on the applicant and the requirement to undergo a medical examination to verify that she was not pregnant was an interference with her right to respect for her private life. The ECtHR held that denying a woman's ability to remarry without observing the waiting period or being medically examined violated her intimacy, bringing her private life under the scrutiny of national authorities. The ECtHR expressed its concern as to the implication that divorced women have a duty towards society to reveal pregnancies before remarrying and must face a long waiting period to protect the interest of a possible unborn child. This requirement demonstrated an antiquated view of female sexuality as tied to the female reproductive capacity.

Regarding Article 12 in conjunction with Article 14, the Court also found a violation. The Court concluded that requiring divorced women to wait 300 days before remarrying due to a possible pregnancy was direct discrimination on the basis of sex. This discrimination was not justified by the goal of preventing uncertainty about the paternity of the unborn child. The unequal treatment was not objectively justified or necessary. There had thus been a violation of Article 14 read in conjunction with Article 12 of the Convention.
Concerning Article 6, the ECtHR found that while the proceedings of the Turkish Constitutional Court had indeed taken longer than usual, the duration had not been unreasonable in length. The complaint as to the length of the proceedings was therefore dismissed.

The Court concluded that there had been a violation of Articles 8 and 12 in conjunction with Article 14 ECHR.

Other relevant cases

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

C-356/21, *J.K. v TP S.A.*, Opinion of Advocate General Ćapeta delivered on 8 September 2022, ECLI:EU:C:2022:653

Sexual orientation

Equal treatment in employment and occupation • Directive 2000/78/EC • Article 3 • Prohibition of any discrimination based on sexual orientation • Self-employed worker • Refusal to renew a contract.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

C-301/21, *Curtea de Apel Alba Iulia and Others v YF and Others*, judgment of 20 October 2022, ECLI:EU:C:2022:811

Age

Social policy • Equal treatment in employment and occupation • Directive 2000/78/EC • Article 2(1) and (2) • Prohibition of discrimination on the grounds of age • National legislation as a result of which the salary paid to certain judges is higher than that of other judges of the same level and performing the same duties • Article 1 • Subject matter • Forms of discrimination listed exhaustively.

C-304/21, *VT v Ministero dell'Interno, Ministero dell'Interno – Dipartimento della Pubblica Sicurezza – Direzione centrale per le risorse umane*, judgment of 17 November 2022, ECLI:EU:C:2022:897

Age

Social policy • Equal treatment in employment and occupation • Article 21 of the Charter of Fundamental Rights of the European Union • Directive 2000/78/EC • Article 2(2), Article 4(1) and Article 6(1) • Prohibition of discrimination on grounds of age • National legislation fixing a maximum age limit of 30 years for the recruitment of police commissioners • Justification.

REFERENCES FOR PRELIMINARY RULINGS – ORDERS

C-569/21, *Ministero dell'Interno, Presidenza del Consiglio dei Ministri v PF*, Order of the Court of 17 November 2022

Age

Article 99 of the Rules of Procedure of the Court of Justice • Social policy • Equal treatment in employment and occupation • Article 21 of the Charter of Fundamental Rights of the European Union • Directive 2000/78/EC • Article 2(2), Article 4(1) and Article 6(1) • Prohibition of discrimination on grounds of age • National legislation fixing a maximum age limit of 30 years for the recruitment of technical psychologist commissioners • Justification.

European Court of Human Rights

Scavone v Italy, Application No. 32715/19, judgment of 7 July 2022

Sex

Article 3 (substantive) • Article 14 (+ Article 3) • Article 8 • Article 2 • Alleged failure of national judicial authorities to provide effective protection to women who were victims of domestic violence • Istanbul Convention • Statutory limitation for cases concerning domestic violence • Commitment to preventing and tackling violence against women.

C. v Romania, Application No. 47358/20, judgment of 30 August 2022

Sex

Article 8 • Private life • Positive obligations • Significant flaws in criminal investigation concerning alleged sexual harassment at the workplace • Failure to protect complainant's personal integrity • Non-compliance with State duty to take measures for protection from secondary victimisation.

J.I. v Croatia, Application No. 35898/16, judgment of 8 September 2022

Sex

Article 3 (procedural) • Failure to effectively investigate alleged death threats against vulnerable rape victim by her abuser and father, in breach of domestic law.

Paketova and Others v Bulgaria, Applications Nos. 17808/19 and 36972/19, judgment of 4 October 2022

Racial or ethnic origin

Article 14 (and Article 8) • Discrimination • Positive obligations • Private and family life • Home • Authorities' omissions resulting in ethnic Roma being driven away from their homes after anti-Roma protests and not being able to return • Officials' repeated public display of lack of acceptance of the Roma and opposition to their return, reinforcing applicants' legitimate fear for their safety and representing a real obstacle to their peaceful return • Disadvantaged and vulnerable position of Roma and need for their special protection • Failure to provide measures of special protection and information on assistance.

Muhammad v Spain, Application No. 34085/17, judgment of 18 October 2022

Racial or ethnic origin

Article 14 (and Article 8) • Discrimination • Private life • Allegations of racial profiling by police during identity check on a street duly examined and found unsubstantiated by administrative courts • Identity check within the ambit of Article 8 • Obligation to investigate not absolute, meaning obligation to use best endeavours • Domestic courts' decisions sufficiently reasoned • Existence of adequate legal framework to seek remedy against discrimination.

Basu v Germany, Application No. 215/19, judgment of 18 October 2022

Racial or ethnic origin

Article 14 (and Article 8) • Discrimination • Private life • Lack of independent effective investigation into arguable allegations of racial profiling by police during identity check on a train • Necessary threshold of severity attained for the check to fall within the ambit of Article 8 • Duty to investigate in order to protect from stigmatisation the persons concerned and to prevent the spread of xenophobic attitudes.

Malagic v Croatia, Application No. 29417/17, judgment of 17 November 2022

Sex

Article 8 • Positive obligations • Private life • Appropriate measures taken at appropriate times to protect applicant's physical integrity, with due account of recurring nature of domestic violence by her former husband • Domestic courts' decision to lift restraining order in force for over three years not unreasonable or manifestly disproportionate in circumstances • Existence of legal framework allowing applicant to complain about domestic violence and seek authorities' protection.

Elmazova and Others v North Macedonia, Applications Nos. 11811/20 and 13550/20, judgment of 13 December 2022

Racial or ethnic origin

Article 14 (and Article 2 of Protocol 1) • Right to education • Discrimination of Roma pupils on account of their segregation in two State-run primary schools attended predominantly by Roma children and with Roma-only classes • State's failure to take desegregation measures to correct applicants' factual inequality and to avoid perpetuation of discrimination resulting from their over-representation in one of the district's schools • Segregation in both schools not objectively and reasonably justified by legitimate aim.

Article 46 • Execution of judgment • Respondent State required to take individual measures to end the segregation of Roma pupils in the two State-run primary schools (Roma segregation in education).

Valaitis v Lithuania, Application No. 39375/19, judgment of 17 January 2023

Sexual orientation

Article 13 • Discontinuation of investigation into homophobic comments on the internet not disclosing any prejudicial attitude by the authorities taking account of the Court's case law • Wide-ranging and multifaceted domestic measures combating hate speech in response to Court judgment in *Beizaras and Levickas* (Discontinuation of investigation into online homophobic speech).

Y v France, Application No. 76888/17, judgment of 31 January 2023

Transgender

Article 8 • Positive obligations • Refusal of national authorities to write the words 'neutral' or 'intersex' on the birth certificate of an intersex person instead of 'male' • Discordance between the biological and legal identity of the applicant source of suffering and anxiety • Absence of European consensus • Widened margin of appreciation • Importance of issues of general interest • Choice of society at the discretion of the respondent State having to determine at what pace and to what extent requests from intersex people regarding civil status should be met, taking into account their difficult situation.

M.B. and Others v Slovakia (No. 2), Application No. 63962/19, judgment of 7 February 2023

Racial or ethnic origin

Article 3 (substantive and procedural) • Inhuman and degrading treatment of applicants, minors of Roma ethnicity, by officers at a police station • Ineffective investigation.

Article 14 (and Article 3) • Discrimination • Insufficient evidence that applicants' ill-treatment was racially motived • Authorities' failure to investigate possible racist motives.

Duğan v Türkïye, Application No. 84543/17, judgment of 7 February 2023

Transgender

Article 5(1) • Deprivation of liberty • Unjustified short-term detention at a police station of applicant, a transgender person, for disrupting traffic.

Article 14 (+ Article 5) • Discrimination • Applicant's failure to produce *prima facie* evidence that she was taken to the police station because she is transgender.

T.H. v Bulgaria, Application No. 46519/20, judgment of 11 April 2023

Disability

Article 14 (and Article 2 of Protocol 1) • Discrimination • Right to education • Primary school's response, including reasonable adjustments, to aggressive and disruptive behaviour of child diagnosed with hyperkinetic and scholastic-skills disorder • Objective and reasonable justification for different treatment • School (headteacher and teacher) engaged in a difficult balancing act between applicant's and classmates' interests, including their safety, well-being and effective education • Article 14 not requiring all possible adjustments to alleviate disparities resulting from someone's disability regardless of costs or practicalities involved.

A.E. v Bulgaria, Application No. 53891/20, judgment of 23 May 2023

Sex

Article 3 (substantive and procedural) • Positive obligations • Failure to provide adequate protection, in law and in practice, to a child victim of domestic violence • Failure to put in place an effective domestic legal framework punishing all forms of domestic violence and providing sufficient safeguards for victims • Ineffective investigation into allegations of serious violence • Applicable legal provisions incapable of adequately responding to violence inflicted on victims unable to initiate and pursue judicial proceedings as private prosecutors.

Article 14 (+ Article 3) • Discrimination • Domestic authorities' failure to adequately address domestic violence against women.

Key developments at national level in legislation, case law and policy

This section provides an overview of the latest main developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom, from 1 July 2022 to 30 June 2023.

AL Albania

LEGISLATIVE DEVELOPMENT

Sex

Definition of 'sexism' introduced into Albanian legislation through audiovisual media law

In May 2023, the Albanian Parliament amended Law No. 97/2013 on audiovisual media.[1] The amendments mostly target video distribution platform services. However, two relevant provisions regarding gender equality were also introduced:

- the definition of 'sexism';
- the principles of gender equality and prohibition of sexism in the media.

The amended law introduced the term 'sexism' for the first time in Albanian legislation. Sexism, according to Article 3(36/1) of the amending law, is defined as any act, action, gesture, visual representation, written or spoken word in audiovisual media, practice or behaviour which:

- 'is based on the idea that a person or group of persons is inferior because of gender;
- occurs in the public or private sphere, online or offline;
- aims at violating human dignity, the fundamental rights and freedoms of a person or group of persons, Albanian citizens, foreigners, or stateless persons;
- results in physical, sexual, psychological, or socio-economic harm towards a person or group of persons, Albanian citizens, foreigners or stateless persons;
- creates or fosters the creation of an environment that evokes fear, hostility, is degrading and insulting or humiliating;
- nurtures, or aims to maintain and reinforce gender stereotypes.'

With the introduction of the principles of gender equality and the prohibition of sexism in the media, the new Article 32(4) also prohibits media service providers from 'broadcast[ing] programmes containing violence or hate speech against a group of persons or a member of this group on a basis such as: gender, race, (...), sexual orientation and any other form of discrimination according to the law on protection from discrimination'.

Online source:
https://qbz.gov.al/eli/fz/2023/75/67fcdac8-3463-4609-b7d3-73218aff6606

CASE LAW

Disability

Equality body finds discrimination on the ground of disability in access to postal services

The Together Foundation (the complainant) submitted a complaint before the national equality body, the Commissioner for Protection from Discrimination (CPD), claiming that the lack of physical accessibility for persons with disabilities at a post office amounted to discrimination on the ground of disability. The CPD concluded that the post office's failure to comply with statutory technical standards created barriers for persons with disabilities, amounting to unequal treatment.[2]

1 Albania, Law No. 97/2013 on audiovisual media in Albania, amended by Law No. 30/2023, published in the Albanian Official Journal No. 75 of 10 May 2023, https://qbz.gov.al/eli/fz/2023/75/67fcdac8-3463-4609-b7d3-73218aff6606.

2 Albania, Commissioner for Protection from Discrimination, Decision No. 42 of 27 March 2023, Available at: Vendim-nr.-42-date-27.03.2023-Fondacioni-Se-bashku-kunder-Postes-Shqiptare-sh.a-Zyra-Postare-Tirana-21-Diskriminim-ne-formen-e-rende.pdf (kmd.al).

The respondent, Albanian Post, failed to establish a reasonable and objective justification for the unequal treatment and did not bring any evidence that it had fulfilled its statutory obligation to take measures to remove barriers and ensure accessibility. The CPD found that discrimination had taken place and requested that Albanian Post take the necessary measures to guarantee the accessibility of its offices to persons with disabilities. The CPD also requested that Albanian Post draft a plan to identify all existing facilities and services, in all places of exercise of the activity, for which adaptation is needed, in order to prevent discrimination against persons with disabilities in the provision of services. Finally, the CPD ordered Albanian Post to provide training for its staff on accessibility issues for persons with disabilities.

Online source:
Vendim-nr.-42-date-27.03.2023-Fondacioni-Se-bashku-kunder-Postes-Shqiptare-sh.a-Zyra-Postare-Tirana-21-Diskriminim-ne-formen-e-rende.pdf (kmd.al)

POLICY AND OTHER RELEVANT DEVELOPMENTS

Publication of the monitoring report on the implementation of the national LGBTI+ action plan

Sexual orientation

Gender identity

In July 2022, the Ministry of Health and Social Protection published the monitoring report for 2022 on the implementation of the National Action Plan (NAP) 2021-2027 for LGBTI+ persons.[3] The report was based on a detailed analysis of data regarding the measures and activities that were planned between November 2021 and December 2022. The report showed that 28 % of the measures and activities were fully realised, 33 % were partially realised, and 6 % of the activities were in the process of being realised. There is no information on the realisation of the remaining measures.

The report noted some positive developments, including the following:

- The adoption of several acts improving the legal framework, aimed at ensuring protection from discrimination due to sexual orientation and gender identity.
- Materials have been produced, either for training purposes (notably for police officers and for local government employees); or for awareness raising (regarding free legal aid and 'comprehensive sexual education in a safe school environment').
- Training sessions were provided, mainly regarding sexual and gender diversity, the law on legal aid guaranteed by the state and health services with a focus on sexual health. Target groups included public administration and State police employees, social service employees, psychologists, social workers and teachers.

The report also noted the following further necessary changes at institutional level:

- A clear expression of political will for the implementation of some measures and activities, mainly related to the reform of the legal framework.
- Increasing the level of awareness among the responsible and partner institutions regarding their obligations for the implementation of the NAP.
- Adopting strong measures to, notably, guarantee a friendly environment in schools for LGBTI students and provide more information to students and teachers about the mechanisms of protection from bullying and discrimination.
- Involving, in various activities, organisations with the appropriate and necessary capacities in various fields, not only specialised LGBTI NGOs, in particular for representation in various legal/administrative or judicial processes.

3 The report is not yet publicly available.

2022 Annual Report of the Albanian Ombudsman

Gender

The 2022 Annual Report of the Albanian Ombudsman was delivered to the Albanian Parliament on 2 May 2023.[4] The annual report presents some interesting insights into gender-based violence and LGBTIQ rights.

The promotion and protection of the rights of women and girls is an integral part of the Ombudsman's work to promote human rights. The annual report finds that one of the main problems in Albania is that women and girls are subjected to various forms of violence leading to violations of human rights.[5]

The 2022 annual report expresses the Ombudsman's concerns regarding the new 'judicial map' introducing a reorganisation of courts, which was approved through the latest decision of the High Judicial Council.[6] The report's assessment is that 'the implementation of the new judicial map constitutes a violation and restriction of rights', because it will be to the detriment of access to justice for victims of gender-based violence, victims of human trafficking and victims of criminal offences of sexual harassment and violent sexual relations with adults and minors. The Ombudsman is of the opinion that the relocation of courts as part of the reorganisation of the judicial system might make it difficult for citizens to access courts (if they live too far away etc). Furthermore, there is a risk that the courts will issue decisions on protection orders in the absence of the trial parties.

The annual report also reports on the protection and promotion of the rights of the LGBTIQ community.[7] The LGBTIQ community was faced with increased problems in 2022, including: a deteriorating economic position; high rates of unemployment; lack of housing and security; and the struggle to meet basic needs. The Ombudsman concluded that despite the positive steps that have been taken in Albania in this regard, LGBTIQ persons continue to face discrimination and stigmatisation, hate speech and physical violence.

Some related recommendations of the Ombudsman concern the need to:

- further improve the legislation in accordance with SOGI (sexual orientation and gender identity);
- implement the existing legislation and the national action plan for the advancement of the rights of LGBTIQ persons;
- strengthen the support and partnership with LGBTIQ organisations and civil society organisations for human rights to raise awareness of the recognition and respect of human rights.

The report made general recommendations, which were not addressed to specific authorities or organisations that would be responsible for the recommended action.

Online source:
http://www.parlament.al/dokumentacioni/aktet/17f53d7d-ee0d-415b-8457-96cf1007d263

4 Albanian Parliament (2023), http://www.parlament.al/dokumentacioni/aktet/17f53d7d-ee0d-415b-8457-96cf1007d263.
5 Albanian Ombudsman (2023) *Raporti Vjetor për veprimtarinë e Institucionit të Avokatit të Popullit. Viti 2022* (*Annual Report on the activities of the Ombudsman 2022*), p. 121, http://www.parlament.al:5000/Files/20230504110504499 5Raporti%20vjetor%20i%20veprimtarise%20se%20institucionit%20te%20Avokati%20te%20Popullit%20per%20vitin%202022-%20Final.pdf.
6 Albania, High Judicial Council, decision No. 147 of 29 March 2023 on determining the categories of courts (*Për përcaktimin e kategorive të gjykatave*), published in the Official Journal No. 53 of 29 March 2023, https://qbz.gov.al/eli/fz/2023/53/f044ea35-3dc2-4874-a8aa-cd362be46b5b; Albanian Ombudsman (2023), *Annual Report on the activities of the Ombudsman 2022,* p. 69.
7 Albanian Ombudsman (2023), *Annual Report on the activities of the Ombudsman 2022*, pp. 29, 126-128.

Austria AT

POLICY DEVELOPMENT

Adoption of a National Disability Action Plan 2022-2030

Disability

In July 2022, the Council of Ministers adopted the new National Disability Action Plan, covering policy, equality and non-discrimination; accessibility; education; employment; autonomous living; health and rehabilitation; and awareness raising and information. The chapter on non-discrimination sets out the following measures:

- Evaluation of the legal framework for equal treatment regarding disability
- Extension of standing to claim the removal of barriers (not only compensation)
- Introduction of a legal minimum amount of compensation for discrimination
- Standing to bring discrimination claims before the Supreme Court irrespective of the generally applicable limitations by the amount in question
- Duty for all federal public entities to support the Disability Ombudsman
- Assessment of options for introducing *actio popularis* in the Act on the Employment of Persons with Disabilities
- Awareness raising for judges and prosecutors on multiple and intersectional discrimination
- Development of proposals to strengthen protection against multiple discrimination
- Publication of important court decisions in 'simple language'[8]
- Training of officers in charge of the mandatory reconciliation processes
- Financial support to institutions mandated to file *actio popularis*.

Although the action plan sets out some possibilities for important improvements in the legal protection against discrimination on the ground of disability, it has been criticised by the Disability Ombudsman for the lack of clear budgetary plans and by disability NGOs for the unsatisfactory involvement of organisations of persons with disabilities.[9] The main points of criticism target the areas of inclusive education and de-institutionalisation.

Online source:
https://www.bundeskanzleramt.gv.at/dam/jcr:89f8ed09-12e5-4aab-8ad0-d7f82001904d/25_16_bei.pdf

Belgium BE

LEGISLATIVE DEVELOPMENTS

Adoption of new community-level anti-discrimination legislation

All grounds

In the Belgian federal system, the competence to legislate on discrimination in the areas covered by the EU directives is shared between the federal state and the federated entities (Communities[10] and

8 Language version accessible to persons with learning difficulties, also known as 'easy read'.
9 See for example: BIZEPS (2022) 'Nationaler Aktionsplan Behinderung (NAP) hat Optimierungspotenzial' (National disability action plan has potential for improvement), 20 June 2022, https://www.bizeps.or.at/nationaler-aktionsplan-behinderung-hat-optimierungsbedarf/.
10 The French Community, which is commonly referred to as the Fédération Wallonie-Bruxelles, the Flemish Community and the German-speaking Community.

Regions[11]). The state and the federated entities are thus competent to adopt the measures necessary to prevent and combat discrimination in their areas of competence. This situation of 'shared competence' has given rise, since 2007, to a particularly abundant and complex federal and federated legislation.

Paradoxically, this body of legislation still contained important gaps, notably in Brussels where the directives had not been transposed in the fields of competence of the Joint Community Commission (*Commission Communautaire commune*), which has jurisdiction over 'bi-personal' matters in Brussels, including for instance family allowances and healthcare provided by public hospitals.

This gap was filled by an Ordinance of the Joint Community Commission of 30 June 2022 to promote diversity and combat discrimination in the institutions, centres and services within the competence of the Joint Community Commission and in the services of the United College of the Joint Community Commission.[12] This ordinance will apply, within the limits of the competences devolved to the Joint Community Commission, to all persons, both in the private and public sectors, including public bodies, in the following matters: health policy; personal assistance (*aide aux personnes*); access to and supply of goods and services; access to, participation in and other exercise of publicly available economic, social and political activities; and labour relations.

In these fields, the Ordinance aims to protect people against discrimination based on age; sexual orientation; civil status; birth, wealth; religious, philosophical or political convictions; trade union beliefs; language; current or future state of health; disability; physical or genetic features; nationality; alleged race; colour; descent; national origin; ethnic origin; social origin; and gender.

Online source:
http://www.ejustice.just.fgov.be/mopdf/2022/08/04_1.pdf#Page28

New law and royal decree implementing the Work-Life Balance Directive 2019/1158 in the private sector

Gender

Belgium had not taken all necessary steps to implement the Work-Life Balance Directive 2019/1158 before the deadline of 2 August 2022. In an attempt to resolve this, a law and a royal decree were adopted on 7 October 2022.[13] On 27 September 2022, the National Labour Council adopted Collective Agreement No. 162, on the right to request flexible working arrangements.[14]

The most important changes introduced by these new instruments are the following:

1. Reinforced protection against dismissal for workers dismissed for benefiting from or being about to benefit from thematic leave:
   - During periods of leave, a worker can only be dismissed for a reason not related to the request for leave (e.g. birth leave), time credit or thematic leave;
   - In the case of dismissal outside the protection period, i.e. more than a month after the requested start or more than three months after the end of the leave period, the worker is protected against

11 The Walloon Region, the Flanders Region and the Brussels Capital Region.
12 Belgium, Ordinance of the Joint Community Commission of 30 June 2022, OJ 4 August 2022.
13 Belgium, Act of 7 October 2022 partially transposing Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, and regulating certain other aspects of leave, *Moniteur Belge / Belgisch Staatsdblad* 31 October 2022; Royal Decree of 7 October 2022 partially transposing Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, *Moniteur Belge / Belgisch Staatsdblad* 31 October 2022.
14 Belgium, Collective Bargaining Agreement No. 162 of 27 September 2022 establishing a right to request a flexible working arrangement.

dismissal if the preparatory acts for the dismissal were taken by the employer during the protection period;
- The burden of proof regarding the reason for the dismissal falls on the employer. Also, at the employee's request, the employer must justify the dismissal in writing;
- A non-renewal of a temporary contract on the grounds of pregnancy, childbirth or taking converted maternity leave will be presumed to be linked to maternity protection;
- In the case of dismissal due to birth, or any types of leave covered by the Directive, the protection allowance is increased from three to six months' pay.

2. The Act and Royal Decree introduce a specific carer's leave within the existing framework of leave for imperative/compelling reasons (10 days per year). Workers may now take up to five days off a year in order to provide personal care or assistance to a member of their household or family who needs it for a 'serious medical reason'. These days are to be deducted from the worker's entitlement to unpaid leave for compelling reasons (10 days per year). Workers taking such leave are protected against termination of employment (see point 1 above).

3. A general framework for flexible arrangements. The collective agreement (CA) adopted by the National Labour Council that entered into force on 1 October 2022 introduced a right for workers in the private sector to request flexible working arrangements for care purposes. The new Act adopts a similar supplementary scheme for workers not covered by the CA (e.g. contractual employees in the public sector). This system enables full-time workers to spread their working time over four days instead of the usual five, making their working time more flexible. Workers who apply to enter the four-day work week regime benefit from protection against dismissal (see point 1). Furthermore, the employer must ensure that these employees are not treated adversely. Access to such flexible working arrangement is now limited to a previous employment period of six months.

4. The employer now has to communicate in writing their reasons for refusing certain forms of leave ('*motivé*') or postponing parental leave. The absence of a decision will be deemed to be an agreement by the employer.

The above provisions of the Act and Royal Decree came into force on 10 November 2022.

Online source:
http://www.ejustice.just.fgov.be/eli/arrete/2022/10/07/2022205847/justel

Strengthened protection for witnesses of discrimination against retaliation

All grounds

Belgian legislation on the protection against discrimination was too formalistic in its protection of witnesses, as it only protected those who reported the facts in a signed and dated document. The Act of 7 April 2023, published in the Official Journal on 15 May 2023 extends the protection

> 'to persons who intervene as a witness or have made a report or complaint, in favour of the person concerned by the alleged violation, and to persons who give advice or provide help or assistance to that person, as well as to any person who invokes the issue of the violation of this law'.

The new Act is applicable to the anti-discrimination legislation and the Act of 4 August 1996 on Wellbeing at Work. The Royal Decree of 1 May 2023[15] adjusts accordingly the Code on Wellbeing at Work that compiles all the royal decrees implementing the Act of 4 August 1996.[16]

15 Belgium, Royal Decree of 1 May 2023, available at: http://www.ejustice.just.fgov.be/eli/arrete/2023/05/01/2023202336/moniteur.

16 Belgium, Act of 4 August 1996 on the wellbeing of workers in the performance of their work (*Wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk*), 4 August 1996.

The European Court of Justice held in Case C-404/18 of 20 June 2019, *Hakelbracht,* that Article 24 of Directive 2006/54 must be interpreted as precluding legislation, such as the Belgian Gender Equality Act, from protecting an employee

> 'who has supported a person who is believed to be discriminated against on the ground of sex solely if that employee has intervened as a witness in the context of the investigation of that complaint and that the employee's witness statement satisfies formal requirements laid down by that legislation'.[17]

While the *Hakelbracht* case concerned the protection of witnesses in a case of discrimination based on sex, the implications of the judgment were wider. It also applies to the other two anti-discrimination acts of 10 May 2007 – the Race Act[18] and the General Act[19] – which implement Directives 200/43/EC[20] and 2000/78/EC[21] respectively, and which contain the same provisions on the protection of witnesses against retaliation.

Incidents of harassment and sexual harassment are not covered by the anti-discrimination legislation, but by the 1996 Act on Wellbeing at Work, which therefore also needed to be amended.

Online source:
http://www.ejustice.just.fgov.be/eli/loi/2023/04/07/2023202456/moniteur

Reform of the federal anti-discrimination law

All grounds

The federal anti-discrimination laws provide that their application and effectiveness is subject to assessment by the two parliamentary chambers. That assessment is based on evaluation reports produced by a committee of experts in 2017 and 2022. The 2022 report contains 73 recommendations to strengthen the fight against discrimination, hate speech and hate crime in various areas. These recommendations inspired a major reform adopted in June 2023, which amended the three federal anti-discrimination laws.[22]

The reform, which entered into force on 30 July 2023, contains the following important amendments:

- Better compensation for victims of discrimination beyond employment, through a significant increase of the lump sums provided by law.[23]
- Protection against multiple discrimination, including 'cumulative discrimination' (where the protected criteria are added together, while remaining dissociable) and 'intersectional discrimination' (where the protected criteria interact and become indissociable). The judge may decide to combine lump-sum compensation.
- Formal prohibition of discrimination by association and by assumption, which were previously only recognised implicitly.

17 CJEU, judgment of 20 June 2019, *Hakelbracht,* C-404/18, ECLI:EU:C:2019:523.
18 Belgium, Law punishing certain acts motivated by racism or xenophobia (*Wet tot bestraffing van bepaalde door racisme of xenophobie ingegeven daden*), 10 May 2007.
19 Belgium, Anti-Discrimination Law (*Antidiscriminatiewet*), 10 May 2007.
20 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) OJ 2000 L180, p. 22.
21 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive) OJ 2000 L303, p. 16.
22 Belgium, Act of 28 June 2023 amending the Act of 30 July 1981 to fight against certain acts inspired by racism or xenophobia, the Act of 10 May 2007 to fight against certain forms of discrimination and the Act of 10 May 2007 to fight against discrimination between women and men, *Official Gazette* of 20 July 2023.
23 Under Belgian law, victims of discrimination may choose between claiming full compensation for the damage (subject to proving the actual extent of the loss) and claiming a lump-sum amount of damages stipulated by law. The reform has tripled the lump-sum amounts applicable beyond employment and provides that they will be indexed annually.

– Allowing courts adjudicating discrimination cases to order positive measures to prevent the recurrence of similar discriminatory acts, such as the adoption of a diversity policy.
– Relaxing the rules relating to the requirement of the victim's consent in collective action proceedings.

While these important improvements are welcome, it is unfortunate that, despite the recommendation from the Evaluation Commission, the reform failed to remove national provisions preventing victims of harassment, sexual and gender-related harassment from relying on anti-discrimination legislation if they are employees.[24] The possibility of combining lump-sum compensation in situations of multiple discrimination in such cases will thus not be applicable.

Furthermore, the three laws allow direct discrimination to be justified when the protected criterion does not fall within the scope of EU law. The implementation of the new provisions on intersectional discrimination can thus be expected to prove problematic in cases where justification is allowed for one criterion but not for the other. The wording of the law refers to 'the regime most favourable to the victim', but that may not be sufficient to prevent the justification of direct discrimination based on sex, for instance, from being accepted, given the hesitations in Belgian case law regarding the possibilities of justification.

Online source:
http://www.ejustice.just.fgov.be/eli/loi/2023/06/28/2023043712/justel

Bulgaria

BG

CASE LAW

Interpretative court ruling of the Supreme Court of Cassation on the change of sex/gender in civil registration

Transgender

An Interpretative ruling of 20 February 2023, delivered by the General Assembly of the Civil College (OSGK) of the Supreme Court of Cassation (VKS), follows a sequence of conservative rulings by the Constitutional Court of the Republic of Bulgaria.[25] In the VKS ruling, the Court was asked to respond to the question whether it is permissible, and if so under what conditions, for the Court to allow, under the Civil Registration Act (ZGR), a change in the civil status record of a petitioner who claims to be transsexual. This question was answered in the negative, contributing to the conservative trend in court practice to the detriment of the rule of law and human rights.

What adds to the complexity of the issues brought by the ruling of the VKS, is that it builds on the outcome of Constitutional Court Ruling No. 15/2021,[26] which stipulates that the notion of 'sex' according to the Constitution should be understood only in its biological meaning. From the very beginning, the majority of the deciding judges focused on the fact that the court is bound by Constitutional Court Ruling No. 15/2021.

As a result, with a majority of only 7 (28 judges versus 21 judges with dissenting opinions), the VKS ruled that there is no possibility according to objective substantive law currently in force in Bulgaria, for the Court

24 Subject to the Law of 4 August 1996 on wellbeing at work.
25 Bulgaria, Supreme Court of Cassation (VKS), judgment No. 2/2020 of 20 February 2023, https://www.vks.bg/talkuvatelni-dela-osgk/vks-osgk-tdelo-2020-2-reshenie.pdf.
26 Bulgaria, Constitutional Court, Judgment No. 15/2021 of 26 October 2021, https://www.vks.bg/iskania-do-konstitucionnia-sad/ks-reshenie-kd-6-2021.pdf.

to admit in the proceedings under Chapter III, Section VIII of the Civil Status Registration Act a petition for a change in civil status records of the sex, name and ID number of a petitioner who claims to be transsexual.

Despite the specific subject of the interpretative decision, one of the motivations of the majority vote is based on an argument which falls outside of the scope of the interpretation task of the Court, namely that there is no legal obligation under EU law for Bulgaria to recognise same-sex marriage. In addition, the decision is based on the allegation that if there is a violation of Article 8 of the European Convention on Human Rights, it is related to the lack of legislation in Bulgaria and the lack of legal conditions and procedures that would allow the change of the status and legal recognition of the change of sex. Based on such arguments, with the unilateral interpretation and ban on the change of sex, which does not exist in law, the VKS ruling goes beyond the scope of the specific task and the competence of the Court.

The Court decided that the public interest should prevail over the private interest of transgender people, although these rights are recognised as real and not denied. According to the argument of the VKS, the public interest is represented by the values in society, which are shaped by religion and morals, especially in relation to marriage.

As a result of the interpretative ruling from February 2023, all applications for change of sex have been denied. The decision, along with the Constitutional Court rulings preceding it, marks a backlash in the protection of human rights and the respect of the regional and universal instruments of human rights.

Online source:
https://www.vks.bg/talkuvatelni-dela-osgk/vks-osgk-tdelo-2020-2-reshenie.pdf

Equality body finds that articles on the website of a political party amounted to anti-Roma harassment

Racial or ethnic origin

A Bulgarian citizen of Roma origin (the complainant) filed a complaint with the Commission for Protection against Discrimination (CPD) due to 233 publications contained under the heading 'The Gypsy Question' on the official website of a far-right political party. The articles presented the Roma as criminals, prone to unlawful behaviour and dangerous. The complainant argued that the contents of the relevant section, taken as a whole, constituted hate speech against the Roma in Bulgaria, harassment on the ground of ethnicity and incitement to discrimination on the same ground. She also noted that the alleged offence was ongoing.

In June 2023, the CPD ruled on the complaint, finding that the respondent had committed discrimination against the complainant in the form of harassment on the ground of ethnicity. It imposed an administrative penalty (fine) of EUR 500 (BGN 1 000) and issued a binding injunction for the respondent to take measures to avoid and prevent publications that create negative public attitudes and prejudices and that stigmatise representatives of particular ethnic communities in Bulgaria.

The CPD reasoned that in its case law it had repeatedly held that highlighting and referring to racial, religious, ethnic, mental and physical status in a generalising manner constitutes discrimination prohibited by law. It further noted that in cases of generalisation, the veracity of the allegations is irrelevant, because generalising assessments, qualifications and suggestions about an entire group are discriminatory.

The decision is subject to appeal. In the meantime, the contested content is still available.

Online source:
https://www.bghelsinki.org/web/files/richeditor/documents/external/institutions/kzd/2023-06-27-kzd-vmro.pdf

Supreme Administrative Court upholds an equality body decision finding harassment on the ground of sexual orientation in an online newspaper article

Sexual orientation

The complainant alleged before the Commission for Protection against Discrimination (CPD) that a publication on the website of an online newspaper with the headline 'Faggots in the USA are sounding the alarm' constituted harassment on the ground of sexual orientation and had the effect of violating the human dignity of persons of homosexual orientation. The article was a translated version of one published in a Russian newspaper.

In November 2021, the CPD decided on the complaint, finding that the article amounted to harassment, and imposing the following measures on the respondent publisher:

- to develop and introduce in the company methods and mechanisms for self-monitoring and rules for non-discrimination in the work of editors and journalists;
- to report to the CPD on the results of the application of the methods and mechanisms developed; and
- to remove the content of the article from the relevant website.[27]

In July 2023, the Supreme Administrative Court (SAC) upheld that the article had been proven to create a hostile, degrading and offensive environment for people of 'different sexual orientation'.[28] It confirmed that the assessment of whether conduct is capable of causing harm to the dignity of a person and of creating a degrading or threatening environment must be made according to a set of objective criteria defined by the particular circumstances of each case. It held that the nature of the specific statements in this case and the fact that they had been widely disseminated through the mass media was of particular importance for this assessment, and concluded that they amounted to harassment within the meaning of the law.

The SAC upheld the conclusion that the use of the terms 'faggots', 'sodomites' and 'perverts' had conveyed an unambiguous message about a particular group of persons on the basis of their sexual orientation, inculcating a certain stereotype in society, leading to hostility, intolerance and exclusion. The Court finally recalled that the right to free expression and dissemination of opinion cannot override the right to non-discrimination.

Online source:
https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=2139084&code=vas&guid=1417781364

Croatia HR

POLICY AND OTHER RELEVANT DEVELOPMENTS

Research on attitudes, awareness and prevalence of discrimination

All grounds

At the end of 2022, the Office of the People's Ombudsperson conducted its fourth study on attitudes, awareness and forms of discrimination in society (the previous study was from 2016). The research involved a sample of 1 000 respondents and covered four thematic areas: social distance (prejudices and stereotypes); acquaintance with the legislative and institutional framework for combating discrimination; perception of the prevalence of discrimination; and personal experience of discrimination. The research results were presented to the public on 6 February 2023.

27 Bulgaria, Commission for Protection against Discrimination, Decision No. 801 of 22 November 2021 in Case No. 856/2019.
28 Bulgaria, Supreme Administrative Court, Decision No. 7579 of 10 July in Case No. 9989/2022.

Some 56 % of respondents were aware of the existence of the Anti-discrimination Act, while 20 % of respondents stated that they had been discriminated against in the past five years. Both figures have increased since 2016. The number of respondents with a relatively accurate understanding of the concept of discrimination has also increased. However, only 3.9 % of respondents correctly identified the People's Ombudsperson as a central equality body for combating discrimination, which is a persistent trend.

Of the respondents who stated that they had been discriminated against, only 40 % acted upon it, although the most common response of this group was to leave the discriminatory environment, for instance by resigning from their job in employment-related cases (18 %). Among respondents who did not act upon the discrimination, 52 % said that it would not change anything, 21 % that the proceedings would be too complicated, time consuming and expensive, and 20 % that it would make their situation even worse.

The results of the research also showed that prejudices are less present than in previous years, notably towards asylum seekers, persons with mental disabilities, members of the LGBTIQ community and certain age groups. In parallel, however, negative trends have also been noted, for instance with regard to stereotypes about the Roma community and about inequality between men and women.

The respondents perceived discrimination to be most common in the area of working conditions and employment (53 %), and on the grounds of nationality and origin (38 %). Finally, they perceived that discrimination is in most cases committed by public bodies (32 %).

Online source:
https://www.ombudsman.hr/hr/download/istrazivanje-o-stavovima-i-razini-svijesti-o-diskriminaciji-i-pojavnim-oblicima-diskriminacije-2022/?wpdmdl=15351&refresh=63e0c6603768c1675675232

Adoption of the National Gender Equality Plan and of the National Plan for Combating Sexual Violence and Sexual Harassment

Gender

On 9 March 2023, the Government adopted the National Gender Equality Plan for the period to 2027, with the relevant action plan up to 2024.[29] On 29 December 2022, the Government adopted the National Plan for Combating Sexual Violence and Sexual Harassment for the period to 2027, with the first action plan for its implementation up to 2024.[30]

The National Gender Equality Plan is the first national mid-term strategic planning measure in the field of gender equality after the last national gender equality policy ended in 2015. It sets out a vision of a society of equal opportunities, free of gender discrimination, and identifies seven key priorities for action: promotion of human rights of women and gender equality; improvement of the position of women in the labour market; combating violence against women; gender-sensitive education; promotion of women in political and public decision-making positions; gender equality in public policies and promotion of gender equality in international politics and cooperation. The key priorities are divided into 7 specific objectives, with a total of 33 measures for their implementation, which are detailed in the first action

29 Croatia, Gender Equality Plan for the period to 2027 (*Nacionalni plan za ravnopravnost spolova za razdoblje do 2027. Godine)*, https://ravnopravnost.gov.hr/UserDocsImages/dokumenti/NPRS%202027%20APRS%202024/Nacionalni%20plan%20za%20ravnopravnost%20spolova,%20za%20razdoblje%20do%202027..pdf, with the action plan for the period to 2024, https://ravnopravnost.gov.hr/UserDocsImages//dokumenti/NPRS%202027%20APRS%202024//Akcijski%20plan%20za%20ravnopravnost%20spolova%20za%20razdoblje%20do%202024..pdf.

30 Croatia, National Plan for combating sexual violence and sexual harassment for the period to 2027 (*Nacionalni plan za suzbijanje seksualnog nasilja i seksualnog uznemiravanja, za razdoblje do 2027*. Godine), available at: https://vlada.gov.hr/sjednice/181-sjednica-vlade-republike-hrvatske-37587/37587, with the relevant action plan for the period to 2024, https://mrosp.gov.hr/UserDocsImages/dokumenti/Socijalna%20politika/Dokumenti/AKCIJSKI%20PLAN%20ZA%20SUZBIJANJE%20SEKSUALNOG%20NASILJA%20I%20SEKSUALNOG%20UZNEMIRAVANJA%20DO%202024.%20g.pdf.

plan for the period to 2024. They include: awareness-raising measures across different areas; measures supporting female employability and entrepreneurship; measures aimed at the prevention of gender-based violence and violence against women; measures to eradicate gender stereotypes in education; and gender mainstreaming in public policies and international relations.

The National Plan for Combating Sexual Violence and Sexual Harassment represents the first comprehensive strategic document concerning protection against sexual violence and sexual harassment. It sets two priorities: creating the conditions for life free from sexual violence and sexual harassment, and raising the quality of life and social inclusion of victims of sexual violence and sexual harassment. This involves three specific objectives: prevention of sexual violence and sexual harassment; improvement of protection mechanisms and access to support services for victims; and more dissuasive sanctions for perpetrators. The action plan outlines 24 measures for achieving the specific objectives, including: prevention and awareness-raising measures in different sectors (such as tourism, sports, education, and the online environment); improvement of victim support mechanisms; measures aimed at resocialisation of perpetrators of sexual offences; and measures targeted specifically at child victims of sexual violence.

National Plan for the Protection and Promotion of Human Rights and the Suppression of Discrimination

All grounds

On 30 March 2023, the Croatian Government adopted the National Plan for the Protection and Promotion of Human Rights and the Suppression of Discrimination 2023-2027, defining specific goals, as well as two implementation plans.[31] The previous plans were the National Programme for the Protection and Promotion of Human Rights 2013-2016 and the National Plan for Combating Discrimination 2017-2022.

The new national plan attempts to ensure compliance with the principles of the European Pillar of Social Rights, as well as EU policies such as the EU Anti-racism Action Plan 2020-2025, the EU Gender Equality Strategy 2020-2025, the EU LGBTIQ Equality Strategy 2020-2025, the EU Strategic Framework for the Equality, Inclusion and Participation of Roma 2020-2030, the EU Action Plan on Integration and Inclusion 2021-2027 and the EU Action Plan for Human Rights and Democracy 2020-2024.

The objectives in the area of protection and promotion of human rights are to improve the efficiency of the public administration and of the judiciary; to raise the level of information among the general public and institutions about instruments for the protection and promotion of human rights; to facilitate access to the judiciary and public law bodies; and to strengthen the mechanisms for monitoring and implementing the Constitutional Act on the rights of national minorities. In the area of prevention and suppression of all forms of discrimination, the aims are to improve the prevention of discrimination; to provide support to victims of discrimination; to raise awareness regarding the importance of fighting racism, xenophobia and other forms of intolerance, and to encourage a culture of remembrance of victims of genocide. A specific aim in both areas is the improvement of cooperation with civil society organisations and the media.

In addition to the national plan, the two implementation plans for 2023 were also adopted, one for each of the two priority areas.[32] The plans define and regulate the measures, as well as setting out performance

31 Croatia, Decision of the Government on the adoption of the National Plan for the Protection and Promotion of Human Rights and Suppression of Discrimination for the period until 2027, the Action Plan for the Protection and Promotion of Human Rights for 2023 and the Action Plan for Suppression of Discrimination for 2023, *Official Gazette* 37/2023, available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2023_03_37_625.html; the text of the National Plan is available at: https://pravamanjina.gov.hr/UserDocsImages/dokumenti/Nacionalni%20plan%20za%20ZPLJP%20razdoblje%20do%202027.pdf.

