



European  
University  
Institute

ROBERT  
SCHUMAN  
CENTRE FOR  
ADVANCED  
STUDIES

# WORKING PAPERS

RSCAS 2020/75  
Robert Schuman Centre for Advanced Studies  
Centre for Judicial Cooperation

The potential of the Charter in fighting hate:  
Enforcing international human rights standards through  
victims' rights

Rita Gião Hanek and Lilla Farkas



European University Institute

**Robert Schuman Centre for Advanced Studies**

Centre for Judicial Cooperation

**The potential of the Charter in fighting hate: Enforcing international human rights standards through victims' rights**

Rita Gião Hanek and Lilla Farkas

EUI Working Paper **RSCAS** 2020/75

Terms of access and reuse for this work are governed by the Creative Commons Attribution 4.0 (CC-BY 4.0) International license. If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper series and number, the year and the publisher.

ISSN 1028-3625

© Rita Gião Hanek and Lilla Farkas, 2020

This work is licensed under a Creative Commons Attribution 4.0 (CC-BY 4.0) International license.  
<https://creativecommons.org/licenses/by/4.0/>

Published in November 2020 by the European University Institute.  
Badia Fiesolana, via dei Roccettini 9  
I – 50014 San Domenico di Fiesole (FI)  
Italy

Views expressed in this publication reflect the opinion of individual author(s) and not those of the European University Institute.

This publication is available in Open Access in Cadmus, the EUI Research Repository:  
<https://cadmus.eui.eu>

## **Robert Schuman Centre for Advanced Studies**

The Robert Schuman Centre for Advanced Studies, created in 1992 and currently directed by Professor Brigid Laffan, aims to develop inter-disciplinary and comparative research on the major issues facing the process of European integration, European societies and Europe's place in 21<sup>st</sup> century global politics.

The Centre is home to a large post-doctoral programme and hosts major research programmes, projects and data sets, in addition to a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration, the expanding membership of the European Union, developments in Europe's neighbourhood and the wider world.

For more information: <http://eui.eu/rscas>

The EUI and the RSCAS are not responsible for the opinion expressed by the author(s).

## **Centre for Judicial Cooperation**

The Centre for Judicial Cooperation was created in December 2011 as a joint project of the EUI Law Department, and since 2016 is part of the RSCAS. Its aim is to provide an umbrella framework for the judicial cooperation and dialogue initiatives undertaken at the European University Institute. It offers a platform of exchange of knowledge and experiences between judges and academics. For this purpose, the Centre engages both professional groups to participate in differentiated activities ranging from workshops and conferences to pure research and policy endeavours. In order to disseminate the results of its work the Centre shall publish the Working Papers based on the findings of research activities thus engaging in the open sourced discussion with the judicial and academic communities. The Centre for Judicial Cooperation employs a unique philosophy and methodology, which attracts both judges and other legal practitioners and academics. Our experts constitute the second strengths of the Centre adding to its international character the most up-to-date knowledge.

Contacts: Centre for Judicial Cooperation, Villa Raimondi, via Boccaccio 121, IT-50133 Florence

Editor of the CJC Working Papers: Research Fellow Dr. Madalina Moraru, [madalina.moraru@eui.eu](mailto:madalina.moraru@eui.eu)

Telephone: [+39] 055 4685761

[www.eui.eu/cjc](http://www.eui.eu/cjc)



## **Abstract**

Analysis of the EU non-discrimination acquis tends to be limited to the gender equality and non-discrimination directives, showing a gaping difference in the level of protection accorded to certain groups over others. Broadening the perspective to procedural and soft law measures pertaining to criminal forms of discrimination can, however, yield more nuanced insights. The working paper documents the emergence of a 'continuum of equality' in the criminal branch of EU anti-discrimination law, particularly in the Victims' Rights Directive. It shows that the Charter of Fundamental Rights of the EU can play an important role in approximating EU norms to international human rights standards and offer strategies for addressing legislative deadlock to equalize protection across discriminated groups. Rather than the prohibition of discrimination, Charter provisions governing the relationship between EU and international norms become significant in this process.

## **Keywords**

EU Charter, hate, discrimination, victims, continuum of equality, soft law.





## 1. Introduction

In 2016 the Dutch EU Presidency chose to rent a truck and officially join the Warsaw Pride Parade. The bright orange vests read “No hate” rather than “equality” or “non-discrimination” indicating that characteristics protected under the EU *acquis* appear more limited for discrimination not meeting the threshold of *hate*.<sup>1</sup> Could the EU Presidency rally behind a statement condemning discrimination tout court, rather than only condemning manifestations of discrimination that amount to “hate” at the next Parade? If so, what should be the role of EU non-discrimination law and the Charter of Fundamental Rights of the EU? Do *judicial interaction* and/or policy processes on hate speech and hate crime have the potential to meaningfully broaden the scope of protection from discrimination? These are some of the questions this paper seeks to answer.

The literature has investigated case law that concerns a limited number of legal measures, asking whether Article 14 of the European Convention on Human Rights and the Strasbourg Court (ECtHR) or Article 21 of the EU Charter and the Luxembourg Court (CJEU) provides better protection against discrimination.<sup>2</sup> It has queried the levels of protection dependent on the ground of discrimination,<sup>3</sup> proposing intersectional approaches as a panacea for legislative shortcomings.<sup>4</sup> The dominant supranational, top-down approach can conceal the complementarity of these instruments at the national level and the fact that intersections between different branches of law are key to making progress in addressing prejudice and discrimination.<sup>5</sup>

Researchers have not explored the ways in which EU and domestic law and adjudication address hate speech and hate crime, unscathed by legislative deadlock that otherwise characterizes anti-discrimination provisions. The difference stems from the two tiers of protection from discrimination, i.e. ‘civil’ and ‘criminal’ wrongs, and the disconnected analysis of the civil and criminal branches of EU anti-discrimination law.

The classic legal account distinguishes between the bodies of EU anti-discrimination and criminal law, i.e. the Gender Equality Directive (Recast)<sup>6</sup> and the Gender Goods and Services Directive<sup>7</sup>, the Racial Equality Directive<sup>8</sup>, the Framework Employment Equality Directive<sup>9</sup> (hereafter “the gender

---

<sup>1</sup> Alex Duval Smith, 'Thousands March For LGBTI Rights In Warsaw Amid Rising Hostility' *The Guardian* (London, 11 June 2016) C3.

<sup>2</sup> Christa Tobler, 'Equality and Non-discrimination under the ECHR and EU Law. A Comparison Focusing on Discrimination against LGBTI Persons' (2014) 74 (3) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 521.

<sup>3</sup> Mark Bell and Lisa Waddington, 'More equal than others: distinguishing European Union equality directives', (2001) 38 *Common Market L. Rev.* 587.

<sup>4</sup> See, for instance, [Dagmar Schiek and Victoria Chege \(eds.\), \*European Union Non-Discrimination Law : Comparative Perspectives on Multidimensional Equality Law\*\(Taylor and Francis, 2008\); Dagmar Schiek and Anna Lawson \(eds.\), \*European Union non-discrimination law and intersectionality: investigating the triangle of racial, gender and disability discrimination\* \(Ashgate Publishing Ltd, 2013\).](#)

<sup>5</sup> Renáta Uitz, 'Lessons from Sexual Orientation Discrimination In Central Europe' (2012) 60 *American Journal of Comparative Law*.

<sup>6</sup> 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) [2006] OJ L 204/23.

<sup>7</sup> 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 [2004] OJ L 373/37.

<sup>8</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22

<sup>9</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] 303/16.

equality and non-discrimination directives”) on the one hand, and the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (hereafter “Framework Decision”)<sup>10</sup>, the Audiovisual Media Services, the Electronic Commerce and the Victims’ Rights Directive (hereafter “the Victims Directive”)<sup>11</sup> on the other. Hate-related instruments adopted in the context of criminal law cooperation also include the Guidance Document and Note on the implementation of the Victims Directive and the Framework Decision respectively; as well the Code of conduct on countering illegal hate speech online (hereafter “the Code”).<sup>12</sup>

This working paper explores differences and similarities between these two branches of anti-discrimination law, attributing identical significance to both, while recognizing that their mode of implementation (transposition as compared to (judicial) cooperation) may vary. Criminal codes across the EU list offences outlawing *discriminatory crimes* or *crimes with discriminatory elements*, such as hate crimes, hate speech offences or discrimination. We contend that *discriminatory crimes* form part of *equality law* broadly understood.

As concerns the EU non-discrimination *acquis*, the ability to handle diversity and dispersed authority arises from the fact that the EU itself is an intergovernmental body that coexists, operates, and legislates within the diversity of its members. It must, by definition, embrace diversity. As concerns the equal treatment of diverse population groups, there is no tangible distinction between *grounds of discrimination in the civil branch* and *protected characteristics in the criminal branch*.<sup>13</sup> The expansion of Member States’ obligations under the criminal branch demonstrates the emergence of a *continuum* of equality that partly increases the coherence of EU equality law.<sup>14</sup> It stands in stark contrast with the civil branch, where gaping differences remain due partly to legislative deadlock concerning the so-called draft Horizontal Directive.<sup>15</sup>

We trace these developments in three steps. First, Part 1 introduces the central organizing concept, the continuum of equality, highlighting its potential in bridging the two tiers of relevant EU law, namely anti-discrimination norms adopted under Article 19 TFEU and *hate* related norms under Articles 82 through 86 TFEU. The analysis focuses on the asymmetries between lists of grounds (civil branch) and protected characteristics (criminal branch) in secondary legislation.

Part 2 explores the external influence of the ECtHR on the criminal branch of EU anti-discrimination law, using the examples of *sexual orientation* and *sex/gender* specific *hate*-related instruments in the

---

<sup>10</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55.

<sup>11</sup> Recital 9, 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 2001/220/JHA [2012] OJ L 315/57.

<sup>12</sup> EC European Commission, 'Guidance Document related to the transposition and implementation of 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 2001/220/JHA' [2013] Ref Ares (2013)(3763804) DG Justice; EU High Level Group on combating racism, xenophobia and other forms of intolerance, Guidance Note on the Practical Application of Council Framework Decision 2008/913/JHA, November 2018 (“Guidance Note”); European Commission, Code of Conduct on Countering Illegal Hate Speech Online, June 2016; Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2018] OJ L 303/69.

<sup>13</sup> “It is important to view the EU measures aimed at addressing racism and xenophobia in the context of the broader EU legislative framework. Instruments aimed at supporting victims of crime and antidiscrimination measures are of particular relevance in this respect”, LIBE Committee, *Study on European Legal Framework on hate speech, blasphemy, and its interaction with freedom of expression*, 2015.

<sup>14</sup> Anti-discrimination, non-discrimination and equality law are used interchangeably throughout the paper.

<sup>15</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final.

European Court of Human Rights' recent jurisprudence. We find that EU norms codify Strasbourg jurisprudence and promote consistency with international human rights law, simultaneously strengthening the clout of the anti-discrimination directives as concerns criminal forms of discrimination.

Part 3 investigates whether the Charter can facilitate the emergence of a continuum of equality by bridging EU Member States' obligations under EU and international law, mindful of the higher level of protection accorded under the latter. We conclude that rather than this being the case, the Charter has been used for three distinct purposes: a) to maintain the *status quo*; b) to reinforce the salience of EU law as a catalyst for change; but also c) to uphold/impose a narrow reading of the anti-discrimination directives.

## **2. Two-tiered approach to EU anti-discrimination law**

In the context of equal treatment, the law – through binding as well as non-binding measures - plays a symbolic yet not necessarily key role in the EU's experimentalist, multi-level governance structure, powered by policymakers, courts and legislators.<sup>16</sup> Against this backdrop, this section canvasses EU anti-discrimination law from the perspective of a continuum of equality that creates bridges between the two tiers of the relevant EU *acquis* as well as between different forms of judicial and policy cooperation and exchange.