32 Action Plan for the Protection and Promotion of Human Rights for 2023, available at: http://pravamanjina.gov.hr/UserDocsImages/dokumenti/Akcijski%20plan%20zastite%20i%20promicanja%20ljudskih%20prava%202023.pdf; and Action Plan for the Suppression of Discrimination for 2023, available at: http://pravamanjina.gov.hr/UserDocsImages/dokumenti/Akcijski%20plan%20zastite%20i%20promicanja%20ljudskih%20prava%202023.pdf.

monitoring, deadlines, the responsibilities of specific authorities, and assessment of the necessary costs for the implementation of the national plan. The measures in the Action Plan for the Suppression of Discrimination include: capacity building of public and civil servants to act in the field of combating discrimination; development of the support systems for victims of discrimination; establishment of a system for collecting data on equality; increasing the awareness of the business community about the prohibition of discrimination under the Anti-discrimination Act; prevention of inequality in access to healthcare; improvement of the conditions for realising the right to housing for groups at risk of discrimination in housing policies; effective coordination of interdepartmental cooperation, monitoring and analysis of the occurrence of hate crimes; and improvement of the prevention of hate crimes and hate speech.

Online sources:
https://narodne-novine.nn.hr/clanci/sluzbeni/2023_03_37_625.html
https://pravamanjina.gov.hr/UserDocsImages/dokumenti/Nacionalni%20plan%20za%20ZPLJP%20razdoblje%20do%202027.pdf
http://pravamanjina.gov.hr/UserDocsImages/dokumenti/Akcijski%20plan%20zastite%20i%20promicanja%20ljudskih%20prava%202023.pdf
https://pravamanjina.gov.hr/UserDocsImages/dokumenti/Akcijski%20plan%20suzbijanja%20diskriminacije%202023.pdf

CY Cyprus

CASE LAW

Legislation targeting age discrimination declared unconstitutional

Age

Since 2017, the opposition parties have repeatedly claimed that the lack of access to unemployment and sickness benefits for persons aged 63 or more who choose to remain professionally active instead of retiring and claiming their statutory pension, amounted to age discrimination. On 30 November 2020, the Government introduced a bill purporting to address this gap but, instead, provided new eligibility criteria for access to sickness benefits for this category of persons. The new criteria would treat contributions to the public social insurance fund based on the age of the contributor differently, creating a new form of discrimination of persons aged 63 or more who choose not to retire.

The majority of MPs in the parliamentary Labour Committee opposed the proposed eligibility criteria, which would eventually force persons aged 63 or more who fall sick to apply for the statutory pension, on which a 12 % penalty applies by virtue of another law.[33] In April 2021, the Committee thus removed the eligibility criteria from the Government bill and passed it without them.[34]

In parallel, Parliament amended the Law on Social Insurance to allow persons aged 63 or more who are temporarily unemployed and do not claim a statutory pension to receive unemployment benefits.[35]

33 Since the economic crisis measures adopted in 2012, the pension of persons choosing to retire at the age of 63 has been reduced by 12 %.
34 Cyprus, Social Insurance (Amendment) (No. 4) Law of 2021.
35 Cyprus, Social Insurance (Amendment) (No. 5) Law of 2021

In May 2021, the President of the Republic referred both laws back to Parliament for reconsideration,[36] on the grounds that they would lead to increased expenditure, in violation of the Constitution,[37] thus jeopardising the sustainability of the social security system. Parliament refused to revise the proposed amendments to meet the Government's demands.

The President consequently challenged the two amendments before the Supreme Court, which found that they were not compliant with the Constitution and infringed the principle of separation of powers. Further, the Supreme Court held that the amendments interfered with the powers of the Executive to assess the conditions for the provision of benefits in the exercise of its administrative function and to assess its financial consequences on the social security fund.[38] The Court was not presented with and did not consider potential age discrimination.

On 22 September 2022, Parliament adopted the bill regulating eligibility to sickness benefits, including the criticised criteria for persons aged 63 or more, as introduced by the Government in November 2020.

Online source:
https://www.nomoplatform.cy/bills/o-peri-koinonikon-asfaliseon-tropopoiitikos-ar-5-nomos-toy-2022/

Equality body decision on age discrimination in the statute of the journalists' union

Age

On 18 November 2022, the Ombudsperson issued a decision in her capacity as the Equality Body stating that the deprivation of the right of retired journalists to be elected to the governing board of the union of journalists amounts to age discrimination. The complainants argued that the union of journalists amended its statute only days before the deadline for submitting candidacies for the next election of the new board, so as to exclude them from the board on the ground of their age. The amendment, which was approved by 85 % of the members, was based on the argument that journalists who are no longer in the labour market should not have an executive role and make decisions for those who are still active in the labour market, adding that there is no other union where retired persons have an executive role. Furthermore, the criterion for exclusion from the board was not age but whether or not the candidate was working as a journalist.

The decision concluded that the amendment infringed the Employment Equality Directive which specifies that differences of treatment on grounds of age can be justified only (*sic*) if they are related to employment policy, labour market and vocational training objectives. The Ombudsperson recommended that the journalists' union permit retired journalists to be elected to the governing board, adding that this inevitably must lead to the postponement of the (then) upcoming election for the new governing board.

The Equality Body misinterpreted Article 6(1) of the Employment Equality Directive by failing to recall that it permits *any* differences objectively and reasonably justified by any legitimate aim. The justification offered by the union could arguably have passed the test of objectivity and reasonableness.

Online sources:
http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/236804A45D097043C2258901002E3685/$file/4_2020.pdf?OpenElement
https://politis.com.cy/556492/article?fbclid=IwAR0gDwozSfTuZgcMg9W_M71X6jI4zkJRNNMTm7BdA_lUIoX-YkKxwnTmOgs
http://www.cylaw.org/nomoi/enop/non-ind/2004_1_58/full.html

36 In accordance with the procedure provided for by Article 52 of the Constitution of the Republic of Cyprus.
37 Article 80.2 of the Constitution provides that no bill involving an increase in the expenditure of the state budget may be tabled by a Member of Parliament.
38 Cyprus, Supreme Court, *President of the Republic v. House of Representatives*, 20 July 2022, Ref. 6/2021 and 7/2021.

CZ Czechia

CASE LAW

Supreme Court decision on disability and reasonable accommodation

Disability

In July 2022, the Supreme Court decided on a claim filed by a man with a physical disability who worked for the Czech Prison Services in a facility to which he had to commute 292 km every week. As his disability made it impossible for him to continue driving such a long distance, he asked to be transferred to a closer facility that had advertised a vacant position matching his profile. His request was denied, and he was forced to resign. He turned to the Equality Body, which found that there had been discrimination.[39] He then turned to the courts, claiming discrimination due to the employer's failure to provide reasonable accommodation.

The first-instance court upheld his claim and granted him damages.[40] However, the second-instance court rejected his claim; the court argued that the employer had no obligation to accept the employee's request and failed to make any reference to the concept of reasonable accommodation.[41] This judgment was challenged before the Supreme Court.

The Supreme Court elaborated on the concept of reasonable accommodation in line with EU law, particularly taking note of the judgment of the CJEU in *HR Rail SA*.[42] It stated that the second-instance court failed to take into consideration the disability of the claimant, and to examine whether the rejection of the transfer represented a denial of reasonable accommodation. The Court dismissed the argument that a request for a job transfer must be documented by an opinion of a company doctor and ruled that employers must refrain from discrimination when deciding on such a request even if it is documented by other means.[43]

The case will be reviewed again by the municipal court, which is bound by the legal reasoning of the Supreme Court.

Online source:
https://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/6448C13362CEF062C12588E3001926CD?openDocument&Highlight=0

Constitutional Court decision on possible discrimination against a teacher with a disability

Disability

On 3 January 2023, the Constitutional Court published its decision concerning a case of discrimination in employment on the grounds of disability. The case concerned a teacher with a visual impairment who worked at a high school. The school allegedly dismissed her due to redundancy, but the claimant argued that the dismissal was based on her disability and brought a discrimination claim before the courts.

39 Czechia, Opinion of the Public Defender of Rights of 21 January 2019, No. 7571/2017/VOP, available at: https://eso.ochrance.cz/Nalezene/Edit/6674.
40 Czechia, District Court in Prague 4, judgment of 26 May 2021, No. 48 C 214/2019.
41 Czechia, Municipal Court in Prague, judgment of 20 October 2021, No. 62 Co 282/2021.
42 CJEU, judgment of 10 February 2022, *HR Rail SA*, C-485/20, ECLI:EU:C:2022:85.
43 Czechia, Supreme Court, judgment of 27 July 2022, No. 21 Cdo 916/2022.

The claim was upheld by the first-instance court, but it was later dismissed by the second-instance court and the Supreme Court. The claimant then turned to the Constitutional Court, which cancelled the previous decisions and decided in the claimant's favour.[44]

The Court found that the second-instance court and the Supreme Court did not adequately evaluate all the circumstances of the case, notably the school's selection of 'redundant' employees. The Court also elaborated on the concept of shifted burden of proof. It affirmed that the claimant needs to prove a difference of treatment on discriminatory grounds, while the respondent needs to prove that such treatment was based on non-discriminatory considerations as it is presumed that such treatment was discriminatory until the opposite is proven. The courts will then conduct an analysis of the legitimacy and proportionality of the difference of treatment. In the present case, the courts did not sufficiently analyse whether the respondent managed to bear the shifted burden of proof. Furthermore, they did not adequately look into whether the school had exercised all reasonable accommodation to ensure the claimant's equal access to employment due to her disability.

The second-instance court will re-evaluate its decision in the light of the Constitutional Court's findings.

Online source:
https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezy/2023/4-366-21_-_an.pdf

Supreme Court ruling on a violation of personal rights on the ground of gender

Gender

On 22 February 2023, the Supreme Court of the Czech Republic ruled on a case regarding the protection of personality on the ground of gender discrimination.

The applicant, who had undergone gender reassignment surgery, worked in a kindergarten and ran a transgender theatre that sought to break down social stereotypes. He was also a member of the Sexual Minorities Committee of the Human Rights Council. The defendant had started spreading rumours about the applicant, claiming that he was a paedophile and spread sexually transmitted diseases. He sent dozens of letters with similar allegations to the authorities, the police, and to parents of children whom the applicant taught. The applicant appealed to the court, which awarded him compensation for non-pecuniary damage of EUR 14 574 (CZK 350 000) at first instance, but the court of second instance changed the amount to EUR 416 (CZK 10 000) until the case reached the Supreme Court.

In particular, the Supreme Court criticised the second-instance court for failing to take sufficient account of the harm caused by the defendant's conduct (he defamed the applicant before the public authorities, the applicant had to stop working in public institutions, his children were bullied in educational establishments, and one of the children even attempted suicide).

The Supreme Court emphasised that the defendant's aim was to harm the applicant, which is not permissible in a democratic society. The Supreme Court therefore reversed the judgment in the second instance and returned the amount of compensation for non-pecuniary damage to the original amount of EUR 14 574.

Online source:
https://www.nsoud.cz/Judikatura/ns_web.nsf/0/A362C22FE3496949C125895E004BE976/$file/Vyhla%C5%A1.%20zn%C4%9Bn%C3%AD%20rozsudek%2025%20Cdo%202262_2021.pdf?open

44 Czechia, Constitutional Court, decision of 20 December 2022, No. IV. ÚS 366/21, available at: https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezy/2023/4-366-21_-_an.pdf.

Supreme Administrative Court confirms a finding of discriminatory hate speech in goods and services

Religion or belief

Racial or ethnic origin

In February 2023, the Czech Supreme Administrative Court confirmed the decision of a lower court in a case concerning discriminatory statements motivated by religion, race or ethnicity when providing goods and services.

The case concerned statements made by a restaurant on social media stating '*We do not cook for immigrants in our restaurant! STOP ISLAM!*'. The Trade Inspectorate found that these statements amounted to discrimination in violation of the Consumers' Protection Act. It imposed a fine of approximately EUR 2 525 (CZK 60 000). The restaurant challenged the decision before the administrative court which rejected the claim, after which the restaurant filed a cassation complaint to the Supreme Administrative Court.

In March 2023, the Supreme Administrative Court confirmed the previous court's decision and found that the statement amounted to discrimination as it was clear that people with a migrant or Islamic background would be treated differently to other customers. The court rejected the restaurant's claim that the statement was not implemented in practice, as even 'hypothetical' different treatment might constitute discrimination.[45] It noted that the statements:

- constituted an *a priori* blanket ban on a whole group,
- were primarily motivated by hatred, which excluded them from protection under freedom of speech,
- were neither appropriate nor proportionate, and thus amounted to direct discrimination as per Czech law.

Neither the Trade Inspectorate nor the Supreme Administrative Court specified the relevant ground(s) of discrimination, although the latter noted that the statements could amount to discrimination primarily on the grounds of religion, but also possibly nationality,[46] race, or ethnicity.

Judgment on the authorisation of midwives to assist in home births

Gender

In 2020, a midwife was fined EUR 4 223 (CZK 100 000) for assisting five women during their home births.[47] The relevant authority argued that the midwife had exceeded the powers defined by her authorisation to provide health services.

However, the Regional Court in Pilsen found that the midwife was entitled to conduct home births until the need for specialised care in a health facility arose. According to the court, the risks and potential for complications should be borne in mind by the midwife, but that does not disqualify her from performing a home birth. At the same time, the court added that when women opt for a home delivery they prioritise other considerations before a sterile environment. The court reversed the decision in relation to the offence and referred the case to the regional authority for further proceedings.

In its judgment, the court referred to a decision of the European Court of Human Rights against Czechia, where the court held that preventing midwives from facilitating and assisting in home births could not be justified in a democratic society by a convincing argument referring to public health.[48]

The regional court overturned the regional authority's decision to fine a midwife who assisted with home births. In its position, the court came close to a previous decision of the European Court of Human Rights,

45 Czechia, Supreme Administrative Court, 24 February 2023, No. 2 As 94/2020 – 27 (not publicly available).
46 In Czech anti-discrimination law, 'nationality' includes a subjective perception of belonging to a group defined and connected by cultural, geographical, language or other affiliation; not necessarily corresponding with one's citizenship.
47 Czechia, Regional Court in Pilsen, judgment of 19 December 2022, No. 77 A 159/2020.
48 *Dubská and Krejzová v the Czech Republic* [GC], No. 28859/11 and 28473/12, 15 November 2016.

which had assessed that Czech legislation[49] which prohibits midwifes from assisting in home births, constitutes a violation of a woman's right to respect for private and family life.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Research on secondary victimisation and stereotypes in court decisions

Sex

In February 2023, the NGO 'ProFem – centre for victims of domestic and sexual violence' presented the results of its research and analysis on secondary victimisation and stereotypes in court decisions.[50]

According to the research, which is based on the analysis of 76 judicial judgments concerning criminal offences of rape and domestic violence, gender stereotypes are reflected in a number of court decisions. Among the most common phenomena observed were the downplaying of violence, the denial of its negative effects on the psyche of victims, victim blaming, excusing perpetrators and attributing acts of violence to their uncontrolled instincts.

The above factors played a part in deciding guilt and the type of punishment. The research also includes a statistical comparison of sentences, which shows that the real penalties for the offence of child rape and infliction of serious bodily harm is not 5-12 years' imprisonment, as the Penal Code states, but 3-8 years, as shown by the practice of the courts, due to the regular use of the mechanism of an extraordinary reduction of the penalty rate.

One of the main conclusions of the analysis is that the Czech courts – regularly, rather than in isolated cases – downplay sexual violence and assess it more as an 'unpleasant experience', thus contributing to a greater tolerance of violence in Czechia. In addition, the phenomena described in the research can have devastating effects on the victim, including secondary victimisation.

The analysis of secondary victimisation and stereotypes in court decisions brings new data to the field of judicial practice. Gender stereotypes associated with a misunderstanding of domestic and sexual violence are reflected in the decisions of the Czech courts, and in particular in the gravity of sentences or suspended prison sentences. There are gaps in the education of the members of investigative and prosecuting bodies and of the experts on the topic of domestic and gender-based violence.

Online source:
https://www.profem.cz/cs/o-nas/novinky/a/analyza-sekundarni-viktimizace-rozpory-a-stereotypy-v-rozsudcich

49 Czechia, Act No. 372/2011 on health services and conditions of their provision of 6 November 2011, https://www.global-regulation.com/translation/czech-republic/506953/health-services-act.html.

50 *Michálková, E. (2023) 'Analysis: secondary victimisation, contradictions and stereotypes in judgments', (Analýza: sekundární viktimizace, rozpory a stereotypy v rozsudcích)*, press release, 21 February 2023, https://www.profem.cz/cs/o-nas/novinky/a/analyza-sekundarni-viktimizace-rozpory-a-stereotypy-v-rozsudcich. Havilková, P. and Šmídová, I (2023) 'Bagatelizace a Nerovnost: analýza rozsudků sexuálního a domácího násilí' (Trivialisation and Inequality: an analysis of judgments on sexual and domestic violence), https://www.profem.cz/shared/clanky/1072/profem-prezentace.pdf.

DK Denmark

LEGISLATIVE DEVELOPMENT

Tripartite agreement on sexual harassment

Sex

The tripartite negotiations on how to combat sexual harassment and promote a cultural change in the workplace commenced in 2020.[51] The outcome was a variety of policy initiatives, and a law proposal 'L 31 Proposal for law amending the law on equal treatment of men and women in occupation, etc., law on work environment, and law on vocational training'.[52] The law was passed in the Parliament on 23 March 2023, and entered into force on 1 April 2023.[53]

One of the main outcomes of the negotiations was that sexual harassment should primarily be seen as a cultural issue, and therefore initiatives must be focused on establishing a cultural change in this regard. In addition, it was concluded that the legal protection against sexual harassment needs to be strengthened. The negotiations resulted in 14 initiatives in 5 main areas of focus:[54]

1. A clear set of rules regarding sexual harassment cases and higher payments to victims in severe cases, including:
   - A clarification of employers' responsibility in the Equal Treatment Act;
   - A clarification of employees' responsibilities in dealing with sexual harassment.

2. A focus on sexual harassment in the workplace by:
   - Establishing a healthy workplace culture through cooperation between employers and employees;
   - More focus on sexual harassment in companies' mandatory workplace assessments by the Danish Working Environment Authority.

3. Increased knowledge about sexual harassment, annual statements on the number of verdicts and guidance regarding sexual harassment from the Danish Working Environment Authority.

4. Focus on young people in vocational training, including, for instance, better conditions for apprentices who have raised sexual harassment cases against their employers.

5. The establishment of the alliance against sexual harassment:
   An alliance consisting of relevant organisations and social partners working on the prevention of sexual harassment in Danish society, including the labour market, education, culture, etc. The goal is to create lasting cultural changes and maintain a focus on the prevention and handling of sexual harassment, as well as to ensure ongoing dialogue, exchange of experience and knowledge-sharing.[55]

51 The labour market in Denmark is partially regulated by cooperation between the Government, employers, and employee associations. This is often referred to as 'the Danish Model'. The Government collaborates with the two sides on, for instance, working conditions through collective agreement. This collaboration takes place in 'tripartite negotiations'. DJØF, 'How the Danish labour market works', union webpage with information in English: https://www.djoef.dk/english/working-in-denmark.aspx.

52 The Danish Parliament, 2023. L 31 Proposal for an Act amending the Act on equal treatment of men and women with regard to employment, etc., the Act on the working environment and the Act on vocational training. *(Folketinget, 2023. L 31 Forslag til lov om ændring af lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v., lov om arbejdsmiljø og lov om erhvervsuddannelser),* https://www.ft.dk/samling/20222/lovforslag/l31/index.htm.

53 Denmark, Ministry of Employment 2023, Bill on sexual harassment (*Beskæftigelsesministeriet 2023, Lovforslag om seksuel chikane er vedtaget i Folketinget*) https://bm.dk/nyheder-presse/pressemeddelelser/2023/03/lovforslag-om-seksuel-chikane-er-vedtaget-i-folketinget/.

54 Denmark, Ministry of Employment 2022, Tripartite agreement on initiatives to combat sexual harassment in workplaces (*Beskæftigelsesministeriet 2022, Trepartsaftale om initiativer til at modgå seksuel chikane på arbejdspladser*), https://bm.dk/media/20425/aftaletekst.pdf.

55 Website of Alliance on Sexual Harassment: https://seksuelchikane.dk/.

Online sources:
https://www.ft.dk/ripdf/samling/20222/lovforslag/l31/20222_l31_som_vedtaget.pdf
https://www.djoef.dk/english/working-in-denmark.aspx

CASE LAW

Supreme Court ruling on dismissal of swimming instructor and reasonable accommodation

Disability

In November 2018, the complainant was granted a flex job (an adapted job for persons with disabilities) because of her diagnoses of anxiety, depression and ADHD. She worked a few hours a week as a sports coordinator at a small sports association for persons with psycho-social disabilities, primarily run by volunteers.

In addition to office work, the complainant conducted swimming lessons, which required her to take an annual lifeguard test. She had passed the lifeguard test in 2019 and had to take a new test in 2020, which she refused because she did not think that she was up to it. The complainant was dismissed on the grounds that the sports association could not meet her special needs, which included the exemption from conducting swimming lessons and taking a lifeguard test as well as a need for an available contact person when she was at work. The complainant argued that she had been discriminated against because of her disability. Her case reached the Supreme Court.

The Supreme Court found that conducting the swimming lessons was an essential function of the sports coordinator's position, and that the employer had considered and examined several alternative solutions, for example whether others could take care of the swimming lessons. The Supreme Court concluded that the employer was not required to have made further considerations or investigations. Taking into account the nature, size and finances of the association, there was also no basis for challenging the employer's assessment that it would not be possible to exempt the sports coordinator from conducting swimming lessons or to make a contact person available.[56]

The employer had thus fulfilled its obligation to provide reasonable accommodation and the complainant's claim was dismissed.

Online source:
https://domstol.dk/media/gwsfzzza/26753-anonymiseret-dom.pdf

Supreme Court decision on dismissal of teacher due to religion

Religion or belief

The complainant was a physical education teacher who was dismissed from his job because he declined to comply with instructions from his employer. The teacher was a Seventh Day Adventist and it was a crucial part of his belief that he should not work on Saturdays. In 2017, he was asked to teach at an open house event on a Saturday, but refused, arguing that another member of his team could do it, similar to the previous year. When the teacher did not show up for the event, he was dismissed.

The Board of Equal Treatment had previously made the assessment that the difference of treatment on the ground of religion was both legitimate and appropriate. However, the Board found that the employer had rejected, without any dialogue, the various suggestions for alternative solutions proposed by the teacher. Thus, the Board concluded that the employer could not prove that the principle of equal treatment had not been violated. The teacher was awarded compensation equalling nine months of salary.[57] The employer brought the case before the civil courts.

56 Denmark, Supreme Court, Case No. BS-26753/2021-HJR of 6 September 2022.
57 Denmark, Board of Equal Treatment, Decision No. 9192 of 28 February 2019.

The Supreme Court found that requiring the teacher to work for three hours at the open house event was necessary. The Court argued that the school had concluded, after an assessment, that the claimant could not be replaced by any other teacher as he was the only qualified physical education teacher employed at the school. The Court therefore found that the teacher was obliged to work at the open house event, and that it did not amount to discrimination on the ground of religion or belief to terminate his contract due to his refusal to do so.[58]

Online source:
https://domstol.dk/media/rpxff2v1/31220-2021-anonymiseret-dom.pdf

Collective settlement agreement did not prevent a discrimination case before the courts

Age

On 5 January 2017, the complainant received information that she would be dismissed from her employment as a public school teacher. She contacted her trade union and signed a document giving the union the power of attorney to process her case before the Board of Equal Treatment.

Her union then entered into a settlement with the municipality regarding the intended dismissal of her and seven other teachers, all aged above 53. The union negotiated that only four of the notified terminations would be carried out, including that of the complainant. Among other things, the settlement agreement precluded the parties from subsequently complaining to the Board of Equal Treatment. The case primarily concerned whether the trade union's power of attorney agreement with the complainant meant that the settlement agreement between the union and the municipality prevented the complainant from bringing a claim under the Act on the Prohibition of Discrimination in the Labour Market etc. before the Board of Equal Treatment and the courts.

The Supreme Court stated that the complainant's age discrimination claim was not covered by the collective agreement, and that the union therefore could not negotiate that particular claim on the basis of an organisational power of attorney. According to the Supreme Court, the power of attorney only authorised the trade union to process the case before the Board of Equal Treatment on her behalf. Since the complainant had not subsequently agreed to the settlement with the municipality, she was not precluded from bringing her claim under the Act on the Prohibition of Discrimination in the Labour Market etc. before the Board or the courts.[59]

The case then concerned whether the complainant had been subjected to discrimination due to age. The Supreme Court determined that, although the information on the age distribution in the case could point in the direction of a presumption of discrimination, the municipality had proved that the termination of the complainant had no direct or indirect connection with her age. There was therefore no discrimination on the ground of age.

Online source:
https://domstol.fe1.tangora.com/media/-300016/files/32481-2022_Anonymiseret_dom.pdf

Board of Equal Treatment decisions on service dogs and hygiene considerations

Disability

During the first half of 2023, the Board of Equal Treatment issued eight different decisions on whether limitations on access to different services with a service dog amounted to disability discrimination. Each of the eight cases concerned complainants with different forms of psychiatric conditions, such as post-traumatic stress disorders, anxiety and/or schizophrenia.

58 Denmark, Supreme Court, judgment of 7 September 2022, case No. BS-31220/2021-HJR, available at: https://domstol.dk/media/rpxff2v1/31220-2021-anonymiseret-dom.pdf.
59 Denmark, Supreme Court, judgment of 27 June 2023, case No. BS-32481/2022, available at: https://domstol.fe1.tangora.com/media/-300016/files/32481-2022_Anonymiseret_dom.pdf.

Decisions where the Board found disability discrimination:

- A complainant was refused access with her service dog to a hospital for an examination. The Board found that the hospital had not proved that it was impossible to receive the complainant with her service dog without disregarding hygiene considerations. The complainant was awarded compensation of EUR 1 340 (DKK 10 000) due to disability discrimination.[60]
- A complainant was refused access to a theatre with her service dog. The theatre justified the refusal by referring to guests with allergies and guests with a fear of dogs, as well as the risk of interrupting the performance. The Board did not find it reasonable to refuse access without a concrete assessment and justification. The complainant was awarded compensation of EUR 670 (DKK 5 000) due to disability discrimination.[61]

Decisions where the Board did not find disability discrimination:

- A complainant was denied access with her service dog to an indoor public swimming pool due to hygiene reasons. The Board assessed that the denial was necessary to ensure the quality of bathing water in the swimming pool. There was therefore no disability discrimination.[62]
- A complainant was denied access to a restaurant with her service dog. The Board referred to the preparatory works of the Act on the Prohibition of Discrimination due to Disability stating that food hygiene could be a valid reason for a restaurant to prohibit guests from bringing dogs, and found that the denial of access was justified by a legitimate aim to ensure food safety in the restaurant, which was equipped with an open kitchen. There was therefore no disability discrimination.[63]
- A complainant was not allowed to bring her service dog during her stays in the closed ward of a psychiatric hospital, notably due to hygiene challenges. The Board held that the prohibition was justified by a legitimate aim to ensure the health and safety of other patients and staff. There was therefore no disability discrimination.[64]
- A complainant was refused access to a water park with her service dog. The Board assessed that a general ban on animals in the water park was necessary in order to ensure quality and hygiene standards. There was therefore no disability discrimination.[65]
- A complainant was refused permission to bring her service dog to the quiet zone of a train, where a general ban on animals was imposed for the sake of people with allergies. The Board assessed that such a general ban was necessary in order to ensure the health of others. The was therefore no disability discrimination.[66]
- A complainant was refused access with his service dog to an outpatient hospital department for an examination. The hospital had stated that patients were treated in teams and that the man could not be isolated from other patients. The Board assessed that it was necessary to limit the service dog's access to the department for hygiene reasons. The was therefore no disability discrimination.[67]

60 Denmark, Board of Equal Treatment, decision No. 9520 of 24 May 2023, available at: https://www.retsinformation.dk/eli/accn/W20230952025.
61 Denmark, Board of Equal Treatment, decision No. 9118 of 13 January 2023, available at: https://www.retsinformation.dk/eli/accn/W20230911825.
62 Denmark, Board of Equal Treatment, decision No. 9519 of 24 May 2023, available at: https://www.retsinformation.dk/eli/accn/W20230951925.
63 Demark, Board of Equal Treatment, decision No. 9515 of 3 May 2023, available at: https://www.retsinformation.dk/eli/accn/W20230951525.
64 Denmark, Board of Equal Treatment, decision No. 9377 of 21 April 2023, available at: https://www.retsinformation.dk/eli/accn/W20230937725.
65 Denmark, Board of Equal Treatment, decision No. 9273 of 1 March 2023, available at: https://www.retsinformation.dk/eli/accn/W20230927325.
66 Denmark, Board of Equal Treatment, decision No. 9233 of 8 February 2023, available at: https://www.retsinformation.dk/eli/accn/W20230923325.
67 Denmark, Board of Equal Treatment, decision No. 9108 of 18 January 2023, available at: https://www.retsinformation.dk/eli/accn/W20230910825.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Action Plan on Intimate Partner Violence and Partner Murder

Gender

On 26 June 2023, the Minister of Equality announced an action plan against intimate partner violence and partner murder.[68] The overall aim of the action plan is to ensure earlier detection of the violence and better help for the victims, their children and the perpetrator.

The action plan has 26 initiatives:

Violence is a social responsibility – coordination and early detection

1. Development of a systematic detection tool for health personnel in meetings with pregnant and new parents.
2. Upskilling courses for health personnel on detection and handling of violence against pregnant women and new parents.
3. Municipal preparedness for detection and handling of violence in close relationships.
4. Partnership to combat violence in intimate relationships and partner murder.
5. Continuation and strengthening of the organisation *Lev uden Vold* (Live Without Violence).
6. A national information effort on partner violence.
7. Study on the development of the incidence of intimate partner violence in Denmark.
8. Nationwide annual creative competition to prevent intimate partner violence among young people.

Action must be taken – early and effective action

9. Pool for strengthening outpatient courses for adults exposed to violence.
10. Subsidy for *Danner's and Projekt Q-værk's* outpatient services for women exposed to violence.
11. Targeted support and treatment services in the health system for pregnant and new parents exposed to violence.
12. Equality of crisis centre services for men exposed to violence.
13. Fund for interventions for children and young people who have grown up with domestic violence.
14. Strengthened protection of children in relation to custody and visitation.
15. Possibility of starting psychological treatment for children with the consent of only one parent.
16. Better protection for children who stay at a crisis centre and change schools.
17. Guide – The right help for children and relatives of partner homicide.
18. Extension of the violence provision in the Act on Foreigners.

Breaking the cycle of violence – greater focus on the perpetrator

19. Criteria for parole of inmates convicted of partner violence or partner murder.
20. Nationwide outpatient treatment of perpetrators of violence and their families.
21. Strengthening the processing capacity of the Danish Stalking Centre.
22. A national security guide on digital security and stalkerware.
23. Penal reform to crack down on violence.
24. Strengthened follow-up on domestic violence after police calls on domestic violence episodes.
25. Strengthened efforts of the police towards victims of violence in close relationships.
26. Knowledge of the relationship between victim and perpetrator and of homicide in Denmark, including partner homicide.

68 Denmark, *Handlingsplan mod partnervold og partnerdrab 2023-2026*, https://digmin.dk/Media/638234619918283183/Handlingsplan%20mod_partnervold_og_partnerdrab_2023-2026_tilgaengelig.pdf.

To implement the plan, a budget of EUR 31.3 million (DKK 233.8 million) has been set aside in the period 2023-2026 and EUR 5 million (DKK 37.9 million) will be allocated annually thereafter.

Report of the Pay Structure Committee

The Pay Structure Committee published its report after completing its work in June 2023.[69] The Committee was set up in September 2021 as a follow-up to a parliamentary intervention ending a conflict on a collective agreement in the nursing sector.

The Committee was set up to:

- Analyse the salary structures and salary development in the public sector;
- Explain the effects and consequences of changed pay structures in the public sector, including the significance for the private sector;
- Explore opportunities for developing wage formation in the public sector within the framework of the Danish agreement model in the public sector.

It was outside the scope and purpose of the Committee to assess what constitutes a 'correct' or 'fair' wage for specific professions in the public sector. Rather, the tripartite group wanted to form a common basis, which could be used as a starting point for their further discussions.

The Committee's statistical analysis indicates, for example, that there is a tendency for certain professions with a high proportion of female employees, and of employees working part time, to have a lower actual salary than a statistically calculated salary when factors of education, experience and management responsibility are taken into account.

The report also indicates that employees in specific sectors, largely in the private sector and mostly working full time, have a higher actual salary on average than a statistically calculated salary when their education and experience level and management responsibility are taken into account.

The statistical analyses must also be considered in the light of the gender-segregated labour market. The gender division is seen both between the private and public sectors and internally within the public sector. Seven out of 10 public employees are women, and while 8 out of 10 employees in municipalities and regions are women, the distribution in the State overall is closer to 5 out of 10.

The Committee report points out that the salary structures in the public sector today reflect the tripartite group's choices, compromises, and priorities through many decades of negotiations. The Committee does not find it possible to point to a single standing impact point as the determinant of the current salary structures. The current salary structures therefore cannot be said to be politically determined, for example, as a result of different civil service reforms in the post-war period.

This is in contrast to a much-publicised analysis of the civil service reform of 1969.[70] According to this analysis, the reform created a salary hierarchy in the public sector, where the female-dominated professions generally ranked lower in terms of pay than the male-dominated professions, seen in relation to their level of education, responsibility, etc. The study of the 1969 reform concluded that the salary hierarchy for public servants has not changed much since.

69 Denmark, Pay Structure Committee (2023) *Pay Structure Committee Main Report*, June 2023, https://www.loenstrukturkomiteen.dk/afrapportering/.

70 Elkjær Sørensen, A. (2020) *Kvindefag i historisk skruetvinge: En analyse af tjenestemandsreformens betydning for hierarkiet i offentlige lønninger fra 1969 til 2019*, Danish Institute of Human Rights, https://menneskeret.dk/files/media/document/Rapport_Tjenestemand_tilg%C3%A6ngelig.pdf.

The much-debated issue of pay in female-dominated professions ranking lower than the male-dominated professions has not been settled by the report of the Pay Structure Committee. The next step would be for the Government to invite the social partners to the tripartite negotiations on the implementation of a basis for government promise to set aside a budget of EUR 134 091 388 (DKK 1 billion) in 2024, increasing to EUR 402 274 164 (DKK 3 billion) in 2030 to address wages and working conditions in public welfare.[71]

EE Estonia

POLICY AND OTHER RELEVANT DEVELOPMENTS

Equal Pay Day

Sex

Estonia marked Equal Pay Day on 23 February 2023. Despite the fact that the gender pay gap in Estonia has decreased by 9.2 % since 2013,[72] problems continue to exist and were brought to public attention by the media on the occasion of Equal Pay Day.

Equal Pay Day is the day when the number of additional working days that women must work in order to earn a salary equal to men's salary of the previous calendar year is reached. The gender pay gap was 14.9 % in 2021, which means that women will have to work an extra 38 days to earn the same annual salary earned by men. According to Statistics Estonia, in 2021, women made 85 cents for every euro earned by men. The gender pay gap has been reducing by 0.7 percentage points year on year (from 15.6 % in 2020 to 14.9 % in 2021).[73]

Pay transparency and a wider use of collective agreements could help to reduce the gender wage gap in Estonia, since its causes can still mainly be found in the widespread use of individual wage negotiations and the lack of a uniform basis for wage determination in many organisations.[74]

Increasing economic equality between women and men is highlighted in the Welfare Development Plan for 2023-2030.[75] The national strategy and action plans 'Estonia 2035' and Estonia's Recovery and Resilience Plan (ERRP) mention gender equality challenges and promise to tackle gender stereotypes, women's lower employment rate, gender segregation in education and employment, the high gender pay gap, and gender inequalities in relation to life expectancy and healthy life years.[76]

Women's political participation

Sex

The parliamentary elections took place on 5 March 2023. One third of the candidates were women, but they generally have lower positions on the lists. A study on candidate lists from a gender perspective

71 Danish Government (2022) *Ansvar for Danmark Det politiske grundlag for Danmarks regering* (Responsibility for Denmark – the political basis of government for Denmark), https://www.stm.dk/statsministeriet/publikationer/regeringsgrundlag-2022/.

72 The gender pay gap was 24.8 % in 2013. Statistics Estonia (2022) 'Gender pay gap was the smallest on record', https://www.stat.ee/en/node/258613.

73 Statistics Estonia (2022), 'Gender pay gap was the smallest on record', https://www.stat.ee/en/node/258613.

74 Sepper, M.L. (2021), *Does more information on wages equal pay transparency*? Host Country Discussion Paper – Estonia, https://www.praxis.ee/wp-content/uploads/2021/10/Host-Country-Paper-Gender-pay-Gap.pdf.

75 *Sotsiaalministeerium* (2023), *Heaolu arengukava 2023-2030* (Welfare Development Plan 2023-2030). Available in Estonian at: https://www.sm.ee/heaolu-arengukava-2023-2030#heaolu-arengukava-20.

76 'Estonia 2035', adopted on 12 May 2021, pp. 6-12, https://www.valitsus.ee/en/media/4269/download; Estonia's Recovery and Resilience Plan (*Taaste- ja vastupidavuskava*), 5 October 2021. Available in English at: https://ec.europa.eu/info/files/estonias-recovery-and-resilience-plan_en.

found a stagnation compared to the preceding elections, raising questions about the effectiveness of gender equality policy, and encouraging women to vote for women.[77]

The Estonian Parliament has 101 members.[78] In 2019, 28 women were elected to the Parliament, of whom only 2 won an individual mandate, while men won 11 individual mandates; 20 women compared to 48 men got into the Parliament with a district mandate and 6 women compared to 20 men secured a seat with a compensation mandate.[79] In 2023, 33 % of the 968 candidates for the 101 Parliament seats are women.[80] Gatekeepers are powerful in the conservative parties (EKRE, Isamaa), but liberals (Reform Party) also nominated more male than female candidates, whereas the Estonian Green Party, Social Democrats, and a new party, Eesti200, have appointed women as active policy makers and office holders.[81]

Equality law coordinating department moves from the Ministry of Social Affairs to the Ministry of Economic Affairs and Communications

All grounds

In the early 2000s, the Gender Equality Department was formed within the Ministry of Social Affairs. The unit developed over the years to become the coordinator of the drafting and implementation of all equality law and policy, in relation to all the protected grounds under Estonian equality law. In 2015 the unit was named the Equality Policies Department and in November 2022 it was restructured into the Equality Policies and Anti-Poverty Department.

In June 2023, the Government reformed its structure and the new coordinator for equality matters is now the Ministry of Economic Affairs and Communications. The Government of the Republic Act was amended for this purpose.[82] It now states that the Ministry of Economic Affairs and Communications is responsible for 'promotion and coordination of equal treatment and gender equality and drafting of relevant legislation.' There is currently no information to suggest that the size or internal structure of the department has been altered in any way.

Online source:
https://www.riigiteataja.ee/akt/130062023011

77 Raun, A. (2023), *We need 40 women in the Parliament: Unfortunately, the electoral lists face stagnation* ('Vajame riigikokku 40 naist. Paraku vaatab valimisnimekirjadest vastu stagnatsioon'), *Eesti Päevaleht,* 28 January 2023. Available in Estonian at: https://epl.delfi.ee/artikkel/120133862/poliittehnoloog-alo-raun-vajame-riigikokku-40-naist-paraku-vaatab-valimisnimekirjadest-vastu-stagnatsioon; Tarand, K. (2023), '*Get your beards off*' ('Ajage habemed ära!'), *Sirp,* 27 January 2023. Available in Estonian at: https://sirp.ee/s1-artiklid/arvamus/ajage-habemed-ara/?fbclid=IwAR3MNa0pU55o25BiTsfsHol_oeOztG50FYy5SjtlGRyzAQljeY7HE9qcIZ0.

78 Estonia, *Riigikogu valimise seadus* (Riigikogu Election Act), RT I, 3 January 2020, 13, https://www.riigiteataja.ee/en/eli/514122020002/consolide.

79 Article 62 of the Riigikogu Election Act provides that a simple quota is calculated for each electoral district, which is obtained by dividing the number of valid votes cast in the electoral district by the number of mandates in the district. Mandates that are not distributed in electoral districts on the basis of a simple quota are distributed as compensation mandates among the political parties whose candidates receive at least 5 % of the votes nationally.

80 National Electoral Committee distributed mandates for Riigikogu elections, https://www.valimised.ee/en/national-electoral-committee-distributed-mandates-riigikogu-elections; Standing as a candidate in 2023 Riigikogu elections, https://www.valimised.ee/en/parliamentary-elections-2023/standing-candidate-2023-riigikogu-elections.

81 Raun, A. (2023), 'We need 40 women in the Parliament: Unfortunately, the electoral lists face stagnation', *Eesti Päevaleht,* 28 January 2023. Available in Estonian at: https://epl.delfi.ee/artikkel/120133862/poliittehnoloog-alo-raun-vajame-riigikokku-40-naist-paraku-vaatab-valimisnimekirjadest-vastu-stagnatsioon.

82 Estonia, Government of the Republic Act, RT I 1995, 94, 1628, amended 20 June 2023, available at: https://www.riigiteataja.ee/akt/111062013007?leiaKehtiv.

FI Finland

LEGISLATIVE DEVELOPMENTS

Partial reform of the Non-Discrimination Act approved by Parliament

Racial or ethnic origin
Religion or belief
Age
Disability
Sexual orientation

On 30 November 2022, a Government proposal on a partial reform of the Non-Discrimination Act was adopted by Parliament. The amendments entered into force on 1 June 2023.[83]

The reform contained the following amendments:

- extending the mandate of the Non-Discrimination Ombudsman to investigate cases in the field of employment;
- extending the mandate of the Non-Discrimination Ombudsman to bring cases of alleged discrimination without an identified victim before the National Non-Discrimination and Equality Tribunal;
- clarifying the concept of harassment to cover not only harassment directed at an individual but also harassment directed at a group of people, such as Jewish people, the Roma or homosexuals;
- extending the duty to draft equality plans to cover early childhood education and strengthening the responsibility of those arranging early childhood or other education to react to harassment;
- revising the concept of reasonable accommodation to better reflect the UN CRPD and prioritising the needs of the person with disabilities;
- allowing the National Non-Discrimination and Equality Tribunal to make a recommendation on the amount of compensation when deciding on a case (i.e. outside employment).[84]

The amendments largely respect the Ministry of Justice's working group proposal although some changes were made in Parliament. Most significantly, the proposed extension of the mandate of the Non-Discrimination and Equality Tribunal to decide on compensation was revised so that the Tribunal can only make a recommendation on the amount of compensation.

Furthermore, the Government will be required to review before the end of 2024 the possibility of extending the mandate of the Tribunal to cover cases in the field of employment.

Online source:
https://www.eduskunta.fi/FI/vaski/EduskunnanVastaus/Sivut/EV_189+2022.aspx

New anti-discrimination law in autonomous Åland

Racial or ethnic origin
Religion or belief
Age
Disability
Sexual orientation

On 8 June 2022, the self-governing province of the Åland Islands approved a reform of the anti-discrimination legislation, which entered into force on 1 January 2023.[85] Following this reform, the mainland Finnish Non-Discrimination Act is applicable in Åland in all areas of life, including the areas where Åland has autonomous legislative competence.

Before 2023, a separate Provincial Act on Prevention of Discrimination in the Province of Åland was applicable in the fields of life where the Åland Islands have autonomy, i.e. employment matters related to local civil servants, healthcare, social welfare, education, self-employment, promotion of employment,

83 Finland, Act Amending the Non-Discrimination Act (1192/2022), available at: https://www.finlex.fi/fi/laki/alkup/2022/20221192.
84 The National Non-Discrimination and Equality Tribunal does not have authority to investigate and handle employment discrimination according to the Non-Discrimination Act.
85 Finland, Provincial Act (2022:43) on the Implementation of the Non-Discrimination Act, available at: https://www.regeringen.ax/alandsk-lagstiftning/alex/202243.

and some aspects of the provision of services e.g. transport services. In all other fields, the mainland Finnish Non-Discrimination Act has always been applicable.