### **2.1 The continuum of equality**

In practice, there exists a *continuum* of intolerance and discrimination, ranging from less severe manifestations to more serious forms. The Allport's scale of prejudice and discrimination distinguishes interlocution from avoidance, discrimination and physical attack.<sup>17</sup> There is a wide spectrum of discriminatory manifestations in between these forms, in turn requiring an equally wide spectrum of state measures and legislative provisions.

The *continuum* of intolerance and discrimination necessitates a *continuum* of legal and policy responses. These responses can range from non-legal, prevention-oriented measures - such as promoting tolerance and non-discrimination in schools and publicity campaigns - through countering hate speech with speech or the adoption of codes of conduct to civil law litigation, labour law inspections and the prosecution of discrimination and hate crimes.

In all forms of discrimination that have a victim wronged by a conduct, the basic discriminatory mechanism involves: (i) the existence of a "victim"; (ii) the existence of a "discriminator" (acting with or without discriminatory intent); (iii) the choice of a victim on the basis of characteristics protected by law; and (iv) harm suffered by the victim.

A victim-centric perspective characterizes criminal, civil as well as administrative law but the threshold of criminal conduct is determined by national legislators in a discretionary therefore diverse manner. Criminal law represents the most intrusive measure, thus the last resort in the protection of rights and values. Only the most egregious violations tend to be criminalized and not all grounds included in anti-discrimination legislation are protected under criminal law. Hate speech offences and hate crimes are sanctioned only on a sub-set of grounds otherwise included in domestic civil or administrative laws. Logically, all the grounds protected under criminal law should also be included in other branches of anti-discrimination legislation but there are important exceptions to this rule.

---

<sup>16</sup> Gráinne de Búrca, 'EU Race Discrimination Law: A Hybrid Model?' in Gráinne de Búrca and Joanne Scott (eds), *Law and Governance in the EU and the US* (Hart Publishing, 2006) 98.

<sup>17</sup> Gordon Allport, *The Nature of Prejudice* (Addison-Wesley, 1954).

Due to the open list of grounds in Article 14 ECHR that safeguards the principle of equal treatment, Strasbourg caselaw has levelled out protection between discrimination as a civil wrong and discrimination as a crime as concerns the grounds/protected characteristics - an issue explored in Section II. Rulings not only address hate speech and hate crime, but also impose positive obligations with an emphasis on ex officio duties to investigate and prosecute bias regardless of whether national legislation explicitly lists a given *protected characteristic*. This broadens the scope of protection from discriminatory crimes at the national level with two important consequences for EU anti-discrimination law: first, it settles the scope of the Victims' Rights Directive, and second, it informs the interpretation of the Charter of Fundamental Rights as concerns criminal forms of discrimination.

Equality and non-discrimination at the EU level have been ensured through a so-called "hybrid" model. Complementing judicial enforcement, policy exchange and financial incentives have not only been offered but also preferred by the European Commission. This governance approach relies on "revisability and open-endedness" and is "more radically bottom-up, with judicial enforcement playing a residual role to monitor the adequacy of processes."<sup>18</sup> Irrespective of the conceptual or political origins of this approach, the goal has been, and still is, to broaden the scope of the normative framework.<sup>19</sup> "Revisability" does not mean, however that the way is always "forward".

Against this backdrop, the *continuum* of equality signifies an interdisciplinary and cross-sectoral approach to equality and non-discrimination.<sup>20</sup> Regardless of their nature (legal, policy, other) and repressive character (criminal, administrative or civil), state responses to different manifestations of discrimination form a continuum, mirroring discrimination in practice. The continuum of discrimination encompasses all violations of law with a discriminatory element *vis-a-vis* an individual or a group, including direct and indirect discrimination, harassment or instruction to discriminate, hate crime and hate speech, including gender-based violence.<sup>21</sup>

## 2.2 Civil and criminal branches of EU anti-discrimination law: personal scope

EU non-discrimination norms have grown from a narrowly tailored body of law on employment and market-related discrimination to a complex regime covering a much broader range of fields and a much wider scope of *grounds*.<sup>22</sup> The concept of 'grounds' and 'protected characteristics' can be used interchangeably but the first more often appear in the civil branch, while the second in the criminal branch. They refer to personal characteristics, including race, colour, ethnic or social origin, religion or belief, disability, age, gender, gender expression and identity, sexual orientation, etc. that are also explicitly mentioned in the open list of Article 21 of the Charter of Fundamental Rights of the EU.

The international non-discrimination framework binding EU Member States is robust. In addition to and preceding EU law, it consists of United Nations treaties including the *International Covenant on Civil and Political Rights* (ICCPR), on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD), Council of Europe treaties such as the *European Convention on Human Rights* (ECHR) and

---

<sup>18</sup> de Búrca (n 28) 98.

<sup>19</sup> Gráinne De Búrca, 'The European Union in the negotiation of the UN Disability Convention' (2010) 35 *European Law Review* 174 at 221.

<sup>20</sup> See, for instance, sections on hate crime and hate speech in European Union Agency for Fundamental Rights, *Handbook on European non-discrimination* (European Union, 2018) 81 and 86. As well as Council of Europe, *Links between Freedom of Expression and Other Human Rights* (2019), page 82.

<sup>21</sup> Hate crimes are *criminal offences committed with a bias motive* according to the OSCE definition endorsed by the European Commission in the Guidance Note on the Framework Decision 2008/913/JHA.

<sup>22</sup> Elise Muir, Pursuing Equality in the EU, in Damian Chalmers and Anthony Arnall (Eds.), *The Oxford Handbook of European Union Law*, 2015.

the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).<sup>23</sup> The EU has ratified the CRPD and is set to ratify the Istanbul Convention.