As of 1 January 2023, the only difference between mainland Finland and Åland is that the requirement of domicile (legal place of residence) in Åland and the requirement of proficiency in Swedish language cannot be considered as discrimination in issues which fall under the autonomy of the Åland Islands.[86]

The legislative change was motivated by the widening of the personal and material scope of the mainland Finnish Non-Discrimination Act in 2015, which caused a significant difference in protection between the areas where the Åland islands have autonomy and other areas.

The application of the mainland Non-Discrimination Act means that the interpretation on the concepts of the Act by the courts in the mainland will become part of the interpretation in the areas where Åland has autonomy.

Online source:
https://www.regeringen.ax/alandsk-lagstiftning/alex/202243

CASE LAW

Supreme Administrative Court decision on police ethnic profiling as racial discrimination

Racial or ethnic origin

Two black women complained about police discrimination after they were stopped and searched by two police officers at 2 am in the centre of Helsinki. The officers were on surveillance for suspected prostitutes and performing immigration status checks. They admitted that their actions were in part influenced by the fact that the women were black but denied any discrimination.

In 2018, the Non-Discrimination and Equality Tribunal had found that the police had practised ethnic profiling, which qualified as direct discrimination prohibited by the Non-Discrimination Act. The Tribunal ordered the police to refrain from repeating the discriminatory stop and search practices and imposed a conditional fine of EUR 10 000 in order to enforce compliance with its injunction.[87]

The police appealed against the decision of the Tribunal to the Helsinki Administrative Court which overturned the decision, finding that the action of the police did not amount to discrimination.[88] A further appeal brought the case before the Administrative High Court.

In September 2022, the Administrative High Court upheld the decision of the Non-Discrimination and Equality Tribunal. The Court examined whether the difference of treatment based on colour of skin and ethnic origin was justified according to the Non-Discrimination Act.[89] The Court acknowledged that the action of the police was based on legislation, as required for justification, but considered that it did not fulfil the proportionality requirement. The facts invoked by the police that many prostitutes working in downtown Helsinki are black, and that these two women were seen talking with a man, were not a weighty reason to stop the women after the man had left.[90]

86 Swedish is the only official language in Åland. Right of domicile in Åland is acquired at birth if possessed by either parent. Persons who have lived in Åland for five years, are Finnish citizens and have an adequate knowledge of Swedish may apply for the domicile status. Right of domicile in Åland is a requirement for the right to: vote and stand for election in elections to Åland Parliament; own and/or be in possession of real estate and conduct business in Åland.

87 Finland, National Non-Discrimination and Equality Tribunal, 19.12.2018, case No. 337/2018 https://www.yvtltk.fi/material/attachments/ytaltk/tapausselosteet/kmnntSkQp/YVTltk-tapausseloste-_19.12.2018-etninen_profilointi.pdf.

88 Finland, Helsinki Administrative Court, 12.4.2021, case No. 21/0128/2.

89 The Non-Discrimination Act allows justification of direct discrimination on all grounds in all fields of life, including (racial) origin in the scope of EU law.

90 Finland, Administrative High Court decision of 8 September 2022, ECLI:FI:KHO:2022:106.

Online source:
https://kho.fi/fi/index/paatokset/vuosikirjapaatokset/1662440009521.html

Discrimination in employment due to the use of traditional Roma clothing

Racial or ethnic origin

The work contracts of two Roma hairdressers were terminated after lasting only two weeks, due to them wearing the traditional Roma skirt at work. Prior to starting the work, the women had agreed with the local manager of the hairdressing salon that they would wear a plain version of the traditional dress, but the owners of the salon chain insisted that the Roma skirt could not be used at all as it did not fit the image of the hairdresser salon and was also unhygienic.

The women contacted the Non-Discrimination Ombudsman who directed them to contact the occupational health and safety authorities as the Ombudsman does not have authority to investigate employment discrimination. The health and safety authorities did not find the skirt to cause any health or safety concerns and concluded that possible employment discrimination was at hand. The case was thus transferred to the police to be investigated under the Criminal Code. The prosecutor decided just two weeks before the statutory limitation deadline not to press criminal charges against the employer. As the Roma women were left without any protection against discrimination, the Non-Discrimination Ombudsman decided to take the case to the district court, representing the claimants.

In March 2023, the Pirkanmaa District Court decided that the reason for terminating the employment contract was the women's ethnic origin which became visible due to the skirt they wore. The court concluded that the health and safety concerns were mentioned only afterwards, when the women questioned the termination of their contract. The court awarded each claimant EUR 12 000 as compensation for direct discrimination according to the Non-Discrimination Act and 5 months' salary as compensation for financial damages according to the Employment Contracts Act.[91]

Employment discrimination against the Roma is frequently referred to as systematic.[92] However, there is no case law in this area, which may explain why the Ombudsman took the case to court, which is extremely rare.

It is significant that the court referred to the constitutional right of the Roma to maintain their culture (by using traditional clothing) and stated that it outweighed the need of the company to maintain a universal dress code for the workers.

The case also shows the complexity of access to justice in employment discrimination. The procedure followed in this case, which is standard in employment discrimination cases, would have left the claimants without access to justice had there not been exceptional action by the Non-Discrimination Ombudsman. The Criminal Code provisions applied by the prosecution services in such cases are much weaker than the Non-Discrimination Act, notably with regard to the burden of proof.

This low level of protection was one of the main arguments for the extension of the mandate of the Non-Discrimination Ombudsman to cover employment discrimination, as described above.[93]

Online source:
https://yle.fi/a/74-20024895

91 Finland, Pirkanmaa District Court, 29 March 2023, decisions Nos L 758/2022/458 and L 758/2022/455.
92 See e.g. interview with Roma activist Leif Hagert: *Duunitori* (2023) 'The recruitment of the Roma is usually terminated before it has really started', 8 April 2023, https://duunitori.fi/tyoelama/romanit-syrjinta-tyoelamassa.
93 See 'Partial reform of the Non-Discrimination Act approved by Parliament', above p. 104.

France

FR

CASE LAW

Legality of the dismissal of a trade union representative for addressing his subordinates using racist, anti-Muslim and sexist language

Racial or ethnic origin

Religion or belief

Gender

The claimant was employed by the respondent as a financial manager, and was also a trade union representative. He was dismissed for having addressed three of his female subordinates using brutal and inappropriate language of a sexist and racist nature, making reference to their religion and attempting to cause shame.

In French labour law, a union representative is protected from dismissal unless the Labour Inspector has given their authorisation and the employer establishes serious misconduct. While the dismissal was not authorised by the Labour Inspector, it was authorised by the Minister of Labour on appeal. The claimant challenged the minister's decision before the administrative courts.

The first and second-instance courts concluded that the claimant's language towards his subordinates had showed a vulgar attitude but had not been sufficiently objectionable to justify dismissal for serious misconduct. They considered notably that the claimant was considered overall to be a friendly colleague who had never been the object of any disciplinary sanction and that the events occurred in a context of reorganisation and tension.[94] The employer challenged the second-instance decision before the Council of State (Supreme Administrative Court).

In October 2022, the Council of State noted that the claimant's statements were made repeatedly and that they systematically targeted his subordinates who were all female, apparently of North-African origin and of Islamic faith. The sexist and racist nature of the statements led the Court to conclude that they could not be held to be trivial and only in bad taste. Furthermore, the fact that there were tensions or that the claimant had no previous disciplinary record was irrelevant. Such language towards employees by a person in a position of authority constitutes discriminatory harassment and violates the employer's duty to ensure security. Therefore, it justifies the dismissal of a protected employee.[95]

In France, private employees are generally subject to the judicial courts while public sector employees are subject to the administrative courts. Since the Me Too movement, the Court of Cassation has developed a jurisprudence imposing, on *private* employers, a strict duty to investigate and punish harassment in general and sexist, racist and anti-Muslim behaviour and language in particular.[96] With the present decision, the Council of State appears to be following a similar line of reasoning for public sector employees, who usually benefit from a highly protected employment status and are rarely dismissed.

Online source:
https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-10-07/450492

Religious expression on social media by employees exercising a public service

Religion or belief

The claimant was employed under a private law contract by an association providing public employability services to unemployed young persons, financed by the State. In May 2015, in the context of a

94 France, Administrative Court of Lyon, judgment of 21 June 2018 in case No. 1802985; and Administrative Court of Appeal of Paris, judgment of 19 January 2021 in case No. 19PA02121.
95 France, Supreme Administrative Court (Conseil d'État), 7 October 2022, No. 450492.
96 See, for instance, Court of Cassation, social chamber, 21 March 2021, No. 18-25597; and Court of Cassation, social chamber, 5 December 2018, No. 17-14594.

partnership between the city and the association, the claimant started leading a programme intended to provide individualised support and professional employability counselling to youth in great difficulty and vulnerability.

In December 2015, the association dismissed the claimant for aggravated fault due to public statements posted by the claimant on social media, in his own name. The employer argued that the statements were incompatible with the exercise of the claimant's mission. The letter of dismissal referred to 'important dishonest criticism of both Les Républicains and the National Front parties, taking the French flag in disrespect, and calling for the diffusion of the Qur'an accompanied by suras calling for violence, these being political and religious manifestations that go beyond his right to private life, freedom of speech, and constitute excesses that put into question the minimal loyalty required by his position, constituting a violation of his obligation of reserve and neutrality'.

The employer was convicted by the Court of Appeal for discriminatory dismissal on the ground of political opinions and religious beliefs. The Court held that the dismissal violated the claimant's freedom of speech and right to private life, which were protected outside the exercise of his professional functions.

The employer challenged the decision before the Court of Cassation, alleging that an employee working for an association in the service of a city and executing a duty of public service towards vulnerable young persons is bound by an obligation of discretion and the respect of the principle of neutrality and religious secularity that goes beyond the strict distinction between expression at work and outside of work.

In October 2022, the Court of Cassation decided on the case. It held that the employer is managing a public service, and its employees are thus subject to the obligations of neutrality and secularity imposed on public servants. Employees executing a public service are also subject to the same rules of ethics and conduct as public servants, including an obligation to respect rules of proper conduct and discretion beyond the execution of their functions.[97]

To correctly establish the limits to the freedom of expression of an employee bound by the obligation of discretion, neutrality and secularity, the Court was required to consider the mission of the employee towards the public he serves. In this regard, the Court had to consider whether the social media account allowed the persons benefiting from the claimant's counselling services to identify him and whether, due to the content of the public statements, they constituted a violation of his obligation of discretion. If so, the dismissal was justified due to the non-fulfilment of a genuine and determining occupational requirement.

The Court of Cassation quashed the decision and returned the case to the Court of Appeal.

Online source:
https://www.courdecassation.fr/decision/634f93f8b5afe5adfff28804

Data analysis of origin to establish discrimination in hiring practices

Racial or ethnic origin

The claimant was hired for a series of short-term interim contracts with the same employer. In 2019, he initiated an action to have his labour contracts requalified as a permanent contract, claiming that he was maintained in a precarious interim status as a result of discrimination on the ground of his origin.

To support this allegation, the claimant presented statistics based on the compulsory hiring registry over a specific period of time, analysing the data on short-term interim contracts and permanent contracts

97 France, Court of Cassation, social chamber, decision of 19 October 2022, No. 21-12.370.

according to the employees' surnames, divided between European-sounding names and non-European-sounding names.

Some 18 % of short-term interim contract employees with European names were offered a permanent contract compared to approximately 7 % of those with a non-European name. In addition, employees with a non-European name represented about 8 % of all short-term interim employees and only 2 % of permanent employees occupying the same positions.

The Court of Appeal concluded that there was an appearance of discrimination on the basis of this quantitative data, shifted the burden of proof to the employer, and held that the employer had failed to provide objective justifications. The employer challenged the decision before the Court of Cassation alleging that employers are prohibited from computing statistics on the origin of employees, contesting the basis of the quantitative analysis and objecting to the conclusion of the Court of Appeal that it had failed to provide objective justification further to the shift in the burden of proof.

The Court of Cassation decided on the case in December 2022, finding that the quantitative data presented by the claimant was admissible in evidence and sufficient to establish an appearance of discrimination, thus shifting the burden of proof.[98]

Regarding the justifications invoked by the employer, the Court found that the claim that the discrepancy must be the result of an inferior number of candidates of non-European origin was irrelevant considering that the argument of the claimant was not related to all hiring practices but to the specific situation of opportunities to move from being short-term interim employee to a permanent employee.

This decision is the first since 2011 to explicitly address the admissibility and method of computation of quantitative evidence substantiating allegations of discrimination based on the origin of various categories of employees, identified through their surnames. It is also the first where the data was analysed by the claimant and not by the national equality body. However, the Court did not respond to the respondent's argument that employers are prohibited from exploiting such data for management purposes.

Online source:
https://juricaf.org/arret/FRANCE-COURDECASSATION-20221214-2119628

Access to evidence in application of the protection of personal data by the GDPR

All grounds

In the context of a case of alleged salary discrimination on the ground of (ethnic) origin, the Court of Appeal granted the claimant's petition to access certain evidence withheld by the respondent employer, notably a limited number of payslips of eight other employees. Personal information on the pay slips was to be anonymised except certain information of relevance such as remuneration and the names of the employees. This information was considered relevant as the claimant argued that this data would show a difference in treatment between employees with European-sounding and non-European-sounding names. The employer challenged the decision, alleging that the communication of this information was contrary to the protection of the personal data of employees provided by the GDPR.

The Court of Cassation ruled on the case in March 2023, recalling first that the right to the protection of personal data under the GDPR is not an absolute right and that it must be balanced with other rights, including the right to an effective remedy and access to an impartial tribunal.[99] Referring explicitly to the GDPR and to the ECHR, the Court stated that the production of information violating the right to privacy

98 France, Court of Cassation, social chamber, 14 December 2022, No. 21-19628. See also the conclusions of the public reporter, available at: http://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2023-02-17/450852.

99 France, Court of Cassation, social chamber, 8 March 2023, No. 21-12492.

can be justified if it is indispensable to the exercise of a right and the request is proportionate to the purpose for which it is requested.

The Court further clarified that a judge determining a request for access to evidence must take the following approach:

- First, determine which information is necessary to enforce the right to access to evidence and whether it is proportionate to the objectives pursued.
- Secondly, determine whether the information requested could violate the right to private life of other employees. If so, it must be indispensable to the exercise of the right to evidence and proportionate, and, if need be, the scope of information must be restricted by the Court.

The decision of the Court of Appeal ordering the production of the payslips was maintained and the recourse dismissed.

This is the first case to address the issue of the right to have access to evidence in discrimination cases by reference to the GDPR.

Online source:
https://www.courdecassation.fr/decision/64085bce66b1bafb02f11fb0

Legality of the French Football Federation's regulation forbidding players from wearing clothes or signs manifesting religion or beliefs

Religion or belief

In August 2021, the French Football Federation (FFF) amended its rules and regulations to prohibit 'the wearing of all signs or clothes ostensibly manifesting a religious, philosophical, community or political acquaintance or belief (...) as well as all acts of proselytism or propaganda, whether in competition or in events organised by the federation or related to it'.

The Human Rights League and two NGOs petitioned the Court to annul this rule, alleging that it constituted a disproportionate restriction to freedom of religion and expression as well as intersectional indirect discrimination against women wearing the Islamic veil, in violation of the Law of 27 May 2008. Another NGO presented an *amicus curiae* brief in support of the claimants' position, while the Women's International League presented a brief arguing in support of the dismissal of the claim.

In June 2023, the Supreme Administrative Court (*Conseil d'État*) ruled on the claim, noting that sporting federations are responsible by law for the good functioning of a public service, including the implementation of rules and regulations related to the practice of the sporting activity they manage. As such, the FFF must take all necessary measures to ensure that all persons over whom they have authority respect their duty of neutrality and refrain from displaying their convictions and beliefs. This obligation therefore applies to all players selected for the French national teams during events and competitions in which they participate in such a capacity.[100]

It is also the federation's responsibility to determine rules of participation in the competitions they organise, including rules regarding clothing and equipment necessary to ensure the safety of players and due respect to the rules applicable to each sport. While registered members are not *per se* required to respect the neutrality duty, the rules of participation adopted by federations can limit the freedom of expression of their opinions and beliefs in order to ensure the good functioning of the public service and proper protection of others if they are adapted and proportionate to this objective. Sporting federations can thus adopt and implement an obligation of neutrality regarding the clothes that players are wearing

100 France, Supreme Administrative Court (Conseil d'État), second and seventh chambers, 29 June 2023, Nos 458088, 459547 and 463408.

during competitions and sporting events in order to ensure public order and prevent confrontations and disruptions.[101]

The Court thus concluded that the provision at hand in the present case is adapted and proportionate. The indirect discrimination argument was considered to be moot and was thus not addressed.

Online source:
https://www.conseil-etat.fr/actualites/interdiction-par-la-fff-du-port-pendant-les-matchs-de-tout-signe-ou-tenue-manifestant-ostensiblement-une-appartenance-politique-philosophique-r

POLICY AND OTHER RELEVANT DEVELOPMENTS

Equality Body framework decision on access to evidence in discrimination cases

All grounds

General rules of civil procedure in France do not provide access to evidence to the benefit of the claimant through discovery. The claimant bears the burden of proof and does not have a right to build his or her case with elements provided by the respondent.

However, the Code of Civil Procedure provides a right to have access to evidence before filing an action in court, in order to safeguard evidence in view of future litigation. This provision has been used by discrimination lawyers to support motions to obtain access to comparative evidence in support of discrimination cases. This line of argument has produced considerable jurisprudential developments in support of the principle of a derogatory right to have access to evidence in discrimination cases.

The Defender of Rights has a mandate to investigate claims of discrimination, request documents and hear witnesses. When the investigation leads to a finding of discrimination, the body has standing to file observations before the court, producing the evidence collected and presenting its own analysis of the facts of the case and the applicable law.

The Defender of Rights is receiving an overwhelming number of claims filed for the sole purpose of facilitating access to evidence by triggering the presentation of the observations of the Defender of Rights before the court. The Defender of Rights has observed that judges are not familiar with the specificity of the rules relating to access to evidence in discrimination cases, which hinders access to justice of victims of discrimination and is responsible for the overwhelming number of complaints. In this context, the Defender of Rights adopted a 'Framework decision of Observation before the Court' in August 2022, outlining the applicable law, jurisprudence and arguments for the judge in relevant cases.[102]

This decision can be filed in the court record as 'Observations of the Defender of Rights' by each claimant who wishes to support their argument in favour of their right to be given access to evidence.

Online source:
https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=46539&opac_view=-1

101 It is notable that the Public Reporter presented the opinion that ordinary players, not acting in a public service capacity, can only have clothing restrictions relevant to the protection of their safety imposed on them. The Court did not follow this opinion. See Public Reporter's report available at: http://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2023-06-29/458088.

102 France, Defender of Rights (2022), Framework decision No. 2022-138 of 31 August 2022, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=46539&opac_view=-1.

National plan to fight racism, antisemitism and discrimination on the ground of origin 2023-2026

Racial or ethnic origin

On 30 January 2023, the Prime Minister organised an event to launch the National action plan against racism, antisemitism and discrimination on the ground of origin 2023-2026, together with all the members of cabinet concerned, including the Minister of Justice, the Minister of Employment and the Minister for Equal Opportunities, Equality between Women and Men and Diversity.

The plan is the result of a vast consultation with all civil society and institutional stakeholders. It proposes 80 measures to be implemented under the authority of each competent minister, ranging from education programmes in elementary school and professional training for all economic bodies and employers, to the improvement of enforcement, data collection and the fight against hate speech on the internet. The priorities are grouped into five themes: naming, measuring, educating, sanctioning, and supporting victims.

The Government proposes to develop public surveys to measure experiences of discrimination and situation testing in employment as a tool to track, name and shame and to implement anti-discrimination measures. It also intends to improve repression and punishment of racism and discrimination through an improvement to the criminal complaint mechanism and in the enforcement of penal actions. The plan also announces the creation of a civil sanction to be paid in addition to civil damages, financing a fund supporting collective action. It also refers to an improvement to the procedural mechanism for collective action, without however providing further details.

This programme will be enforced under the supervision of the inter-ministerial delegate against racism, antisemitism, discrimination and LGBT hate and will be subject to evaluation by the National Commission for Human Rights.

Online source:
https://www.enseignementsup-recherche.gouv.fr/sites/default/files/2023-02/plan-national-de-lutte-contre-le-racisme-l-antis-mitisme-et-les-discriminations-li-es-l-origine-2023-2026-26358.pdf

Annual report of the activity of the Defender of Rights for the year 2022

All grounds

The national equality body, the Defender of Rights, has a head office and a network of 550 delegates throughout the country who provide direct independent assistance to victims in formalising their claim and finding the best means of action. They can also propose mediation services. Claims that require formal investigation are then addressed to the central head office and are concluded by non-binding decisions. The Defender of Rights can also pursue an equitable settlement, i.e. by proposing a solution correcting the unfairness of a strict application of the law despite the absence of effective means of legal action. The body is also mandated to, on its own initiative, present independent observations before the courts as a third party (*amicus curiae),* filing evidence gathered through its investigation in the court record and proposing arguments on the proper application of the law.

In April 2023, the national equality body published its activity report for the year 2022. It shows a continuation of the trends that were already notable the previous year.[103]

The telephone service operated by the equality body received 100 416 telephone inquiries covering all areas of its competence, which corresponds to an increase of 19 %. In addition, the local delegates throughout the country received 6 700 discrimination claims while the head office registered 6 545 discrimination complaints for formal investigation.

103 See: Defender of Rights (2022) *Annual report for the year 2021*, available at: https://www.defenseurdesdroits.fr/fr/dossier-de-presse/2022/07/rapport-annuel-dactivite-2021.

In 2022, the most common ground of discrimination invoked was disability (20 % of complaints), followed by 'origin' which covers race, nationality and ethnic origin (18 %). Some 11 % of complaints concerned the ground of health, followed by sex and pregnancy (7 %), age (3 %), religion and religious beliefs (3 %), and sexual orientation (2 %). Some 41 % of the discrimination complaints received in 2022 concerned the field of employment and 21 % related to access to goods and services including housing, while 7 % concerned access to education and 6 % related to access to public services.

In 2022, the Defender of Rights reached, through its delegates, amicable resolutions in 75 % of the claims in which it intervened and adopted 221 formal non-binding opinions including recommendations, proposals for reform and observations before the courts. Although the Defender of Rights generally used to present observations before the courts in an average of 100 discrimination cases each year, in 2021, this number had dropped to 42. In 2022, the total number of observations before the courts continued to drop to 110, while the number of such observations related to discrimination cases was not published. Unlike in previous years, the equality body presented no opinions to Parliament on legislation relating to discrimination in 2022.

In addition to its litigation work, the equality body published four reports on fundamental rights relating to discrimination issues, as well as the results of four studies on discrimination.

To deal with the increase in the volume of claims and the absence of a corresponding increase in resources, the Defender of Rights continued in both 2021 and 2022 to redeploy and invest in local human resources to favour amicable resolution of cases. The number of formal investigations at the head office has thus been reduced, and therefore also the number of decisions in discrimination cases, leading to less visibility of the anti-discrimination mandate and a reduced presence of the equality body before the courts in significant cases.

Online source:
https://www.defenseurdesdroits.fr/fr/rapports/2023/04/rapport-annuel-dactivite-2022

Germany DE

LEGISLATIVE DEVELOPMENTS

Triage Act: Legislation prohibiting discrimination in the distribution of scarce intensive care resources during a pandemic

All grounds

In November 2022, the Bundestag adopted amendments to the Protection Against Infection Act regulating the distribution of scarce intensive care resources during a pandemic. The amendment responded to the Federal Constitutional Court's ruling of December 2021 according to which there had been no efficient measures so far ensuring that no one is placed at risk of a disadvantage on the ground of disability in the allocation of life-sustaining treatment in the event of shortages in the available intensive care resources. The Court had emphasised the tragic choices often caused by triage situations such as those occurring during a pandemic.[104]

The key point of the amendments is the explicit prohibition of discrimination in the allocation of scarce but vital treatment resources on the ground of disability, degree of frailty, age, ethnic origin, religion or belief, gender or sexual orientation. According to the amended law, the decisive criterion for available treatment in the event of scarcity of resources due to the particular situation is the 'current and short-

104 Germany, Federal Constitutional Court, decision of 16 December 2021, *BVerfG* 1 BvR 1541/20.

term probability of survival.' Criteria not affecting such probability will not be considered. Other diseases (comorbidities) may only be taken under consideration 'if they, due to their severity or combination, significantly reduce the short-term probability of the current disease-related survival'. Ex-post triage (i.e. ending the treatment of a patient in favour of another due to the latter's higher chance of survival) is explicitly prohibited. The now amended Protection Against Infection Act imposes procedural requirements, including that allocation decisions be taken by two medical specialists with many years of experience in the field of intensive care medicine, and that they be documented.

Online source:
https://www.bundestag.de/dokumente/textarchiv/2022/kw45-de-infektionsschutzgesetz-917438

German Catholic Church reforms ecclesiastical law

Racial or ethnic origin
Religion or belief
Age
Disability
Sexual orientation
Gender

The Catholic bishops in Germany decided in November 2022 to amend the regulations for employees of the Catholic Church exercising their right to self-determination. According to the amended Basic Regulations on Service in the Church 2022, all employees regardless of their origin, religion, age, disability, sex, 'sexual identity' and way of life can be representatives of a church meant to serve people. In addition, the German Bishops' Conference stated that diversity is recognised as an enrichment. The 'core area of private life' is no longer of any concern for employment relations, including, in particular, personal and intimate relations to others.

By amending their ecclesiastical law, the Catholic Church in Germany has responded to recent developments and pressure from their base. In January 2022, Catholic Church employees, including members of the clergy, launched the 'Out In Church' campaign sharing their diverse sexual orientations as well as gender identities, thus risking their employment. The practical effect of the new regulations remains to be seen as each individual bishop (27 in total in Germany) may decide for or against their implementation.

The head of the Anti-Discrimination Agency and Federal Anti-Discrimination Commissioner Ferda Ataman criticised the reform because leaving the Church is still considered a ground for termination of employment. Her suggestion is that any exemptions should apply only to the clergy and proposes the amendment of the 'church-clause' of the General Act on Equal Treatment, which stipulates far-reaching rights for church employers (Section 9).

Online source:
https://www.dbk.de/presse/aktuelles/meldung/neufassung-des-kirchlichen-arbeitsrechts

Implementation of the Work-Life Balance Directive

Gender

Following some delay, the German legislature finally passed its law implementing the Work-Life Balance Directive. The Bundesrat (Federal Council) approved the unchanged draft of the Bundestag (Parliament) on 16 December 2022. It was proclaimed on 23 December 2022 and has thus been in force since 24 December 2022.[105]

The changes are relatively minor and predominantly focus on the inclusion of employers with few employees/workers.

Accordingly, an employer with fewer than 15 employees will now have to give reasons if an application for part-time parental leave is rejected. Moreover, the Act introduces the requirement for a written

105 Germany, Act on the Further Implementation of the European Compatibility Directive in Germany (Compatibility Directive Implementation Act – VRUG), BMFSFJ – *Vereinbarkeitsrichtlinienumsetzungsgesetz* (VRUG).

justification (within 4 weeks) if a request to reduce working time is rejected by an employer with more than 15 workers.

The Care Leave Act and the Family Care Leave Act did not entitle employees working in smaller undertakings (15 employees or 25 employees respectively) to take leave. The Implementation Act now entitles them to request leave. Note that there is no entitlement to the leave. However, if a period is indeed agreed, the normal conditions apply. Employers have to deal with the request within four weeks and give reasons if they reject it. While on leave, workers are protected from dismissal.

Finally, the General Equal Treatment Act now clarifies that the Federal Anti-Discrimination Agency is also responsible for discrimination related to leave. However, this does not add an additional protected characteristic.

Online source:
https://dip.bundestag.de/vorgang/gesetz-zur-weiteren-umsetzung-der-richtlinie-eu-2019-11

CASE LAW

Gender-sensitive language in company communication

Transgender

Gender

The case concerned a work instruction/guide developed by Audi for its external and internal communication. The policy aimed to ensure the use of gender-sensitive language and included a gap between the forms of address for men and women (as indicated by the gendered word endings) in order to recognise non-binary people.[106] The instruction was aimed at implementing the company's diversity and inclusion policy, which refers to equal opportunities, inclusion, gender equality and the General Equal Treatment Act. Specifically, the work instruction was to be used to ensure inclusive language.

The claimant was an employee of a different subsidiary, Volkswagen, and requested that the 'gender gap' not be used in communications with him. Specifically, the claimant considered the use to be a latent insult and indicative of addressing a predominantly or exclusively female group. As such he considered the absence of the 'male ending' to violate his right to personal autonomy (Article 2 Basic Law) protecting his gender identity. He was seeking injunctive relief based on the Civil Code and the General Equal Treatment Act. This argument was rejected by the court.[107]

The court decided that the claimant is not entitled to injunctive relief according to Section 21 of the General Equal Treatment Act. Specifically, the issue did not fall within the material scope of the Act because the claimant was not employed by the company but by a different subsidiary and did not have a contract with the defendant. As such, the court did not determine whether his situation was included within the personal scope of the Act, that is whether the issue fell within the scope of the protected characteristic.

There was also no injunctive relief under the Civil Code. Indeed, the court rejected that the claimant was obliged to use the work instruction in his own communication because he was not employed by the defendant and thus not included in its scope.

The indirect effect of constitutional norms on dignity and personal autonomy (Articles 1 and 2 Basic Law) does not change that. Indeed, the court rejected that it imposed a duty to use the male form to address

106 In German, the endings of nouns that refer to people denote gender, with a tendency for plural nouns to favour the masculine form. One approach to gender inclusive language is to use an underscore or asterisk (known as a gender star) to separate masculine and feminine articles or endings. For example: 'Der_die BSM-Expertin ist qualifizierte_r Fachexpert_in'.

107 Germany, District Court Ingolstadt, Judgment 83 O 1394/21 of 29 July 2022, https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2022-N-19421?hl=true.

the claimant within the context of professional communication. There is a general obligation to use the correct gender when addressing somebody, taking into account their gender identity, as it falls within the protective scope of constitutional norms. However, this does not include cases that, based on an objective assessment, do not specifically determine the gender of the addressee in the way that they are addressed. While the court accepted that the 'gender gap' is not used in common language, it rejected the argument that it addressed a primarily or exclusively female group or excluded the male addressees.

The court concluded that even if the work instruction fell within the protective scope of the claimant's private life, it could be justified by balancing different legitimate interests. While the legitimate interest of the claimant was not a trifle, the court balanced this with the legitimate interests of inclusion, equal opportunities and gender equality.

The German debate on gender-sensitive and inclusive language is often controversial. As in previous cases, the judgment received significant press coverage. Overall, it demonstrates how our understanding and perception of gender identity and equality changes over time and how sexual minorities gain cultural and legal recognition. These battles are fought on several fronts, with the legal dimension being only one of them. Indeed, most notably, the constitutional right to personal autonomy (Article 2) and (more recently) the right to equality (Article 3) have been the most relevant constitutional provisions here, as they led the Constitutional Court to recognise transgender and gender-diverse identities and significantly challenged the binary construction of gender. As explored in the gender equality country report for Germany, it has forced the legislature to recognise a diverse sex status other than male and female and allow for the legal recognition of transsexual people. The current Government plans to reform the area of law and introduce an act on self-determination (*Selbstbestimmungsgesetz*) simplifying the recognition of transsexual, intersex and non-binary people.

The case on the gender gap brings the debate full circle, as it involves a male claimant who requests the use of the masculine form in correspondence with him. Indeed, if the generic masculine includes women, it is difficult to see how the use of a gender gap can be problematic, even if it does not include a male ending, but indicates their inclusion with a dash.

The decision was appealed and is currently pending.

Online source:
https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2022-N-19421?hl=true

Federal Labour Court rules in highly anticipated case on equal pay

Sex

Gender

In February 2023, the Federal Labour Court decided on a highly anticipated case that concerned the right to equal pay for men and women. The judgment confirms the principle of equal pay for men and women in the strongest manner yet. The Court confirmed that the right to equal pay is irrespective of different negotiation tactics. As such, it significantly departs from previous (lower) case law.

Accordingly, the female claimant was overall successful in claiming outstanding pay, as she was paid at a lower rate than one of her male colleagues who was hired around the same time and performed the same work. Specifically, the Federal Labour Court (*Bundesarbeitsgericht,* BAG) considered the fact that she was paid less than her male colleague (EUR 3 500 gross income compared to EUR 4 500/ EUR 4 000 gross income) to be sufficient to establish a *prima facie* case of pay discrimination and thus shift the burden of proof.[108] The employer then failed to demonstrate that the difference in pay was unrelated to the employees' sex. The BAG rejected references to the negotiation tactics (i.e. the male employees requesting a higher level of pay, which was granted) and the fact that the male employee

108 Germany, Federal Labour Court (BAG), Judgment of 16 February 2023, Case No. 8 AZR 450/21.

followed a higher-salaried employee who previously occupied the position.[109] The claimant also received compensation for non-economic loss.

This is a significant development within the German case law concerning equal pay. Indeed, lower courts in this case and previous ones have considered successful negotiation tactics to constitute an objective work-related reason. Specifically, courts have considered that a higher salary following negotiations is aimed at successful recruitment and thus not related to the applicant/employee's sex. Compared to that, the BAG judgment is more closely aligned with the requirements developed by the CJEU.[110]

The case indicates a positive impact of the German Pay Transparency Act[111] within the context of equal pay litigation. While a very low number of employees request pay information, the equal pay provisions within the Act certainly led the courts to reconsider their case law on equal pay and as a result to implement the principle more thoroughly. As such, an objective assessment of the differences in pay is now all that is required, and claimants do not need to further demonstrate that the difference was directly based on sex.

This is obvious within the context of the burden of proof. In 2021, the BAG confirmed that it was sufficient for the claimant to demonstrate a difference in pay between her and her male comparator to sufficiently shift the burden of proof.[112] This departed from previous case law that rejected a general right to equal pay and required additional evidence of discrimination. With this case, the Court is further strengthening the objective assessment of pay equality, by rejecting subjective factors that invite biases (such as negotiation tactics) to explain pay differences. Indeed, perceived and real differences in negotiation tactics, e.g. the forcefulness of the demands made, are deeply gendered and likely benefit male employees.

Objective reasons for differences in pay remain. Disparities in qualification or seniority still enable the employer to demonstrate that the difference in pay is based on objective criteria and not the employee's sex. In 2021, the Court discussed differences in pay based on seniority. Referencing *Cadman*,[113] the Court made explicit that seniority-based pay discrepancies may in some circumstances require further justification, namely if it can be shown that work experience and ability do not go hand in hand.[114]

Online source:
www.bundesarbeitsgericht.de/presse/entgeltgleichheit-von-maennern-und-frauen

POLICY AND OTHER RELEVANT DEVELOPMENTS

Appointment of new Federal Commissioner for Anti-Discrimination/Head of the Federal Anti-Discrimination Agency

All grounds

In July 2022, Ferda Ataman was elected by the Bundestag and officially appointed by the Federal President of Germany as the new Independent Commissioner for Anti-Discrimination and head of the Federal Anti-Discrimination Agency. According to an amendment of the General Act on Equal Treatment (AGG) of 23 May 2022, the Federal Commissioner for Anti-Discrimination becomes the head of the Anti-Discrimination Agency and is elected by the Bundestag with a majority of its members after nomination by the Federal Government. She will serve for five years, with the possibility of re-election.

109 Germany, Federal Labour Court (BAG), Judgment of 16 February 2023, Case No. 8 AZR 450/21.
110 Court of Justice of the European Union (CJEU), judgment of 10 March 2005, *Nikoloudi*, C-196/02, ECLI:EU:C:2005:141; 28 February 2013, *Kenny and Others*, C-427/11, ECLI:EU:C:2013:122; 26 June 2001, *Brunnhofer*, C-381/99, ECLI:EU:C:2001:358.
111 *Entgelttransparenzgesetz*, Act of 30 June 2017 (BGBl. I S. 2152), last changed by Article 25 of the Act from 5 July 2021 (BGBl. I S. 3338).
112 Germany, Federal Labour Court, Judgment of 21 January 2021, 8 AZR 488/19, ECLI:DE: BAG:2021:210121. U.8AZR488.19.0.
113 Court of Justice of the European Union (CJEU), 3 October 2006, *Cadman*, C-17/05, ECLI:EU:C:2006:633.
114 Germany, Federal Labour Court, Judgment of 21 January 2021, 8 AZR 488/19, ECLI:DE:BAG:2021:210121. U.8AZR488.19.0, para 68.

Ataman was elected by the Bundestag with a small majority, and her nomination stirred up intense debate both in Parliament and in the general public sphere as she is considered by her critics to be a 'left-wing activist'.

Online source:
https://www.bundesregierung.de/breg-en/news/anti-discrimination-commissioner-2060474

Independent Commission of Experts presents report on anti-Muslim hostility in Germany

Religion or belief

In June 2023, a report on anti-Muslim hostility in Germany was published,[115] having been commissioned by the Federal Ministry for Interior and Community in 2020 following an anti-Muslim shooting. The report, which was prepared by the Independent Commission of Experts on anti-Muslim hostility comprised of academics and representatives of civil society and NGOs, was the result of almost three years of systematic work. The findings of the report are based on various reliable sources, such as scientific studies, criminal statistics and specific anti-Muslim cases reported by anti-discrimination agencies, advice centres and NGOs.

The report provides evidence that Muslims in Germany face widespread discrimination. Statistics indicate that at least one-third of Muslims living in Germany have experienced some kind of hostility in their everyday life because of their religion, in the form of discrimination, expressions of hatred and/or violence. The report makes specific recommendations to both governmental and non-governmental bodies, including the creation of a specific task force against anti-Muslim hostility. It also recommends providing training in various institutions such as daycare facilities and schools, police forces, governmental authorities, media outlets and entertainment establishments. The Federal Minister of the Interior and Community has promised to react to the report with determination, the focus being awareness raising to reach the goal of respectful coexistence.

Online source:
https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2023/06/uem-abschlussbericht.html

2022 Annual report of the Federal Anti-Discrimination Agency

All grounds

In June 2023, the Federal Anti-Discrimination Agency published its *Annual Report for 2022*.[116] According to the report, the agency dealt with 8 827 requests in 2022, 43 % of which concerned racial discrimination or ethnic origin, 27 % disability, 21 % gender, 10 % age, 5 % religion, 4 % sexual identity and 1 % belief. The number of inquiries increased by 14 % compared to the number registered for 2021, a fact that was interpreted by Ferda Ataman, head of the Federal Anti-Discrimination Agency and Federal Commissioner for Anti-Discrimination, as a sign of the growing awareness of anti-discrimination in Germany. Most complaints to the agency concerned access to goods and services and employment.

The agency also noted that it received complaints concerning discrimination on grounds other than those covered by the General Act on Equal Treatment (AGG), including physical appearance, weight, family status, caregiving, nationality or social status. It argues that there is thus reason to reform the AGG to broaden its personal and material scope of application.

115 Independent Commission of Experts on Anti-Muslim Hostility (2023) Anti-Muslim hostility – A German Picture (*Muslimfeindlichkeit – Eine deutsche Bilanz*), published 29 June 2023.

116 Germany, Federal Anti-Discrimination Agency (2023) *Annual Report 2022*, 27 June 2023, available at: https://www.antidiskriminierungsstelle.de/SharedDocs/aktuelles/DE/2023/20230627_Jahresbericht_2022.html. See also: Federal Anti-Discrimination Agency (2022) *Annual Report 2021*, 16 August 2022: https://www.antidiskriminierungsstelle.de/SharedDocs/pressemitteilungen/EN/2022/20220816_Vorstellung_Jahresbericht.html.

Online source:
https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Jahresberichte/2022.html?nn=305458

Greece

EL

LEGISLATIVE DEVELOPMENTS

First-ever administrative fines on violence and harassment at work

Sex

Ministerial Decision 800/16/31.8.2022[117] with its ratification of the ILO Convention 190 on Violence and Harassment[118] introduced administrative fines to be imposed by the Labour Inspectorate for breach of the provisions of Act 4808/2021.[119]

The Ministerial Decision provides fines of EUR 500 to EUR 3 000 for significant general breaches,[120] and fines of EUR 1 800 to EUR 8 000 for grave breaches,[121] which escalate according to the number of employees. Fines for individual breaches range from EUR 2 000 to EUR 10 500. A fine of EUR 750 is imposed on employers who refuses to provide the required documents or information before the Labour Inspectorate (LI), in particular in the context of the reversal of the burden of proof, which applies in all proceedings before the LI in cases of discrimination on the grounds of sex (and on the other grounds) and VH, including sexual harassment and harassment related to sex at work. If the breach recurs within four years from the initial inspection, the LI may proceed to the provisional closure of up to five days of the specific branch or even of the enterprise. Most significantly, in the case of an imminent danger to the life, health or safety of an employee due to violence and harassment,[122] the LI, after inviting the alleged harasser to instantly provide explanations, may order the employer to adopt one or more measures until the imminent risk is over and can impose a fine of EUR 1 500 for each day of the employer's non-compliance. This is a totally innovative provision.[123]

According to the Labour Inspectorate's first annual report on violence and harassment,[124] in the second semester of 2021, of all violence and harassment complaints brought before the LI, 13.4 % (13 cases) concerned sexual harassment (in 2022, 13 cases); 67 % were brought by women and 33 % by men (no distinct statistical data are kept on the sex of the offenders in sexual harassment cases). Since 1 September 2022, the LI has imposed administrative fines of a total of EUR 17 000 in all violence and harassment cases (there is no disaggregation of sexual harassment cases).

117 Greece, Ministerial Decision 800/16/31.08.2022, OJ B 4629/1.9.2022.
118 EELN, flash report (Greece) of 5 July 2021, 'ILO Convention 190 on Violence and Harassment sanctioned by Greece', https://www.equalitylaw.eu/downloads/5436-greece-ilo-convention-190-on-violence-and-harassment-sanctioned-by-greece-152-kb.
119 Until its entry into force, there were no explicit provisions for administrative fines regarding sexual harassment and those for any breach of the gender equality law applied (Article 23(2) Act 3896/2010, implementing Articles 18 and 25 of Directive 2006/54).
120 Greece, Act 4808/2021, Article 5(c) and (d) (provision of information on violence and harassment (VH) risks and on the internal procedures), Article 6 (provision of information on VH, including sexual harassment, risks and protective and preventive health and safety measures), Article 7 (evaluation of VH risk, including sexual harassment) and Article 8 (tasks of the occupational doctor regarding work placements and adjustments in the favour of victims of VH, including sexual harassment, and domestic violence).
121 Greece, Act 4808/2021, Article 5(a) and (b) (management of VH complaints and cooperation with the authorities), Article 9 (internal policies for the prevention and elimination of VH for private enterprises with more than 20 employees), Article 10 (internal management of VH complaints) and Article 11 (definition of VH as a disciplinary offence in internal rules).
122 Greece, Act 4808/2021, OJ A 101/19.06.2021, Article 12(3).
123 Greece, Ministerial Decision 80016/31.8.2022, OJ B 4629/1.9.2022, Article 4(6).
124 Greece, Labour Inspectorate (2022) *Independent Department for the monitoring of violence and harassment, First Annual Report 2021*, March 2022, https://www.sepe.gov.gr/wp-content/uploads/2022/09/%CE%95%CE%A4%CE%97%CE%A3%CE%99%CE%91-%CE%95%CE%9A%CE%98%CE%95%CE%A3%CE%97-%CE%95%CE%A4%CE%9F%CE%A5%CE%A3-2021.pdf.

Online source:
https://www.kodiko.gr/nomothesia/document/838688/yp.-apofasi-80016-2022

New provisions on 'special leave for maternity protection' in breach of Directives 2006/54[125] and 2019/1158[126]

Sex

Article 43 of Act 4997/2022,[127] amended the legal framework of 'special leave for maternity protection' ('*ειδική άδεια προστασίας μητρότητας*') initially accorded to mothers only,[128] regarding its personal scope and its duration. According to the new provision: (i) the length of the leave is extended from six to nine months[129] and (ii) seven out of nine months of this leave can now be shared with the father, if the latter is employed in the private sector (including under part-time and fixed-term employment). In other words, the new provision preserves mothers as the holders of the right to qualify for the special leave at issue, whereas fathers may share only part of the leave as a derivative (not individual) right.