In the international legal framework, the list of protected grounds is an open one, except in ground-specific treaties. Initially, this limited the protection of victims belonging to the so-called younger generation of protected characteristics – disability, sexual orientation or gender identity – but this is not the case anymore.

The Treaty on the Functioning of the European Union (TFEU) in Article 19 provides for the Council and the European Parliament to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.<sup>24</sup> This is the basis in EU primary law for the adoption of EU norms on non-discrimination. On the other hand, Articles 82 through 86 TFEU provide for the establishment of minimum rules applicable in the Member States to facilitate mutual recognition of judgments and judicial decisions, as well as police and judicial cooperation in criminal matters. These provisions form the basis of EU norms and standards on criminal forms of discrimination.

EU secondary law adopted under Article 19 TFEU includes the Racial Equality Directive that prohibits discrimination on the grounds of racial or ethnic origin and applies to employment, education, social services and benefits, and goods and services. The Employment Equality Framework Directive that only applies to employment and prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation. The Gender Equality Directive (Recast) and the Gender Goods and Services Directive which prohibits gender discrimination apply respectively to employment and access to goods and services. At present, sexual orientation, religious belief, disability and age are only protected in the context of employment, because a proposal to extend protection to goods and services (the so-called 'Horizontal Directive'), has been stuck in the legislative process since 2008.

The Framework Decision concerning hate-crimes is based on Articles 29 and 31 TEU.<sup>25</sup> It aims at approximating the criminal laws of EU Member States; mandating criminalization of hate crimes and certain forms of hate speech, on the grounds of race, colour, religion or belief, descent or national or ethnic origin.<sup>26</sup> ICERD and the Framework Decision take similar approaches, so that according to the OSCE/ODHIR database of hate crime laws, EU Member States criminalise racist hate crime (except the Netherlands, Ireland and Estonia that lack hate crime provisions, but penalise hate speech. Sexual orientation is explicitly included in the hate crime provisions of 18 EU states, gender identity in nine, sex/gender in ten and disability in 13.<sup>27</sup>

The broadening of the Strasbourg Court's positive obligations doctrine concerning hate crimes has resulted in the gradual expansion of protected characteristics, which has had a direct as well as indirect effect on Member States given the EU's efforts to emulate this approach.<sup>28</sup> This tendency has been limited to criminal cooperation, still, it may have further reaching effects when it comes to discrimination prohibited in criminal law but (also) falling under directives in the civil branch of EU anti-discrimination law.

---

<sup>23</sup> This section does not provide a comprehensive overview, which can be found in European Union Agency for Fundamental Rights, 'Handbook on European Non-Discrimination Law – 2018 Edition' (, (European Union, 2020).

<sup>24</sup> Treaty on the Functioning of the European Union, [2012] OJ C 326/47.

<sup>25</sup> Treaty on European Union [2012] OJ C 326/13. According to Article 29 TEU, the Council can adopt decisions to define the EU's approach to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions. According to Article 31 TEU decision must be unanimous.

<sup>26</sup> This should not prevent the broadening of the scope of protection, see preambular paragraph 10 of the Framework Decision.

<sup>27</sup> OSCE ODIHR, 'What Do We Know | OSCE - ODIHR' (*Hatecrime.osce.org*, 2020). <<https://hatecrime.osce.org/what-do-we-know>> accessed 17 July 2020.

<sup>28</sup> Alastair Mowbrey, *The Development of Positive Obligations under the European Convention on Human Rights* (Hart, 2004).

Criminal codes across the EU outlaw discriminatory crimes or crimes with discriminatory elements, such as hate crimes, hate speech or harassment not reaching the level of hate. Directives in the civil branch define and sanction harassment, which is often used to fight hate speech under criminal, as well as civil law, depending on domestic legislation transposing the directives.<sup>29</sup> National courts can thus investigate, prosecute and - in theory - provide remedy to hate speech victims.<sup>30</sup>

In line with international obligations, EU law on the investigation and prosecution of hate crimes and hate speech, as well as on the protected characteristics in the criminal branch is now more detailed and broader than procedural safeguards and protected grounds provided in the civil branch. The case may be that harassment under the civil branch is sanctionable in relation to a shorter “list” of grounds and a more limited set of fields than harassment under the criminal branch, giving rise to a wedge in and across the Member States. Conspicuously, the most comprehensive list of protected characteristics can be found in the most recent criminal law instrument, the Victims’ Rights Directive.<sup>31</sup>

The procedural approach in the criminal branch stands in stark contrast with the substantive take on discrimination of directives in the civil branch, with significant implications for the personal as well as material scope of protection particularly noticeable in the list of grounds. Under the Victims’ Rights Directive, specific protection stems from the protected characteristic targeted by the perpetrator. This implies a State obligation to acknowledge and tackle the underlying motivation, such as homophobia, which in practice cannot be achieved if measures are limited to criminal law alone. Can the authorities identify bias motivation and prevent secondary victimization as required under the directive if homophobic discrimination is not outlawed in other fields? <sup>32</sup> A homophobic hate crime victim ought not be discriminated by public authorities in other areas of law, otherwise his protection as a crime victim becomes meaningless. In the criminal branch it is left to prosecutors and judges to fill the gaps of an inconsistent legal and policy framework and respond to the perpetrators’ prejudiced motivation.<sup>33</sup>

Fragmentation and inconsistencies in the civil branch is challenged before the CJEU, often in the form of strategic litigation. The preliminary reference procedure has been used to broaden the scope of protection, especially when national norms explicitly leave certain identity traits unprotected.<sup>34</sup> The Strasbourg Court’s positive obligations doctrine can engender favourable changes in the interpretation of Article 21 of the Charter of Fundamental Rights and the subsequent sections explore how building on the relevant Strasbourg jurisprudence courts, legislators, and policy makers (can) promote the equal treatment agenda by embracing the concept of equality as a continuum.

---

<sup>29</sup> Dieter Schindlauer, “Using the conception of harassment in national anti-discrimination legislation as a tool in combating hate speech?” (2018) 2, *European Equality Review*, 78.