According to the Act's explanatory memorandum, the new provision aims to extend the maternity protection accorded to female employees in the private sector in line with the existing nine-month cumulative leave replacing reduced working hours accorded to female employees in the public sector. However, the latter is provided for both female and male civil servants, in their capacity as parents, irrespective of sex, as an individual, non-transferable right.[130]

The new provisions introduce discrimination on the grounds of sex in breach of both Directive 2006/54, as interpreted by the CJEU in the cases *Roca Álvarez*[131] and *Syndicat CFTC*,[132] and Directive 2019/1158 Article 5(1), which requires that parental leave be an individual right for both mothers and fathers.

First, the fact that the 'leave' in question immediately follows the statutory maternity leave is not sufficient for it to be considered that it may be reserved for female workers in that it is intended to protect them in connection with the effects of pregnancy and motherhood (CJEU, *Syndicat CFTC*, paragraph 69).

Secondly, the length of the leave at issue (now nine months following the expiry of the nine weeks' postnatal maternity leave) exceeds the period necessary for the biological and psychological protection of the woman and of the special relationship between the woman and her child after childbirth (CJEU, *Roca Álvarez*).[133]

Thirdly, to hold that only a mother whose status is that of an employed person is the holder of the right to qualify for the special leave at issue, whereas a father with the same status can only enjoy this right in part but not be the holder of it, is liable to perpetuate a traditional distribution of the roles of men and

125 Council Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Recast Directive) OJ 2006 L204, p. 262.
126 Council Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (Work-Life Balance Directive) OJ 2019 L188, p. 79.
127 Greece, Act 4997/2022, OJ A 219/25.11.2022.
128 The 'special leave for maternity protection' is accorded only to mothers, including commissioning or adoptive ones, insured by the general social security scheme (e-EFKA/IKA) in the private sector (and partly, in the public sector).
129 According to the transitional provision of Article 83(2) Act 4997/2022, leave in use as of the entry into force of the new provision (25 November 2022) will be extended until the completion of the nine-month period.
130 Greece, Article 53(2) of the Code of Civil Servants (Act 3528/2007, OJ A 26/09.02.2007), as amended by Article 47(4) Act 4674/2020, OJ A 53/11.3.2020.
131 Court of Justice of the European Union (CJEU), judgment of 30 September 2010, *Roca Álvarez,* C-104/09, ECLI:EU:C:2010:561.
132 Court of Justice of the European Union (CJEU), judgment of 18 November 2020, *Syndicat CFTC,* C-463/19, ECLI:EU:C:2020:932.
133 Due to the modalities of enjoyment, this is even more evident if the leave in question is taken at the end of the above-mentioned cumulative leave and the annual leave, i.e. (nine weeks or two months' maternity leave + three months and a week cumulative leave + one month annual leave=) about six and a half months after childbirth. In this respect, the leave seems to be accorded to workers in their capacity as parents of the child and should be considered as parental leave

women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties (CJEU, *Roca Álvarez*, paragraph 36).

Further, the new provisions are discriminatory by providing that female workers who are mothers and whose status is that of an employed person are entitled to take the said leave, whereas male workers who are fathers with that same status are not entitled to share the biggest part of the leave at issue unless the child's mother is also employed (CJEU, *Roca Álvarez*, paragraph 39).

Finally, the fact that the leave is paid only with the minimum salary does not appear to ensure maintenance of pay and/or entitlement to an adequate allowance for the female worker, a condition required for maternity leave by Article 11(2) of Directive 92/85 (CJEU, *Syndicat CFTC*, paragraph 73). Rather, it amounts to parental leave, of which two out of four months are paid with the monthly minimum wages according to the national provisions implementing Directive 2019/1158.[134]

Online source:
https://www.taxheaven.gr/law/4997/2022

New provisions on violence and harassment in the public sector

Gender

Act 4808/2021 ratifying ILO Convention 190[135] on the elimination of Violence and Harassment in the World of Work (C-190), unjustifiably excluded the public sector from the scope of Articles 9-11 (internal policies for the prevention and elimination and management of complaints of violence and harassment), which apply only to companies in the private sector with more than 20 employees. This has been criticised by the National Commission for Human Rights (NCHR) in its report on the bill[136] and in legal literature.[137] To counterbalance this deficit, the legislature gave authorisation to the Minister of Interior Affairs to 'define the competent organs and the necessary measures for the prevention and elimination of violence and harassment in the public sector',[138] on the basis of which the Ministerial Decision (MD) on the prevention and elimination of violence and harassment phenomena in public entities, was adopted with a delay of 19 months.[139]

1) Measures for information and prevention (Article 4 MD): (i) information for employees on the existing legal framework, including soft law;[140] (ii) posting (at the workplace or in the intranet) of information on the applicable procedures for complaints and the management of violence and harassment behaviours and the contact details of the competent authorities; (iii) training of employees on the management of violence and harassment at work and elimination or restriction of such phenomena; (iv) information and sensitisation campaigns and encouragement of employees' participation therein; (v) the existence of a safe and discreet environment for employees who want to submit a complaint.

134 Greece, Act 4808/2021, implementing Articles 5 and 8 of Directive 2019/1158, Article 28. See EELN (Greece) flash report of 9 July 2021 'Greece transposes Directive 2019/1158 on work-life balance', https://www.equalitylaw.eu/downloads/5444-greece-greece-transposes-directive-2019-1158-on-work-life-balance-141-kb.

135 EELN (Greece), flash report of 5 July 2021, 'ILO Convention 190 on Violence and Harassment sanctioned by Greece', https://www.equalitylaw.eu/downloads/5436-greece-ilo-convention-190-on-violence-and-harassment-sanctioned-by-greece-152-kb.

136 In its report on the bill dated 14 June 2021, the National Commission for Human Rights (NCHR) found that the authorisation given to the Minister of Interior Affairs by Article 22(4) of Act 4808/2021 was in breach of the Constitution (Article 43(2)), according to which the authorisation should be specific and defined; instead, internal procedures in the public sector should have been defined by the law itself, https://www.nchr.gr/images/pdf/apofaseis/ergasia/paratiriseis_ergasiako_final.pdf.

137 Petroglou, P. (2022), 'Η σεξουαλική παρενόχληση στην εργασία – Η μεταφορά του βάρους απόδειξης, άλλες εγγυήσεις του ενωσιακού δικαίου και οι εφαρμοστικές της Δ.Σ.Ε. 190 διατάξεις' (ν. 4808/2021) (Sexual harassment at work – The shift of the burden of proof, other safeguards of the EU law and the sanctioning provisions of ILO C-190 (Act 4808/2021), *Epitheorissis Ergatikou Dikaiou 2022*, pp. 737-770.

138 Greece, Act 4808/2021, Article 22(4).

139 Greece, Ministerial Decision DIDAD/F.64/946/OIK.858/ 19.01.2023, published in OJ B 343/26.01.2023.

140 Article 3.3.1 of the Code on Ethical and Professional Behaviour of Employees in the Public Sector (July 2022), provides that employees in the public sector are expected to invariably comply with the provisions of Act 4808/2021 on the prohibition of violence and harassment in the world of work, https://www.ypes.gr/wp-content/uploads/2022/07/Code_final-1.pdf.

The above provisions lag behind the various provisions applying to private sector enterprises with more than 20 employees.

2) Management of violence and harassment complaints (Article 5 MD): Violence and harassment complaints can be submitted (i) to the Ombudsman; (ii) within the same entity or before a supervising body; (iii) before the National Transparency Authority, if the above-mentioned persons/institutions fail to examine the complaint within a three-month period; (iv) before the competent Integrity Counsellor[141] (Article 23 Act 4795/2021) or before the top HR manager of the entity or of the supervising entity; (v) before the court. The complaints are submitted using a confidential protocol. The competent bodies must examine the complaint within five working days and it may be forwarded to the competent disciplinary body within another three working days. The complainant is informed on the developments of his/her complaint.
3) Employment measures against the harasser (Article 6 MD): recommendation, transfer to another unit, change of workplace, change of working hours, obligatory use of leave, initiation of the disciplinary procedure, disciplinary punishment, or termination. The complainant may be transferred to another unit or change working place or working hours only upon his/her request. Moreover, upon his/her written declaration, the complainant can abstain from work for up to three working days[142] if he/she reasonably believes that there is a severe risk for his/her life, health, or security, in particular if the harasser is a superior, or no necessary and appropriate measures have been taken despite the complaint, or if the measures taken are not able to stop the violence and harassment. The above provisions also lag behind those applying to enterprises in the private sector irrespective of the number of employees that grant the right to abstain from work for a reasonable time without the three-days limit (Article 12(3) Act 4808/2021) and explicitly recognise the victim's right to compensation, including moral damages (Article 12(5) Act 4808/2021). In this regard, the MD is *contra legem*[143] at national level and, most importantly, contrary to the EU general principle of non-regression.[144] Moreover, in failing to provide compensation, it is also in breach of Article 30 of the Istanbul Convention.

Online source:
https://www.lawspot.gr/nomika-nea/prolipsi-kai-antimetopisi-fainomenon-vias-kai-parenohlisis-stin-ergasia-se-foreis-toy?lspt_destination=upgrade

Legislation improving the rights of persons with disabilities or chronic illnesses in social and economic life

Disability

In February 2023, the Parliament adopted legislation to:

- promote the full participation of persons with disabilities or chronic illnesses in social and economic life by enshrining the general principle of equal treatment;
- eliminate derogatory and stereotypical terminology in legislation; and
- strengthen the direct and effective access of persons with disabilities to justice.[145]

141 According to Article 24 of Act 4795/2021, OJ A 62/17.4.2021, the Integrity Counsellor provides personalised counselling to employees of the public sector who are victims of sexual harassment, discrimination, bullying or moral harassment, among other things.
142 The three-day limit is even shorter than the one provided for the investigation of the complaint (five working days plus another three days to forward the complaint to the disciplinary authorities).
143 It is contrary to Article 12 of Act 4808/2021, which explicitly applies to the public sector by analogy (Article 3(2) Act 4808/2021).
144 Court of Justice of the European Union (CJEU), judgment of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709, paragraphs 26 and 51.
145 Greece, Law 5023/2023 on the principle of equal treatment regardless of disability or chronic illness, updating the terminology of the Civil Code, the Code of Civil Procedure, the Criminal Code, the Code of Criminal Procedure, the Code of Administrative Procedure, the Code of Notaries and Law 4478/2017, for its harmonisation with the Convention on the Rights of Persons with Disabilities ratified by Law 4074/2012 and other provisions to facilitate access to justice for persons with disabilities, *Official Journal* 34 A/17.02.2023.

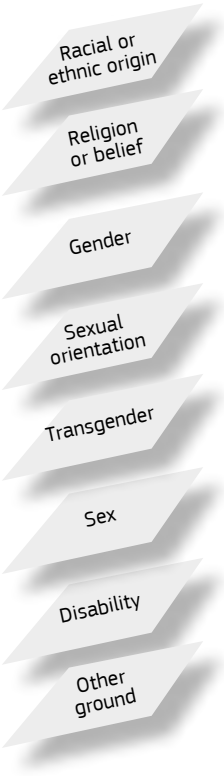
First, the material scope of the prohibition of discrimination on the grounds of disability or chronic illness has been extended to cover the areas of social protection, including social security and healthcare, social benefits and tax benefits, education and access to the availability and provision of commercially available goods and services to the public, including housing.

Secondly, pejorative terms have been reformulated and stereotyped expressions replaced in provisions of the basic legislation such as the Civil and Criminal Codes and the Codes of Civil, Criminal and Administrative Procedure. Terminology that is not respectful of the inherent dignity of persons with disabilities as stipulated by the UN CRPD has thus been amended.

Thirdly, several provisions have been adopted in relation to the right of persons with disabilities to effective access to justice, notably improving accessibility to court buildings. The provisions establishing access to free legal aid have also been amended, establishing positive action for persons with a disability of more than 67 %, who will no longer be required to meet any income-related criteria.

Online source:
https://www.e-nomothesia.gr/law-news/demosieutheke-nomos-5023-2023.html

Preventing and addressing bullying and violence in education in relation with groups vulnerable to discrimination



On 9 March 2023, Parliament adopted Law 5029/2023 to prevent and address violence and bullying in schools.[146] The law defines bullying and intra-school violence as any form of physical, verbal, psychological, emotional, social, racist, sexual, electronic or other violence and delinquent behaviour, which affects the school community and disrupts the educational process, including insults, discrimination or harassment on the grounds of a student's religious beliefs, ethnic origin, race, gender, sexual orientation, expression of gender identity, gender expression or gender characteristics, health and physical or other actual condition. The same applies by analogy in the case of forms of violence or such conduct against teachers or other members of the school community. The law further provides that the Ministry of Education and Religious Affairs, at central and regional level, will develop actions and programmes with the aim of preventing, identifying and addressing school violence and bullying, as well as strengthening relationships of trust among members of the educational community. Such actions and programmes include in particular: a) the training of teachers, guardians and students, b) the development of relevant actions, programmes and educational material, c) the preparation of scientific research, d) collaboration between the competent services of the ministry with all relevant bodies and structures, e) the preparation of guidelines on how to handle incidents of discrimination and of bullying of students belonging to vulnerable groups, to be distributed to all primary and secondary schools. In addition, the law stipulates that the standard operating regulations of school units at all levels of education must be updated, so that issues related to vulnerable groups of students are addressed.

The concept of school bullying and intra-school violence in Law 5029/2023 includes many forms and manifestations of violence, such as physical, verbal, psychological, emotional, social, racist, sexual, online, etc., against a school student's religious beliefs, ethnic origin, race, gender, sexual orientation, expression of gender identity or sex characteristics, health and physical or other actual condition.

From a gender perspective, it is deplorable that intra-school violence is approached in a gender-blind way: there is no notion of the structural nature of violence against women and girls as gender-based violence according to the Istanbul Convention. This is in full disregard of the fact that girls are exposed to a higher risk of gender-based violence than boys, especially in the digital context. In the same vein, there is no intersectionality approach: gender is not examined in connection with other grounds of vulnerability such

146 Greece, Law 5029/2023 on 'Living in Harmony Together – Breaking the Silence': Regulations to prevent and deal with violence and bullying in schools and other provisions, OJ 55 A/10.03.2023.

as racial or ethnic origin, disability, religious beliefs, sexual orientation, etc. Nonetheless, it is generally acknowledged that women and girls who are neither a group nor a minority, but constitute more than half of humanity, are particularly vulnerable to episodes of multiple discrimination.[147]

The failure to consider gender equality as well as intersectionality is in breach of Article 10 of Act 4604/2019,[148] which requires gender mainstreaming in public policies. More importantly, it is also in breach of the Istanbul Convention,[149] the implementation of which is being currently reviewed by GREVIO in the framework of its first evaluation of Greece.[150]

Online source:
https://www.e-nomothesia.gr/kat-ekpaideuse/n-5029-2023.html

CASE LAW

Equality body opinion on the use of headscarves during nursing practice in public hospital clinics

Religion or belief

In July 2022, the Greek Ombudsman issued an equality body opinion regarding the prohibition of the use of headscarves during nursing practice in public hospital clinics. The Ombudsman investigated a complaint from a female Muslim nurse regarding the prohibition on nursing students wearing headscarves during their practice in the pathology-surgery clinic of a public hospital.

Both the administration of the hospital and the competent directorate of the Ministry of Health invoked the applicable clothing regulation, which provides for nurses to wear hats of a specific fabric – 'caps' – without exception. The hospital management also invoked the duty of care of the staff to avoid the spread of multi-resistant microorganisms and germs, in accordance with the Internal Regulation of Prevention and Control of Infections, in the context of the protection of public health. In this regard, the hospital administration referred to data, according to which personal clothing of staff increases the risk of transferring germs.

The Ombudsman noted that the ban on the use of headscarves during nursing practice in the clinics does not constitute direct discrimination, according to Article 4(1) and (2) of Equal Treatment Law 4443/2016, as the ban is not linked to religious beliefs, but concerns the observance of the prescribed uniform dress of nurses, based on objective provisions of a regulatory nature, which are applied to nursing staff indiscriminately.[151]

In addition, the Ombudsman found that the ban did not amount to indirect discrimination as it was objectively justified by the hospital administration, on the basis of the legitimate purpose of limiting the conditions for the spread of infections and to ensure public health.

147 See Koukoulis-Spiliotopoulos, S. and Masse-Dessen, H. (2014) 'Thirty years of the Gender Equality Network, Who We Are, What We Do and Why We Do It', *European Gender Equality Law Review* 2014/1, available at: https://www.equalitylaw.eu/downloads/2802-european-gender-equality-law-review-1-2014.

148 Greece, Act 4604/2019, OJ A 50/26.03.2019. See also flash report (Greece), 1 July 2019, 'New Act 4604/2019 on substantive equality entered into force on 26 March 2019', https://www.equalitylaw.eu/downloads/4907-greece-new-act-4604-2019-on-substantive-equality-entered-into-force-on-26-march-2019-pdf-102-kb.

149 In particular IC Articles 5(2) ('State obligations and due diligence'), 6 ('Gender sensitive policies') and 7 ('Comprehensive and co-ordinated policies'), 14 ('Education'), 16 ('Preventive intervention and treatment programmes'), 26 ('Protection and support for child witnesses') and 28 ('Reporting by professionals').

150 See: https://www.coe.int/en/web/stanbul-convention/-/council-of-europe-s-expert-group-on-violence-against-women-visits-greece.

151 Greek Ombudsman, Opinion No. 264690/2019 issued on 8 July 2022.

Finally, the Ombudsman emphasised that the means of achieving this goal are expedient (use of the components of the nursing uniform, given the disinfection specifications), but also necessary and proportional, because the limitation of the headscarf concerns only the nursing staff (either students or permanent staff), while for other categories of hospital employees who do not perform sanitary duties the use of the headscarf has already been allowed.

Online source:
https://www.synigoros.gr/el/category/default/post/h-apagoreysh-xrhshs-mantilas-kata-thn-praktikh-askhsh-noshleytikhs-se-klinikes-dhmosioy-nosokomeioy-den-stoixeio8etei-diakrish-logw-8rhskeytikwn-pepoi8hsewn?fbclid=IwAR36AuecOnuo8PZuM9jxMrKyIZt-1KNDjVFj1h4vIpU0axOL-0FIKm092sg

Removal of discriminatory references regarding homosexuality from school textbooks

Sexual orientation

In December 2022, after receiving a request from a high school student, the Ombudsman issued an equality body opinion concerning discriminatory references in school textbooks.[152] The request concerned 'hygiene microbiology' textbooks, which contained statements connecting the transmission of sexually transmitted diseases with the 'spread of homosexuality', as well as with tourism, urbanisation and immigration.

Combining its mandates to (a) mediate between citizens and public services to monitor and promote the implementation of the principle of equal treatment and (b) defend and promote the interests of the child, the Ombudsman addressed its opinion to the Ministry of Education and Religious Affairs and the Institute of Educational Policy, proposing a systematic review of school textbooks, in order to remove any wording that allows misinterpretations and negative characterisations linked to sexual orientation. The body also proposed that the Ministry remove any wording that may lead to stigmatisation or targeting of people with an immigrant background.

The Institute of Educational Policy issued an opinion in agreement with the above proposals of the Ombudsman, and the Ministry of Education and Religious Affairs announced that, in the newest edition of the textbook in question, which is distributed to students during the 2022-2023 school year, the above formulations have been removed.

Online source:
https://www.synigoros.gr/el/category/default/post/synopsh-diamesolabhshs-or-afairesh-apo-sxoliko-biblio-anaforwn-poy-synedean-thn-omofylofilia-kai-th-metanasteysh-me-th-syxnothta-twn-se3oyalikws-metadidomenwn-noshmatwn?fbclid=IwAR3s_PZPC63w3xiv6syZqySm_Y546Dn-SmrFgj_Q4npo38SKMgLqWcy1HIw

Equality body opinion on age limits in access to employment

Age

In January 2023, the Ombudsman issued an equality body opinion regarding the refusal by a bar association to hire the claimant as an administrative employee due to the upper age limit of 40 years stipulated in the job advertisement.

The Ombudsman noted that age limits are often based on stereotypes regarding physical abilities even where such abilities are not always necessary for the exercise of the duties of the specific positions. It thus noted that it is mandated to investigate whether upper age limits have been based on a specific justification, as required by law.[153]

152 Greek Ombudsman, Opinion No. 301079/15931/23-3-2022, issued on 15 December 2022.
153 Greek Ombudsman, Opinion No. 328523/67719 issued on 20 January 2023.

The Ombudsman further noted that a legitimate derogation from the general prohibition of age discrimination is allowed only when the different treatment based on an age-related characteristic is specifically justified. It thus held that the age limit at hand introduced direct age discrimination and was prohibited by law. Finally, the Ombudsman called on the respondent to justify the specific reasons why age was considered an essential qualification for the exercise of the position, what purpose was served by the age limits – minimum and maximum – and how the principle of proportionality was fulfilled.

Following the Ombudsman's opinion, the respondent issued a new call for expressions of interest, removing all age limits.

Online source:
https://www.aftodioikisi.gr/nomothesia/paremvasi-stp-gia-tin-apaloifi-anotatoy-orioy-ilikias-se-prokiryxi/

Discriminatory conditions for a survivor's pension granted by an occupational social security scheme

Sex

Gender

In 2010, an adult unmarried son of a deceased civil servant, who was fit to work (hence, he did not satisfy the conditions to be entitled to the state pension), asked for the pension provided for by Article 5(1)(b) of the Code of Civil and Military Pensions,[154] alleging that the more favourable conditions for unmarried daughters should be applied in his case as well for reasons of gender equality. After his petition was dismissed, he filed an appeal to the Court of Audit, which was rejected by Judgment 60/2020. His appeal on points of law was further rejected by Judgment No. 1706/2022 of the small plenary of the Court of Audit.[155] The Court recalled that the right to a survivor's pension for unmarried daughters had been recognised in the Greek social security system from its very existence (1852).[156] As the societal view on the role of women changed, in 1990 this right was abolished[157] but only in the case of civil servants who had been appointed after 1 January 1983. For those appointed before that date, as in the given case, the measure was retained for the sake of substantive equality.

Judgment No. 1706/2022 of the Court of Audit is in breach of Article 157 of the TFEU and Article 7 of Act 3896/2010, transposing Article 9 of Directive 2006/54, as:

i) the social security scheme of the Greek public servants is an occupational social security scheme according to the relevant autonomous EU law concept.[158] The fact that since 1 January 2017 it has

154 Article 5(1)(b) of the Code of Civil and Military Pensions (CCMP)1 provides for the right to a state pension for unmarried daughters of deceased civil servants, irrespective of age. However, unmarried sons are only entitled to the state pension under the additional condition that they are minors (< 18 years) or unfit to work at a percentage of at least 50 %.

155 The Court held that the scheme of public servants was an occupational one. Nonetheless, the measure in question was not found to be in breach of Article 157 TFEU, Articles 21 and 23 of the Charter of Fundamental Rights and Directive 2006/54 (the CEDAW and the Greek Constitution as well) as it constituted 'positive discrimination / affirmative action' aimed at counterbalancing existing disadvantages and establishing substantive equality in favour of unmarried daughters. See Court of Audit, small plenary, judgment No 1706/2022, published on 2 November 2022, made accessible to the applicant on 2 February 2023.

156 According to the Court, this was because at the time 'girls were raised only in order to create and care for a family and not in order to make a living as self-existing and independent personalities, as this was secured by the father and later the husband'.

157 Greece, Act 1902/1990, OJ A 138/17.10.1990, Article 1(2).

158 Court of Justice of the European Union (CJEU), 26 March 2009, *European Commission v the Hellenic Republic*, C-559/07, ECLI:EU:C:2009:198; Court of Audit (CA) judgments: No. 317/2020 (Full Section), 1807/2014 (Full Section), 930/2020, 37/2017, 303/2017, 790/2016, 3744/2014, etc.

been merged into one single scheme (EFKA)[159] together with all the main existing social security schemes for employees, self-employed, liberal professionals and farmers, is irrelevant;[160]

ii) a survivor's pension falls within the scope of Article 157 of the TFEU;[161]

iii) Article 157 of the TFEU prohibits any direct or indirect discrimination on the grounds of gender in occupational social security schemes without any derogation;[162]

iv) Article 157(4) of the TFEU authorises positive action measures which contribute to helping women conduct their professional life on an equal footing with men and offset the disadvantages to which the careers of female employees are exposed by helping those women in their professional life. It, however, does not allow measures limited to granting more favourable conditions for pensions in the context of an occupational social security scheme (e.g. more favourable age limits for women), without providing a remedy for the problems which they may encounter during their professional career;[163]

v) once the Court has found that discrimination in relation to pay exists and so long as measures to bring about equal treatment have not been adopted by the scheme, the only proper way of complying with Article 157 of the TFEU is to grant to the persons in the disadvantaged class the same advantages as those enjoyed by the persons in the favoured class.[164]

vi) The plenary of the Court of Audit, adjudicating at last instance, rejected the applicant's request for a preliminary ruling from the CJEU reasoning that there is no need of interpretation of the EU law in view of the standard case law of the Court of Audit.

vii) The applicant has already filed a recourse to the European Court of Human Rights pleading that there has been: (i) 'denial of justice' (ECHR *Spassov v Bulgaria*) due to a manifest error of law by a national court regarding the interpretation and application of EU law; (ii) a failure of the highest national court to give proper reasons for its refusal to refer preliminary questions to the CJEU as the above reasoning does not satisfy the criteria established in the CJEU *Cilfit* judgment[165] (ECHR *Sanofi Pasteur, Bio Farmland Betriebs*)[166] and consequently is in breach of Article 6(1) of the European Convention

159 As of 1 March 2020, the single scheme of supplementary pensions ETEAEP was merged into EFKA, which was renamed 'e-EFKA' (Article 1 Act 4670/2020, OJ A 43-28.2.2020).

160 Article 7(2) Directive 2006/54: '2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect'; Court of Justice of the European Union (CJEU), 12 September 2002, *Pirkko Niemi*, C-351/00, ECLI:EU:C:2002:480, para. 42.

161 Court of Justice of the European Union (CJEU), 9 October 2001,*Pensionskasse für die Angestellten der Barmer Ersatzkasse WaG and Hans Menauer*, C-379/99, para. 32; 17 April 1997, *Dimossia Epicheirissi Ilectrismou (DEI) v Evrenopoulos*, C-379/99 paras. 22; 28 September 1994, *Coloroll v Russell and Others*, C-200/91, paras. 18-19; 6 October 1993, *Ten Oever v Stichting Bedrijfspensioenfonds voor het GUzenwassers-en Schoonmaakbedrijf*, C-109/91, paras. 13-14.

162 Court of Justice of the European Union (CJEU), Case C-559/07 *European Commission v the Hellenic Republic,* 26 March 2009.

163 Court of Justice of the European Union (CJEU), 26 March 2009, *European Commission v the Hellenic Republic*, C-559/07, ECLI:EU:C:2009:198, para. 68; 13 November 2008, *European Commission v the Republic of Italy*, C-46/07, ECLI:EU:C:2008:618, para. 57-58; 29 November 2001, *Joseph Griesmar v Ministre de l'Économie, des Finances et de l'Industrie, Ministre de la Fonction publique, de la Réforme de l'État et de la Décentralisatio*n C-366/99, ECLI:EU:C:2001:648, paras. 62-65. See also Greek Court of Audit. 317/2020 (Full Section), 1807/2014 (Full Section), 930/2020, 37/2017, 303/2017, 790/2016, 3744/2014.

164 Court of Justice of the European Union (CJEU), 28 September 1994, *Constance Christina Ellen Smith, and Others v Avdel Systems Limited*, C-408/92, ECLI:EU:C:1994:349, para. 19; 17 April 1997, *Dimossia Epicheirissi Ilectrismou (DEI) v Evrenopoulos*, C-379/99 para. 42.

165 CJEU, judgment of 29 February 1984, *Cilfit*, C-77/83, ECLI:EU:C:1984:91. In *Cilfit* the CJEU found that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court of Justice (*act éclairé*) or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt (*act claire*). The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

166 ECtHR, *Sanofi Pasteur v France,* Application No. 25137/16, 13 February 2020, on the need for domestic courts which, under Article 267 TFEU, are in principle obliged to make a reference to the CJEU for a preliminary ruling, to give reasons when they reject an application to that effect by one of the parties to the proceedings. In the *Sanofi Pasteur* case, the ECHR found that the French Court of Cassation had breached Article 6 of the Convention by limiting its reasoning to finding that there was no need to call the CJEU. See also, ECtHR, *Bio Farmland Betriebs S.R.L. v Romania*, Application No. 43639/17, 13 July 2021.

of Human Rights.[167] In this regard, in its very recent judgment *Georgiou v Greece* of 14 March 2023, the European Court of Human Rights (ECtHR) found a violation of Article 6-1 ECHR due to the fact that the highest penal court rejected Mr Georgiou's request for a preliminary reference of a legal question to the CJEU without any justification. In terms of just satisfaction, the Court considered that reopening of the proceedings would constitute appropriate redress for violations of the applicant's rights.

viii) In view of the violation of the principle of equal pay, in the event of an action for damages before the national courts, the Greek State risks being found liable to provide to the applicant reparation for the damage incurred by a decision of one of its courts adjudicating in last instance.[168]

POLICY AND OTHER RELEVANT DEVELOPMENTS

Ombudsman's report on the educational needs of students with disabilities

Disability

On 12 September 2022, the Ombudsman published a special report in the context of its duty to monitor the implementation of the UN CRPD. The report, which refers to the year 2021, highlights the obstacles that students with disabilities and/or special educational needs face in accessing general education. According to the report, although Law 3699/2008[169] explicitly provides that special education, as well as general education, is compulsory and functions as an integral part of the unified public and free education, it is still treated by the state as of secondary importance in relation to general education.

The report identified a critical underlying cause of this to be the constant insufficiency of resources to meet the educational needs of students with disabilities, in particular with regard to their inclusion in *general* schools. For instance, only about 40 % of the requests for parallel support teachers that had been approved were implemented in 2021-2022. The report noted that the (partial or complete) non-implementation of approved requests constitutes a violation of the children's right to education, as it creates serious or even insurmountable obstacles to their school integration and educational progress. In addition, the report underlined that all the students for whom parallel support is approved, need it *from the beginning of the school year*, and that ideally, it should be provided by qualified permanent teachers (as 'reference persons'), in particular for children who face severe barriers to social interaction and behavioural disorders. Instead, in practice, unqualified substitute teachers alternate between schools throughout the country. The lack of qualified school nurses in many schools was also highlighted as an issue of concern for many children and students with certain disabilities or health issues, creating further inequalities between these children and students without such disabilities.

Online source:
https://www.synigoros.gr/el/category/default/post/porisma-or-sobara-proskommata-sthn-enta3h-sth-genikh-ekpaideysh-ma8htriwn-kai-ma8htwn-me-anaphria-h-kai-eidikes-ekpaideytikes-anagkes

167 Article 6(1) (right to a fair trial) ECHR: '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

168 Court of Justice of the European Union (CJEU), judgment of 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-244/01, ECLI:EU:C:2003:513.

169 Greece, Law No. 3699/2008 on the special education and training of persons with disabilities or with special educational needs, *Official Journal* 199A /02.10.2008.

Roma organisations react to the exclusion of many Roma families from child allowance

Racial or ethnic origin

In March 2023, Roma organisations reacted to the exclusion of many Roma families from a specific child allowance, due to the application of the criterion that each child is enrolled in school and has sufficient attendance to not be required to repeat a school year. The criterion has existed in law since 2020 but was not applied in practice until March 2023, in the middle of the school year. Suddenly, new applicants for the benefit are now requested to attach the certificate of attendance of each child or their student registration numbers. On the other hand, those already receiving the benefit do not need to fulfil this criterion.

The Panhellenic Confederation of Roma organisations considers that measures and actions on behalf of the Ministry of Education such as this sudden activation of the 2020 legislative provision seem punitive and weaken the already vulnerable and marginal situation of hundreds of families who live in inhumane conditions, without access even to basic goods.

According to the Confederation, many Roma parents encounter significant difficulties when attempting to enrol their children in the schools of their area, due to the lack of available places. Ensuring attendance is particularly difficult when the child can only be enrolled in a school located far away from the home. Furthermore, the implementation of the attendance criterion is particularly problematic for Roma children who have left school earlier and are now too old to attend the lower levels of education but too young to attend a second-chance school or night school.

Consequently, Roma organisations requested the following measures:

- the postponement of the application of the relevant criterion until the Ministry of Education ensures the possibility of registering all children in all school levels in the schools of their area, and
- the creation of special school integration departments for older children.[170]

The Government has not implemented any of the measures requested.

Online source:
https://opeka.gr/oikogeneies/epidoma-paidiou/nomothetiko-plaisio/

Hungary HU

LEGISLATIVE DEVELOPMENT

Student loan forgiveness for young mothers

Sex

The Government Decree on the system of student loans[171] was amended by Government Decree on the amendment of certain government decrees relating to family policy, on 28 December 2022.[172] From 1 January 2023, the following new provisions are in force in the Government Decree on the system of student loans:

170 Greece, Panhellenic Confederation of Roma organisations (2023) 'Announcement on the exclusion of many families from receiving child benefit', press release, 27 March 2023.
171 Hungary, Government Decree 1/2012 (I. 20.) on the system of student loans (*Korm. rendelet a hallgatói hitelrendszerről*), 20 January 2012.
172 Hungary, Government Decree No. 595/2022. (XII. 28.) on the amendment of certain government decrees relating to family policy (*Korm. rendelet egyes családpolitikai intézkedésekről szóló kormányrendeletek módosításáról*), 28 December 2022, Articles 1-2.

– Article 18/A (1a): 'Women under the age of 30 with a student loan who give birth to a child, or adopt a child, during higher education studies or within two years after graduation, shall be given a non-repayable child-related grant covering 100 % of the remaining student loan debt of theirs. […]
– Article 34/K: [the above provision] is to be applied in cases of children born or adopted, or foetuses born dead, after the coming into entry [of the provision].'

The amending decree was introduced in the context of a package of governmental measures in the field of family policy in late December 2022, including a provision on a personal income tax break for mothers under 30 years of age.[173]

As for the direct regulatory context of the new provisions, a previous amendment of the Governmental Decree on the system of student loans, in force from 1 January 2018, included the provision that women are entitled to an alleviation of 50 % of their student loans after giving birth to, or adopting, a second child, and an alleviation of 100 % after giving birth to, or adopting, a third child (moreover, pregnant women may suspend the repayment of their student loans from the 91st day of their pregnancy, for a total duration of 36 months).

The Parliamentary Commissioner for Fundamental Rights – the Ombudsperson of Hungary – implemented an *ex officio* investigation regarding these amendments after receiving complaints from individuals who claimed that these provisions were discriminatory since fathers (biological, adoptive or single) were excluded from the alleviations.[174] According to the conclusions of the Ombudsperson, the Government should consider revising the amendment.[175] Another aspect of these provisions (in force from 1 January 2018) is that only those women who gave birth to or adopted at least one of their children after 31 December 2017 are eligible. An individual affected by this measure filed a complaint against the Decree with the Constitutional Court,[176] claiming that the provision is discriminatory because those women whose children were born (or adopted) earlier are excluded from the alleviation. The Constitutional Court rejected the complaint, claiming that the restriction was not arbitrary, but was based on a sensible reason, which carried due constitutional weight to justify the differential treatment; namely that the measure served the aim to encourage further childbearing, thus promoting a favourable demographic trend, rather than supporting the upbringing of children already born.[177]

Given that the recent amendment of the Government Decree on the system of student loans is applicable only in cases of children born or adopted (or fetuses born dead) after 1 January 2023, in a phasing-in system, this provision also features a definite demographic aspect.

Online source:
https://njt.hu/jogszabaly/2012-1-20-22.36#SZ34F@BE2

173 EELN (2023) Flash Report (Hungary) 'Personal income tax break for young mothers', 20 March 2023, https://www.equalitylaw.eu/downloads/5839-personal-incoma-tax-break-for-young-mothers.
174 EELN (2019) Flash Report (Greece), 'Report of Ombudsperson on preferential treatment of women concerning repayment conditions of student loans', 4 March 2019, https://www.equalitylaw.eu/downloads/4850-hungary-report-of-ombudsperson-on-preferential-treatment-of-women-concerning-repayment-conditions-of-student-loans-pdf-76-kb.
175 Hungarian Ombudsperson (2018) *Az alapvető jogok biztosának jelentése az AJB-978/2018.számú ügyben*, (Report regarding Case No. AJB-978/2018), Kezdőlap - AJBH.
176 For more information please see: EELN (2020) *Country report: Gender equality – How are EU rules transposed into national law? Hungary, 2019*, pp. 64–65, https://www.equalitylaw.eu/downloads/5044-hungary-country-report-gender-equality-2019-pdf-1-26-mb.
177 Hungary, Constitutional Court Decision (*AB határozat*) No. 3363/2018. (XI. 28.), 20 November 2018.

Personal income tax break for young mothers

The Government Decree on the preferment for mothers under the age of 30 was published on 28 December 2022.[178] This new regulation stipulated that from 1 January 2023, women between 25 and 30 years of age who give birth to a (living or dead) child or adopt a child, or become eligible to child-related benefits due to pregnancy (from the 91st day after the conception of the fetus, proven by a medical document) are entitled to personal income tax relief until the end of the calendar year in which they turn 30.

Article 1 of this Decree provided that this provision is in force as long as the 'emergency situation launched with regard to the military conflict on the territory of Ukraine, and the related humanitarian catastrophe, and with the aim of declining and handling the impacts of these in Hungary', provided by another Government Decree,[179] is in force. The latter Government Decree came into force on 1 November 2022 and includes a sunset clause of 210 days (expired on 29 May 2023, and later prolonged until 26 November 2023).

This regulation concerning the personal income tax break for young mothers was launched in the context of a package of governmental measures in the field of family policy in late December 2022, which also included a provision on student loan forgiveness for mothers under 30 years of age.[180] It was framed by the Government as follows: 'Just like with all the other family support measures, the Government's aim is twofold. We encourage childbearing, moreover, we would like families with children to have more money.'[181]

As for the direct legal context of the new provision, mothers of four or more children, including adopted children, are entitled to lifelong personal income tax relief (from 2020),[182] moreover, young workers under 25 years of age (regardless of sex or family status) are also entitled to personal income tax relief (capped at the level of national average salary),[183] while first-time married couples (if at least one of the parties is married for the first time) are entitled to a (moderate level of) personal income tax deduction for 2 years.[184]

However, while the above provisions (targeting mothers of at least four children, workers under 25 and first-time married couples) are included in the Personal Income Tax Act, i.e. these are rules are provided at the level of a parliamentary act, the new provision (targeting young mothers between 25-30) was included in a governmental decree. Moreover, the latter is provided only for a limited period, connected to the emergency due to the war in Ukraine. However, this provision features a definite demographic aspect, as it is applicable in a phasing-in system: for mothers of children born (alive or dead) or adopted after 1 January 2023, or fetuses conceived after 1 October 2022.

Online source:
https://njt.hu/jogszabaly/2022-596-20-22

178 Hungary, Government Decree 596/2022. (XII. 28.) on the preferment for mothers under the age of 30 (*Korm. rendelet a 30 év alatti anyák kedvezményéről*), 28 December 2022.
179 Hungary, Government Decree 424/2022. (X. 28.) on launching emergency situation, and on certain rules connected to the emergency situation, with regard to the military conflict on the territory of Ukraine, and the related humanitarian catastrophe, and with the aim of declining and handling the impacts of these in Hungary (*Korm. rendelet az Ukrajna területén fennálló fegyveres konfliktusra, illetve humanitárius katasztrófára tekintettel, valamint ezek magyarországi következményeinek az elhárítása és kezelése érdekében veszélyhelyzet kihirdetéséről és egyes veszélyhelyzeti szabályokról*), 28 October 2022.
180 Hungary, Government Decree No. 595/2022. (XII. 28.) on the amendment of certain governmental decrees relating to family policy (*Korm. rendelet egyes családpolitikai intézkedésekről szóló kormányrendeletek módosításáról*), 28 December 2022.
181 See Hungarian Government (2022) 'Januártól jön a 30 év alatti anyák szja-mentessége' (Coming in January: tax break for mothers under 30), 29 December 2022, https://kormany.hu/hirek/januartol-jon-a-30-ev-alatti-anyak-szja-mentessege.
182 Hungary, Act CXVII of 1995 on personal income tax (*1995. évi CXVII. törvény a személyi jövedelemadóról*), 22 December 1995, Article 29/D.
183 Hungary, Act CXVII of 1995 on personal income tax, Article 29/F.
184 Hungary, Act CXVII of 1995 on personal income tax, Article 29/C.

CASE LAW

Constitutionality of the exclusion of persons with severe speech impairments from eligibility for disability allowance

Disability

Following a stroke, the complainant developed an impairment of speech and cognition that made him incapable of independent living. His application for a disability allowance was rejected on the basis that his disability was not qualified as 'severe' under the relevant national legislation.[185]

The exhaustive list of categories of 'persons with severe disabilities' entitled to a disability allowance includes persons whose severe hearing impairment is accompanied by 'a severe and irreversible impairment of speech that makes communication impossible, and is manifested in the deficiencies of expression or the lack of acoustic manifestations of speech.' The regional court thus concluded that a person with a speech impairment without a hearing impairment cannot qualify to receive a disability allowance.[186]

In February 2023, the Constitutional Court (CC) agreed that the legislation excluded the complainant from eligibility for a disability allowance but concluded that this exclusion amounted to discrimination. According to the Court, while it cannot be derived from either the Fundamental Law or Hungary's international obligations that the State would be obliged to grant the disability allowance for persons with severe disabilities to *all* persons with disabilities, the legislature may not act arbitrarily when defining 'severe disabilities'.[187]

The Court first concluded that persons with 'severe disabilities' are those whose condition is persistent or irreversible, who cannot live an independent life or who require continuous assistance from others. It concluded that all persons who can be thus characterised are in a comparable situation. The Court then concluded that there is no reasonable ground for the differentiation between persons with severe speech impairment and persons with (other) severe disabilities who qualify for the disability allowance. As it was not possible to remedy this legal gap by annulling the impugned provisions or parts of them, the Court called on the legislature to pass legislation regarding the conditions under which persons with speech impairment who otherwise meet the criteria for disability allowance (i.e. being – due to their disability – unable to live an independent life, or require continuous assistance from others) become eligible for this form of support. The deadline for passing such legislation is 31 December 2023.

Online source:
https://jogkodex.hu/doc/8120715

Discrimination by association in access to housing

Racial or ethnic origin

The complainants were a married couple; the wife was of Roma origin and the husband was not. The husband had reached a rental agreement about an apartment with a landlord, received the keys and handed over a deposit. The day after the tenants moved in, the landlord went to the apartment, where the wife and her family members were unpacking. He made various comments about the state of the apartment and told the wife that they could not stay there. He then called the husband and told him notably that he did not have a problem with him, only with his wife, because she was a 'gypsy'.

185 Hungary, Act XXVI of 1 April 1998 on the rights of persons with disabilities and the guaranteeing of their equal opportunities ('RPD Act') and Government Decree 141/2000 (VIII. 9.) on the rules of qualifying and reviewing severe disability, and of providing disability allowances ('Government Decree').
186 Hungary, Debrecen Regional Court, judgment No. 8.K.700.864/2020/27.
187 Hungary, Constitutional Court, decision No. 2/2023. (II. 23.) AB, of 23 February 2023.

The landlord acknowledged having made such a comment, but claimed that his main concern was the mess in the apartment as well as the attitude of the wife and her family (wearing shoes indoors and raising their voices when confronted about it).

In December 2022, the Ombudsman, acting as equality body, ruled on the complaint. It did not accept the respondent's arguments, noting that the state of the apartment one day after moving in was inevitable. The Ombudsman concluded that the complainants had been disadvantaged by the landlord's decision not to allow them to rent the property. Notably, not only the wife, but also the non-Roma husband was discriminated against on the basis of ethnic origin, as a violation of the requirement of equal treatment can be qualified as discrimination by association 'if someone suffers a disadvantage not because of their own protected characteristic but due to the protected characteristic of a person who is in a direct (family or friendly) relationship with them, therefore, the husband could request protection on the basis of his wife's protected characteristics.'[188]

The Ombudsman issued a warning to the respondent and banned him from engaging in the discriminatory conduct in the future.

Online source:
https://www.ajbh.hu/documents/10180/7305081/EBF_AJBH_28_2022_nemzetis%C3%A9ghez+val%C3%B3+tartoz%C3%A1s_szolg%C3%A1ltat%C3%A1s.pdf/03f1aad6-6daa-8285-7df8-b1ab1c4d0cc9?version=1.0&t=1676023843408

Supreme Court (Kúria) judgment on discrimination in the child protection system

Racial or ethnic origin

In September 2021, the regional court in Budapest ruled on the *actio popularis* lawsuit initiated by the European Roma Rights Centre (ERRC) against the Ministry of Human Capacities, regarding the practice of the child protection institutions in Nógrád County of taking Roma children into care on the basis of the families' social status and poverty, in much larger proportions than non-Roma children. The court concluded that by failing to conduct targeted examinations and to prepare adequate professional protocols, the ministry had breached the right to equal treatment of both children who had been removed from their families due to financial reasons (direct discrimination based on socioeconomic status) and Roma children who had been removed from their families due to financial reasons (indirect discrimination based on ethnicity). The court ordered the ministry to (1) monitor and collect data on the number of children of (perceived) Romani origin in state care in Nógrád County every year for five years; (2) publish the results of its data collection and the measures taken to reduce the overrepresentation of Roma in state care on its website; (3) carry out a targeted review within the next 12 months of the application of the prohibition of discrimination based on socioeconomic status and Romani origin in cases of child removals in Nógrád county; and (4) adopt and implement an action plan to be monitored by the ministry with all relevant documentation published on its website for the sake of transparency.[189]

The ministry appealed against the judgment. In March 2022, the appeals court overturned important parts of the first-instance judgment, finding notably that it could not be concluded that the ministry had a specific duty to carry out targeted investigations into the issues or to prepare professional protocols. However, since the ministry did prepare such protocols on other issues, it would have been required to address the problems identified by ERRC too, so in that regard the discriminatory omission could be established.[190]

188 Hungary, Commissioner for Fundamental Rights (Ombudsman), national equality body decision No. EBF-AJBH-28/2022, December 2022.
189 Hungary, Regional Court of Budapest, judgment No. 27.P.20.939/2020/44 of 22 September 2021, available at: http://www.errc.org/press-releases/budapest-court-rules-state-removal-of-romani-children-from-families-is-discrimination. For further information, see *European equality law review*, Issue 2022/1, pp. 113-114.
190 Hungary, Appeal Court of Budapest, decision No. 8.Pf.20.817/2021/4. of 22 March 2022.

The first-instance court had concluded that the ERRC as claimant had satisfied its burden of proof when it demonstrated the existence of a protected ground (Roma ethnicity) and of a disadvantage suffered by the protected group (overrepresentation in state care). The ministry had then failed to satisfy its burden of proof to demonstrate the lack of discrimination when referring to testimonies of child protection professionals. However, the appellate court concluded that such witness statements constituted adequately convincing proof against discrimination based on ethnicity. Therefore, the court of second instance found that discrimination could be established only on the basis of socioeconomic status. The court of second instance thus only upheld the ministry's obligation to prepare a professional protocol addressing the removal of children solely for financial reasons.

The ERRC requested an extraordinary review from Hungary's supreme court (*Kúria*). In February 2023, the Court rejected the request for formal reasons, because although the claimant challenged the appeal court's assessment of the evidence, it failed to expressly invoke the specific relevant provision of the Code of Civil Procedure that sets out the rules on how the court will establish the facts of the case.[191]

Online source:
http://www.errc.org/press-releases/budapest-court-rules-state-removal-of-romani-children-from-families-is-discrimination

Supreme Court (Kúria) decision regarding state bodies' lack of liability for failure to provide supported housing for persons with disabilities despite statutory obligation

Disability

Six mothers and their adult children with severe disabilities living under their guardianship (the complainants) sued the Ministry of Human Capacities and the Directorate-General for Social Affairs and Child Protection for their failure to provide supported housing in or in the proximity of Budapest, despite their statutory obligation to do so.

In December 2021, the regional court found in favour of the complainants, and concluded that the failure of the directorate to provide supported housing as prescribed by law and of the ministry to create a sufficient institutional framework and to instruct the directorate to comply with its statutory obligations, amounted to a violation of the complainants' dignity, right to private life and right to equal treatment. Although the right to equal treatment does not encompass a right to positive measures, where there is a statutory obligation to take measures to compensate for existing disadvantages, the omission to do so will be regarded as a violation of the right to equal treatment. Refuting one of the respondents' main arguments, the court recalled an earlier judgment of the (then) Supreme Court, which in a case of educational segregation found that the civil courts deciding on claims relating to inherent personality rights do have the right to prescribe specific measures for state authorities to put an end to a violation even if it occurs in the context of a relationship of public law. The first-instance court thus ordered the respondents to, among other things, (i) provide the complainants with supported housing, and (in the meantime) provide them with the services that are available for the residents in such housing (i.e. food, transportation, supervision, care); (ii) pay each complainant EUR 12 800 (HUF 5 million).[192]

In April 2022, the appeals court upheld the first-instance judgment, emphasising that if the state authorities' failure to comply with such statutory obligations does not entail their liability for the violation of inherent personality rights caused by the omission, then the statutory obligations would be rendered null, void and unenforceable.[193]

191 Hungary, Kúria, judgment No. Pfv.IV.20.857/2022/10 of 1 February 2023, available at: https://eakta.birosag.hu/anonimizalt-hatarozatok (by searching the case number).
192 Hungary, Regional Court of Budapest, judgment No. 27.Pf.21.357/2019/76. of 7 December 2021.
193 Hungary, Appeals Court of Budapest, judgment No. 8:pf.20.047/2022/5. of 12 April 2022.

One year later, Hungary's supreme court (*Kúria*) overturned the judgment and rejected the complainants' petition. The Court did not dispute that the respondents had failed to comply with their statutory obligation. However, contrary to the long-standing jurisprudence of its predecessor, it concluded that state authorities, when failing to perform a task prescribed by public law, do not engage in a 'direct attack' on individuals' inherent personality rights. Therefore, the Civil Code protection of inherent personality rights cannot be invoked, as a civil court would then intervene in public law relationships without adequate authorisation, which would also violate the constitutional principle of the separation of powers. Therefore, 'in the absence of a civil law relationship, a civil court may not oblige the [...] respondents to take measures that belong to the sphere of public law.'[194]

The Court acknowledged that certain laws expressly authorise the civil courts to review public law activities by state and municipal authorities (i.e. claims for pecuniary damages for actions or inaction of the state) but was of the view that no such authorisation exists in the present case. While the Equal Treatment Act (ETA) places an obligation on state authorities to respect the requirement of equal treatment 'when establishing their legal relationships, in their legal relationships, and in the course of their procedures and measures (hereafter jointly referred to as legal relationships)', according to the Court, there is no 'legal relationship' between the ministry and the directorate on the one hand and the complainants on the other. The respondents cannot therefore be held liable on the basis of an inherent personality rights claim even under the ETA.

It is notable that the Court failed to recognise that the ETA also refers to 'procedures and measures' of state entities, not only 'legal relationships'. In addition, the Civil Code clearly establishes the required authorisation regarding the compensation of non-pecuniary damage, if not to injunctive measures such as those prescribed by the first and second-instance courts.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Ombudsman becomes Hungary's independent mechanism under the UN Convention on the Rights of Persons with Disabilities

Disability

On 30 November 2022, the Parliament adopted legislation to add another mandate to the Commissioner for Fundamental Rights (*Ombudsman*).[195] As a result, as of 1 January 2023, in addition to (i) his general mandate, (ii) the mandate of the equality body, (iii) the national preventive mechanism under the Optional Protocol of the UN Convention against Torture, and (iv) the former Independent Police Complaints Board, the Ombudsman also fulfils the role of the independent mechanism under Article 33 of the UN Convention on the Rights of Persons with Disabilities (CRPD) to promote, protect and monitor implementation of the CRPD.

In this capacity, the Ombudsman now has some additional rights and obligations, including to monitor compliance with the CRPD, even in the absence of individual complaints or the suspicion of any constitutional breach. He may proceed *ex officio* regarding individual rights violations if the person with disability is unable to assert their rights or if the submission of a complaint would impose a disproportionate burden on them. In the course of his investigation, the Ombudsman may inspect court files and expert opinions regarding the person with disability, even without their authorisation. In addition, he must formulate opinions on the drafts of any legislation concerning the situation of persons with disabilities; participate in the preparation of the National Disability Programme and monitor its implementation; and formulate an opinion on the draft of Hungary's country report on the implementation of the CRPD. The Ombudsman Act now provides that a separate unit within the Ombudsman's Office, with at least 11 employees, will be set up to perform the tasks of the independent mechanism under the CRPD.

194 Hungary, Kúria, judgment No. Pfv.IV.21.186/2022/10 of 5 April 2023 (not publicly available).
195 Hungary, Act L of 2022 on the amendment of certain laws serving Hungary's security.

While on paper, this amendment does not seem to raise problems, it is highly problematic due to the Ombudsman's lack of functional independence.[196] In addition, the budget of the Ombudsman's Office has not been increased to an extent that would be commensurate with the new task, in view of the recent inflation rate. This will affect the Ombudsman's ability to fulfil the CRPD mandate as well as to perform its equality body functions.

Online source:
https://net.jogtar.hu/jogszabaly?docid=a1100111.tv

IS Iceland

POLICY AND OTHER RELEVANT DEVELOPMENTS

Equal Pay Certificate questioned

Gender

To combat the gender pay gap in Iceland and promote equality in the labour market, equal pay certification was enacted with the equal pay standard by Law No. 56/2017.[197] The purpose of the standard is for organisations to implement an equal pay system, which ensures that their decisions do not include discriminatory practices based on gender.

New research published in the Icelandic Review of Politics and Administration[198] examined whether the equal pay standard had achieved its goals. The survey concludes that it is not possible to confirm that the implementation of the standard has had any direct effect on the gender pay gap. The research was based on interviews with all four certification bodies who investigate the implementation and the certification standard. Furthermore, changes in the gender pay gap were analysed based on data on wages during 2012-2020 from Statistics Iceland, as well as data from organisations that participated in the wage study for the entire period. Wages of men and women within organisations before and after the equal pay certification were also compared.

The survey reveals serious flaws regarding a lack of guidelines from the Government and the legal framework. There are significant discrepancies in the measures employed by the certification bodies when assessing companies and firms for the equal pay certification standard. The standard is only used in Iceland, and therefore it lacks the paradigm entailed in coordination frameworks that international standards use for their operation. The methods used differ, which means that it is difficult to assess the situation or draw a parallel between comparable firms or institutions in the same sector.

The gender pay gap has decreased by almost 8 % over the time while there is hardly any significant difference between wage trends in organisations that have received certification and those that have not (only 1 %). Hence, the validity of the implementation of the standard is contested. Those conducting the survey recommend that the authorities make improvements to coordinate the working method regarding

196 In April 2022, the Ombudsman, as Hungary's national human rights institution (NHRI), was downgraded by the Global Alliance of NHRIs from an A-status (fully independent) to a B-status (partially independent). See *European equality law review*, Issue 2022/2, pp. 111-112.
197 Iceland, Legislation on Equal Pay Certification (No.56/2017), 1 June 2017.
198 Haraldsdóttir, R. K., Rafnsdóttir, G. L. and Jónsdóttir, G. A. (2022), 'Að sníða verkfærið að veruleikanum eða veruleikann að verkfærinu? Um jafnlaunastaðal og afnám kynbundinna launa' (To tailor the tool to match reality or reality to match the tool? On the equal pay certification system and the abrogation of the gender pay gap), *Icelandic Review of Politics and Administration*, Vol. 18, No. 2, December 2022, p. 235, https://pdfs.semanticscholar.org/141f/0af8921c2c9d6bd9a63fc0d655299be2654b.pdf. Article first published online 15 December 2022, on: http://www.stjornmalogstjornsysla.is.

the certification process to ensure that it does not turn out to be a quick-fix remedy, which fails to address underlying problems.

This new survey has provided a boon for employers who are opponents of the equal pay certification standard.

Online sources:
https://www.ruv.is/frettir/innlent/2022-12-26-jafnlaunavottun-ekki-haft-bein-ahrif-a-launamun-kynjanna
http://www.irpa.is/article/view/a.2022.18.2.4/pdf

New report from the National Police Commissioner shows steep increase in domestic violence

Gender

A new report of the National Police Commissioner published in January 2023, states that there has been a 12 % increase in reports of domestic violence. Nearly 70 % of the incidents concern violence against a spouse/partner or former spouse/partner. It is estimated that 4 % of the population experiences domestic violence each year.[199]

In 78 % of incidents the aggressor was a male and in 67 % of the instances the victim was female. In cases between spouses/partners, 80 % of the aggressors were male and 77 % of the victims were female.[200] In 2022 there were 118 requests for restraining orders, which is similar to the previous three years. In 2022 there were 102 serious cases of domestic violence where the life and health of the victim was repeatedly threatened.

Online source:
https://www.logreglan.is/wp-content/uploads/2023/01/Heimilisofbeldi-og-manndrap-BI-skyrsla-fyrir-ytri-vef-2022-jan-des.pdf

Italy

IT

LEGISLATIVE DEVELOPMENT

Gender Equality provisions in the Budget Act for 2023

Gender

Article 1, paragraph 359 of the Budget Act for 2023 modified Article 34 of Decree No. 151 of 26 March 2001 on the support of motherhood and fatherhood concerning the allowance for parental leave.[201] This leave can be taken until the child is 12 years old, and is covered by an allowance of 30 % of the last monthly remuneration for a duration of 3 months for each parent as a non-transferrable right, and for a further 3 months, as an alternative between parents. If both parents take up non-transferable parental leave and one of them takes up the alternative parental leave as well, the period covered by the allowance is nine months. Single parents are entitled to a maximum of 11 months of parental leave and 9 months are covered by the allowance. The leave is paid by the INPS (the National Institute for Social

199 Iceland, National Police Commissioner (*Lögreglan*) (2023), 'There were never more reports of domestic violence and disputes to the police than in 2022' (*Aldrei fleiri tilkynningar um heimilisofbeldi og ágreining til lögreglu en árið 2022*), https://www.logreglan.is/aldrei-fleiri-tilkynningar-um-heimilisofbeldi-til-logreglu-en-arid-2022/.

200 Iceland, National Police Commissioner (*Lögreglan*) (2023), 'There were never more reports of domestic violence and disputes to the police than in 2022' (*Aldrei fleiri tilkynningar um heimilisofbeldi og ágreining til lögreglu en árið 2022*) https://www.logreglan.is/aldrei-fleiri-tilkynningar-um-heimilisofbeldi-til-logreglu-en-arid-2022/.

201 Italy, Act No. 197 of 29 December 2022, Budget Act for 2023, published in OJ of 29 December 2022 No. 303 ordinary supplement No. 43, https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2022-12-29&atto.codiceRedazionale=22G00211&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.44104089524786305&title=lbl.dettaglioAtto.

Security). In this context, Article 1, paragraph 359 increased the amount of one month's allowance to up to 80 % of the last monthly remuneration: parents, as an alternative to each other, can benefit from this increase for the maximum total length of one month per child aged up to six years.

Article 1 paragraph 357 of Act No. 197/2022 also raised by 50 % the amount of the single and universal allowance, which all families are entitled to in support of parenthood. Moreover, the increases in the amount of the universal allowances already provided by Article 5 of Decree No. 230/2021 and by Article 38 of Decree No. 73/2022 for children with disabilities,[202] as temporary measures for 2022, became permanent.

Finally, Article 1, paragraphs 338-341 provide for an increase in the Equal Opportunities Fund: this is essentially to finance actions to combat gender-based violence and human trafficking.

Although the amendments described above can be appreciated as a further effort to sustain families and birth rates, they fall within the traditional measures of protection of maternity and paternity and do not involve a more equal sharing of responsibilities within the family which is crucial in the promotion of equal opportunities at work.

Moreover, the increase in the parental leave allowance is still too low to encourage the main breadwinner of the family to take the leave. Indeed, in Italy, parental leave is mostly taken up by women, mainly due to the gender pay gap and the fact that men are still the main breadwinner. Given that parental leave benefits are calculated as a percentage of the worker's pay, it is more economic for families to lose part of the woman's pay than part of the man's pay. Moreover, the compensation remains too low to allow a decent living standard.

Online source:
https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2022-12-29&atto.codiceRedazionale=22G00211&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.44104089524786305&title=lbl.dettaglioAtto

New Act aimed at improving social inclusion and participation in the labour market contains provisions in support of working parents and victims of gender-based violence

Gender

On 29 June 2023, Decree No. 48 of 4 May 2023[203] on urgent measures aimed at improving social inclusion and participation in the labour market was converted into law by Act No. 85 of 3 July 2023.[204] Some amendments provided by this Decree regard the support of parents and the support of victims of gender-based violence.

202 Italy, Decree No. 230 of 29 December 2021, implementing the Delegation Act No. 46 of 1 April 2021 on the ruling of the single and universal allowance supporting parenthood, published in OJ No. 309 of 30 December 2021, https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-12-30&atto.codiceRedazionale=21G00252&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.5134386353725344&title=lbl.dettaglioAtto.

203 Italy, Decree No. 48 of 4 May 2023 as amended and converted by Act No. 85 of 3 July 2023.

204 Italy, Decree No. 48 of 4 May 2023 on Urgent measures for social inclusion and access to labour market, as converted and amended by Act No. 85 of 3 July 2023, published in OJ No. 153 of 3 July 2023, p. 72, https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2023-05-04&atto.codiceRedazionale=23G00057&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.8869139209030448&title=lbl.dettaglioAtto.

In the private sector, following Article 42 of the Decree, the right to smart working[205] (provided that the job can be performed in this way) has been extended to 31 December 2023 for working parents of children aged up to 14 years. The same measure has not been provided for the public sector. This gap has been explained by the need to allocate sufficient funds to sustain the extension. Nevertheless, this justification raises some doubts, considering that smart working involves savings for the employer, at least in the public sector, where most collective agreements do not recognise the meal voucher and/or any reimbursement of expenses for the use of personal working equipment for employees who carry out smart working.

The Decree also provided for an overall reform of the basic income introduced by the previous Government which will fully come into force from 1 January 2024.[206] Several amendments to this reform show growing attention to the problem of gender-based violence, which is increasingly in the news in Italy. In fact, in the context of the new ruling on the basic income, under Article 3 paragraph 6 of the Decree, the victims of gender-based violence enrolled in a protection programme are considered as an independent family unit from the husband for access to social and/or economic benefits provided by Decree No. 48/2023. Moreover, under Article 6 of the Decree, they are not required to join and actively participate in training, work activities, or any other active labour policy promoted by the public placement agencies, unlike other beneficiaries of the basic income. At the same time, in order to favour their participation in the labour market, they are entitled to access a personalised inclusion path organised by public placement agencies on a voluntary basis.

Within the latter reform of the basic income, another amendment recognises a minimal facilitation for working parents. Article 9, which states that beneficiaries are required to accept a permanent contract, applies to working parents of children aged up to 14 years only if the job offer is within 80 km from their home or within 120 minutes of travel time by public transport.

Online source:
https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2023-05-04&atto.codiceRedazionale=23G00057&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.8869139209030448&title=lbl.dettaglioAtto

Reform of the Public Procurement Code and the gender equality certification system

Gender

Article 2 paragraph 1 of Decree No. 57/2023 modifies Article 108 paragraph 7 of the Reform of the Public Procurement Code. The latter had been approved by Legislative Decree No. 36/2023 but will be enforceable from 1 July 2023.[207]

In order to promote gender equality, Article 2 states that the highest score to be attributed to companies for the adoption of policies aimed at achieving gender equality must be included in calls for tenders, notices and invitations announced by the contracting bodies. This is based on the possession of the gender equality certification provided by Article 46*bis* of Decree No. 198 of 11 April 2006 on the Code of Equal Opportunities between Men and Women (Equal Opportunities Code).

205 Following Act No. 81 of 22 May 2017 on measures for the protection of non-entrepreneurial self-employment and measures to promote smart working, published in OJ No. 135 of 13 June 2017, https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2017-06-13&atto.codiceRedazionale=17G00096&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.8382034481062757&title=lbl.dettaglioAtto (last accessed 6 July 2023), smart working is a different way of organising work activities, where the results are crucial. It is allowed for all kinds of jobs, with no percentage limits on total working time, and the arrangements are mainly governed by an individual agreement.

206 Articles 1-13 of Decree No. 48/2023 provide for the ruling of the new social inclusion allowance as a national measure to combat poverty, fragility, and social exclusion of the weakest groups through reintegration programmes, as well as professional training, work, and any other active employment policy.

207 Italy, Decree No. 57/2023 (*Decreto legge n. 57/2023*), 29 May 2023.

This provision is of significant importance in the context of implementing the National Recovery Plan (PNRR),[208] which involves the launch of significant public investment in various sectors.

Regarding the evaluation of the applicants in public tenders, notices and invitations, the previous text of Article 108 paragraph 7 of Decree No. 36/2023 provided for the possibility of self-certifying the possession of the requirements to demonstrate respect for gender equality, and the verification of this self-certification by the contracting body.

The previous method did not offer the same guarantees of the system provided by Article 46 of the Equal Opportunities Code, where certification is issued under accreditation, which is a form of conformity assessment carried out by an independent and impartial third party.[209] Moreover the contracting authorities, especially the smaller ones, may lack the skills required to verify the reliability of the self-certification.

The amendment restores centrality to the certification system, which ensures a homogeneous and more reliable assessment. Also, the final confirmation of the certification system as a distinct and positive requirement for participation in public tenders is helpful. In fact, it had been deleted in previous drafts of the reform. This would have marked a step backward, considering the impact of the implementation of the PNRR in the near future in the labour market.

Online sources:
https://www.normattiva.it/ricerca/avanzata/0?tabID=0.4559184121820792&title=lbl.risultatoRicerca&initBreadCrumb=true
https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2023-03-31&atto.codiceRedazionale=23G00044&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.4559184121820792&title=lbl.dettaglioAtto

LT Lithuania

LEGISLATIVE DEVELOPMENTS

Reform of labour market measures for persons with disabilities

Disability

On 19 July 2022, the Parliament adopted legislative amendments proposed by the Ministry of Social Security and Labour, creating wider opportunities for persons with disabilities to actively participate in the labour market, and providing employers with the necessary assistance with regards to recruitment and accommodation for employees with disabilities.[210] The new amendments entered into force on 1 January 2023.

208 Gender equality is not included in the six missions of the Recovery Plan, but is one of the three cross-cutting objectives of the whole plan, of which implementation is ruled by Decree No. 77 of 31.05. 2021, as converted and modified by Act. No. 108 of 29.07.2021, on the governance of the National Recovery Plan and on the first measures aimed at strengthening the Public Administration and simplifying and accelerating administrative procedures.

209 Under Article 46 of the Equal Opportunities Code (Decree No. 198/2006), a certification system on gender equality has been enhanced under the guidelines issued by a Decree of the Prime Minister following a proposal of the Department for Equal Opportunities, the Minister of Labour, and the Minister of the Economic Development. The certification attests different policies and measures undertaken at the enterprise level aimed at filling the gender gap in remuneration and career and accreditation is necessary in order to accede to national and EU Funds sustaining investments. The regulations for practice in order to achieve accreditation are published at https://www.pariopportunita.gov.it/it/attuazione-misure-pnrr/i-parametri-minimi-per-l-ottenimento-della-certificazione-della-parita-di-genere/.

210 Lithuania, Law on Amendments to Articles 2, 16, 20, 24, 25, 30-2, 35, 38, 41, 42, 43, 44, 45 and 47 of the Law on Employment, No. XIV-1390, 19 July 2022. Available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a2d72942080211edbfe9c72e552dd5bd.

Previously, the state provided financial support to social enterprises where at least 40 % of employees were persons with disabilities. The model was flawed as it significantly limited the opportunities of persons with disabilities to choose a workplace and created de facto segregation as well as unequal conditions under which to employ employees with disabilities for employers who did not have a special status and operated in the open labour market. The aim of the amendments was to improve and clarify the legal framework to promote the participation of persons with disabilities in the open labour market. The state will thus no longer provide financial support to such 'social enterprises'. Instead, support will follow a person with a disability who intends to find employment and needs additional support or adaptations. The amendments also aim to ensure the effectiveness of active labour market policy measures; to create legal prerequisites to encourage employers to adapt workplaces and their environment to persons with disabilities; to increase the sustainability of the employment of persons with disabilities; and to implement measures to help prevent employees with disabilities from dropping out of the labour market.

The amendments provide support for those working in the open labour market in the form of: subsidised employment; adaptation of workplaces; subsidies for work assistant expenses; and a set of measures for implementing an active labour market policy.

According to the data of the State Social Insurance Fund Board under the Ministry of Social Security and Labour, only 29 % of all persons with disabilities of working age were working on 1 January 2022 in Lithuania. The aim of the amendments and of the current labour market policies is to reach targets of 39 % of persons with disabilities working in the open labour market by 2025, and 47 % by 2030.

Online sources:
https://socmin.lrv.lt/lt/naujienos/m-navickiene-zmonems-su-negalia-platesnes-galimybes-darbo-rinkoje
https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a2d72942080211edbfe9c72e552dd5bd

Reform of assistance for and assessment of disability

Disability

On 20 December 2022, the Parliament adopted amendments to the Law on the Social Integration of Persons with Disabilities, in order to improve the disability assessment model, provide more targeted support for persons with disabilities, increase access to services and assistance, improve the speed with which personalised services and assistance can be provided and make public information more accessible to all.[211] The positive changes are expected to affect the daily and social life of more than 221 000 persons with disabilities. The reform will enter into force in 2024.

- Disability assessment

The current model of disability assessment is contrary to the UN CRPD. The amendments de-emphasise medical criteria, focusing more on the scope of the individual's needs and environmental barriers, and will assess a wide range of other areas such as mobility, self-service, communication, daily activities, living environment, etc, in order to clarify the individual's needs. In addition, the person with a disability will be involved in the assessment. Disability will continue to be assessed solely on medical criteria in some rare cases, notably regarding cancer.

- The term 'capacity for work' replaced by 'capacity to participate'

The term 'capacity for work' is currently used in the social security field but will be replaced with 'capacity to participate' to underline the importance of persons with disabilities participating not only in the labour market, but also in education, cultural activities, society and politics. Additional legal acts will be adopted to implement this.

211 Lithuania, Law amending Law No. I-2044 on the Social Integration of Persons with Disabilities (new wording), No. XIVP-2014(2), 20 December 2022. Available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/253a8e20720911ed8a47de53ff967b64.

- Better access to help and services

The need for services and assistance is currently being assessed by various institutions. For this reason, under the new provisions, a new Agency for the Protection of the Rights of Persons with Disabilities[212] will diagnose and assess the individual's disability as well as their needs in order to take an active part in all aspects of their life. That assessment will be shared with all relevant authorities who will then contact the person and provide them with the assistance and services that they need.

- Accessibility of information

State and municipal authorities and bodies will have to provide information to persons with disabilities in a way that is accessible and understandable to them. Presenting information in understandable ways and making the information environment accessible to persons with intellectual, visual and hearing impairments will enable persons with disabilities to receive all the information they need in a timely and understandable manner.

- Handling complaints

Complaints regarding disputes between the beneficiary, the institution paying the benefit or pension and the authority assessing the level of disability were previously handled by the Dispute Commission under the Ministry of Social Security and Labour. This commission will be abolished and such disputes will now be handled by the Lithuanian Administrative Disputes Commission.

Online sources:
https://socmin.lrv.lt/lt/naujienos/seimas-pritare-kitamet-prasides-zmonems-turintiems-negalia-svarbi-reforma
https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/253a8e20720911ed8a47de53ff967b64

LU Luxembourg

LEGISLATIVE DEVELOPMENT

Transposition of Directive 2019/1158 on work-life balance (WLB Directive)

Gender

In July 2023, two laws transposing the WLB Directive 2019/1158 were passed in Parliament. During the legislative procedure in Parliament, the State Council, which operates as a second chamber, opposed several provisions of the bills presented by the Government. Successive amendments were first made by the Government and then by Parliament.[213] Both laws are published in the Mémorial.[214]

212 The new institution will be created by merging the Department of Disability Affairs and the Office for the Disability and Working Capacity Assessment.

213 Luxembourg, Parliamentary Procedure: Paternity leave – Bill No. 8017: https://www.chd.lu/fr/dossier/8017. Transposition of WLB Directive, except paternity leave – Bill No. 8016: https://www.chd.lu/fr/dossier/8016.

214 Luxembourg, Law of 29 July 2023 amending 1° Article L. 233-16 of the Labour Code and 2° Article 28-5 of the amended Law of 16 April 1979 establishing the general rules for State civil servants (former Bill No. 8017). Mémorial No. 524 of 18 August 2023, available at: https://data.legilux.public.lu/filestore/eli/etat/leg/loi/2023/07/29/a524/jo/fr/pdfa/eli-etat-leg-loi-2023-07-29-a524-jo-fr-pdfa.pdf. Law of 15 August 2023 amending 1° the Labour Code, 2° the amended Law of 16 April 1979 on the general rules for State civil servants and 3° the amended Law of 25 December 1985 on the general rules for civil servants in municipalities (former Bill N°8016). Mémorial No. 512 of 17 August 2023, available at: https://data.legilux.public.lu/filestore/eli/etat/leg/loi/2023/08/15/a512/jo/fr/pdfa/eli-etat-leg-loi-2023-08-15-a512-jo-fr-pdfa.pdf.

Law of 29 July 2023 on paternity leave:

- extends paternity leave of 10 working days from the biological father to the 'second parent' by amending Article L. 233-16 S.1 point 2 of the Labour Code (LC) in the following way:

  'An employee obliged to leave his/her job for personal reasons is entitled to an extraordinary leave in the following cases: (...) 2) 10 days for the father or the person recognised as the equivalent second parent by the national legislation applicable according to the residence or the nationality of the child or the parent concerned and which allows her/him to establish filiation in respect of the child without having to use the adoption procedure, on the occasion of the birth of the child';

- grants paternity leave to state civil servants and civil servants of municipalities;
- extends paternity leave to self-employed workers by introducing new paragraphs into Article L. 233-16 LC. Self-employed workers must prove an activity of at least six months. From the 17th hour of paternity leave on, they will be granted a compensatory allowance funded by the State budget.

Law of 15 August 2023 transposing WLB Directive, except paternity leave:

- Creates a right for time off from work on grounds of *force majeure* for urgent family reasons of 1 work day per 12 months, in the case of illness or accident making the immediate attendance of the worker indispensable (Article L. 233-16 S.1 point 9 LC). During the leave, 100 % of the salary will be granted to the worker; 50 % of the salary will be paid by the employer and 50 % by the State (Article L. 233-16 S.7 al.4 LC).
- Creates a right for carer's leave of 5 working days per 12 months for workers to provide personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason. The 'relatives' are the worker's son, daughter, mother, father, spouse and partner in civil partnership. Regarding 'the need of significant care or support for a serious medical reason', Luxembourg adopted the German definition of '*Pflegebedürftigkeit*' (Article L. 233-16 S.1 point 10 LC). During the leave, 100 % of the salary will be granted to the worker; 50 % of the salary will be paid by the employer and 50 % by the State (Article L. 233-16 S.7 al.4 LC).
- Transposes Article 9 of the Directive by introducing a new Chapter VI on flexible working arrangements in Book II, Title III of the LC (Articles L. 236-1 and -2). In particular, it creates a right to request flexible working arrangements for caring purposes for workers with children up to 9 years or carers, who are employed for at least 6 months in the same company. The flexible working time arrangements are limited to a maximum of one year.
- Adapts Articles L. 234-44 and L. 234-46 LC regarding the transposition of Article 5 of the Directive on parental leave. The employer must provide reasons for any refusal of request or postponement of the leave and offer flexible ways of taking the 'second parental leave' prior to any postponement.
- Grants the same rights and legal protection to State civil servants and civil servants of municipalities.

Directive 2019/1158 was transposed at a minimum level, because workers are already granted numerous types of extraordinary leave listed in Article L. 233-16 S.1 LC. In conclusion, the main innovations are:

- carer's leave, flexible time arrangements, and paternity leave for the 'second parent';
- extension of the rights and legal protection to State and municipality civil servants;
- extension of paternity leave to self-employed workers.

MT Malta

CASE LAW

Criminal Court case on sexual harassment

Sex

Gender

The Criminal Court delivered a judgment on 20 March 2023, which uncovered a discrepancy in the law between the English version and the Maltese version of Article 29 of the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, which transposes Article 2(1)(d) of Recast Directive 2006/54.[215] In this case, *Republic of Malta v. Omissis,* a police constable was accused of rape and sexual harassment. The Court decided that rape could not be proven in this case, but that the acts of the accused amounted to harassment and unwanted acts towards the alleged victim, and that there was no doubt that such acts resulted in discrimination on the basis of sex. In order to determine whether the acts constituted sexual harassment, the Court needed to determine whether such acts could be considered offensive, humiliating, and intimidating towards the alleged victim. The Court stated that these adjectives were cumulative[216] and not alternative and concluded that although the acts could be considered offensive and humiliating, the alleged victim could not be considered to be intimidated.

Whereas the English version specifies that it is not lawful for an employer or an employee to sexually harass another employee or the employer by subjecting the victim to an act of physical intimacy; or requesting sexual favours from the victim; or 'subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim'; in the Maltese version, instead of humiliating or intimidating, the word 'or' is replaced by the word 'and'. Therefore, the Court could not find the accused guilty and ordered notification of this judgment to the Minister for Justice in order to investigate whether the law required an amendment so that the adjectives mentioned would no longer remain cumulative but could exist independently of one another.

Online source:
https://timesofmalta.com/articles/view/police-constable-cleared-rape-judge-compares-msida-station-brothel.1020454

ME Montenegro

CASE LAW

Protector of Human Rights decision on discriminatory retirement legislation

Age

The complainant, employed in an educational institution, argued that the newly amended Labour Law imposing retirement at the age of 66 amounted to discrimination on the ground of age in comparison with civil servants and state employees whose imposed retirement occurs at the age of 67. The Protector of Human Rights referred to the explanation of the amendment, which stated that the aim was to harmonise the Labour Law with the Law on Pension and Disability Insurance. The Protector noted that

215 Article 29(2)(ċ)(i) Chapter 452 Laws of Malta (MT version), https://legislation.mt/eli/cap/452/mlt and Article 29(2)(c)(i) Chapter 452 Laws of Malta (EN version), https://legislation.mt/eli/cap/452/eng as reported in the *Times of Malta* (2023) 'Police constable cleared of rape as judge compares Msida station to a brothel', 20 March 2023, https://timesofmalta.com/articles/view/police-constable-cleared-rape-judge-compares-msida-station-brothel.1020454.

216 Article 29(2)(ċ)(i) Chapter 452 Laws of Malta, https://legislation.mt/eli/cap/452/mlt.

this did not represent an objective and reasonable justification as the latter law does not imply automatic retirement, but only a right to retire and acquire the right to an old-age pension.

Upon the Protector's request to provide clarifications, the Parliament failed to prove that there was no violation of equality before the law. The Protector thus stated that the relevant provision of the Labour Law amounted to discrimination on the ground of 'belonging to a group'.[217] The Protector referred to CJEU case law in cases such as *Commission v. Hungary* (C-286/12), *Fuchs* and *Köhler* (C-159/10 and C-160/10).[218]

POLICY AND OTHER RELEVANT DEVELOPMENTS

Strategy for the protection of persons with disabilities from discrimination and the promotion of equality 2022-2027

Disability

In July 2022, the Strategy for the protection of persons with disabilities from discrimination and the promotion of equality 2022-2027 was adopted. It addresses the main deficiencies in protection against disability discrimination in the field of employment.[219] The strategy focuses on the need for: harmonisation of the legal framework with the provisions of the UN Convention on the Rights of Persons with Disabilities; shifting the emphasis from mandatory employment of persons with disabilities (quota system) to other measures necessary to achieve their equality in this area; a higher level of application of affirmative action in employment; a higher level of state aid to the northern region in order to improve the economic conditions for work and employment of persons with disabilities; collection of categorised statistical data on the employment rate and the state of persons with disabilities, classified by gender, age, type of employment and salary; enabling workplace equipment and workplace adaptation in accordance with reasonable adaptations and needs of persons with disabilities; and providing further education for persons with disabilities who are already employed.

Netherlands NL

LEGISLATIVE DEVELOPMENTS

Proposed amendments to law proposal on sexual offences

Sex

On 10 October 2022, the Government submitted a law proposal on sexual offences to the House of Representatives.[220] The law proposal aims to regulate cross-border sexual activities through criminal law. The proposal defines sexual offences as different types of conduct involving involuntary, unequal, or unwanted sexual contact. The law extends the protection against assault and rape, online sexual abuse (for example, sexual comments via social media or the unwanted sending of nude photos and sex videos) and sexual harassment. In addition, the proposal extends the scope for criminal action against sexually harmful behaviour by criminalising sexual harassment as an offence against the public order. It also increases the penalties for certain acts, such as sexual offences against children.

217 Montenegro, Protector of Human Rights, decision No. 220/22 of 28 July 2022, available at: https://www.ombudsman.co.me/docs/1667894294_28072022_preporuka_scg.pdf.

218 CJEU, judgment of 6 November 2012, *Commission v. Hungary*, C-286/12, ECLI:EU:C:2012:687; 21 July 2011, joined cases C-159/10 (*Fuchs*) and C-160/10 (*Köhler*), ECLI:EU:C:2011:508.

219 Montenegro, Strategy for the protection of persons with disabilities from discrimination and the promotion of equality 2022-2027, available at: https://www.gov.me/dokumenta/e9659c4e-e7f6-41f2-ab98-0fd115b80601.

220 See: Netherlands, Sexual Offences Bill – overview, Wetsvoorstel seksuele misdrijven aangepast om slachtoffers beter te beschermen | Nieuwsbericht | Rijksoverheid.nl.

On 9 March 2023, the Minister of Justice and Security presented a number of amendments to the proposal to the House of Representatives.[221] The Minister proposes to extend the limitation periods on reporting sexual offences and to abolish the limitation period in the case of rape. In addition, victims of rape may claim compensation from the 'Fund for violent crimes' (*Schadefonds Geweldsmisdrijven*). A criminal ban on child sex dolls is also added to the bill. The proposed amendments were made following meetings with victims of sexual crimes and requests from various parties in the House of Representatives.

The law proposal will be further debated in the House of Representatives and, if it is adopted, will subsequently be submitted to the Senate. The Government aims to bring the new law into force in 2024.

A first law proposal on sexual offences was submitted to Parliament in 2019. That proposal was criticised because it differentiated between rape and sex against one's will. Subsequently, the Government adapted the law proposal in order to make all forms of sex without consent punishable. The amended law proposal has been favourably received. The main criticism is now being directed at the fact that the law will not enter into force before 2024.

The law proposal is important, as it makes all forms of sex against one's will punishable, whereas previously acts have only qualified as rape when there is evidence of 'coercion' on the side of the perpetrator. This means that when women 'freeze' during rape, it does not qualify – in principle – as rape in accordance with the Dutch Criminal Code. The fact that the Government wants to change the law is therefore a positive development. Unfortunately, however, the process takes a lot of time. For this reason Amnesty International urged Parliament in December 2021 to act more quickly.[222] Parliament has not followed this advice, however.

Online source:
https://www.eerstekamer.nl/wetsvoorstel/36222_wet_seksuele_misdrijven

Disability and sexual orientation added to constitutional non-discrimination provision

Disability

Sexual orientation

On 17 January 2023, the Dutch Senate adopted a bill to add the discrimination grounds of disability and sexual orientation to Article 1 of the Constitution, thus concluding a process that was initiated in June 2010.[223] The amended provision now reads:

> 'All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex, disability, sexual orientation or any other grounds whatsoever shall not be permitted.'[224]

The long duration of the process reflects both the rigid character of the Constitution (any amendment requires two readings in Parliament and a two-thirds majority in the second reading) and the extensive debate surrounding the proposed change. The bill nevertheless received broad support in both readings.

Article 1 was introduced into the Constitution in 1983, when it was already commonly accepted that disability and sexual orientation constituted protected grounds that would be covered by the formula 'or any other grounds whatsoever'. Both grounds later received explicit protection at the level of statutory legislation, through the adoption of the General Equal Treatment Act (GETA) in 1994 and the Disability Discrimination Act (DDA) in 2003 as well as the Criminal Code which offers protection against hate

221 See: Netherlands, Sexual Offences Bill – overview, Wetsvoorstel seksuele misdrijven aangepast om slachtoffers beter te beschermen | Nieuwsbericht | Rijksoverheid.nl.
222 See: Amnesty International (2021) 'Tweede Kamer, zorg dat de Wet seksuele misdrijven sneller dan 2024 wordt ingevoerd' (House of Representatives to ensure that the sex offences act is introduced sooner than 2024), 6 December 2021, https://www.amnesty.nl/actueel/tweede-kamer-zorg-dat-de-wet-seksuele-misdrijven-niet-pas-in-2024-wordt-uitgevoerd.
223 The Netherlands, *Kamerstukken II* 2020-2021, 35 741, 1.
224 Official translation by the Dutch Ministry of the Interior and Kingdom Relations, available at www.denederlandsegrondwet.nl.

speech and hate crime. Rather than closing gaps in protection, the aim of the amendment was thus to consolidate the protected status of both grounds by including them in the Constitution, which is hierarchically superior to and more difficult to change than statutory legislation. Consequently, most of the debates surrounding the amendment were related to the desirability and/or necessity of listing (certain) discrimination grounds in the Constitution. During the first reading, an amendment that sought to add the ground age in addition to disability and sexual orientation was rejected, in accordance with the opinion of the Council of State, due to the number of situations in which differences in treatment on the ground of age may be objectively and reasonably justified.

It is worth noting that the original proposal for the constitutional amendment used the term 'hetero- or homosexual orientation', as do the GETA and Criminal Code,[225] instead of 'sexual orientation'. Nevertheless, the authors of the constitutional amendment considered that the term 'sexual orientation' was more inclusive and amended the bill. Meanwhile, the Government announced that the GETA and Criminal Code will also be amended to include the term 'sexual orientation' instead of 'hetero- or homosexual orientation'. A proposal to this effect was submitted for public consultation in 2021 but has not yet been introduced in Parliament.

Finally, the Dutch legal system currently does not offer the possibility of constitutional review, and national courts thus lack competence to assess the compatibility of statutory legislation with the constitutional non-discrimination provision. This may change in the future, however, as the Government has announced its intention to propose another constitutional amendment with the purpose of introducing constitutional review.

The amended provision entered into force on 22 February 2023, following Government ratification and publication in the *Official Gazette*.[226]

Online source:
https://zoek.officielebekendmakingen.nl/stb-2023-62.html

Registration as parent in birth certificate of child

Transgender

The Decree on Civil Status 1994 has been changed to enable transgender fathers, who give birth to a child, to register as the parent from which the child was born, instead of as the mother, on the child's birth certificate.[227] The Decree is effective as of 1 March 2023.

The change in the law is important for transgender men who were legally registered as male when they gave birth but were biologically still female at the time of giving birth. The law applies not only to the registration of a newborn child, but also in the case of recognition of a child and of recognition of an unborn child.

The Decree will have retroactive effect until 1 July 2014, meaning that persons who are registered on the birth certificate of their child as the 'mother from whom the child was born', while they were legally men at that time, can also request the civil registration to change the registration to 'parent from whom the child was born'. The request may be made up to three years after the entry into force of the amended Decree, thus until 1 March 2026.

The amended Decree is a further step towards the recognition of the position of transgender people. A sex-neutral indication on the child's birth certificate is a better representation of the child's actual

225 The term has been interpreted in Dutch law as including bisexual orientation.
226 Netherlands, *Official Gazette* (*Staatsblad*) 2023, 62.
227 Netherlands, Amendment of the Decree on Civil Status 1994, 28.11.2022. Available at: Staatsblad 2022, 484 | Overheid.nl > Officiële bekendmakingen (officielebekendmakingen.nl).

situation than a registration as 'mother'. The adaptation has no consequences for other provisions of the Decree on Civil Status 1994. Any further extension of the possibility of gender-neutral registration will be considered in the context of the decision-making process on the possible introduction of the mention of an X on the birth certificate.[228]

Online source:
https://zoek.officielebekendmakingen.nl/stb-2022-484.html

Act on double surname accepted by Parliament

Sex
Gender

On 21 March 2023 the law proposal on double surnames was adopted by the Senate. The proposal had already been adopted, on 13 September 2022, by the House of Representatives. The law makes it possible for parents to give their children the surnames of both parents. This is a change from the previous situation. Until 1998, children were automatically given the surname of the father. Since 1998 it has become possible to choose the name of the mother instead of the father. The new law allows parents to give their children a double surname. The new law will enter into force on 1 January 2024.