<sup>30</sup> Bulgaria, Burgas Administrative Court, decision No. 564 in case No. 1786/2017, Valery Simeonov v. A.A., of 23 March 2018, available at: [www.admcourt-bs.org/CMS\\_ADM/images\\_content/1786\\_2017R.htm](http://www.admcourt-bs.org/CMS_ADM/images_content/1786_2017R.htm) cited by Human European Consultancy. 2019. *A Comparative Analysis of Gender Equality In Europe*. [online] Available at: <<https://www.humanconsultancy.com/downloads/1568-a-comparative-analysis-of-gender-equality-law-in-europe-2019-pdf-1-72-mb>> [Accessed 26 August 2020].

<sup>31</sup> Victims’ Rights Directive recital 9, article 1 sets forth that “any victim should be treated without discrimination based on “race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health, etc.”

<sup>32</sup> OSCE/ODHIR, *Hate Crime Victims in the Criminal Justice System, a practical guide* (Warsaw, 2020) 10

<sup>33</sup> See, for example, the analysis on state primary schools protests by parents in the UK against the teaching program “No Outsiders” aimed at promoting equality for LGBTI people and challenging homophobia in Neville Harris, *Education, Law and Diversity* (Bloomsbury Publishing 2020) 5:

<sup>34</sup> Uitz (n 5) .

### 3. Asymmetric evolution of EU anti-discrimination law

There are discrepancies in the evolution of the normative landscape when it comes to the criminal v the civil branch of EU non-discrimination law. This section demonstrates how the list of protected characteristics has *de facto* been extended as a result of interaction between courts, legislators and policy makers in the criminal branch, first in relation to the Framework Decision and later the Victims' Rights Directive. Gradual improvements in the criminal branch imply that a seemingly weaker governance technique can trigger more robust approximation of legal standards when cocooned in already existing obligations under international human rights law that bind Member States.

#### 3.1 Framework decision and secondary legislation

As mentioned above, the Framework Decision mandates action against hate speech and hate crimes based on race and religion. The narrow personal scope begs the question why only these types of hate speech and crime should be prohibited under EU law when all humans are born free and equal in dignity and in rights?<sup>35</sup> To answer, this section revisits the tensions between universal human rights and EU anti-discrimination law as concerns the criminal branch.

ECtHR case law extends protection from discrimination in criminal law to grounds not covered by the Framework Decision. In *M.C. and A.C. v. Romania* the Strasbourg Court extended protection from hate crimes to sexual orientation, determining that the authorities' failure to effectively investigate a homophobic attack violated the applicants' right of effective investigation in conjunction with the prohibition of discrimination (Articles 3 and 14 of the ECHR).<sup>36</sup> The ECtHR clarified in *Identoba and others v. Georgia* that *gender identity* is also a protected ground.<sup>37</sup> In *Beizaras and Levickas v. Lithuania* the court ruled that the authorities' refusal to investigate hate-speech comments about a same-sex kiss on Facebook amounts to a discriminatory attitude.<sup>38</sup>

Due to political sensitivities, national authorities seldom investigate gender based violence as bias motivated (failing to record misogynist or sexist slur or to take note of underlying stereotypical power relationships) or prosecute these cases as crimes against the community. They focus instead on interpersonal aspects (the perpetrator's alcoholism or unemployment) or blaming the victim. That said, the ECtHR has considered gender-based violence as discriminatory conduct in several cases.<sup>39</sup>

Recent EU directives include provisions on incitement to violence or hatred on grounds beyond the ones listed in the Framework Decision. The AVMSD establishes that communication shall not (...) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.<sup>40</sup> The Victims' Rights Directive goes beyond this list without maintaining hierarchy among the grounds. It protects, among others, lesbian, gay, bisexual, transgender, intersex (LGBTI), disabled and gender victims of hate crime establishing minimum standards on the

---

<sup>35</sup> Natalie Alkiviadou, 'Hate Speech on Social Media Networks: Towards A Regulatory Framework?' (2018) 28 Information & Communications Technology Law.

<sup>36</sup> *M.C. and A.C. v. Romania* App no 12060/12 (ECHR 12 April 2016).

<sup>37</sup> *Identoba and Others v Georgia* App no 73235/12 (ECHR, 12 May 2015).

<sup>38</sup> *Beizaras and Levickas v. Lithuania* App no 41288/15 (ECHR 14 January 2020).

<sup>39</sup> *Eremia v. the Republic of Moldova* App no 3564/11 (ECHR 28 May 2013), *M.G. v. Turkey* App no 646/10 (ECHR 22 March 2016), and *Halime Kilic v. Turkey* App no 22492/93 (ECHR 28 March 2000)

<sup>40</sup> Audiovisual Media Services Directive. See also Article 28a in the Proposal for a Directive amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM/2016/0287 final - 2016/0151 (COD) at.

rights, support and protection of victims of crime and ensuring that they are recognised and treated with respect, receive proper protection, support and access to justice.<sup>41</sup>

Generally overlooked in discussions about the EU anti-discrimination *acquis*, these directives regulate equal treatment in the criminal branch.<sup>42</sup> They are in conformity with international law obligations stemming from the Istanbul Convention, the CRPD and ECHR. Depending on national legislation, the Victims' Rights Directive offers protection from discrimination in criminal law to grounds and in fields not covered by the EU directives in the civil branch.

### 3.2 Soft law measures

Soft law measures perform a similar function. The European Commission has adopted Guidance Documents and Notes to facilitate the implementation of both the Framework Decision and the Victims' Rights Directive. These soft law instruments do not modify the scope of secondary legislation, yet they further clarify Member State obligations.