Parents can give a double surname to their children when their first child is born on or after 1 January 2024. The chosen family name then applies to children born thereafter. The law also provides for a transitional regime. If the oldest child was born on or after 1 January 2016, parents can choose a double surname. Parents have one year to request alteration of the surname if they meet these requirements as of 1 January 2024.

For adopted children it will become possible to choose a combination of their name at birth and the name of one of the adoptive parents. There is a maximum of two names.

Besides the fact that the new law has a positive effect on gender equality, it also has provided a solution for people who have several nationalities and therefore a different surname in another country. For them a (costly) renaming procedure will no longer be necessary to bring uniformity to their surnames.

Online sources:
https://www.eerstekamer.nl/wetsvoorstel/35990_introductie_gecombineerde
https://www.rijksoverheid.nl/actueel/nieuws/2023/03/21/wetsvoorstel-dubbele-achternaam-aangenomen#:~:text=Sinds%20de%20invoering%20van%20de,werking%20op%201%20januari%202024

CASE LAW

Right to social security of domestic care workers

Sex
Gender

The case concerns the applicant Carol Kollmann, who worked as a care provider for an older woman who received a personal budget ('*Persoonsgebonden budget*' – PGB) to pay for her care services. The applicant asked the social security authorities (UWV) to register the years that she worked as care provider (from 2015 to 2018) as years worked in their system so that they would contribute to social security provisions. But the UWV refused the request. When the older woman went to a nursing home and no longer needed home care, Kollmann applied for unemployment benefit. This request was refused as well.

In both cases the UWV referred to the Regulation for personnel at home *('regeling Dienstverlening aan huis')*. This Regulation stipulates that workers who work less than four days a week in the employment of a private individual are not covered by social insurance, including the Unemployment Act. Kollmann

228 EELN Flash Report (Netherlands) of 16 May 2022: https://www.equalitylaw.eu/downloads/5641-netherlands-gender-neutral-registration-80-kb.

decided to take her case to court, stating that the Regulation leads to discrimination on the ground of sex, as over 90 % of the care providers in private homes are women and there is no objective justification for this discrimination. She was supported by Bureau Clara Wichmann,[229] an NGO in the field of women's rights, and the Association of Women and Law.

In December 2021, the Rotterdam District Court ruled that Kollmann is indeed entitled to employment benefits, and that the Regulation for personnel at home must be repealed because of its discriminating effects. On 30 March 2023, this decision was confirmed by the Centrale Raad van Beroep (Central Appeal Board), the Supreme Court in social security cases. Like the Rotterdam Court, the Central Appeal Board ruled that the exclusion of PGB carers from the right to social security constitutes discrimination against women, since this group of workers consists of approximately 95 % women, and there is no objective justification for the exclusion.[230] The justifications presented by the UWV – that the Regulation is necessary in order to combat undeclared work and stimulate the labour market for personal services – were dismissed by the Central Appeal Board. The Court referred to a report by a Government committee in which it was pointed out that, as far as PGB workers are concerned, the Regulation has had no effect on the amount of undeclared work and has not stimulated the labour market for the workers concerned.[231]

The judgment has important implications, as it means that thousands of PGB carers who develop a disability or become unemployed can now claim social security rights. The legislature will have to amend the Regulation and abolish the exclusion from social security.

It is important to note that the ruling does not yet affect domestic workers who do not work on a PGB basis. For them, the Regulation continues to apply. The Central Appeal Board focused its judgment on the group of PGB carers, who are paid out of public money, unlike regular domestic workers.

Both the Rotterdam Court and the Central Appeal Board based their judgment on Article 4 of Directive 79/7/EEC[232] and both referred to the judgment by the CJEU in the *TGSS* case.[233] EU law thus helped the Dutch courts to put an end to the discrimination of, at least, this group of women.

Online source:
https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBROT:2021:12432

POLICY AND OTHER RELEVANT DEVELOPMENTS

Senate report on effectiveness of anti-discrimination legislation

All grounds

In June 2022, the parliamentary Committee of Inquiry into the Effectiveness of Anti-discrimination Legislation presented its findings in a report entitled, *Do equal justice*.[234] The Committee reported on the reasons why existing anti-discrimination legislation is not always effective in combating discrimination and issued recommendations to the Dutch legislature to improve the quality of future legislation.

229 See: Clara Wichmann, clara-wichmann.nl.
230 The Netherlands, Central Appeals Board, 30 March 2023, ECLI:NL:RBROT:2021:12432.
231 Central Appeal Board (2023) 'PGB service providers who work less than 4 days a week may not be excluded from unemployment benefits' (*Pgb-dienstverleners die minder dan 4 dagen per week werken mogen niet uitgesloten worden van WW*), 30 March 2023, https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Centrale-Raad-van-beroep/Nieuws/Paginas/Pgb-dienstverleners-die-minder-dan-vier-dagen-per-week-werken-mogen-niet-uitgesloten-worden-van-WW.aspx.
232 Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ 1978 L6, p. 24.
233 CJEU, judgment of 24 February 2023, *CJ vs Tesorería General de la Seguridad Social (TGSS)*, C-389/20, ECLI:EU:C:2022:120, EUR-Lex - 62020CJ0389 - EN - EUR-Lex (europa.eu).
234 Netherlands (2023) *Do equal justice*. A summary of the report in English is available at: https://www.eerstekamer.nl/intern_stuk/20220607/do_equal_justice_samenvatting/f=/vltsi61u34r1.pdf.

The Committee of Inquiry was established by the Senate in March 2021 to investigate the gap between anti-discrimination law 'in the books' and in practice. The Committee's main objective was to identify interventions that could be adopted by the Dutch legislature to better combat discrimination. The inquiry focused on prevailing issues of discrimination across four fields: the labour market, education, social security and the police.

The Committee identified a number of underlying mechanisms that lead to discrimination and could therefore be the focus of legislative intervention. Examples of these mechanisms are: the persistence of 'organisational and other cultures'; insufficient consideration of citizens' vulnerability in legislation and policy; the use of algorithms; and discretionary power of public bodies responsible for the implementation of legislation in the absence of sufficient accountability. The identification of these mechanisms is followed by the presentation of an assessment framework, to be used by legislators when considering legislative proposals. The framework includes six themes that should be addressed during the legislative process to avoid unintended discriminatory effects of legislation. Amongst these themes are trust (laws should be written on the premise that citizens are well-intentioned but that the capacity for self-reliance differs between people); attention should be given to groups affected by discrimination including by actively involving them in the legislative process; responsibility (implementing organisations should be given explicit responsibility for combating discrimination and the legislature should ensure that responsibility structures are well-organised, e.g. by imposing targets or requiring discrimination impact reports); and clear and effective (complaints) procedures.

The findings of the Committee report were debated in September 2022 and were endorsed by a majority of the Senate. After the debate, the Senate adopted a motion asking the Government to respond to the Committee's recommendations. The President of the Senate was asked to propose ways to implement the recommendations into the Senate's legislative function and to share the report with the lower house of the Parliament.

The 'assessment framework' presented in the report can be understood as an instrument to support mainstreaming equality into Dutch legislation, which could also prove effective in the fight against structural discrimination. Of course, the effectiveness of this approach will greatly depend on the extent to which the framework is actually used during the legislative process.

Online source:
https://www.eerstekamer.nl/commissies/poc

MK North Macedonia

LEGISLATIVE DEVELOPMENT

Relevant amendments to the Law on Social Protection

Disability

Racial or ethnic origin

The Law on Social Protection was amended several times in the reporting period, both through legislative amendments and through a Constitutional Court judgment.[235]
The legislative amendments expand the personal and material scope of measures and rights provided for persons with disabilities and for their parents or guardians, as well as removing obstacles for access to social services for persons who do not hold personal identification documents. They expand the scope

235 North Macedonia, Law on Social Protection, *Official Gazette* Nos. 104/19, 146/19, 275/19, 302/20, 311/20, 163/21, 294/21, 99/22, 236/22, 65/23; and Constitutional Court, USud Nos. 27/2020 and 289/2020, of 1 December 2022, http://88.85.126.176/PregledNaZakon.aspx?id=62139.

of the service of 'personal assistance' and make it available to persons with combined disabilities. In addition, the law now enables access to minimal guaranteed assistance for persons that have a birth certificate issued under the special law for unregistered persons, a majority of whom are Roma.

In December 2022, the Constitutional Court annulled part of the provision that accorded a disability allowance until the age of 65 (the general state mandatory pensionable age). According to the Court, tying the termination of such an allowance to age instead of the continued existence (or not) of a need based on disability was contrary to the Law on Prevention and Protection against Discrimination.

Criminal law amendments adopted to align with the Istanbul Convention standards

Gender

On 13 February 2023, the Parliament passed amendments to the Criminal Code in order to bring the laws in alignment with the obligations under the Istanbul Convention.[236] Several articles were amended, and new provisions were added, adjusting existing legal institutions and introducing new ones. The adoption of these amendments was long awaited, as the legislative proposal was originally submitted to the Parliament for adoption in July 2021 by the previous Government.[237] The preparation of a draft new Criminal Code started when the proposal was first lodged with the Parliament. This process coupled with the blockade of the work of the Parliament by the opposition,[238] pushed the plan for adoption of the amendments to the current Criminal Code into the background. Civil society organisations opposed this sidelining of the amendments and advocated for their adoption to avoid further delays to the introduction of the new crimes and the reformulation of the existing ones.

The definition of domestic violence in Article 122, paragraph 21, was amended to bring it in line with the Istanbul Convention (IC). This definition can now be read to also include violence in LGBTI+ couples and to include more than physical and sexual violence, such as psychological and economic violence.

The definitions for sexual assault and rape were amended in the fully rewritten Article 186. The Criminal Code used to refer to rape with an older term, '*obljuba*' (*обљуба*) which, although defined in the Macedonian language as a forced sexual act,[239] is quite similar to the word for making love. The new definition is very centred on vaginal, oral, or anal penetration with a sex organ or an object. It requires a lack of clearly expressed 'willingness' which can roughly be equated with consent. The ramifications of this choice of words and whether it will water down the protection in rape cases will need to be seen in practice. However, existing court practice leaves little room for hope that the margin for a clearly expressed willingness or desire will not be a wide one.

The amendments introduced for the first time a definition of gender-based violence (GBV) in Article 22, paragraph 43. This definition is in line with the IC. A new Article, Article 129-a, was introduced, criminalising female genital mutilation and 144-a introducing stalking as a crime. These provisions are also in line with the IC.

The crime of sexual harassment was introduced for the first time in the Criminal Code. The proposal did not contain a reflection as to how a distinction will be made between sexual harassment as a civil liability and/or a misdemeanour under other national acts, such as the Act on Prevention and Protection against

236 North Macedonia, Act Amending and Supplementing the Criminal Code (*Закон за изменување и дополнување на Кривичниот законик),* Official Gazette of the Republic of North Macedonia, No.36/2023.

237 The proposal and the full parliamentary procedure documents are available on the website of the Parliament, (in Macedonian and Albanian): https://www.sobranie.mk/detali-na-materijal.nspx?param=4448d2a8-7fc4-4fdc-9c2a-b43443de38c2.

238 Radio Free Europe (2022) 'Thorny Road to Justice for the "Public Room" Victims' ('*Трнлив пат до правда за жрвите од Јавна соба*'), 9 June 2022, https://www.slobodnaevropa.mk/a/трнлив-пат-до-правда-за-жртвите-од-јавна-соба/31889006.html.

239 The meaning of this term in the Macedonian language was indeed a 'forced sexual act'. See: Digital dictionary of the Macedonian language, '*Обљуба*', http://drmj.eu/show/обљуба/ж.

Discrimination or the Labour Act. This needs to be resolved since the crime is now punishable with either a monetary punishment or imprisonment up to one year.

These amendments represent a milestone for the national legal system in terms of gendering the national legislation and better reflecting the lived realities of women in the law. The question that needs to be tackled now is how to best put these in practice and to resolve issues such as establishing a threshold for sexual harassment as a civil liability and/or a misdemeanour compared to sexual harassment as a crime, or ensuring proper standard setting for 'expressed willingness' in rape cases.

CASE LAW

National equality body finds harassment by a controversial civil society organisation

Racial or ethnic origin

The applicant civil society organisation (CSO) is an association of former soldiers who fought to liberate (then) Macedonia from the Bulgarian fascist occupation in the 1940s. The respondent CSO on the other hand is named after a well-known collaborator of the fascist regime.[240] In April 2022, the respondent CSO opened a 'cultural club' in the Jewish neighbourhood in the town of Bitola, from which thousands of Jews were deported to concentration camps by the Bulgarian regime during the occupation. Following strong public reactions,[241] the applicant CSO filed an application to the national equality body claiming that the opening of the club amounted to harassment on grounds of ethnicity.

The equality body published its opinion on 13 October 2022, finding the following:

- extended and multiple harassment as aggravated discrimination on grounds of national and ethnic belonging, belief, personal and social status, against the members and supporters of the applicant CSO as well as their families, the Macedonian people, and all other ethnic communities in the country.
- extended and multiple incitement, encouragement and instruction of harassment as aggravated discrimination on the same grounds, in the field of public information and media, against the same groups; and
- indirect discrimination by the Ministry of Justice which, by failing to exercise its competences in relation to the Law on Associations and Foundations, failed to prevent the actions of the respondent CSO which resulted in such harassment.[242] In this regard, the equality body found that the arbitrary attitude of the Ministry enabled the respondent CSO to conduct the harassment over an extended period of time, despite its mandate to oversee the Law on Associations and Foundations, which prohibits the founding and activities of CSOs that incite national, racial or religious hatred or intolerance, or undertake actions that violate the rights and freedoms of others.

In November 2022, the Government proposed, and the Parliament adopted, legislative amendments to the Law on Associations and Foundations (LAF) and to the Law on Political Parties (LPP).[243] The LAF was amended to introduce the possibility of refusing the registration of a CSO due to the use of names of persons who have been or are connected to racial, religious, national, ethnic or other intolerance, hatred, genocide, extermination, spreading or supporting, encouraging or approving fascism, Nazism, national-socialism or the Third Reich. The LPP was amended to ban founding documents or activities of political

240 The respondent is one among many CSOs registered as belonging to the Bulgarian community in North Macedonia that carry names of persons associated with the Bulgarian fascist regime.

241 Kanal 5 (2022) 'Strong Reaction of the Jewish Community to the name Vanco Mihajlov – reaction to the opening of a Bulgarian cultural centre Vanco Mihajlov in Bitola' (18.04.2022), https://kanal5.com.mk/ostra-reakcija-na-evrejskata-zaednica-vo-makedonija-za-imeto-vancho-mihajlov/a526083.

242 North Macedonia, Commission for Prevention and Protection against Discrimination, Association of World War II Veterans and their supporters (Sojuz na borci od NOB Bitola) vs CSO Cultural Club 'Ivan Mihajlov', decision of 13 October 2022.

243 North Macedonia, Law Amending and Supplementing the Law on Political Parties, *Official Gazette* No. 236/2023, http://88.85.126.176/PregledNaZakon.aspx?id=61033; Law Amending and Supplementing the Law on Associations and Foundations, *Official Gazette* No. 239/2023, http://88.85.126.176/PregledNaZakon.aspx?id=61071.

parties organised around the same forms of hatred, etc, or calling upon persons and events of the past tied to fascism, Nazism, national-socialism, or the Third Reich. Finally, a ban was added for the name, symbols, and statute of a political party to refer to the same forms of hatred etc.

The amendments required that all political parties and CSOs align with the new provisions within three months. Media reports indicate that the respondent CSO has been deleted from the central registry due to its failure to align itself with the amendments.[244]

Online source:
Association of World War II Veterans and their supporters (*Sojuz na borci od NOB Bitola*) v CSO Cultural Club 'Ivan Mihajlov'

Actio popularis case of direct and indirect discrimination of Roma minors with substance abuse issues

Racial or ethnic origin

The European Roma Rights Centre brought a collective complaint (*actio popularis*) against the Ministry of Health for lack of treatment or rehabilitation programmes for Romani minors with substance abuse issues. While there is a general lack of such programmes, considering the prevalence of substance abuse among Roma children, this group was disproportionately affected. The Court of First Instance Skopje II found that, by not providing them with treatment or rehabilitation, the Ministry of Health discriminated against Romani minors with substance abuse issues. The court ordered the ministry to open a centre for child substance abuse treatment and to adopt a specific treatment programme within three months from the final date of the judgment.[245] The court also found a violation of the right to health protection of all children that abuse drugs.

This case is important for several reasons. First, it is the first final verdict of an *actio popularis* case in front of the national courts following the adoption of the 2020 Law on Prevention and Protection against Discrimination where the court found discrimination. Secondly, it is a rare example of a successful indirect discrimination case. While the court found discrimination against all children that use drugs, it clearly distinguished the marginalised position of Roma children. Thirdly, it is a pioneering effort by the court to enter into what is usually seen as policy making or policy-decision making and to order the Ministry of Health not only to adopt such a programme, but also to build such a centre.

Online source:
http://www.errc.org/press-releases/north-macedonia-ministry-of-health-discriminated-against-romani-children-with-drug-abuse-problems

Alleged discrimination in the exercise of the right to vote

Disability

The CSO Helsinki Committee for Human Rights (the applicant) had completed a detailed monitoring and analysis of equality and discrimination in relation to the right to vote. On the basis of its findings, it brought a case before the courts of alleged discrimination against persons with disabilities, by the Government, the State Election Commission (SEC), and the Ministry of Local Self-Governance. The first-instance court agreed with the applicant and found that the Government and the SEC had directly discriminated against persons with disabilities, violating the principles of reasonable accommodation

244 DW (2023) 'Bulgaria Reacts Strongly to the Removal of the Club "Ivan Mihajlov"', 23 March 2023, https://www.dw.com/mk/radev-i-bugarskoto-mnr-obvinuvaat-za-krsene-na-principite-na-eu-i-tendenciozno-brisene-na-klubot-ivan-mihajlov/a-65094228.

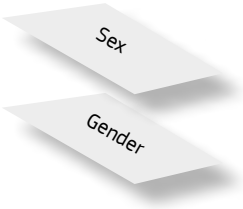
245 North Macedonia, Court of first instance of Skopje, *European Roma Rights Centre v. Ministry of Health*, No. 9П4-884/21, decision of 18 February 2022.

and accessibility.[246] Although the applicant made a clear distinction between the principle of accessibility and the right to reasonable accommodation, this difference was not clearly made by the court.

The court considered that, in a democratic society, it is of utmost importance for the state to protect, and to enable the enjoyment and exercise of the right to vote of persons with disabilities. It further held that making polling stations accessible to persons with disabilities does not cause a disproportionate or undue burden, considering that some polling stations are already accessible. The court found that persons with disabilities should not in any way be identified as sick and infirm people, who due to their health condition are unable to physically access the polling stations and are allowed to vote at home. The court stated that the Government and the SEC should enable persons with disabilities equal and reasonably accommodated access to polling stations, according to the Electoral Code.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Adoption of new gender equality strategy



On 28 July 2022, the Parliament adopted the new national Gender Equality Strategy 2022-2027.

The new Gender Equality Strategy 2022-2027 (GES) was adopted after its predecessor, the National Strategy on Gender Equality 20132020 (old GES), expired. The implementation of the old GES was evaluated and the findings are included throughout the text of the GES; no separate evaluation report was published.

The text of the GES contains several key sections including: legal framework (which discusses the national and international standards of relevance and the links of the GES with other segments of the national policy framework); institutional mechanism on gender equality; the assessment of the current situation regarding gender equality (including in relation to COVID-19 and a specific analysis for several areas including employment, agriculture, environmental protection and climate change, politics and decision-making, health, education and science, women, peace and security, social security, access to justice, sports, culture, media, gender-based violence including stereotypes and sexism and trafficking in persons); and the core of the Strategy composed of priorities per field, linked to aims and specific aims, and expected results and related indicators.

The GES establishes three general aims that are further developed into specific aims, expected results and indicators.

The first aim is to establish an effective and efficient system for advancing gender equality at the central and the local level, which should:

- advance gender mechanisms at the central and local level in line with the legislative framework on advancing gender equality;
- establish a functional system for including the gender perspective in the creation of the policies, programmes, and budget processes at the central and local level;
- establish an effective system for monitoring the situation in relation to gender equality, in line with the international obligations;
- implement the gender perspective in relation to work and the creation of measures and programmes in times of urgency and crisis at the central and local level.

246 North Macedonia, Court of first instance of Skopje, *CSO Helsinki Committee of Human Rights v the Government of the Republic of North Macedonia, State Electoral Commission and the Ministry of Local Self-Governance of the Republic of North Macedonia*, decision of 22 August 2022.

The second aim defined in the GES concerns the improvement of the position of women in all areas of public and private life, which should result in:

- a decrease in the gender gap in the economic participation of women in the labour market, with an intersectional approach;
- advancing the position of women in agriculture through specific measures and policies directed towards affirmation and adequate valuing of their work;
- strengthened mechanisms for the environment and the creation of gender-responsive policies on climate change and climate resistance;
- equal participation of women in decision making at all levels of political and public life;
- equal access to health protection of all women;
- gender-sensitive education and science;
- advancement of gender equality towards positive peace;
- improvement of the approach to social services and the promotion of a gender perspective in social security;
- equal access to justice for all women and men;
- advancement of gender equality in sports;
- advancement of gender equality in culture.

The third aim is to counter gender stereotypes and build a culture of non-violence and non-discrimination on grounds of sex, gender, and gender identity by:

- preventing and fighting against gender-based violence;
- countering gender stereotypes and sexism in promoting equality.

Despite the fact that these are welcome aims, some concerns about the overall document remain. The analysis of the current situation is presented in a fragmented manner, with some areas being detailed whereas others are quite vague. Women are often treated as a homogeneous group, disregarding the fact that different women have different needs and experiences. The extent to which the current situation shaped the aims is questionable, since in some areas it has already been noted that the set aims do not match the description of the current situation, for example in the field of culture.[247] This raises doubts over using the evaluation of the previous strategy in the formulation of the priorities of the new one. In addition, the current situation, the set priorities and specific aims do not approach gender equality as a systemic issue, thus any interventions planned by the strategy can achieve only limited results rather than long-term and systemic ones.[248]

Online source:
https://www.mtsp.gov.mk/content/pdf/2022/strategija_/Стратегија_за_родова_еднаквост_2022_2027.pdf

247 Kotevska, B. (2021), 'Gender, history, and historiography: towards gender sensitive policies which position gender equality as a key priority in the development of the historiography in Macedonia' (*Родот, историјата и историографијата: кон родово сензитивни политики за позиционирање на родовата еднаквост и родовата видливост како клучни приоритети за развојот на историографијата во Македонија*) in: Hadzievska, I. and Kocevska, J., *Archives of the Invisible: Women in the Printed Media in Vardar Macedonia Between the Two World Wars* (*Архиви на невидливите: Жените во печатот од Вардарска Македонија помеѓу двете светски војни*), pp. 139-160, at pp. 154-156.

248 Kotevska, B. (2021), 'Gender, history, and historiography: towards gender sensitive policies which position gender equality as a key priority in the development of the historiography in Macedonia' (*Родот, историјата и историографијата: кон родово сензитивни политики за позиционирање на родовата еднаквост и родовата видливост како клучни приоритети за развојот на историографијата во Македонија*) in: Hadzievska, I. and Kocevska, J., *Archives of the Invisible: Women in the Printed Media in Vardar Macedonia Between the Two World Wars* (*Архиви на невидливите: Жените во печатот од Вардарска Македонија помеѓу двете светски војни*), Skopje, Cinik, pp. 139-160, p. 156.

Adoption of a new national strategy on equality and non-discrimination

All grounds

In August 2022, the Government published a new National Strategy on Equality and Non-discrimination 2022-2026.[249] Although the strategy contains sections on the legal framework and context analysis, its core is composed of general principles and provisions, fields and grounds of protection from discrimination, strategic aims, and mechanisms for implementation and funding.

The vision of the strategy is defined as 'realisation of human rights and establishing of equal opportunities and non-discrimination for all citizens of the Republic of North Macedonia in all areas of social life, including the principle of intersectionality and the gender-transformative approach'. Its mission is defined as 'effective prevention and protection against discrimination through respect of the principle of equality and protection against discrimination for all persons or groups of persons, on the basis of their personal characteristics, and in particular vulnerable social groups'.

The strategy establishes the following as 'key principles and resolutions': participative democracy – consultations; partnership and cooperation; and responsibility. Its general strategic aim is 'effective implementation of activities on prevention and protection against discrimination aiming towards raising the degree of realisation of human rights, equality and non-discrimination'. The strategy sets out the following strategic aims: (1) advancing the legal framework on equality and non-discrimination; (2) strengthening the capacities, advancing the work and coordinating the institutional mechanisms on prevention and protection against discrimination and the promotion of equal opportunities; (3) raising awareness of the different forms of discrimination and promoting the concept of non-discrimination and equal opportunities.

The strategy stipulated that a national coordination body would be responsible for its implementation, run by the Ministry of Labour and Social Policy (MLSP). In October 2022, the national coordination body for monitoring the situation of non-discrimination and the implementation of the legislation, bylaws, and the strategic documents in this area was established by the Government. It will promote the concept of equality and non-discrimination in the policies of all public institutions; monitor the integration of this concept in all sectoral policies in cooperation with the social partners and the institutions from the different areas; monitor the progress of the harmonisation of national law with the EU *acquis* and other European standards pertaining to equality and non-discrimination; participate in the preparation of the national strategy on equality and non-discrimination; follow the periodic reports by state institutions; monitor the implementation of the legislation of relevance for equality and non-discrimination; monitor the implementation of the recommendations provided by the international community pertaining to equality and non-discrimination and establish annual priorities in relation to these; and approve the annual operative plans of the MLSP. The body is composed of members from state institutions, trade unions, CSOs, and independent experts, and is coordinated by the MLSP.[250]

In January 2023, the MLSP proposed, and the Government adopted, the action plan for 2022-2024 for the implementation of the strategy, including budgetary projections for the activities planned. The action plan focuses on (i) adopting new or amending existing legal acts to bring them in line with the Law on Prevention and Protection against Discrimination (LPPD), and (ii) building the capacities of the institutions for effectively implementing the LPPD, including via a multisectoral approach when and as needed. The

249 The strategy has thus far been published in the Macedonian language only. All citations included herein are a translation by the national expert for North Macedonia, Biljana Kotevska.

250 North Macedonia, Decision establishing the National coordination body for monitoring the situation of non-discrimination and the implementation of the legislation, bylaws, and strategic documents in this area, *Official Gazette* No. 218/2022, http://www.slvesnik.com.mk/Issues/6b78b4d883974b73949bf3b72a971f9b.pdf.

action plan also sets out a number of activities for specific fields. The implementation of this action plan, like the strategy, is to be monitored by the national coordination body.[251]

Online source:
Национална стратегија за еднаквост и недискриминација 2022-2026

Equality body Strategy on prevention of structural discrimination and promotion of equality

All grounds

In March 2023, following a series of focus groups with associations that work with marginalised groups (LGBTIQ persons, persons with disabilities, and Roma), the Commission for Prevention and Protection against Discrimination (CPPD) prepared and adopted the Strategy on the prevention of structural discrimination and promotion of the principle of equality of the CPPD.[252] The body relied on the European Commission against Racism and Intolerance's definition of structural discrimination in its General Policy Recommendation No. 2 on equality bodies – revised (2017): 'Structural discrimination refers to rules, norms, routines, patterns of attitudes and behaviour in institutions and other societal structures that, consciously or unconsciously, present obstacles to groups or individuals in accessing the same rights and opportunities as others and that contribute to less favourable outcomes for them than for the majority of the population' (paragraph 20).

The overall aim of the CPPD's policy document, adopted on the basis of its five-year strategic plan (2021-2026), is to guide its work, notably in identifying structural discrimination and the reasons behind it, as well as developing a set of activities and measures that the CPPD can undertake in order to counter and prevent discrimination and promote the public duty of equality. According to the document, the CPPD identified the following priority areas: promotion of equality in society; increasing the visibility of structural discrimination towards marginalised groups; increasing the transparency of the CPPD; and education without discrimination. An evaluation of the implementation of the strategy will be conducted after the implementation period (2023-2026) expires.

Norway NO

CASE LAW

Widespread misgendering of transgender person seen as harassment

Transgender

The case concerned the question whether a hospital had breached the duties to prevent and stop ongoing harassment as defined in the Anti-Discrimination and Equality Act (GEADA).[253]

The complainant, A, had on several occasions been a patient at hospital X. She informed them of her gender identity, but most of the employees at the hospital continued to misgender her, even in front of other patients. This led to a widespread misgendering of her during her stays at hospital X and made her situation significantly more difficult than necessary. A obtained recommendations from the Anti-Discrimination and Equality Ombud regarding the hospital's duties concerning misgendering and the

251 North Macedonia, Action plan with budget implications for the period 2022-2024 for implementation of the National Strategy on Equality and Non-discrimination 2022-2026, website of the Ministry of Labour and Social Policy, https://www.mtsp.gov.mk/content/word/2023/AP_Strategija_ednakvost_2022_2024.docx.

252 North Macedonia, Commission for Prevention and Protection against Discrimination (2023), *Strategy on Prevention of Structural discrimination and Promotion of the Principle of Equality 2023-2026*, https://kszd.mk/wp-content/uploads/2023/03/Стратегија-за-превенција-на-структурната-дискриминација-и-промоција-на-прнципот-на-еднаквост-на-КСЗД.pdf.

253 Norway, Anti-Discrimination and Equality Act (*Antidiskriminerings- og likestillingsloven*) 16 June 2017, Article 13(6).

Anti-Discrimination and Equality Act (GEADA). These recommendations were forwarded to the hospital's management.

A repeatedly asked the hospital to train its personnel in gender identity issues, and even managed to obtain an offer to have a free training session with a well-known medical doctor in the field of transgender healthcare. However, the training was refused on the basis that 'not everyone could deal with everything'.

There were no procedures for patients reporting harassment, only for employees. However, after a while the complainant, A, managed to make a formal complaint to the hospital, after which the issue was raised among the staff and the guidelines from the Anti-Discrimination and Equality Ombud were communicated. During the last two of A's stays at the hospital, no misgendering was reported.

The Equality and Anti-Discrimination Tribunal found that the lack of procedures for patients to report harassment constituted a breach of the duty to prevent harassment in the GEADA Article 13(6).

Since the hospital had taken action to stop the widespread misgendering, and even succeeded in stopping the misgendering, it was not found to have breached the duty to prevent further harassment following the GEADA Article 13(6). This duty is not a duty of result, but of effort. The effort by the hospital was found to be sufficient to fulfil this duty.

The Tribunal did not assess whether the misgendering constituted harassment according to the GEADA Article 13(2). However, it was taken as a given that this constituted harassment during the assessment of whether the duty to prevent further harassment was fulfilled.

This decision constitutes a clarification of the duties of healthcare institutions regarding non-discriminatory healthcare for transgender persons.

The decision focuses on the duties to prevent harassment, and to try to stop ongoing harassment as soon as the management is notified. It is unfortunate that, in this case, the misgendering was not assessed with a view to the criteria in Article 13(2) of what constitutes harassment. The duty of the hospital management to provide some degree of training and guidelines regarding inclusive healthcare for transgender persons is also not entirely clear, as the decision focuses only on the need for notification procedures for patients regarding the hospital's prevention duties. However, the decision makes it clear that misgendering may constitute harassment and that healthcare providers in general have a duty to provide inclusive healthcare. This means acknowledging a person's gender identity. The Equality and Anti-Discrimination Tribunal emphasises the importance of respect for gender identity especially for patients at a hospital.

Healthcare for transgender persons is a difficult and contested topic in Norway. The specialised unit for transgender healthcare at the National Hospital has been criticised by many in the transgender community for decades. The unit has repeatedly been accused of using a paternalist and stereotype-based approach, which sometimes takes the shape of misgendering and other ways of disregarding and/or overruling the gender identity of their patients. It remains to be seen how the GEADA may be applied to the specialised units for transgender healthcare. However, misgendering has now been recognised by the Tribunal as possible harassment, with the subsequent duties to prevent and stop it on a general basis.

Online source:
https://diskrimineringsnemnda.no/media/8822/22-269-offentlig-versjon-av-nemndas-vedtak-og-uttalelse.pdf

Rare court judgment on alleged harassment and victimisation

Racial or ethnic origin

Disability

The claimant is a young man with dark skin and some mental health issues. He brought a case before the courts against his former employer for three different instances of alleged harassment and one instance of alleged victimisation. The court ruled on the case in March 2023.[254]

The first instance took place when the claimant was an apprentice. He took many mental breaks using his mobile phone for the sake of his mental health, although this had not been clearly agreed upon with the employer. One of his colleagues addressed him in a brusque manner, saying that he worked too slowly and that he didn't pay attention. The court concluded that these statements did not amount to harassment.

Another incident concerned another colleague, who called the claimant 'a negro', equalling this to calling someone 'Polish' or 'Chinese'. The court found that such a statement constituted harassment on the basis of ethnicity, despite the lack of malicious intent.

The third instance of alleged harassment concerned comments made by a colleague who stated that the claimant needed to 'toughen up' and 'tolerate more' during a conversation about his need to sometimes arrive late at work because of his mental health issues. The court found that these statements did not amount to harassment.

Finally, when the claimant had mentioned to his employer that he might bring the case to the attention of the media, the employer had responded that they would then tell their side of the story, which would naturally include revealing the claimant's mental health issues. The claimant had argued that this amounted to victimisation, but the court disagreed and dismissed this claim.

The claimant was awarded damages for non-pecuniary losses of approximately EUR 2 500 (NOK 25 000).

Dismissal due to refusal to abide by dress code does not amount to discrimination

Gender

Racial or ethnic origin

Religion or belief

The complainant is a Muslim woman of Somali origin. She had worked for the employer since 2001, as a cleaner with additional duties regarding evacuation of the building in case of emergencies. For religious reasons, she did not wish to wear trousers, so for several years she had sewn her own skirt so as to resemble the uniform trousers as closely as possible. In 2015, she was told by her manager that she had to wear trousers at work but was upon request given dispensation from this demand. From 2018, the employer provided her with skirts. In 2019, she fell during the evacuation after a fire alarm, and she was afterwards told that she could no longer wear skirts at work. Having refused to comply, she was later dismissed.

The complainant claimed that the danger of falling because of her skirt was exaggerated and lacked factual substance. She further claimed that the requirement that she should wear trousers at work, and the ensuing dismissal, amounted to direct discrimination on the basis of a combination of gender, ethnicity and religion.

In February 2023, the Court of Appeal ruled that the requirement to wear trousers did not amount to direct differential treatment and found that it was justified indirect differential treatment.[255]

254 Norway, Court of first instance, judgment of 8 March 2023 No. TRAB-2022-78683.

255 Norway, Borgarting Court of Appeal, judgment of 27 February 2023 in case No. LB-2022-97422. See also, after the cut-off date for this issue, Supreme Court judgment of 27 July 2023 in case No. HR-2023-1217-U.

POLICY AND OTHER RELEVANT DEVELOPMENTS

New action plan for gender, sex and sexuality diversity (2023-2026)

Gender
Sex
Sexual orientation

Some 40 % of LGBTIQ+ persons report having experienced hate crimes in the last two years, although only 8 % of them had reported it to the police. A terrorist attack on the LGBTQI+ community in June 2022, where two persons were killed and many wounded, has added to the need for action from the Government. On 27 January 2023, a new action plan for gender, sex and sexuality diversity was adopted.[256]

The three main goals of this action plan are:
1. Improve the quality of life of LGBTQI+ persons
2 Improve the fulfilment of the rights of LGBTQI+ persons
3. Increase the acceptance of sex, gender and sexuality diversity in the population at large.

The three main target areas are:
1. LGBTQI+ persons with ethic minority background or belonging to religious communities.
2. Transgender persons and persons with gender incongruence.
3. Inclusive sports.

Minister for Equality and Culture announces an evaluation of the Equality and Anti-Discrimination Tribunal

All grounds

The Ministry for Equality and Culture has received a number of complaints and concerns regarding the mandate, available sanctions and quality of the assessments by the Equality and Anti-Discrimination Tribunal. The latter includes a lack of understanding of racism and a lack of representation of the groups concerned among the members of the Tribunal. Even the Equality and Anti-Discrimination Ombud asked for an evaluation earlier this year.[257]

On 8 March 2023, the Minister for Equality and Culture announced during a session of Parliament that she had initiated a process for evaluation of the Tribunal, including access to justice issues such as legal aid, effective remedies and fair process. The number of dismissals and rejections of cases will be assessed, as well as the issue of representation and knowledge of the different grounds of discrimination.[258]

White paper on the use of sign language

Disability

In a white paper published on 13 June 2023 on the use of sign language, the current situation of sign language in Norway was assessed by a group of experts.[259] Their target groups included ethnic and linguistic minorities, and persons with types of disabilities other than hearing and speech impairments.

The paper made six recommendations:
1. Strengthening the access to Norwegian Sign Language communities and arenas for children. This includes access to regional training centres where sign language is used among pupils and others.

256 Norway, Government action plan for gender, sex and sexual diversity (2023-2026), Regjeringens handlingsplan for kjønns- og seksualitetsmangfold (2023–2026).
257 Norway, Equality and Anti-Discrimination Ombud, Request of evaluation of the Equality and Anti-Discrimination Tribunal, LDO - Ber om evaluering av Diskrimineringsnemnda.
258 Norway, Written questions to Parliament, 8 March 2023, Skriftlig spørsmål - stortinget.no.
259 Norway, White paper, NOU 2023:20, 'Sign language for life. Proposal for a comprehensive policy for Norwegian Sign Language', available at: https://www.regjeringen.no/contentassets/391e600a691147d9a38233afb54cb6a0/no/pdfs/nou202320230020000dddpdfs.pdf.

This should be done in addition to the municipalities' duty to provide basic knowledge of Norwegian Sign Language to individual pupils.
2. Access to sign language as early as possible after loss of hearing, including to close relatives of the person who has lost their hearing. This includes letting deaf refugees live in the same reception centres, and, when they receive their residence permit, to reside close to sign language arenas.
3. Strengthening the quality of education in sign language.
4. Strengthening the knowledge among teachers, as well as increasing the number of teachers who know sign language.
5. Providing non-discriminatory public services. This includes mainstreaming of legislation and regulations with a view to sign language users. The right to a sign language interpreter should be stated in law. A number of concrete measures are suggested to make equal access to public services a reality.
6. Research and documentation, including the creation of a national centre for sign language in education.

This is a particularly comprehensive and thorough evaluation and is therefore likely to have significant impact. It is also rare that the term discrimination is mainstreamed into a report on a group of persons with disabilities, since the tendency has been to focus on welfare issues and legislation.

Poland PL

LEGISLATIVE DEVELOPMENTS

Introduction of significant changes to the Law on Counteracting Domestic Violence

Gender

On 9 March 2023, the Law on Amendments to the Law on Counteracting Domestic Violence and Certain Other Laws was enacted.[260] The amendment entered into force on 22 June 2023. The reasoning indicates that the bill brings the current law in line with the Istanbul Convention (IC) and EU law:

> 'the introduction of amendments to the Law of 29 July 2005 on Counteracting Domestic Violence is also necessary due to the obligations arising from the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (IC) ratified by the President of the Republic of Poland on 13 April 2015, and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/22/JHA'.[261]

The most notable changes include:

- a change in nomenclature – 'family violence' was renamed 'domestic violence' and 'victims of family violence' was renamed 'victims of domestic violence';
- changing the definition of violence;
- expansion of the circle of protected persons to include ex-partners not living together;
- inclusion of children – witnesses to violence – in the category of persons experiencing violence;
- introduction of the concept of economic violence and cyber-violence;

260 Poland, Law on Amendments to the Law on Counteracting Domestic Violence and Certain Other Laws, 9 March 2023, Journal of Law of 2023, item 535.
261 Explanatory memorandum to the draft law, Parliamentary Print No. 2799, s. 2, source: https://orka.sejm.gov.pl/Druki9ka.nsf/0/110C524A5C435D3AC12589050032B8B6/%24File/2799-uzas.docx.

- changing the rules for the work of interdisciplinary teams and existing working groups that handle the 'Blue Card' procedure;[262]
- establishment of a standard for basic services provided by specialised support centres for people experiencing domestic violence.

The amendment changes the title of the law from 'the Law on Counteracting Violence in the Family' to 'the Law on Counteracting Domestic Violence'. The change makes Polish laws more consistent with the terminology of the IC. However, the rationale behind the change raises doubts. The legislature states that 'the current name of the law stigmatises the family and indicates that only the family is the environment in which acts of violence occur',[263] whereas the legislature is of the opinion that most acts of violence occur in informal relationships, which is a position that remains at odds with available data and research findings.[264] The Law's failure to separately address violence against women remains disappointing.[265]

The most important changes bringing Polish law in line with the provisions of the Convention include changing the definition of violence to include the concept of economic violence and expanding and clarifying the definitions of a person suffering domestic violence and a person who engages in domestic violence in a way that extends protection to former spouses or partners, including when they no longer share a place of residence.

According to the new definition, domestic violence should be understood as

> 'a single or repeated intentional act or omission, using physical, mental or economic superiority, violating the rights or personal property of a person suffering domestic violence, in particular, exposing that person to danger of loss of life, health, property, violating his/her dignity, bodily integrity, freedom, including sexual, causing damage to the person's physical or mental health, causing the person suffering, or harm, limiting or depriving the person of access to financial resources or the ability to work or gain financial independence, or significantly invading the person's privacy or inducing a sense of threat, humiliation, or anguish, including those undertaken by means of electronic communication.' (Article 1(3) of the Law of 9 March 2023, amending the Law on Counteracting Domestic Violence).

While the introduction of the concept of economic violence into Polish law should undoubtedly be evaluated as a step in the right direction, it seems that the provision on economic violence alone is not sufficient.[266] Article 207 of the Criminal Code would need to be amended accordingly so that economic violence would be subject to specific criminal sanctions.

262 The 'Blue Cards' procedure covers all the activities undertaken and carried out by representatives of organisational units of social assistance, municipal commissions for solving alcohol problems, the police, education, and health protection in connection with a justified suspicion of the occurrence of violence in the family. Za: The 'Blue Cards' Procedure – basic information (*Procedura 'Niebieskie Karty' – podstawowe informacje*), State Agency for the Solution of Alcohol-Related Problems (*Państwowa Agencja Rozwiązywania Problemów Alkoholowych PARPA*), https://www.parpa.pl/phocadownloadpap/Przeciwdzialanie/Procedura%20Niebieskie%20karty%20-%20podstawowe%20informacje%20-%20broszura.pdf.

263 Poland, Explanatory memorandum to the draft law, Parliamentary Print No. 2799, source: https://orka.sejm.gov.pl/Druki9ka.nsf/0/110C524A5C435D3AC12589050032B8B6/%24File/2799-uzas.docx., p. 2.

264 Rojek-Socha, P. and Matłacz, A. (2023) 'Domestic violence not only in the family – amendment published' (*Przemoc domowa nie tylko w rodzinie – nowelizacja opublikowana*), 22 March 2023, *Prawo.pl, źródło*, available at: https://www.prawo.pl/prawnicy-sady/przemoc-domowa-nowelizacja-ustawy-o-przemocy-w-rodzinie,510938.html.

265 Chrzczonowicz, M. (2022) 'New law on domestic violence in the Sejm. Minister: 'More violence in informal relationships.' (*Nowa ustawa o przemocy domowej w Sejmie. Ministra: 'Więcej przemocy w związkach nieformalnych'*), 10 December 2022, *OKO Press*, available at: https://oko.press/nowa-ustawa-o-przemocy-domowej-w-sejmie-ministra-wiecej-przemocy-w-zwiazkach-nieformalnych.

266 Poland, Law of 9 March 2023 on amending the Law on Counteracting Domestic Violence and some other laws (*Ustawa z dnia 9 marca 2023 r. o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie oraz niektórych innych ustaw*) (JoL of 2023, item. 535), source: Infor legal database: https://www.infor.pl/akt-prawny/DZU.2023.080.0000535,metryka,ustawa-o-zmianie-ustawy-o-przeciwdzialaniu-przemocy-w-rodzinie-oraz-niektorych-innych-ustaw.html.

An important legal change is the extension of legal protection to children – witnesses of violence – and former spouses and partners. It was pointed out that the perpetrator of violence can be the closest person within the meaning of Article 115(11) of the Criminal Code,[267] but also another related or unrelated person in a de facto relationship, regardless of the fact of cohabitation and housekeeping, persons living and householding together, as well as a former spouse, former partner, or another family member.[268]

Online source:
https://www.infor.pl/akt-prawny/DZU.2023.080.0000535,metryka,ustawa-o-zmianie-ustawy-o-przeciwdzialaniu-przemocy-w-rodzinie-oraz-niektorych-innych-ustaw.html.

Transposition of Directive 2019/1158 on work-life balance

Gender

On 26 April 2023, the regulations implementing Directive 2019/1158 on work-life balance into Polish law came into force.[269]

The Government bill amending the Labour Code (LC) and certain other laws concerning the implementation into the Polish legal order of the provisions of two directives of the European Parliament and of the Council – Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union and Directive 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU – was submitted to the Sejm on 11 January 2023.[270] After a drawn-out stage of drafting the bill by the Ministry of Family and Social Policy (which officially began in February 2022),[271] the bill was processed at a fast pace, and was finally adopted on 9 March 2023. As a result, the Law of 9 March 2023, on amending the Labour Code and certain other laws (Journal of Laws 2023, item 641) came into force on 26 April 2023. The general assessment is that the adoption of the above laws means that the Work-Life Balance Directive has been completely transposed into the Polish legal system.[272]

Among the most significant changes made to the LC are the following:

- granting part of the leave related to the birth/adoption of a child exclusively to fathers;
- introduction of additional types of leave and leave from work, triggered in situations requiring care for a next of kin;
- additional solutions for caregivers of children up to the age of eight in terms of the possibility of using flexible work arrangements;
- greater protection for employees exercising caregiving rights and flexible work arrangements.

The current work-life balance legislation applies to all employees in the public and private sectors regardless of the size of the company or organisation. The provisions apply to full-time and part-time employees, fixed-term and permanent employees, and temporary agency workers.

267 According to Article 115(11) of the Criminal Code 'The closest person is a spouse, ascendant, descendant, sibling, relative in the same line or degree, a person in an adoption relationship and their spouse, and a person in cohabitation'.
268 Wolters Kluwer (2023) 'Countering domestic violence – revolutionary changes added' (*Przeciwdziałanie przemocy domowej – rewolucyjne zmiany*), 31 March 2023, available at: https://www.wolterskluwer.com/pl-pl/expert-insights/przeciwdzialanie-przemocy-domowej-rewolucyjne-zmiany-2023.
269 Poland, Amendments to the Labour Code 2023 (implementation of EU directives including work-life balance), (*Zmiany przepisów Kodeksu pracy 2023 (implementacja dyrektyw UE w tym work-life balance*)), 27 March 2023.
270 Sejmowych, B. A. (2023) 'The course of the legislative process', Print No. 2932, source: https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=2932.
271 Ministry of Family and Social Policy, The course of work on the bill before it was submitted to the Sejm, data from the Government Legislation Centre website, https://legislacja.rcl.gov.pl/projekt/12356556/katalog/12855403#12855403.
272 Poland, Act amending the labor code and certain other acts *(r. o zmianie ustawy – Kodeks pracy oraz niektórych innych ustaw)*, 9 March 2023.

The new parental and paternity leave arrangements include:

- extending parental leave to 41 weeks (or 43 weeks in the case of multiple births);
- introduction of nine weeks of non-transferable parental leave for exclusive use by each parent;
- changing the amount of maternity benefit – 70 % of the salary for the entire period of parental leave;
- detaching the father's right to parental leave from whether the child's mother remained covered by the social security system on the date of delivery.

Solutions to facilitate the care of children and other relatives include:

- the possibility of *force majeure* leave in situations of urgent family matters due to illness or accident (maximum 2 days or 16 hours per calendar year). The employee will receive half of the salary for this time off, calculated as vacation time equivalent.
- the possibility to take unpaid care leave granted to provide personal care or support for serious medical reasons to a person living in the same household, as well as to the father, mother, children, and spouse (up to five days per calendar year).

The legislature has introduced several solutions regarding the possibility of taking advantage of flexible work arrangements, which create a rather complicated patchwork of entitlements that may be used depending on specific circumstances (e.g. being on any of the types of leave dedicated to childcare, the child's age, the child's health condition, etc). Amendments to the LC provide the opportunity for an employee raising a child up to the age of eight to request that flexible work arrangements be applied to him or her, through: part-time employment, the use of mobile working time, a shortened work week system, an intermittent working time system, weekend work or an individual work schedule. When considering the application, the employer should take into account the needs of the employee, as well as the needs and capabilities of the workplace, including the need to ensure the normal course of work, the organisation of work or the type of work performed by the employee. The employer must inform the employee in writing within seven days about the consideration of the application. Employees in the categories specified in the LC may also apply to work remotely. The employer is obliged to grant such a request unless it is not possible due to the organisation of work, or the type of work performed by the employee.[273]

The scope of the legislation is in line with the Directive's objectives. To what extent the provisions introduced will prove effective in practice will only be verifiable after some time of application.

CASE LAW

Sex

Sentence against activist helping to perform abortions

On 14 March 2023, the Warszawa-Praga Południe Regional Court ruled in a case against an activist of the Abortion Dream Team, who was charged with assisting in an abortion. This is the first verdict in which an activist rather than a doctor is accused of assisting with an abortion.[274] The Abortion Dream Team is one of the most well-known initiatives in Poland working in favour of abortion.

273 Włodarski, B. and Piasecka, A. (2023) 'Amendments to the Labour Code – implementation of the work-life balance directive in Poland' (*Zmiany do Kodeksu pracy – wdrożenie dyrektywy work-life balance w Polsce*), 11 April 2023, *PwC Studio*, Prawo i Podatki, source: https://studio.pwc.pl/aktualnosci/prawo/wdrozenie-dyrektywy-work-life-balance-w-polsce#:~:text=Przepisy%20implementuj%C4%85ce%20dyrektyw%C4%99%20wejd%C4%85%20w%20%C5%BCycie%20do%20polskiego,ustawy%20-%20Kodeks%20pracy%20oraz%20niekt%C3%B3rych%20innych%20ustaw.

274 *Rzeczpospolita* (2023) 'First such sentence in Poland. Activist convicted of aiding abortion', (*Pierwszy taki wyrok w Polsce. Aktywistka skazana za pomoc w aborcji*), 14 March 2023, source: https://www.rp.pl/prawo-karne/art38121991-pierwszy-taki-wyrok-w-polsce-aktywistka-skazana-za-pomoc-w-aborcji.

The proceedings took place against the background of the following facts: a pregnant woman who wished to have an abortion was prevented by her violent husband from going to a clinic abroad. As the shipment of the abortion kit, ordered outside of Poland, was late, she contacted the Abortion Dream Team. Subsequently, the accused activist sent the woman her own abortion pills.

The husband confiscated the pills and reported the activist to the police. It is reported that the pregnant woman did not terminate her pregnancy, but later miscarried. As a result of the report, the prosecutor's office charged the activist with 'assisting in an abortion' and 'possession of drugs without a permit with the aim of placing them on the market'. The ultra-Catholic organisation Ordo Iuris represented the interests of the unborn fetus in the trial, and demanded that the activist be sentenced to an absolute prison term. By the court's verdict, the activist was found guilty of violating Article 152 paragraph 2 of the Penal Code by assisting in an abortion. She was acquitted of the charge of possession of drugs with intent to place them on the market. The court punished the activist with 8 months of restriction of liberty by performing unpaid work for 30 hours per month. The reasons for the sentence were kept secret. The activists announced that they will appeal the decision.

This case illustrates that State policy towards women's reproductive rights is becoming increasingly restrictive. Women's reproductive rights are being systemically curtailed. The judgment described (and in particular the rapid promotion of the judge who handed it down) is another manifestation of the general policy of the State aimed at increasing control over the reproduction of women, in particular limiting the possibility for women to freely make decisions about their bodies and procreation plans.

The tragic situation of women unable to make free and safe procreative decisions is also discussed in a report on the situation of Ukrainian female war refugees in Poland, Romania, Slovakia, and Hungary, which was produced in cooperation between the international NGO Centre for Reproductive Rights and seven organisations operating in the countries indicated.[275] The report describes Poland's restrictive anti-abortion law, which in practice makes it impossible for Ukrainian women to terminate their pregnancies, even if the pregnancy is the result of a wartime rape. Although abortion is technically not illegal when it is the result of sexual violence (or where a patient's health or life is at risk), in practice it is almost impossible to access an abortion even in these exceptional situations. In order to obtain legal abortion following rape, for which there is a 12-week time limit, Polish law requires the victims to report the incident to the police and obtain a prosecutorial certificate before abortion care can be provided. If Ukrainian women affected by wartime sexual violence do not want to report the rape, or are too advanced in their pregnancy, they find themselves in a no-win situation in Poland. The amount of time that it takes for the prosecutor's office to deal with a rape report can also be a problem. As the report points out: 'As a result, numerous refugees avoid seeking sexual and reproductive healthcare at all because they cannot afford it, or they return to war-torn Ukraine because they believe they can obtain affordable care more easily there'.[276]

Authors of the report made recommendations to the Government of Poland, including:

- removing the requirements mandating survivors of rape to obtain a prosecutor's certificate prior to abortion;
- issuing clear guidance for medical providers and hospital facilities on the requirements and process for access to legal abortion care;

275 Centre for Reproductive Rights (2023) *Care in Crisis. Failures to Guarantee the Sexual and Reproductive Health and Rights of Refugees from Ukraine in Hungary, Poland, Romania, and Slovakia*, available: https://reproductiverights.org/wp-content/uploads/2023/05/Care-in-Crisis_5-16-23_v2.pdf.

276 Centre for Reproductive Rights (2023) *Care in Crisis. Failures to Guarantee the Sexual and Reproductive Health and Rights of Refugees from Ukraine in Hungary, Poland, Romania, and Slovakia*, p. 18, available: https://reproductiverights.org/wp-content/uploads/2023/05/Care-in-Crisis_5-16-23_v2.pdf.

– taking effective regulatory, oversight and enforcement measures to ensure that access to legal abortion services is not delayed or undermined in practice.[277]

POLICY AND OTHER RELEVANT DEVELOPMENTS

Polish cities adopt the European Charter for Equality of Women and Men in Local Life

Gender

On 11 October 2022, during the Local Trends meeting[278] in Poznań, 16 Polish cities signed the European Charter for Equality of Women and Men in Local Life. The signing ceremony of the Charter was organised by the Council of European Municipalities and Regions (CEMR) and the Association of Polish Cities. The Charter was signed by presidents or mayors of: Bydgoszcz, Chełmno, Jasła, Krosno, Lublin, Ostrów Wielkopolski, Płońska, Poznań, Pruszków, Puck, Skarżysko Kamienna, Sopot, Świdnica, Wałbrzych, Wołomin and the capital of Poland, Warsaw.

The Charter for Equality of Women and Men in Local Life is based on six principles, including, the recognition that equality between women and men is a fundamental right, that the balanced participation of women and men in decision making is a prerequisite for a democratic society, and that the elimination of gender stereotypes is the basis for achieving equality between women and men.[279] The signing of the Charter is a public commitment that means recognising diversity and ensuring equal rights and opportunities for women and men in all areas of life and spheres of functioning influenced by local government. Until recently the Charter had been signed only by three Polish local government authorities.

The European Charter for Equality of Women and Men in Local Life, which was produced 15 years ago by the Council of Municipalities and Regions of Europe, is still little known in Poland. Attempts to implement it have led to controversy in traditional, national and Catholic circles. Signing the Charter is a kind of demonstration and an important pro-equality declaration, which is especially difficult in the current political context, when at the same time many local governments in Poland contest equality on the basis of sexual orientation and transgenderism by adopting various documents stating that a given area is a 'LGBT-free zone' or a 'zone free from LGBT ideology'.[280]

In the recent past, the signing of the European Charter for Equality of Women and Men in Local Life by local authorities often met with repercussions from central Government representatives.

PT Portugal

LEGISLATIVE DEVELOPMENT

Transposition of Directive 2019/1158 into national legislation

Gender

Directive 2019/1158 of 20 June 2019 on work-life balance (the WLB Directive) was recently transposed into national legislation by Law No. 13/2023 of 3 April 2023,[281] which entered into force on 1 May 2023.

277 Centre for Reproductive Rights (2023) *Care in Crisis. Failures to Guarantee the Sexual and Reproductive Health and Rights of Refugees from Ukraine in Hungary, Poland, Romania, and Slovakia*, p. 84, available: https://reproductiverights.org/wp-content/uploads/2023/05/Care-in-Crisis_5-16-23_v2.pdf.

278 The Local Trends event website: https://www.localtrends.pl/pl.

279 Council of European Municipalities and Regions (CEMR), European Charter for Equality of Women and Men in Local Life, https://ccre.org/img/uploads/piecesjointe/filename/charte_egalite_pl.pdf.

280 Council of European Municipalities and Regions (2021) '16 pioneering cities commit to going above and beyond for local equality', press release 8 October 2021, https://www.ccre.org/en/actualites/view/4225.

281 Portugal, Law No. 13/2023, 3 April 2023, available at www.dre.pt.

Not all the provisions from the WLB Directive had to be transposed into domestic legislation as the Portuguese legal system already covers most of its provisions, and in some cases national provisions are more favourable to employees than EU law. The areas where Law No. 13/2023 of 3 April 2023 introduced more significant changes relate to parental leave and to care leave, and other rights granted to the worker with care responsibilities aside from parenting.

However, some problems may remain in relation to the transposition of the WLB Directive in respect of parental leave, care leave, and the social security protection attached to some types of leave.

1. Parental leave

Article 51 of the Labour Code (LC) already establishes the right to parental leave, which is called 'additional parental leave'. This leave can be taken until the child is 6 years old and its duration is 3 months (when taken on a full-time basis) or 12 months (when taken part-time) or a combination of the two systems. This leave provides a right to a social security allowance that corresponds to 25 % of the average salary of the worker for the first 3 months of the leave, but only if the leave is taken immediately after maternity leave.[282]

However, in addition to this leave, Articles 52 and 53 of the LC establish two other types of family-related leave: the 'special leave to assist children aged under 12 years', and the 'special leave to assist a handicapped or chronically ill child or a child with cancer', regardless of their age. On the one hand, these types of leave are granted in periods of six months that can go on for a maximum period of two, three or four years according to the specific situation. On the other hand, these types of leave only give the right to a social security allowance in very limited situations, not for the full duration of the leave, and under strict conditions, including a strict upper limit for the compensation.[283]

Despite the two inconsistencies of the Portuguese legal system when compared with the EU parental leave regime (e.g. the duration of this leave being limited to three months and the maximum age of the child being fixed at six years old), in the past it was possible to hold that the national provisions were in compliance with EU law, because if those types of leave were considered together, national provisions met, and even went beyond the requirements of the Directive as regards parental leave.

However, in view of the changes introduced by the WLB Directive as regards parental leave, three problems may now arise in the national regulation of this leave: a problem related to horizontal provisions, and two problems related to the payment of the leave.

First, the level of protection that is granted to workers that take the 'additional parental leave' is higher than the level of protection for workers that take the subsequent special types of leave to assist a child, especially as regards dismissal and the taking into consideration of the period of the leave for several purposes, including seniority (Articles 63 and 65/6 LC). Therefore, if some part of these types of leave is to qualify as 'parental leave' for the purpose of the Directive, a possible lack of compliance of the national legal rules may arise.

As regards the payment of the leave, two problems may arise.

First, only the 'additional parental leave' gives a right to a social security allowance during the first three months and only if the leave is taken immediately after maternity leave. Therefore, since Article 8(1) of the Directive now establishes that parental leave gives the right to 'adequate compensation' for the whole duration of the leave, the Portuguese legal system may not be in compliance with EU law, because it does not grant the payment of the leave for four months and it does not grant that payment at all when

282 Portugal, Decree-Law No. 91/2009, 9 April 2009, Articles 16 and 33.
283 Portugal, Decree-Law No. 91/2009, 9 April 2009, Articles 20 and 36.

the leave is not taken immediately after maternity leave. Secondly, it is yet to be established whether a social security compensation of 25 % of the average salary is to be considered as an 'adequate compensation' for the purposes of Article 3(1) of the Directive.

2. Care leave

Law No. 13/2023 of 3 April 2023 has also added a new section to the LC, dedicated to the rights of workers with care responsibilities within the family aside from parenting (Articles 101-A to 101-G).

In short, these rights are the following: right to care leave of 5 working days per year for the purpose of assisting a severely dependent person (Article 101-B LC); right to work part-time (Article 101-C LC); right to flexible working time arrangements (Article 101-D LC); right to accrued protection in dismissal (Article 101-F LC); right to refuse extra work (Article 101-G LC); right to time off for 15 days per year for *force majeure* reasons related to the dependent person (Article 252(2) LC).

Specifically as regards 'care leave', Article 101-B LC is fully in line with Article 6 of Directive 2019/1158. And the fact that this leave goes along with the time-off measure of Article 252 LC allows for the conclusion that the Portuguese legal system goes beyond the requirements of the Directive.

However, a problem arises from the notion of 'worker with care responsibilities' that is established at national level, because this notion is very strict. In fact, under Article 101-A LC, all rights that are now granted to the worker with care responsibilities depend upon the fact that he/she already formally qualifies as a 'secondary informal carer' under the Legal Statute of Informal Carers.[284] However, the qualification of such carers as established by that Statute is difficult, as it depends on very strict conditions.

As a result, it is possible to anticipate that most workers with care responsibilities will not be able to take the care leave established in Article 101-B, because they do not formally qualify as 'secondary informal carers' under the applicable legal statute.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Annual report of the Commission for Equality and Against Racial Discrimination (2021)

Racial or ethnic origin

On 9 August 2022, the Commission for Equality and Against Racial Discrimination (CEARD) published its 2021 annual report on discrimination on the grounds of race, ethnic origin, colour, nationality, ancestry and territory of origin. The report gathers statistical and administrative data related to discriminatory practices and sanctions applied, presenting the main trends and developments on the subject for the past year. The report also describes the initiatives of CEARD to promote education, training and awareness-raising on human rights as well as the national policy strategies adopted by the Portuguese Government.

According to the report, 408 complaints were received by CEARD in 2021, representing a decrease of almost 38 % compared to 2020, when 655 complaints were filed. Some 64 % of the complaints received in 2021 concerned alleged discrimination directly targeting specific persons, while almost 25 % concerned alleged discrimination targeting social groups or communities.

The highest number of complaints concerned alleged discrimination in access to goods and services (15 %) or situations on the internet or on social media (14.7 %), while some 7 % of complaints concerned the labour market. Of the 408 complaints received by CEARD, the majority of respondents were private entities (34.6 %) while 21 % of the complaints concerned the public sector, notably police forces and municipal councils.

284 Portugal, Law No. 100/2019 of 6 September 2019 and Decree No. 1/2022 of 10 January 2022.

With regard to the grounds of discrimination, the highest number of complaints concerned nationality (approximately 39 %), followed by skin colour (approximately 17 %), and race and ethnic origin (approximately 17 %). Only 0.7 % of the complaints were related to discrimination on the ground of territory of origin and 3.9 % related to multiple discrimination.

Out of the 408 complaints registered by CEARD, it examined 196 complaints itself, while 212 were subsequently forwarded to other entities with specific competences. Of the 196 complaints examined by CEARD, 85 gave rise to administrative offence proceedings,[285] while 72 were archived due to lack of evidence/information and 39 were still pending. None of the 85 administrative offence proceedings initiated in 2021 led to the issuing of an administrative sanction, while the CEARD standing committee only issued two such sanctions in 2021, which related to proceedings initiated in previous years.

Online source:
https://www.cicdr.pt/documents/57891/574449/Relatório+Anual+2021+-+CICDR.pdf/30d474c4-a771-4c23-b8ea-436d3cc971e6

Report of the Disability and Human Rights Observatory

Disability

In December 2022, the Disability and Human Rights Observatory (ODDH) published the report, *Persons with Disabilities in Portugal – Human Rights Indicators 2022*, presenting the main statistical and administrative data regarding persons with disabilities in Portugal in 2021.[286]

Regarding discrimination, a total of 1 195 complaints of alleged discrimination on the grounds of disability or aggravated health risk were filed with the relevant authorities in Portugal in 2021, which represents an increase of about 16.8 % compared to 2020.[287] The highest number of complaints related to access to healthcare (approximately 40 %), which is a significant increase since 2020, probably caused by the COVID-19 pandemic. Almost 50 % of the complaints filed in 2021 were archived for one of the following reasons: the conflict had been resolved (311), it was established that no discrimination had taken place (206), the complaint was withdrawn (12), lack of evidence of discrimination (9), and 'other reasons' (40).

Regarding employment rates, the overall trend observed in 2021 was a decrease of 4.6 % in unemployment of persons with disabilities, while the overall decrease among the general population was of approximately 17 %. Disaggregated by sex, the data also shows an increase among women with disabilities who are registered as unemployed, compared to men. The report also reveals that in 2020 (latest available data), only 0.59 % of the total human resources of private sector companies with 10 or more employees were persons with disabilities, contrasting with the objective of the private sector quota introduced in 2019.[288] In 2021, some 2.8 % of public sector workers had registered disabilities, which was an increase of 6 % compared to the previous year. This data shows that more women with disabilities (68 %) than men (32 %) are employed in the public sector.

285 Law 93/2017 of 23 August 2017 states that discrimination is a summary offence punishable by a fine, without prejudice to civil liability or the application of other established sanctions (Article 16 (1). The president of CEARD is competent to open an administrative procedure while the standing committee of CEARD is competent to decide whether to impose fines and other administrative sanctions.

286 Disability and Human Rights Observatory (2022), *Persons with Disabilities in Portugal – Human Rights Indicators 2022* (6th edition), presented on 13 December 2022.

287 The report was based on data presented in the annual report of the National Rehabilitation Institute, which is required by law to collect and compile data from all national authorities that are competent to receive complaints of discrimination on the grounds of disability or aggravated health risk.

288 According to Law 4/2019 of 10 January, mandatory quotas of employees with disabilities are imposed on private companies: 1 % for companies with 75 or more employees and 2 % for companies with 250 or more employees. In addition, Decree-Law 29/2001 of 3 February imposes a 5 % quota in the public sector. The report does not provide disaggregated data for companies of different categories, only data for all companies with 10 or more employees.

Regarding social protection, the ODDH report reveals that some 30 % of persons with disabilities were at risk of poverty or social exclusion against approximately 19 % of persons without disabilities. Finally, the report shows that the number of students with disabilities in higher education in the 2021/22 academic year increased by 7.6 % compared to the 2020/21 academic year, and that 1 223 scholarships were awarded to students with disabilities, which represents 1.5 % of the total number of scholarships awarded to higher education students.

Online source:
http://oddh.iscsp.ulisboa.pt/index.php/pt/2013-04-24-18-50-23/publicacoes-dos-investigadores-oddh/item/600-relatorio-oddh-2022

RO Romania

CASE LAW

Constitutional Court revokes the mandate of two of the members of the steering board of the National Council for Combating Discrimination

All grounds

In June 2022, Government Ordinance 137/2000 was amended to include a provision increasing the number of members on the steering board of the National Council for Combating Discrimination (NCCD) from 9 to 11 members.[289] The Parliament subsequently appointed two more members to the steering board. The Parliament decision was challenged before the Constitutional Court by one of the opposition parties, due to the failure to respect the statutory requirement that two thirds of the members should have a law degree. Following the appointments, only 7 out of the 11 members were law graduates. In a prior decision from 2018, the Constitutional Court had specified that this requirement is mandatory.[290]

On 22 February 2023, the Constitutional Court found a violation of the law in the appointment decision due to the lack of compliance with the two-thirds ratio of law graduates. The Court annulled the parliamentary decision, which de facto led to the revocation of the mandate of the two newly appointed NCCD members. While the full reasoning of the Court has not yet been published, the press release of the Court suggests that it maintains the prior position of the Court that the ratio requirement is mandatory and is meant to ensure the effectiveness, legitimacy and professionalism of the equality body.

Online source:
https://www.ccr.ro/wp-content/uploads/2023/02/Comunicat-de-presa-22-februarie-2023.pdf

RS Serbia

CASE LAW

Equality body finds disability discrimination in access to postal services

Disability

A complaint was submitted before the national equality body claiming discrimination against persons with disabilities in access to postal services. Namely, the respondent post office is not accessible for users

289 For further information, see *European equality law review*, Issue 2022/2, p. 128.
290 For further information, see *European equality law review*, Issue 2018/2, pp. 156-157.

in wheelchairs, making it impossible for them to pay bills or send registered mail. The respondent stated that they are a socially responsible company, continuously taking measures to ensure the quality and timeliness of services for all users. Also, new facilities to be opened in the near future will fully ensure accessibility for persons with disabilities. It was further stated that the business programme for 2023 provides financial resources for enabling access to facilities for persons with disabilities.

The Commissioner for Protection of Equality welcomed the respondent's efforts so far in order to ensure the accessibility of post office facilities in Serbia. However, the body still found that the failure to ensure accessibility of the post office amounted to discrimination based on disability.[291]

Equality body decision on age discrimination in access to professional development

Age

A complaint was filed before the equality body against a health centre due to alleged discrimination based on age. It was established that the health centre's 2022 rulebook on the professional development of employees prescribes special conditions based on which the selection of candidates for specialisation is made, namely: age; years of service; average grade at university; length of study; grade in the subject and field for which the candidate applied. The rulebook stipulates that 15 points can be obtained based on years of life (up to 30 years of age); 10 points (up to 40 years of age); or 5 points (up to 50 years of age). The analysis of the criteria showed that candidates who are over 40 years old are scored with a lower number of points compared to younger candidates with the same professional competences, who are thus ranked higher based on their age. Also, by analysing the prescribed criteria, it was determined that the criterion related to the candidate's age is the only criterion that is not related to the candidate's professional abilities, experience, expertise and success in work.

The Commissioner for Protection of Equality found that by prescribing conditions related to different scoring in relation to age, candidates over 40 years old are placed in an unequal position compared to younger candidates. Bearing in mind the goal and the consequences of this method of scoring, the Commissioner underlined that age is neither a real nor a decisive condition for referral to specialisation, taking into account both the nature and specificities under which specialist training is acquired and carried out.[292] The Commissioner ordered the health centre to amend its rulebook in accordance with anti-discrimination law.

Slovakia

SK

LEGISLATIVE DEVELOPMENT

Amendment to the Schools Act to define and address segregation in education

Racial or ethnic origin

Disability

In May 2023, the Parliament adopted an amendment to the Schools Act prepared by the Government, addressing segregation of Roma children in education, exclusion of children with special educational needs and the overall lack of an inclusive approach in education.[293]

The aim of the amendment is to contribute to (i) the reduction of the proportion of pupils who do not attain basic educational skills, (ii) the reduction of the socioeconomic impact on pupils' educational outcomes and (iii) the promotion of equal educational opportunities. Other objectives include increasing

291 Serbia, Commissioner for Protection of Equality, No. 07-00-543/2022-02 of 20 February 2023.
292 Serbia, Commissioner for Protection of Equality, No. 07-00-94/2023-02 of 19 May 2023.
293 Slovakia, Act No. 182/2023 amending Act No. 245/2008 on upbringing and education (Schools Act) and on amendments and additions to certain laws as subsequently amended and amending and supplementing certain laws.

the proportion of pre-school age children participating in pre-primary education, reducing the drop-out rate with a special focus on children with disabilities and social disadvantages, adapting education to the individual needs of each child, and reducing the proportion of disadvantaged children in special education.

The amendment also introduced the following definition of segregation in education: an 'act or omission to act which is contrary to the principle of equal treatment under a special act [*referring to the Anti-Discrimination Act*] and which results or is likely to result in the spatial, organisational, physical or social exclusion or separation of a group of children, pupils, learners or participants in upbringing and education without a reason arising from this Act.' The amendment also specifies that observing the prohibition of segregation in upbringing and education is understood as 'taking measures to prevent and eliminate it.'

The other notable changes include:

- Introducing a legal entitlement for pre-school education from the age of three.
- Amending the definition of special educational needs of children and pupils and introducing a basic framework of eligible support measures in education, to be followed by a catalogue of specific support measures developed by the Ministry of Education. Eligible support measures are those provided by a school/educational establishment, 'necessary to enable a child or pupil to participate fully in upbringing and education and to develop his or her knowledge, skills and abilities.' Providing eligible support measures will be mandatory from 2026.
- Eligibility for primary schools to establish an introductory year for children with communication or mild developmental disabilities who have reached the age of six years, are not continuing compulsory pre-primary education and are not expected to complete the first year of primary school.

The practical impact of these amendments remains to be determined, notably due to the relatively vague and arguably problematic wording of the new definition of segregation.

Online source:
182/2023 Z.z. - Zákon, ktorým sa mení a dopĺňa záko... - SLOV-LEX

CASE LAW

Dismissal of *actio popularis* lawsuit claiming segregation of Roma women at a maternity clinic

Racial or ethnic origin

Gender

In 2013, a human rights NGO filed an *actio popularis* lawsuit under the Anti-Discrimination Act (ADA) against a public hospital, the Ministry of Health as a Government body and founder of the hospital, and against the State (represented by the Ministry of Health). The NGO claimed that the gynaecology and obstetrics wards of the hospital had a long-standing practice of placing Roma women in separate 'Roma rooms' and argued that this practice constituted segregation on the basis of ethnicity and sex. The NGO had been documenting this practice since 2002 and argued that it continued after 2013 and throughout the duration of the proceedings. The NGO requested that the court order the hospital to remove the discriminatory practice, and that it establish the responsibility of the remaining respondents – the State and the Ministry of Health – for failing to take positive measures that would effectively remove the existing segregation.

In July 2022, the district court dismissed the lawsuit, finding that the claimant did not bear its burden of proof to establish a presumption that Roma women were placed in separate rooms because of their Roma origin, despite the testimonies of many victims.[294] The court further held that the placement of Roma

294 Slovakia, District Court of Bratislava III, decision No. 14C/288/2013 of 29 July 2022.

women in a separate room in itself does not necessarily have to constitute unlawful segregation and may be justified by the patients' state of health, the occupancy of the maternity ward, epidemiological measures, as well as the patients' preferences. The court also rejected as irrelevant the opinion of the National Centre for Human Rights (the equality body), which assessed the practice at hand as discriminatory, in violation of the ADA. The claimant appealed against the decision.

Online source:
https://poradna-prava.sk/wp-content/uploads/2022/08/rozsudok-OS-BA-III_romske-izby_anonym.pdf

Supreme Court landmark judgment on segregation of Roma children in primary school

Racial or ethnic origin

In 2015, the NGO Centre for Civil and Human Rights filed an *actio popularis* lawsuit concerning documented segregation of Roma children at a specific primary school. The school was founded by the municipality and had been attended solely by socially disadvantaged Roma children from the nearby marginalised Roma community for many years. In 2015, the authorities had even extended the capacity of the school by adding a low-cost annexe made of metal containers. Non-Roma children living in the area attended other primary schools. The claimant NGO argued that the municipality and the responsible state authorities, including the Ministry of Education, violated national and international anti-discrimination law by not adopting effective measures to eliminate the segregation.

The district court dismissed the lawsuit in October 2016,[295] holding that the claimant did not prove that the education of Roma children in the school was carried out on the ground of their ethnic origin and thus failed to establish *prima facie* discrimination. In 2020, the ruling was fully upheld on appeal by the regional court, which held that the segregation stemmed from demographic development without intentional action by the authorities, and that the Roma parents agreed with the segregated schooling.[296] The claimant filed an extraordinary appeal with the Supreme Court.

The Supreme Court ruling was issued in December 2022 and reversed the judgments of the lower courts.[297] It found that the respondent town and the State, represented by the Ministry of Education, violated the principle of equal treatment by failing to take sufficient measures to eliminate and prevent discrimination on the ground of ethnic origin. The Court specifically held that state institutions are responsible for *de facto* segregation arising as a consequence of demographic development or the setting of school districts.

The Supreme Court also noted the overall importance of desegregation efforts in education, explicitly stating that 'the state, in cooperation with the municipality, must take effective measures (whether by legislative initiative, the creation of incentive conditions or the creation of school districts) to prevent segregation, not just stand by and refer to the strict, often misinterpreted dictum of the law.'

The claimant had also requested that the respondents be ordered to jointly draw up a desegregation plan. In this regard, the Supreme Court returned the case to the district court for further proceeding, considering all facts as well as the enforceability of such a ruling. The district court is still expected to hear this part of the case, while the remainder of this important judgment is final.[298]

Online source:
https://poradna-prava.sk/wp-content/uploads/2023/02/rozsudok-NS-SR-zo-dna-15122022.pdf

295 Slovakia, District Court of Bratislava III, decision No. 11C351/2015-387 of 6 October 2016. See also *European equality law review* Issue 2017/1, pp. 129-130.
296 Slovakia, Regional Court of Bratislava, decision No. 4Co/260/2017–441 of 29 April 2020. See also *European equality law review* Issue 2020/2, pp. 155-156.
297 Slovakia, Supreme Court, decision No. 5Cdo/102/2020 of 15 December 2022.
298 The Supreme Court confirmed this decision in another judgment of 28 March 2023, No. 4Cdo/112/2021, concerning the liability of state authorities for segregation caused by the definition of school catchment areas. Available at: https://poradna-prava.sk/wp-content/uploads/2023/04/uznesenie-NS-SR-Terna-.pdf.

Appeal court judgment on the education of Roma children in special classes for children with intellectual disabilities

Racial or ethnic origin

Three Roma children (the complainants) brought an anti-discrimination lawsuit as part of the strategic litigation programme of the NGO Centre for Civil and Human Rights, arguing that due to insufficient psychological diagnostics by a private centre for special pedagogical counselling (the Centre), they were illegally educated in special classes for children with mild intellectual disabilities. A separate psychological diagnostic test, completed at the request of the parents by an independent psychologist, did not confirm the Centre's diagnosis. In addition to the Centre, the lawsuit also targeted the local primary school. The complainants argued that the school illegally educated them according to the educational plan for children with intellectual disabilities and, moreover, in segregated settings – outside the main school building, separately from the majority children. The lawsuit also underlined that at the time of its submission in the 2015/2016 school year, almost 90 % of school-age Roma children from the nearby segregated Roma community were educated according to the educational plan for children with intellectual disabilities. Finally, the lawsuit also targeted the State, represented by the Ministry of Education.

In November 2021, the district court upheld the lawsuit to a substantial extent, ruling that the Centre and the school had discriminated against the complainants on the ground of their Roma ethnicity, but rejecting the responsibility of the State.[299] Both the complainants and the first two respondents appealed different parts of the first instance decision.

In February 2023, the Regional Court of Prešov dismissed the appeals of the first two respondents, confirming that they had discriminated against the complainants on the ground of ethnicity.[300] Furthermore, it upheld the complainants' appeal and held that the State, represented by the Ministry of Education, was also liable for discrimination, by failing to take effective measures to prevent and eliminate discrimination. In this regard, the Court referred to the landmark judgment of the Supreme Court of December 2022 on the segregation of Roma children.[301] Furthermore, the appeal court noted that the complainants' lack of education is irreversible, and that each of the respondents has undoubtedly contributed to that state of affairs.

Beyond the assessment of the individual case, the appeal court also relied on relevant statistics to note that there is a systematic problem of segregation of Roma children in special education.

The respondents were ordered to apologise in writing and to jointly and severally pay compensation for non-pecuniary damage of EUR 5 000 to each of the complainants (full requested amount). The respondents have submitted an extraordinary appeal before the Supreme Court, which is still pending.

Online source:
https://poradna-prava.sk/wp-content/uploads/2023/05/Anonymizovany-rozudok-KS-PO-diskriminacia-romskych-deti-v-specialnom-vzdelavani.pdf

First-instance court awards compensation in a case of discrimination in access to services

Racial or ethnic origin

In May 2023, the Bratislava District Court finally ruled, at first instance, on a complaint of ethnic discrimination in access to services, which was first submitted in November 2017. The case concerned a man of Roma ethnicity who was refused access to a café although his friend, who is not of Roma ethnicity, was granted access shortly afterwards. Both the claimant and his friend recorded their

299 Slovakia, District Court of Prešov, decision No. 15C/14/2016-557 of 24 November 2021. See also *European equality law review*, Issue 2022/1, pp 140-141.
300 Slovakia, Regional Court of Prešov, decision No. 20Co/21/2022-680 of 28 February 2023.
301 Slovakia, Supreme Court, decision No. 5Cdo/102/2020 of 15 December 2022. See also above, pp. 173.

exchanges with the staff, who confirmed to the friend that their standard practice was to refuse access to Roma customers.

Accepting the recordings as evidence, the court fully upheld the lawsuit, concluding notably that the refusal of access amounted to direct discrimination.[302] The court ordered the respondent to apologise to the claimant and to pay him compensation for non-pecuniary damage in the amount of EUR 1 500 as well as the costs of the proceedings. The court also noted the importance of awarding the full compensation claimed for the purpose of ensuring a wider preventive effect on other service providers.[303]

Online source:
https://poradna-prava.sk/wp-content/uploads/2023/05/rozsudok-OS-BA-I_anonym.pdf

Slovenia

CASE LAW

Equality body finds that denying gynaecological healthcare on grounds of sexual orientation amounted to discrimination

Sexual orientation

The Advocate of the Principle of Equality received a complaint from a homosexual woman who was undergoing an assisted reproduction procedure in Austria, and then sought further medical treatment in Slovenia. Her chosen gynaecologist in Slovenia refused to provide the treatment due to the sexual orientation of the complainant. The gynaecologist had lodged a conscientious objection with the Medical Chamber of Slovenia regarding the provision of all gynaecological medical services to women who are in the same situation as the complainant.

The Advocate received clarifications from the Medical Chamber and its Committee on Legal-Ethical Issues that such a conscientious objection is not admissible as it was not raised in respect of certain medical procedures, but rather in respect of certain procedures exclusively when a certain group of people is concerned. The gynaecologist claimed that she was convinced that her conscientious objection was appropriate, and that she had only been informed that it was not admissible after having already refused to treat the patient. However, she withdrew her conscientious objection after receiving the reply from the Chamber.

The Advocate found that the gynaecologist, by lodging the conscientious objection regarding only homosexual patients going through assisted reproduction procedures and by personally informing the complainant that she should choose another gynaecologist, interfered with the complainant's right to healthcare on the basis of her sexual orientation, thereby infringing the prohibition of direct discrimination.[304]

The Advocate assessed whether such discrimination could be justified within the general exception to the prohibition of direct discrimination under Article 13(1) of the Protection Against Discrimination Act, but concluded that the gynaecologist had failed to meet her burden of proof to demonstrate that the unequal treatment of patients in the case at hand would be permissible under the Act. While

302 Slovakia, District Court of Bratislava I, decision No. 11C/48/2017-132 of 4 May 2023.
303 This first-instance ruling follows the decision of the Constitutional Court No. II.ÚS 470/2022 – 20 of 14 December 2022, which had found that the significant delays in this case had amounted to a violation of the claimant's right to hear the case without undue delay, and had awarded compensation.
304 Slovenia, Advocate of the Principle of Equality decision No. 0700-58/2022/17 of 21 June 2023, available at: https://zagovornik.si/wp-content/uploads/2023/07/Odlocba_Ginekologinja-diskriminirala-pacientko-zaradi-spolne-usmerjenosti.pdf.

conscientious objections can fall within the exception to the prohibition of discrimination, the objection under consideration was discriminatory and is therefore not lawful.

Online source:
https://zagovornik.si/wp-content/uploads/2023/07/Odlocba_Ginekologinja-diskriminirala-pacientko-zaradi-spolne-usmerjenosti.pdf

Equality body finds that the national examination centre discriminated against a student with reading difficulties

Disability

The Advocate of the Principle of Equality received a complaint from the parents of a student with reading difficulties (severe dyslexia and scotopic (Irlen) syndrome) as well as attention deficit disorder. In preparation for the daughter's end of high school exam, the complainants applied to the National Examinations Centre to allow her to use the same accommodation that she had been consistently granted when attending school. The Centre granted her all forms of accommodation except having the exam tasks printed on blue paper or using a transparent coloured foil. Having attended the mock exam without this accommodation, the daughter's results were very poor and she consequently experienced severe health issues. The parents appealed the Centre's decision, arguing that it had prevented their daughter from fully demonstrating her knowledge. Their appeal was rejected by the Ministry of Education, as the Centre argued that the table of possible forms of accommodation for the exam did not provide for the specific form of accommodation requested.

The Advocate of the Principle of Equality found that when refusing to allow the requested accommodation measures, the Centre did not adequately consider the provisions of the Equalisation of Opportunities for Persons with Disabilities Act. The refusal thus resulted in a disadvantageous treatment of the complainants' daughter, and the Centre did not meet its burden of proof to show that it would not amount to discrimination in violation of the Protection Against Discrimination Act.[305] The Advocate referred to the opinion of the Committee on the Rights of Persons with Disabilities to argue that there is a need to replace the exclusively medical model of disability in Slovenia with a social model. By not being able to use the appropriate accommodation, the student was not treated on an equal basis with her peers. In view of this finding of discrimination, the Advocate recommended to the Ministry of Education and the National Examinations Centre that the relevant rules on the conducting of high school exams be interpreted in such a way as to allow the use of coloured transparent foil as a form of accommodation for those students with disabilities who need it.

Online source:
https://zagovornik.si/izdelki/zagovornik-ugotovil-diskriminacijo-dijakinje-s-tezavami-pri-branju-pri-opravljanju-mature/

305 Slovenia, Advocate of the Principle of Equality decision No. 0700-34/2023/17 of 20 June 2023, available at: https://zagovornik.si/wp-content/uploads/2023/07/Odlocba_Zagovornik-ugotovil-diskriminacijo-dijakinje-s-tezavami-pri-branju-pri-opravljanju-mature.pdf.

Spain

ES

LEGISLATIVE DEVELOPMENTS

Adoption of a new comprehensive law for equal treatment and non-discrimination

All grounds

On 12 July 2022, the Spanish Parliament adopted Comprehensive Law No. 15/2022 on equal treatment and non-discrimination, which entered into force two days later. The legislation is a specific anti-discrimination law, which is general and comprehensive in its content. It has significantly reformed the legal non-discrimination framework in Spain.

– *Personal scope (Article 2)*

First, the new law recognises the right of all persons to equal treatment and non-discrimination irrespective of their nationality, residence status and whether they are minors or adults. Secondly, it states that 'No one may be discriminated against on the grounds of birth, racial or ethnic origin, sex, religion, conviction or opinion, age, disability, sexual orientation or identity, gender expression, illness or health condition, serological status and/or genetic predisposition to pathologies and disorders, language, socioeconomic status, or any other personal or social condition or circumstance'. Except the grounds covered by EU law, all these grounds are new in the Spanish legal framework.

– *Material scope (Article 3*)

The new law applies to the following areas: a) employment, both employed and self-employed, covering access, working conditions, including remuneration and dismissal, professional advancement and training for employment; b) access, promotion, working conditions and training in public employment; c) membership of and involvement in political and labour unions, employers, professional, social or economic interest organisations; d) education; e) health; f) transport; g) culture; h) public safety; i) administration of justice; j) social protection, benefits and social services; k) access to supply and provision of goods and services available to the public, including housing, which are offered outside the sphere of private and family life; l) access to and stay in establishments or spaces open to the public, as well as the use of and time spent on public roads; m) advertising, media and information society services; n) internet, social networks and mobile applications; o) sporting activities; and finally p) artificial intelligence and big data management, as well as other areas of similar significance.

– *Forms of discrimination (Title I, Articles 4 to 24)*

The new law recognises that the right to equal treatment and non-discrimination implies the absence of any discrimination on the grounds set out in Article 2. Consequently, it prohibits any conduct, act, criterion or practice that violates the right to equality, and lists the following forms of violation: discrimination that is direct, indirect, by association or 'by mistake', multiple or intersectional; denial of reasonable accommodation; harassment; inducement, order or instruction to discriminate or to commit an act of intolerance; retaliation; and failure to comply with positive action measures derived from normative or conventional obligations; inaction, neglect of duty, or failure to perform duties.