The Victims Rights' Directive's Guidance Document affirms that Member States should pay particular attention to the principle of non-discrimination, which covers all possible discrimination grounds. As underlined in Recital 17, this is particularly relevant in the context of gender-based violence and hate crimes. The Guidance Document's objective is not to criminalise certain acts or behaviours in the Member States because the protection of victims depends entirely on national law. However, under Articles 52 and 53 of the Charter of Fundamental Rights of the EU the applicability of ECtHR caselaw must be considered, an issue explored in Part 3 below.<sup>43</sup> While apparently deferential to national authorities, the Guidance Note highlights that EU Member States' obligations on the inclusion of certain grounds may stem from a normative source outside EU law. The Charter plays a significant part by bringing Member States' international obligations into play as concerns criminal forms of discrimination.

A similar approach characterises the Guidance Note on the practical application of the Framework Decision released by the EU High Level Group on combating racism, xenophobia and other forms of intolerance in 2018. With reference to ECtHR caselaw, the Guidance Note urges Member States to include in their criminal law broader lists than the one mandated by the Framework Decision.<sup>44</sup> This is a reminder that sexual orientation and other grounds should be included in national hate crime and hate speech laws to comply with the ECHR.

The Guidance Note is particularly oriented at implementing positive obligations under the ECHR, which operates as an external normative source in this case. The Note provides details on implementing the duty of effective investigation and prosecution of bias motivated offenses, including the identification and recording of offence, evidence gathering, qualification, charging, sentencing, restitution and compensation.

---

<sup>41</sup> "Gender identity" was first included in EU secondary legislation through Directive 2011/29/EU of the European Parliament and of the Council (recast) on Asylum Qualification [2011] OJ L 337/9. LGBTQI-specific accommodation during asylum interviews is required by Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

<sup>42</sup> The e-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178/1) refers to "incitement to hatred on grounds of race, sex, religion or nationality" (article 3 (4)).

<sup>43</sup> "In all individual provisions of the transposition measures of this Directive the general principles of EU law (e.g. equality and non-discrimination) and the Charter of Fundamental Rights must be respected. Moreover, it is necessary to recall the positive obligations and existing case-law standards of the European Court of Human Rights" (...). Guidance Document, p. 1.

<sup>44</sup> See *Identoba* above and *Vejdeland and Others v Sweden* App no 1813/07 (ECHR 9 February 2012).



In the criminal branch, a narrow interpretation of EU law cannot hold due to the influence of the ECHR through the Charter. In respect of the Victims' Rights Directive, it is impossible to separate out Member State obligations stemming from EU law, and those stemming from international treaties, which essentially broaden the scope of protection from discriminatory crimes under EU law. In this context, the European Parliament's call for the Commission "to revise the Framework Decision in order to include sexism, bias crime and incitement to hatred on grounds of sexual orientation, gender identity and sex" seems belated and unnecessarily limited.<sup>45</sup> The Victims' Rights Directive both directly and indirectly broadens the scope of protection under criminal law.

Soft law measures in the criminal branch of EU anti-discrimination law clarify the role of the Charter in ensuring consistency with Member States' international obligations. With this in mind Part 3 asks what contribution the EU Charter can make to normative consistency overall, particularly in light of the CJEU's so far mixed responses that may erode the continuum of equality in the civil branch.

#### **4. The Charter's potential in the evolution of EU anti-discrimination law**

Contrary to its broadening and consistency-ensuring function in the criminal branch, the Charter's potential has not yet been fully realised in the civil branch of EU anti-discrimination law. In the latter context, the Charter has sporadically, albeit increasingly been called into play for three distinct purposes, namely to maintain the (domestic) *status quo*, to reinforce the salience of EU law as a catalyst of change and a source of autonomous concepts, while at times it has served to legitimate an unjustifiably narrow reading of EU anti-discrimination law.

This section explores ways in which the principle of equal treatment enshrined in Article 21 of the Charter has been used by the CJEU. It should be noted at the outset that while Article 21 has been regularly invoked in caselaw relating to the anti-discrimination directives, with one notable exception it has not been used in the criminal branch due to the lack of legal challenges before the Luxembourg Court.

##### ***4.1 The CJEU's interpretation of Article 21 of the Charter***

Article 21 of the Charter prohibits discrimination with reference to an open list of grounds that explicitly mentions characteristics protected under EU law, as well as many so-called new generation grounds. The provision itself does not create power to enact EU legislation, nor does it provide for a robust prohibition of discrimination, as it does not go beyond areas covered by existing EU anti-discrimination law, while its application is limited to the actions of the EU, its bodies and institutions and the Member States when they implement EU law.<sup>46</sup>

Article 21 references in CJEU judgments are quite recent because the Charter was adopted in 2000, but its applicability was not settled until 2009, when the Treaty of Lisbon entered into force. The Fransson judgment clarified the CJEU's interpretation of the Charter's scope.<sup>47</sup> It is clear from Fransson that the Charter can apply to situations concerning the implementation of EU secondary as well as soft law.

The recently settled issue of the Charter's applicability partly explains the delay in referencing the Charter's non-discrimination principle but it cannot explain the lack of systematic references in CJEU judgments. Important rulings were delivered after 2009, in which reference to Article 21 could have

---

<sup>45</sup> European Parliament resolution of 14 March 2017 on equality between women and men in the European Union in 2014-2015 (2016/2249(INI)), [2018] *OJ C* 263/ 49–63.

<sup>46</sup> Claire Kilpatrick, Article 21 – Non-Discrimination in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Eds.), *The EU Charter of Fundamental Rights: A Commentary*, (CH Beck-Hart-Nomos, 2014) 622 – 647.

<sup>47</sup> Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] ECLI:EU:C:2013:280, para. 18 and 21.

resolved issues such as intersectionality<sup>48</sup> or reinforced judicial protection most notably in relation to sanctions and remedies.<sup>49</sup>

It is also important to note that the preliminary reference procedure has not been used to the same extent as concerns different protected grounds, so that while for instance age discrimination has generated extensive case law, the same cannot be said about racial or ethnic origin and religion, despite the slowly growing body of cases concerning the latter two grounds.<sup>50</sup> Conversely, Charter references seem to dominate adjudication on the grounds of religion and disability.

Still, an extensive body of case-law attests to the challenges of national courts dealing with the implementation of the anti-discrimination directives and Article 21 of the Charter.<sup>51</sup> Leading judgments provide a glimpse into the CJEU's diverse approaches to Article 21 throughout the years.<sup>52</sup> They also serve as indicators on how the CJEU may address lingering inconsistencies that occur in relation to obligations under EU anti-discrimination law on the one hand and Member States' international human rights obligations on the other.

Article 21 of the Charter expresses the purpose of the CJEU's interpretation of the gender equality and non-discrimination directives.<sup>53</sup> The CJEU's "expansive approach adopted in *Mangold* [as] to the horizontal effect of fundamental rights in the EU and the further rooting of this approach in the Charter" is a key contribution.<sup>54</sup> The Court first made a link between the Charter and the principle of equal treatment in *Küçükdeveci*.<sup>55</sup> In *Ajos*, the Court reaffirmed that the general principle of equal treatment was capable of having direct horizontal effect within the scope of application of EU law.<sup>56</sup> More recent cases attest to the Court's readiness to provide horizontal effect to related Charter rights as well,<sup>57</sup> thus 'constitutionalising' certain rights enshrined in the Charter.<sup>58</sup>

---

<sup>48</sup> Case C-443/15 *David L. Parris v Trinity College Dublin and Others* [2016] ECLI:EU:C:2016:897. For an analysis see, Dagmar Schiek, On Uses, Mis-Uses and Non-Uses of Intersectionality Before the European Court of Justice (ECJ): The ECJ 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*, CETLS Online Paper Series, Vol 7 (3), 2018.

<sup>49</sup> Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* [2013] ECLI:EU:C:2013:275. For details, see, Katrin Wladasch Making Antidiscrimination Law Effective: Burden of Proof, Remedies and Sanctions in Discrimination Cases. In T. Giegerich (ed.) *The European Union as Protector and Promoter of Equality. European Union and its Neighbours in a Globalized World*, vol. 1. (Springer, Cham, 2020).

<sup>50</sup> Several interlocking factors may explain these differences, including the relatively resourceful applicants in cases concerning age for instance, litigation strategies that focus on certain issues such as disability discrimination in Denmark, and/or the approach of national courts to making preliminary referrals – some countries being more active than others.

<sup>51</sup> This section relies on the ACTIONES Project that identified CJEU judgments as the main vehicle of judicial dialogue vis-à-vis Member State courts (vertical judicial dialogue) as compared to cross-national, horizontal borrowing among national courts. It must be recalled that a systematic study of national caselaw could not be undertaken, given the linguistic barriers and the vast number of courts. See ACTIONES Project, *Handbook on Techniques of Judicial Interactions in the Application of the EU Charter: Module 6*, available at <https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/ACTIONES/ACTIONESplatform>

<sup>52</sup> These judgments are discussed in Kimberly Liu and Colm O'Cinneide, *The ongoing evolution of the case-law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*, (European Union, 2019).

<sup>53</sup> *Ibid*, p. 8.

<sup>54</sup> *Ibid*, p. 92.

<sup>55</sup> Case C-555/07, *Küçükdeveci v Swedex GmbH & Co KG* [2010] ECLI:EU:C:2010:21 para. 21.

<sup>56</sup> Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* [2016] ECLI:EU:C:2016:278.

<sup>57</sup> For instance, joined cases C-569/16 and C-570/16 *Stadt Wuppertal and Volker Willmeroth als Inhaber der TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K. v Maria Elisabeth Bauer and Martina Broßonn* [2018] ECLI:EU:C:2018:871.

<sup>58</sup> Liu and O'Cinneide (n 55).

Given the significance of Article 21 in itself but also as the expression of a general principle of EU law and given the CJEU's function as the final interpreter of EU law, it is reasonable to expect that even when national courts making preliminary referrals fail to do so, the Court would invoke this Charter provision. Simultaneously, when national courts do invoke Article 21, the CJEU should in principle respond to such preliminary questions. In practice, however, the Luxembourg Court has not taken such a principled approach to cases implicating Article 21 of the Charter.

There are important judgments in which the CJEU did not respond to questions raised by national courts in relation to the Charter. This was the case in *Coman* that concerned the relocation of a same sex couple from a Member State that does recognize same sex marriage and same sex spouses as family members to another that does neither.<sup>59</sup> In the preliminary reference the Romanian Constitutional Court invoked EU norms on freedom of movement "in light of" Article 21 of the Charter, but the Luxembourg verdict did not engage with the latter provision. Conversely, the CJEU instrumentalised the Charter by underlining that refusing a residence permit to a same-sex spouse would be inconsistent with the right to respect for private and family life, guaranteed by the EU Charter. The conclusion was that the contested refusal was precluded by Article 21 TFEU within the remit of the freedom of movement for EU nationals and their family members. The Court based its reasoning on free movement, invoking fundamental human rights only at the justification stage, which in some commentator's view renders the judgment partly 'catalytic', missing a proactive outcome on the ground of sexual orientation.<sup>60</sup>

On the other end of the scale, there are examples when the CJEU made excellent use of Article 21 of the Charter. In *CHEZ*, the Luxembourg Court invoked this Charter provision to justify a broad reading of both the personal and material scope of the Racial Equality Directive as concerns the Roma minority, emphasizing the importance of effectively protecting the rights enshrined in Article 21.<sup>61</sup> The verdict extended protection to a non-Roma treated unfavourably 'together with the Roma' in the context of the placement of electricity meters in 'Roma districts' on poles as high as seven meters.<sup>62</sup>

Among several positive examples, in which the CJEU did rely on the Charter, some stand out as general references, and few as particular references to Article 21. An example of the latter is *Deckmyn*, a case concerning copyrighted work used by a third party for purposes of imparting Islamophobic messages, Article 21 of the Charter was invoked to reinforce the protection of the original work from the defendants' 'ironic' use.<sup>63</sup>

In relation to an unsuccessful job application from a German citizen to a religious organisation due to failure to comply with occupational requirements stemming from the (Christian) religious nature of that organization in *Egenberger*, the Court held that the prohibition of discrimination on grounds of religion or belief constitutes an aspect of the general principle of equal treatment under Article 21.