Discrimination by association is defined as 'when a person or group of which he or she is a member, due to his or her relationship with another person on which any of the grounds set out in the first paragraph of Article 2 of this law apply, is subjected to discriminatory treatment'. Discrimination by mistake is defined as 'discrimination based on an incorrect assessment of the characteristics of the person or persons being discriminated against'. Multiple discrimination is defined as that which occurs 'when a person is discriminated against simultaneously or consecutively for two or more of the causes set out

under this Law', and intersectional discrimination 'when several of the causes set out under this Law concur or interact, generating a specific form of discrimination'. The Law recalls that in cases of multiple and intersectional discrimination, justification of the difference in treatment, must be given 'in relation to each of the grounds of discrimination'.

Title I further stipulates that the Labour and Social Security Inspectorate is empowered to ensure respect for the right to equal treatment and non-discrimination in access to employment and working conditions, for which it should carry out specific actions to monitor this right. It also stipulates that employers may not inquire into the health status of job applicants. Finally, Title I enables the adoption of affirmative action measures through collective bargaining to prevent, eliminate and correct all forms of discrimination.

– *Promotion (Title II, Articles 25 to 39)*

Under the heading 'Defence and promotion of the right to equal treatment and non-discrimination', the law stipulates that protection against discrimination requires the application of sufficient methods or instruments for its detection, the adoption of preventive measures, and the articulation of appropriate measures for the cessation of discriminatory situations. To this end, the law establishes measures such as rendering null and void all agreements that cause discrimination; attributing to the person who causes discrimination the obligation to repair the damage caused; and recognising the legal standing of various entities for the defence of the right to equal treatment and non-discrimination. Without prejudice to the legal standing of victims, 'political parties, trade unions, professional associations of self-employed workers, consumer and user organisations and legally constituted associations and organisations whose aims include the defence and promotion of human rights shall have legal standing, under the terms established by procedural laws, to defend the rights and interests of their members or associates or users of their services in civil, contentious-administrative and social judicial proceedings, provided that they have their express authorisation'.

– *Independent Authority for Equal Treatment and Non-Discrimination (Title III, Articles 40 to 45)*

One crucial improvement introduced by the new law is the creation of the Independent Authority for Equal Treatment and Non-Discrimination. Once established,[306] it will be a state administration body, i.e. an independent public law entity with functional autonomy from the public administrations. It will be responsible for protecting and promoting the equal treatment and non-discrimination of persons on the grounds and in the areas of state competence provided for under this law, in both the public and private sectors. Until its establishment, Spain remains the only EU Member State where the national equality body, the Council for the Elimination of Racial and Ethnic Discrimination, is competent only in matters related to racial or ethnic origin. Once the new authority is established, it will replace the Council.

– *Sanctions (Title IV, Articles 46 to 52)*

Infringements under the new law may be minor, serious or very serious, although the law provides that acts or omissions that constitute multiple discrimination will always be considered 'very serious'. Infringements will be punishable by fines ranging from EUR 300 to EUR 500 000. In addition, 'very serious' infringements may give rise to the suppression, cancellation or total or partial suspension of official aid granted or applied for in the sector of activity in which the infringement occurred, the closure of the establishment in which the discrimination took place, or the cessation of the economic or professional activity carried out by the offender for a maximum period of five years.

306 The law stipulated that the new authority would be established within six months of its adoption. However, as of 30 June 2023, the authority had not yet been established.

– *Care, support and information for victims (Title V, Articles 53 to 54)*

Finally, the law attempts to ensure that public authorities guarantee information to victims of hate incidents, discrimination and acts of intolerance and provide them with real and effective comprehensive care. Campaigns to support victims' organisations and bodies specialised in assisting victims of discrimination and intolerance are also promoted.

Online source:
https://www.boe.es/buscar/act.php?id=BOE-A-2022-11589

New law on sexual freedom: 'Only yes means yes'

Sex
Gender

On 25 August 2022, the Parliament finally adopted the Organic Law on the Comprehensive Guarantee of Sexual Freedom, after a long and controversial journey since the preliminary draft was approved by the Council of Ministers more than two years ago.[307] The Act, popularly known as the 'Only yes means yes' Law, was prompted by feminist mobilisations after the sentencing of the notorious gang rape case '*La Manada*' (The Pack) in 2018,[308] which led to the discussion on the need to adapt the Criminal Code on sexual aggressions to meet both current social demands and the requirements of the Istanbul Convention. The new Law entered into force on 6 October 2022.

The Law defines its purpose as 'the adoption and implementation of effective, global and coordinated policies (...) that guarantee awareness, prevention, detection and punishment of sexual violence, and include all specialised comprehensive response measures against all forms of sexual violence'.

The Law reforms several other laws and regulations. Most notably, it amends the Penal Code and eliminates the distinction between sexual assault and sexual abuse, which obliged victims to show that there had been violence or intimidation, besides the lack of consent. Under the new regulation, all conduct that violates freedom without the consent of the other person is considered sexual assault. The Law establishes that 'it will only be understood that there is consent when it has been freely expressed through acts that, in view of the circumstances of the case, clearly express the will of the person'. This reform allows Spain to comply with the obligations assumed with the ratification of the Istanbul Convention. In addition, 'chemical submission'[309] is expressly introduced as a form of sexual assault.

Following the recommendations of the GREVIO report on Spain of October 2020, the Law expands existing protection mechanisms for victims of intimate partner violence to other victims of sexual violence, forced marriages and female genital mutilation, and it strengthens the legal framework on psychological violence, stalking, sexual violence, sexual harassment, and the exploitation of prostitution. The law pays particular attention to online violence and violence in the digital environment, especially in relation to children under the age of 16. Despite the criticisms of Spain by the CEDAW Committee, obstetric violence has not been included in the Law.

The Law explicitly adopts an intersectional approach and a gender perspective.

307 Spain, Organic Law on the Comprehensive Guarantee of Sexual Freedom (*Ley Orgánica de Garantía Integral de la Libertad Sexual*) 6 September 2022.

308 The case refers to the gang rape of an 18-year-old woman by a group of 5 men during the festival of San Fermin in Pamplona in 2016. The first two courts to decide on the case (first instance and appeal court) did not qualify the crime as 'rape', because the Spanish Criminal Code distinguished sexual offences in sexual abuse and sexual aggression. Both are non-consensual acts, but sexual aggressions also required violence or intimidation. In 2019, the case was reviewed by the Supreme Court that considered that there was intimidation, and it was a sexual aggression (rape).

309 The ingestion of one or several psychoactive substances by a person without their consent, with criminal purposes of an economic or sexual nature.

The Law introduces a new right to reparation, as one of the central elements of institutional responsibility to achieve the complete recovery of the victims.

The new Law includes a chapter on training and professional specialisation aimed at personnel in teaching and education, health and social services, the security forces, the judiciary (including prosecutors and lawyers), and the forensic and prison system.

The last chapter (Measures for the effective application of the Organic Law) establishes the obligation to develop a state prevention strategy and to evaluate the effectiveness and impact of the Law, through data collection mechanisms. A comprehensive system of institutional response is also set out, under the responsibility of the Government Delegation against Gender Violence.

Online source:
https://www.boe.es/buscar/pdf/2022/BOE-A-2022-14630-consolidado.pdf

Interpretation by the Courts and reform proposal of the new law on sexual freedom

Sex

Gender

As described above, the definition of sexual aggression (including rape) based solely on the lack of consent was introduced in the Criminal Code by the Law on sexual freedom (popularly known as the 'Only yes means yes' Law).[310] The newly introduced regulation of sexual aggression also modified the penalties and introduced new aggravating circumstances.

With the entry into force of the new regulation, some courts have interpreted that the new law is less punitive and have reviewed and reduced the sentences of prisoners and people accused of sexual offences, by virtue of the retroactive effect of more favourable criminal laws. This has created an enormous controversy and sparked heated political and public debates. Data about reviewed sentences is scarce and has not been analysed. The Minister of Equality attributed the reductions of sentences to some judges misinterpreting the rules of the Criminal Code (CC).

The Socialist group in the Parliament introduced a reform proposal on 6 February 2023,[311] which has been admitted using an emergency procedure.

The draft touches only a few points of the modifications introduced by the Law 10/2022, most notably the reformed articles in the CC that punish sexual aggressions. It introduces new paragraphs in both Article 178 CC (sexual aggression) and in Article 179 (rape) (proposed Articles 178.3 and 179.2), which establish different penalties if the aggression is committed using violence or intimidation, or against a victim who, for any reason, is unable to express their will (for example due to intoxication, drugs, unconsciousness, coma, or strong intellectual disability). In the case of sexual aggression, the penalty would be from 1 to 5 years, instead of the current sanction (from 1 to 4 years) and in the case of rape, the punishment would be 6 to 12 years' imprisonment instead of 4 to 12 years. The explanation of the reform expressly states that the new provisions reflect not mere aggravating circumstances, but rather elements of the conduct itself that indicate the greater seriousness of the offence.

Online source:
https://www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-318-1.PDF

310 Spain, Organic Law 10/2022 of comprehensive guarantee of sexual freedom, 6 September 2022, https://www.boe.es/buscar/pdf/2022/BOE-A-2022-14630-consolidado.pdf.

311 Spain, Draft Bill 122/000294 for the amendment of Organic Law 10/1995, Criminal Code, in offences against sexual freedom (*Proposición de Ley Orgánica para la modificación de la Ley Orgánica 10/1995, del Código Penal*), presented by the Socialist Parliamentary Group, https://www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-318-1.PDF.

New legislation on equality for trans persons

Transgender

Sexual orientation

Law 4/2023 for the real and effective equality of trans persons and guarantee of rights of LGBTI persons was approved in Parliament on 16 February 2023 and entered into force on 3 March 2023. Although the provisions related to gender self-determination of trans people have monopolised practically the entire debate around the Law, it is actually a comprehensive Law with measures in all areas and for the wider LGBTI community. The objective of the Law is the eradication of situations of discrimination and lack of freedom on the basis of sexual orientation, sexual identity, gender expression, sexual characteristics, and family diversity.[312] Among the references to international legislation, the preamble of the Law expressly mentions the law of the European Union (Articles 2 and 3 TEU, Article 19 and Article 21 TFEU). The law establishes a very broad scope of application: it covers any person, physical or legal, of a public or private nature who resides, is located, or acts on Spanish territory regardless of their nationality, racial or ethnic origin, religion, domicile, residence, age, marital status or administrative situation.

Title I establishes the principles for the intervention of the public powers, beginning with the duty of protection through the necessary measures to recognise, guarantee, protect and promote equal treatment and non-discrimination based on sexual orientation and identity, gender expression or sexual characteristics of LGBTI people and their families. The Law details the principles of action in the administrative, labour and business fields (for example, the introduction of a 'planned set of measures and resources' to achieve real and effective equality for LGBTI people, including an 'action protocol' for dealing with harassment or violence against LGBTI people, in companies with more than 50 people). It also covers measures in health, education, culture, leisure and sports, media and communication, family, childhood and youth, in foreign activity and in international protection, rural areas, and tourism. The Law also establishes a new body, the Council for the Participation of LGBTI Persons, for citizen participation, collaboration and strengthening dialogue between public administrations and civil society. The Law provides for the adoption of four-year State strategies for equal treatment and non-discrimination of LGBTI people, coordinated by the Ministry of Equality (which will also ensure the combination of this strategy with that established by Law 15/2022 for Equal Treatment and Non-Discrimination).

Title II of the Law is dedicated to trans people and contains the provisions that have generated the most political debate, that is, those related to gender self-determination. With the entry into force of the Law, any person of Spanish nationality over the age of 16 can request in the Civil Registry the rectification of the registry indicator of sex, without the need for diagnoses or medical or psychological tests, nor the prior modification of the bodily appearance or function through medical or surgical procedures. Persons under the age of 16 and over the age of 14 can apply on their own, assisted by their legal representatives. In the case of disagreement between parents or with the minor person, a judicial defender will be appointed. Children between the ages of 12 and 14 can request judicial authorisation to modify the registry entry. When appearing at the Civil Registry, the choice of a new name is included, unless the person wishes to keep the one that they already have, and this is in accordance with the principles relating to the choice of a proper name. Within three months from the initial appearance, the application must be ratified, and then a resolution will be issued that will have constitutive effects from its registration in the Civil Registry. It is possible to reverse the change of sex in the registry entry after six months, following the same procedure. However, if one wanted to proceed with a new rectification, one would have to use a judicial procedure. Transgender people who are minors also have the right to register a name change for reasons of sexual identity, regardless of whether or not they have initiated the rectification procedure of the sex indicator. Foreigners who prove the legal impossibility of rectifying the declaration of sex in their country of origin, may request the rectification of the declaration of sex and the change of name in the documents issued to them. The Law establishes that rectification of the registry entry related to sex will not change the legal regime of persons in relation to gender violence offences (men accused of gender violence cannot escape persecution by changing their sex afterwards).

312 As defined in Article 3 of Law for the real and effective equality of trans persons and guarantee of the rights of LGBTI persons, 28 February 2023, https://www.boe.es/buscar/doc.php?id=BOE-A-2023-5366.

The Law specifically repeats for trans people some of the lines of action of the public powers, especially the development of a State strategy for the social inclusion of trans people, as well as measures in the fields of work, health, and education.

Title III refers to protection and reparation measures for discrimination and violence due to LGBTI-phobia. Specifically, the legal standing of organisations is established to defend the rights of people who have given their express authorisation, and to sue in court the defence of diffuse interests when the people affected are an indeterminate group or difficult to determine. The principle of the reversal of the burden of proof is reaffirmed in all cases of discrimination based on sexual orientation and identity, gender expression or sexual characteristics. The Law also refers to protection measures for LGBTI people in special situations: minors, people with disabilities or in a situation of dependency, foreign people, older people, intersex people, and homeless individuals.

Title IV determines the punishment as administrative offences for a series of discriminatory behaviours that are not of a criminal nature.

Online source:
https://www.boe.es/buscar/doc.php?id=BOE-A-2023-5366.

CASE LAW

Constitutional ruling on discrimination on grounds of gender identity

Transgender

In its judgment 67/2022, of 2 July 2022,[313] the Spanish Constitutional Court ruled for the first time in a case of employment discrimination based on gender identity. The case, which came to court as an appeal for the protection of fundamental rights (*recurso de amparo*), analyses the dismissal of a transgender person. Although in the end the dismissal was not considered to be based on the gender identity of the worker, the ruling establishes important points for the Spanish doctrine of anti-discrimination law.

The claimant of this case is a transgender person, who went to work sometimes wearing trousers or sometimes wearing a skirt. On one occasion, the worker was required to return home to change clothes because they were deemed inadequate. The incident led to a meeting with the company director and the head of human resources about the importance of appropriate and respectful dress codes. After the incident and the meeting, the worker continued to wear a skirt sometimes, without any further problems. Before the trial period of the contract ended, the worker was dismissed, and the company alleged reasons of reorganisation and dissatisfaction with the worker's performance and lack of punctuality. The claimant argued that the dismissal was due to discrimination based on gender identity, and its expression through the choice of clothes. The Constitutional Court, however, considered that the proven facts of the case did not support that the claimant was singled out or harassed for wearing skirts, or on grounds of gender identity in general, and that the employer had shown objective reasons for the dismissal not related to gender identity, such as company reorganisation and dissatisfaction with the complainant's performance.

Regardless of the outcome of the case, the ruling of the Constitutional Court points out the 'special constitutional importance' of the case, as it allows the Court to 'provide jurisprudential content' to certain concepts that, until now, had not been adequately addressed.

The Constitutional Court establishes the definition and constitutional construction of sex and gender as diverse legal categories. Until this ruling there was no constitutional doctrine on this aspect and both terms were used as synonyms. The Court considers that it is necessary to distinguish between sex and

313 Spain, Constitutional Court, judgment No. 67/2022 of 2 July 2022, ECLI:ES:TC:2022:67 https://www.boe.es/buscar/doc.php?id=BOE-A-2022-11083.

gender, on account of the changes in the last two decades regarding the regulation of equal treatment in a broad sense, the evolution of the theory on equality between men and women and on intersectional discrimination, as well as the recognition of rights related to sexual orientation and gender identity understood as a dimension of the full development of the personality.

The Constitutional Court adopts a definition of sex as a category that identifies people as female, male or intersex, based on a complex series of biological characteristics (morphological, hormonal, and genetic). Sex tends to formulate a binary and, exceptionally, tertiary classification of members of the human species. According to the Court, although gender connects with biological characteristics, it does not fully identify with them, but rather defines the social identity of people based on social constructions (roles, attitudes, behaviours and values) that are differentially attributed to men and women. Gender includes norms related to roles, external appearance, image and social expectations. The Court considers that sex and gender are not synonymous and that their 'translation to the legal field requires assuming the existing difference to evaluate the normative consequences of such distinction and ensure adequate legal certainty'.

The Court also establishes that sexual orientation and gender identity are personal conditions and elements fundamentally linked to the right to develop a private and family life, as established by Article 8 of the ECHR. Gender identity refers to the identification of a person with gender-defining characteristics that may or may not coincide with the sex attributed to the person by virtue of the biological characteristics present at birth.

The Constitutional Court had already established sexual identity as a protected ground covered by the prohibition of discrimination contained in Article 14 of the Spanish Constitution. In this doctrine, referring to transsexuality, this is considered 'a historically rooted difference and that has placed transsexual people, both by the action of public authorities and by social practice, in disadvantageous positions contrary to the dignity of the person'. This doctrine is, according to the Constitutional Court, applicable to all trans people, which this judgment establishes as a more adequate definition to encompass the different personal identifications of gender identity, and which includes both situations of medical or surgical modification of the body and situations of legal modification in registration data or public recognition of identity data, or even situations in which, without there being a physical or legal transition in the strict sense, other gender expressions are manifested (such as, for example, by adopting a certain dress code). The ruling establishes that gender identity is protected against discrimination by Article 21 of the TFEU, Article 14 of the ECHR and Article 14 of the Spanish Constitution.

This is the first case of employment discrimination based on gender identity. The Court has paid attention to the issue of proof of discrimination in the field of labour relations. The Court established that, although the mere belonging of the claimant to a protected ground of discrimination does not reverse the burden of proof, 'the existence of indications that generate a reasonable suspicion, appearance or presumption in favour of [what is alleged]' is enough. In the case examined, the Court considered that the indication exists because a conflict related to the appearance or the way of dressing of the employee had arisen.

Online source:
https://www.boe.es/buscar/doc.php?id=BOE-A-2022-11083

Discriminatory dismissal of a worker close to 60 years of age

Age

The claimant was dismissed from his employment at the age of 58, due to some restructuring in the production department caused by a drop in sales. The claimant was a member of the management committee together with six other employees, all younger than him. He was the only committee member who was made redundant, together with three other employees, while new university graduates were recruited. The claimant was replaced by another employee, aged 53, who had not been working on the

same project as him. Furthermore, the claimant had been rated in 2019 as having consistently met or exceeded work expectations with a work performance at or above the average level of the team. In 2020, this same rating was proposed by the claimant's line manager, but the human resources department decided to assign him a lower rating after it was agreed that he would be made redundant. The claimant brought a case of alleged age discrimination to the social courts.

Meanwhile, in 2019, the company's chairman gave a speech on leadership management to all employees, in which he proposed an annual removal rate of staff in positions of responsibility in the company, 'accelerating the pace of replacing the old with the new'. The chairman also mentioned that professional staff could continue to work until the age of 50 or 60. Furthermore, in 2020, employees over the age of 50 accounted for 11 % of the workforce and were affected by 34 % of the redundancies that year. Workers under the age of 45 accounted for 73 % of the workforce but were affected by 41 % of the redundancies.

In November 2021, the labour court upheld the claim, classifying the dismissal as null and void due to age discrimination, and ordered the immediate reinstatement of the claimant with payment of wages and compensation for non-pecuniary damages.[314] The employer appealed. The High Court of Justice of Madrid ruled on the appeal in October 2022, upholding the first-instance judgment.[315] The High Court underlined that the replacement of the claimant by a younger employee who did not belong to the project demonstrated that there was no need to reduce the number of employees. It also noted that the employer had not proved any objective and reasonable grounds for dismissing the claimant because of his age, nor had any specific measures been adopted to protect him given his age.

Online source:
https://www.poderjudicial.es/search/AN/openDocument/ad241c57bae699cda0a8778d75e36f0d/20221128

Collective agreement providing for different severance payments for workers depending on their age is not discriminatory

Age

In January 2023, the Supreme Court ruled on the allegedly discriminatory nature of a collective redundancy agreement between a group of companies and workers' representatives. The agreement stipulated that workers under 60 years of age who were made redundant would receive higher compensation than workers aged over 60, although both levels of compensation surpassed the statutory minimum. The agreement also included a number of measures to encourage subsequent job offers and preferential filling of vacancies in the companies concerned. The parties had thus taken measures to improve the workers' conditions as provided by legislation.

The Supreme Court concluded that the difference in the amount of compensation was objectively justified on the basis of the different ages of the workers who were made redundant.[316] The Court noted that workers aged 60 or above are closer to benefiting from a retirement pension and can also benefit from other statutory social security agreements available for redundant workers aged 55 or above. The Court also noted that the agreement was the result of collective bargaining and had been adopted by those entitled to do so, and from this purely formal perspective it could not be considered unlawful. The Court added that age was an appropriate and proportionate criterion for establishing a difference in treatment provided that effective measures were taken to prevent or minimise the damage to the workers concerned as a result of the redundancies.

Online source:
https://www.poderjudicial.es/search/TS/openDocument/8f82f45e42c15004a0a8778d75e36f0d/20230217

314 Spain, Labour Court No. 42 of Madrid, resolution No. 1041/20 of 23 November 2021.
315 Spain, High Court of Justice of Madrid, resolution No. 606/2022 of 20 October 2022.
316 Spain, Supreme Court, judgment of 24 January 2023, resolution No. 62/2023.

Supreme Court ruling on age limits for access to various police forces

In 2021, the Basque Country's National Police and Emergency Services Academy announced a selection procedure for entry into the category of basic rank officer of the Basque Country Police Corps, with the requirement that applicants be under 38 years of age, as established by law. One of the key aspects of the dispute was that the age limit concerned not only the Basque Country Police (the Ertzaintza) but also the local police force.

The claimant did not meet the age requirement and was thus excluded from the selection procedure. His appeal against the exclusion was rejected mainly based on a ruling of the CJEU of 15 November 2016, which considered that age limits for access to the Ertzaintza were compatible with the Employment Equality Directive.[317] The claimant appealed to the Supreme Court.

The claimant argued that the administration had not provided any concrete justification for the contested age limit, and that age-related loss of skills among officers would best be solved by selecting the most capable applicants rather than the youngest ones. He also argued that even though the Ertzaintza's workforce was supposedly ageing, this did not mean that the same situation applied to the local police force. Finally, he considered that the relevant CJEU judgment was not applicable to his case, notably because it did not concern the local police force, but concerned only the Ertzaintza.

For its part, the Basque Police and Emergency Services Academy pointed out that the CJEU ruling had led to a change in the age criterion. It also stated that even though the Ertzaintza and the local police differ in some of their functions, it cannot be ignored, as also noted by the CJEU in 2014,[318] that the local police also perform 'functions relating to the protection of persons and property, the arrest and custody of perpetrators of criminal offences and preventive patrols, which require the use of physical force, i.e. a specific physical aptitude is required, physical capacities which are inextricably linked to the passing of time, i.e. one's age'.

In March 2023, the Supreme Court ruled that no age-based discrimination was involved in requiring applicants to the Ertzaintza and the local police to be under 38 years of age. The Court followed the criteria established by the CJEU in its 2016 judgment, including an endorsement for specific age limits based on workforce ageing analyses and the need to gradually replace older staff.[319]

Online source:
https://www.poderjudicial.es/search/TS/openDocument/9740f2c021fafdaca0a8778d75e36f0d/20230329

317 CJEU, 15 November 2016, *Salaberria Sorondo*, C-258/15, ECLI:EU:C:2016:873.
318 CJEU, 13 November 2014, *Mario Vital v Ayuntamiento de Oviedo*, C-416-13, ECLI:EU:C:2014:2371.
319 Spain, Supreme Court (Contentious-Administrative Chamber), judgment No. 335/2023 of 15 March 2023.

TR Türkiye

LEGISLATIVE DEVELOPMENTS

Proposal for constitutional amendments regarding freedom of religion and a ban on same-sex marriage

Religion or belief

Sexual orientation

In December 2022, Members of Parliament of the ruling coalition submitted a proposal to amend two provisions of the Constitution, regulating freedom of religion and conscience as well as the 'protection of the family and children's rights'.[320]

With regard to freedom of religion, it is proposed to add two paragraphs, emphasising that the exercise of fundamental rights and freedoms, including to work, education, participation in political life, etc. as well as access to goods and services provided by the public or private sector, should not be dependent on whether a woman's head is covered or uncovered. No woman should face condemnation, accusation, or discrimination due to her choice in this regard. In the context of uniforms mandated by service, the State may implement appropriate measures, without however impeding women's right to wear religious headscarves and apparel. The proposal does not apply to other religious clothing or symbols.

With regard to the 'protection of family and children's rights', the proposed amendment would introduce a ban on same-sex marriages and would add the phrase 'the institution of marriage shall be limited to the union between a male and a female' to the provision. The declared aim of the proposal is to 'protect the institution of family and marriage against all kinds of dangers, threats, attacks, decay and the impositions of perverted currents'.

The Parliament's Constitution Committee deliberated on the proposal and presented its report to the Speaker in February 2023.[321]

Online source:
https://cdn.tbmm.gov.tr/KKBSPublicFile/D27/Y6/T2/WebOnergeMetni/0033706a-2ed0-4d62-9bcf-8ca9399e7159.pdf

CASE LAW

Constitutional Court ruling on family surname

Gender

The Constitution of Türkiye states that

> 'Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion, and sect, or any such grounds. Men and women have equal rights. The State must ensure that this equality exists in practice' (Article 10);
>
> 'Family is the foundation of the Turkish society and based on the equality between the spouses' (Article 41 Clause 1);

320 Türkiye, Proposed Law on Amending the Constitution of Türkiye, Turkish Grand National Assembly, Period 27, Legislative Year 6, Docket No. 2/4779, 9 December 2022, available at: https://cdn.tbmm.gov.tr/KKBSPublicFile/D27/Y6/T2/WebOnergeMetni/0033706a-2ed0-4d62-9bcf-8ca9399e7159.pdf.

321 Türkiye, Report of the Turkish Grand National Assembly Constitution Committee, report No. 408, 17 February 2023, available at: https://cdn.tbmm.gov.tr/KKBSPublicFile/D27/Y6/T2/DosyaKomisyonRaporunuVerdi/c494ba13-5c32-4404-9338-88704f109b1c.pdf.

> 'Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated' (Article 20 Clause 1);
>
> 'International agreements duly put into effect have the force of law... In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail' (Article 90 Clause 5).

In its judgment of 22 February 2023, the Constitutional Court of Türkiye declared the first clause of the Civil Code (CC) of Article 187 as unconstitutional and nullified it.[322] The disputed provision stipulated that a married woman was obligated to adopt her husband's surname as the family name; however, she could, through a written declaration to the Registrar of Marriages when signing the marriage contract or to the Civil Registry Office after marriage, opt to retain her maiden name in addition to her husband's surname. The provision also explicitly prohibited a married woman from solely retaining her maiden name after marriage.

The argument was made that a person's surname is an integral part of their identity and personality. The contested provision's restriction on a woman's right to retain her maiden name after marriage was deemed to lack a legitimate purpose. Furthermore, it was argued that this unequal treatment, where married men could retain their birth surnames while married women could not, violated the principle of equality. Reference was made to judgments by the European Court of Human Rights (ECtHR) that found similar cases to be in violation,[323] as well as previous Constitutional Court decisions that ruled in favour of applicants in similar cases, all underscoring the discrepancy between the law and its application.[324]

The Court held that the right to bear a surname was considered not just an obligation but also a fundamental right, as per Article 20 of the Constitution. The ECtHR similarly recognised this right under Article 8 ECHR. The Constitution had been amended over time to emphasise the need for gender equality, particularly between spouses (Articles 10, 40). In this context, it was determined that both men and women were in comparable situations regarding their right to retain their surnames before and after marriage. While men were allowed to bear their surnames alone after marriage, the contested provision only permitted women to retain their maiden names in addition to their husband's surnames, creating an explicit gender-based distinction. Given the absence of valid reasons for treating genders differently when allowing individuals to retain their original surnames after marriage, the Court ruled that Article 187 CC violated Article 10 of the Constitution.

Both the ECtHR and the Constitutional Court received numerous applications from individuals who alleged violations of their rights due to their inability to retain their maiden names after marriage. The ECtHR concluded that such an inability constituted a violation of Article 14 of the Convention in conjunction with Article 8.[325] Despite the judgment in *Unal Tekeli*, Article 187 CC remained unaltered. In its verdict on 10 March 2011, the Constitutional Court rejected the invalidation action, affirming that the rule constituted a constitutional action on its merits, and under Article 152, clause 4 a subsequent invalidation action against the same statute cannot be initiated for 10 years.[326] Nevertheless, in cases brought under the individual application procedure following the 2011 judgment, the General Assembly of

322 Türkiye, Constitutional Court, judgment *E.2022/155* of 22.02.2023, published in the *Official Gazette* on 28 April 2023.
323 ECHR, *Unal Tekeli v Turkey*, Grand Chamber judgment No. 29865/96 of 16 November 2004, paragraph 42.
324 Although the ECHR and the Constitutional Court of Türkiye found a violation in the relevant cases due to the said difference in treatment; the legal provision had not been amended and it was applied by the administration which fell afoul of the binding nature of the Court's decisions and judgements. *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013; *Gülsüm Genç*, no. 2013/4439, 6 March 2014; *Neşe Aslanbay Akbıyık*, no. 2014/5836, 16 April 2015; Aksoy (2023) 'Turkish Civil Code is now more equal', May 2023, https://aksoylaw.com/turk-medeni-kanunu-artik-daha-esit/.
325 ECHR, *Unal Tekeli v Turkey*, Grand Chamber judgment No. 29865/96 of 16 November 2004, paragraph 42.
326 According to Article 152 clause 4 of the Constitution of Türkiye, 'No claim of unconstitutionality shall be made about the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits'.

the Civil Chambers of the Court of Cassation (Türkiye's highest court of civil jurisdiction) had established significant jurisprudence on cases related to maiden names, recognising the supremacy of international treaties in similar situations.[327] However, the ultimate responsibility for ensuring gender equality rested with legislation, and administrative practices needed to align with legislative mandates, as judicial decisions alone were insufficient.

In Case E.No.2022/155, the Constitutional Court revisited the matter a decade after the initial 2011 invalidation action.[328] In its ruling, the Court found that the application of Article 187 CC in these cases was incompatible with the principle of legality, as international treaties advocating equal surname rights for men and women took precedence over domestic laws according to Article 90, clause 5 of the Constitution. The Court acknowledges the progressive evolution of family law over the past 30 years, emphasising gender equality, and equality within the marital status. While public authorities had some discretion in assessing differences in treatment among individuals in similar circumstances, this discretion was narrower in cases of gender discrimination.[329] Given the Constitution's emphasis on equality between spouses (Article 40), lawmakers had limited room for justifying gender-based distinctions. Preserving the integrity of civil registry records and establishing paternity was undoubtedly important for the public interest. However, it was deemed unreasonable to assert that the only means of achieving this was for women to retain their maiden names alongside their husbands' surnames. Numerous alternatives, such as allowing spouses to choose any of their surnames or creating a derivative surname from their pre-marriage names, were available. Additionally, it was challenging to argue that having a common surname was essential for maintaining family bonds. In light of these considerations, it was concluded that the unequal treatment between men and women in their ability to retain their maiden names before and after marriage violated the principle of equality. Consequently, the contested provision was deemed unconstitutional and subsequently nullified.

Online source:
https://www.resmigazete.gov.tr/eskiler/2023/04/20230428-9.pdf

Constitutional Court judgment on discrimination on grounds of disability in access to bank services

Disability

In March 2023, the Constitutional Court ruled on a case of alleged discrimination of a visually impaired woman attempting to obtain a bank loan. The applicant argued that the failure of the bank to accommodate her needs for the purpose of providing her signature on the loan application, despite the different solutions proposed by her, amounted to an infringement of her right to protect and enhance her material and spiritual wellbeing, and a violation of the prohibition of discrimination.

The applicant initiated legal proceedings seeking compensation for non-pecuniary damage from the bank, but the Court of Appeal held that the bank personnel did not engage in tortious conduct warranting non-pecuniary damages. It found no evidence of disrespectful behaviour and attributed the delay in contract

327 Although the Court of Cassation has also acknowledged that in disputes arising from the woman's inability to bear her maiden name alone after marriage, the provisions of the international treaties will prevail as stipulated by Article 90 clause 5 of the Constitution, it is clear that ensuring women and men enjoy equal rights is primarily guaranteed through legislation, the primary source of law, and the administrative practices are meant to align with the guarantees laid down in the legislation. Therefore, the jurisprudence developed by judicial bodies alone has not been sufficient to provide the necessary guarantees in this regard.

328 Türkiye, Constitutional Court, judgment E.No.2022/155 of 22 February 2023 published in the *Official Gazette* on April 28, 2023.

329 The Constitutional Court held in its judgment in the case *Ayşe Tezel and others* of 20 October 2022, that the public authorities enjoy a certain margin of appreciation in assessing whether the difference in treatment between those in a similar situation has an objective and reasonable justification or determining the permissible extent of difference in treatment. However, in case of discrimination based on sex, the margin of appreciation afforded to the public authorities is narrower. Moreover, given the importance attached by the constitution-makers to the aspect of the equality principle between spouses, lawmakers explicitly have a very limited margin of appreciation concerning the difference in treatment between spouses on grounds of sex.

drafting to hesitation over the appropriate wording. Consequently, the applicant was not subjected to discriminatory treatment.

The Constitutional Court found, however, that the bank failed to provide an objective and legitimate reason for the difference in treatment based on the applicant's visual impairment, namely her inability to access a bank loan and having to endure prolonged waiting periods at the bank office. The difference in treatment thus amounted to a violation of the prohibition of discrimination as protected by Article 10 of the Constitution, despite the fact that disability is not among the explicitly listed grounds protected by this provision.[330]

Online source:
https://kararlarbilgibankasi.anayasa.gov.tr/Basvurular/tr/pdf/2017-37627.pdf

Equality body rejects claim of discrimination on grounds of sexual orientation

Sexual orientation

The complainants were denied access to an entertainment facility due to their status as a same-sex couple, while heterosexual couples encountered no difficulties accessing the same location. The complainants' online reservation was initially accepted but the complainants were later informed that they would not be admitted, due to their sexual orientation.

The Human Rights and Equality Institution of Türkiye rejected the complainants' claim of discriminatory treatment based on sexual orientation as inadmissible, due to the absence of explicit provisions in the law pertaining to this ground.[331]

This decision exemplifies the Human Rights and Equality Institution's commitment to adhering to the legislature's original purpose by consistently rejecting applications that involve discrimination based on sexual orientation and gender identity. This commitment is further confirmed by another decision regarding anti-LGBTI+ statements made by a Governor in relation to the planned organisation of a 'pride' march, and the subsequent threats faced by the organisers.[332]

Online source:
https://www.tihek.gov.tr/public/images/kararlar/gmyj6u.%20y

POLICY AND OTHER RELEVANT DEVELOPMENTS

Strategy paper and action plan for Roma citizens

Racial or ethnic origin

On 21 January 2023, a presidential circular was published containing the Strategy Paper for Roma Citizens (2023-2030) as well as the Phase I Action Plan (2023-2025) prepared by the Ministry of Family and Social Services.[333] The strategy and action plan are designed to establish a roadmap for initiatives and activities to be executed through nationwide coordination and collaboration. The effects of the initiatives will be monitored using predefined indicators and targets.

330 Türkiye, Constitutional Court, *Sevda Yılmaz*, B. No. 2017/37627, judgment of 2 March 2023.
331 Türkiye, Human Rights and Equality Institution of Türkiye, decision No. 2023/418 of 24 May 2023, available at: https://www.tihek.gov.tr/public/images/kararlar/gmyj6u.%20y.
332 Türkiye, Human Rights and Equality Institution of Türkiye, decision No. 2022/602 of 1 September 2022, available at: https://www.tihek.gov.tr/public/images/kararlar/l6rikg.pdf.
333 Türkiye, Presidential Circular No. 2023/2, 20 January 2023, *Official Gazette* No. 32080, 21 January 2023, available at: https://www.resmigazete.gov.tr/eskiler/2023/01/20230121-11.pdf.

The following are the guiding principles of the strategy:

i. To combat and prevent social prejudice and social exclusion
ii. To reduce poverty
iii. To increase the participation of Roma citizens in social life through trust, cooperation, and empowerment
iv. To expand access to inclusive basic education
v. To expand access to formal and sustainable employment
vi. To enhance the health of Roma citizens, provide quality health services, and expand access to these services
vii. To ensure safer use of mass media by Roma citizens and children, raise awareness of digital risks among them, and protect them from such risks
viii. To increase effective access to healthy, safe housing and basic shelter services
ix. Roma women should be treated equally so that they can benefit from services and programmes by giving importance to gender equality.

The Action Plan 2023-2025 established a comprehensive set of actions and activities to be executed in the areas of education, employment, health, housing, social services, social assistance and general policy areas. Relevant public institutions were actively involved in the development of the action plan.

Neither the principle of equality, nor the prohibition of discrimination, is mentioned directly in either of the documents.

Online source:
https://aile.gov.tr/media/133056/engelli_haklari_ulusal_eylem_plani_23-25.pdf

National action plan for the rights of persons with disabilities

Disability

In February 2023, a presidential circular was published containing the National Action Plan for Rights of Persons with Disabilities 2023-2025 prepared by the Ministry of Family and Social Services.[334] The aim of the action plan is to determine measures to be taken in 2023-2025 to achieve the goals of the '2030 Unhindrance Vision Document', published in December 2021.

The action plan sets out strong coordination, multilateral cooperation and participation of non-governmental organisations representing persons with disabilities and covers activities that are mainstreaming disability and taking into account the needs of persons with disabilities.

One of the objectives outlined is the 'legal safeguarding of individuals with disabilities from discriminatory practices' and a number of activities are spelled out in pursuit of this aim:

i. To review the national legislation and to carry out a revision study to eliminate the provisions containing discrimination based on disability
ii. Take necessary legal and administrative measures to make complaint mechanisms and procedures accessible to persons with disabilities, regardless of whether they have legal capacity or not, in the event of alleged violation of any right
iii. Enact legal and administrative measures to guarantee the provision of reasonable accommodation for individuals with disabilities, enabling them to effectively exercise their rights.

Online source:
https://aile.gov.tr/media/133056/engelli_haklari_ulusal_eylem_plani_23-25.pdf

334 Türkiye, Presidential Circular No. 2023/4, 2 February 2023, *Official Gazette* No. 32093, 3 February 2023, available at: https://www.resmigazete.gov.tr/eskiler/2023/02/20230203-11.pdf.

Ageing Vision paper and national action plan on the rights of the elderly

In April 2023, the Ministry of Family and Social Services published the Ageing Vision paper and the National Action Plan on the Rights of the Elderly 2023-2025.[335]

Age

The objective of the Ageing Vision paper is to incorporate the principles of old age and ageing into the design, implementation, monitoring, and evaluation of policies, programmes and services. This includes promoting the active involvement of elderly individuals in all stages of these processes. Additionally, the paper aims to address the diverse needs of elderly people, taking into account the evolving and varying conditions they face. Lastly, it seeks to establish efficient coordination and collaboration among multiple stakeholders to effectively uphold the rights of the elderly, recognising that ageing is a multidimensional area of concern.

The 2023-2025 action plan outlines the strategies and actions to be implemented during this period to accomplish the objectives established in the six key policy domains. These policy areas encompass active and healthy ageing, social participation, the creation of age-friendly and accessible environments, preparedness for disasters and humanitarian emergencies, the protection of elderly rights, and the effective implementation and monitoring of these initiatives.

The primary efforts encompassed within the scope of this initiative involve the reassessment and modification of the existing legal structure pertaining to the fight against age-based discrimination, as well as the implementation of measures aimed at pre-emptively addressing age discrimination in the workplace.

Online sources:
https://aile.gov.tr/media/135665/yaslanma_vizyon_belgesi_.pdf
https://aile.gov.tr/media/133624/yasli_haklari_ulusal_eylem_plani.pdf

United Kingdom

UK

CASE LAW

Meaning of religion or belief – gender critical belief

Religion or belief

The claimant holds gender critical beliefs that include the belief that sex is immutable and should not be conflated with gender identity, and that trans women are not women. She alleged that she was discriminated against in a number of respects including when her contract was not renewed following complaints from colleagues at work that her views, expressed on social media, were offensive and transphobic. At a preliminary hearing, the Employment Tribunal decided that the claimant's belief is not protected under the Equality Act 2010, on the basis that these beliefs were incompatible with human dignity and fundamental rights of others, and thus did not meet the criteria for being a protected belief. The tribunal drew attention to the fact that the beliefs were absolutist, and that it was a core component of the belief that she would refer to people by the sex she considered appropriate even if to do so violates their dignity.

The claimant appealed to the Employment Appeal Tribunal (EAT) which held that the belief was a protected belief. Whilst the claimant's belief was offensive to some, it fell within the protection under

335 Türkiye, Ministry of Family and Social Services, Ageing Vision paper and National Action Plan on Rights of Elderly 2023-2025, 29 April 2023.

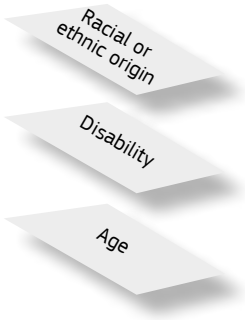
Article 9(1) of the ECHR and therefore within the protection of the Equality Act 2010. The case was remitted to a freshly constituted Employment Tribunal to determine whether the treatment about which the claimant complained was because of or related to her belief.

The freshly constituted Employment Tribunal held that the complaint of direct discrimination in respect of the decision not to renew the claimant's employment was well founded. Other aspects of her claim were dismissed.[336]

This case is part of an ongoing debate on the meaning of non-religious philosophical beliefs for the purpose of protection against discrimination on the ground of 'religion or belief' under the Equality Act. Two other cases can be mentioned to illustrate this debate: a case concerning the dismissal of an employee due to social media statements expressing the employee's lack of belief in gender fluidity and same-sex marriage;[337] and a case concerning the dismissal of a care home worker who refused to be vaccinated against COVID-19, invoking ethical veganism.[338]

Online source:
https://www.judiciary.uk/judgments/maya-forstater-v-cgd-europe-center-for-global-development-masood-ahmed/

Discrimination of Roma and Travellers of a certain age and with disabilities



The claimant's application for planning permission for a permanent site for Gypsies and Travellers was rejected. One of the reasons was that the definition of Gypsies and Travellers had been amended to exclude those who had permanently ceased travelling as a result of disability or old age. It was accepted on behalf of the Secretary of State that this exclusion indirectly discriminated against elderly Gypsies and Travellers and those with disabilities. In upholding the claimant's appeal, the Court of Appeal accepted that the claimant could rely on race discrimination as a ground for challenging the original planning decision. The discrimination involved in excluding from the definition those Gypsies and Travellers who had ceased travelling due to age or disability was inextricably linked to race and ethnicity.[339]

336 United Kingdom, Employment Tribunal, *Maya Forstater v CGD Europe and Others*, Case No. 2200909/2019, decision of 6 July 2022.
337 United Kingdom, Employment Appeals Tribunal, *Higgs v Farmor's School* [2023] EAT 89, decision of 16 June 2023, available at: https://www.gov.uk/employment-appeal-tribunal-decisions/mrs-kristie-higgs-v-1-farmors-school-2-archbishops-council-of-the-church-of-england-2023-eat-89-eat-89.
338 United Kingdom, Employment Tribunal, *Owen v Willow Tower OPCO 1 LTD*, Case No. 2400073/2022, decision of 12 May 2023, available at: https://www.gov.uk/employment-tribunal-decisions/ms-t-owen-v-willow-tower-opco1-ltd-2400073-slash-2022.
339 United Kingdom, Court of Appeal, *Smith v Secretary of State for Levelling Up, Housing and Communities & Anor*, (2022) EWCA Civ 1391, decision of 31 October 2022, available at: https://www.bailii.org/ew/cases/EWCA/Civ/2022/1391.html.

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