This case also dealt with the specific exception available under Article 4(2) of the Employment Equality Directive to churches and other religious organisations from hiring job seekers who do not fit the so called genuine and determining occupational requirement connected to following the employer's religious ethos. Importantly, in *Egenberger*, the CJEU found that "a determination of compliance with this exception cannot be entrusted to the organisation itself and must be subject to effective judicial

---

<sup>59</sup> Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

<sup>60</sup> See Katharine G. Young, 'A typology of economic and social rights adjudication: exploring the catalytic function of judicial review' (2010) 8 (3) *International Journal of Constitutional Law* 385 at 413.

<sup>61</sup> Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] ECLI:EU:C:2015:480.

<sup>62</sup> Sara Benedi Lahuerta, 'Ethnic discrimination, discrimination by association and the Roma community: *CHEZ*' (2016) 53 (3), *Common Market Law Review* 1.

<sup>63</sup> Case C-201/13, *Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België* [2014] ECLI:EU:C:2014:2132 para 30.

review if challenged”.<sup>64</sup> The significance of this finding cannot be undervalued, given that it contrasts with interpretation by German courts that hitherto had given priority to broadly defined religious autonomy rights of religious organisations and affiliated bodies. While Article 21 has undoubtedly embellished the legitimacy of the CJEU’s verdict, *Egenberger* “has triggered a degree of controversy, and is currently the subject of a constitutional challenge before the German Constitutional Court.”<sup>65</sup>

Jurisprudence on minority religions, such as Islam has so far deviated from the Court’s general purposive approach when interpreting Article 21 and the anti-discrimination directives. It is important to note that unlike in *Egenberger*, in cases concerning religious discrimination against Muslim women, i.e. against members of stigmatized and racialized (religious) minorities, the Advocates General and the Court referenced the ECHR, when defining the concept of ‘religion or belief and engaged with the Charter unevenly.

In *Bougnaoui*, Advocate General Sharpston argued that non-discrimination is a fundamental principle of EU law whose justification is narrowly confined, which may at times necessitate the levelling up of protection from discrimination available under the ECHR in pursuance of Article 52(3) of the Charter.<sup>66</sup> Conversely, in *Achbita*, Advocate General Kokott made a rather troubling reference to the Charter provision on the freedom of establishment (Article 16) essentially to read down the level of protection provided on the grounds of religion or belief in the Employment Equality Directive.<sup>67</sup> The CJEU, on its part invoked Article 21 of the Charter to reinforce the applicability of the Directive to the so called Islamic veil cases but did not make substantive use of the principle in order to ensure a high level of protection to Muslim women employees wearing the veil.<sup>68</sup>

There are several rulings in which the Charter is invoked to reinforce a narrow reading or, alarmingly, limit the scope of protection.<sup>69</sup> In *Kaltoft*, the Charter was invoked to reinforce the finding that disability, as a ground should be narrowly defined.<sup>70</sup> In *Test Achats*, the CJEU relied on Article 21 to support the comparability of men and women in relation to insurance, essentially to override EU legislation seeking to favour women over men in this field.<sup>71</sup>

The much criticized *Jyske Finans* case is also an example of the negative trend. In this case, the opinion of Advocate General Wahl invoked the Charter for the purposes of limiting the interpretation of the ground of racial or ethnic origin in a way that weakens but does not exclude the Racial Equality Directive’s applicability to xenophobia affecting persons of foreign (non-EU) origin.<sup>72</sup> The CJEU omitted reference to the Charter and adopted an even narrower interpretation of the Directive than the

---

<sup>64</sup> Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* [2018] ECLI:EU:C:2018:257 para. 59. and 76-77.

<sup>65</sup> Liu and O’Cinniedie (n 55) 12.

<sup>66</sup> Opinion of Advocate General Sharpston delivered on 13 July 2016 in Case C-188/15, *Asma Bougnaoui and Association de défense des droits de l’homme (ADDH) v Micropole S* ECLI:EU:C:2016:553 para 58-72.

<sup>67</sup> Opinion of Advocate General Kokott delivered on 31 May 2016 in Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* ECLI:EU:C:2016:382

<sup>68</sup> Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] ECLI:EU:C:2017:203 para 25-26 and Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l’homme (ADDH) v Micropole S* ECLI:EU:C:2017:204.

<sup>69</sup> Erica Howard, 'EU Anti-Discrimination Law: Has the CJEU Stopped Moving Forward' (2018) 18 *International Journal of Discrimination and the Law*.

<sup>70</sup> Case C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund* [2014] ECLI:EU:C:2014:2463 para 39. The case turned on whether obesity is disability.

<sup>71</sup> Case C-235/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECLI:EU:C:2011:100.

<sup>72</sup> Opinion of Advocate General Wahl delivered on 1 December 2016 in case C-668/15 *Jyske Finans AS v Ligebehandlingsnaevnet, acting on behalf of Ismar Huskic* ECLI:EU:C:2016:914 para. 43.

Advocate General. The judgment came under heavy criticism, with one commentator noting that both the reasoning and the result “begs the question of what space there is for race discrimination in the Race Directive aside from discrimination based on ethnic origin.”<sup>73</sup> The verdict inadvertently challenges domestic jurisprudence in Denmark where similar situations used to amount to indirect discrimination beforehand. Furthermore, it challenges the foundations of EU migrant integration policies that are incidentally based on non-EU origin and stands in stark contrast with *CHEZ*'s broad reading of racial discrimination as extending protection to racial majority individuals associated with minority groups.<sup>74</sup>

All in all, the Charter has been invoked in cases relating to the ground-specific directives in a far from systemic, although generally improving and more consistent manner. Still, both the CJEU and the Advocates General make reference to Article 21 inconsistently. When referring courts rely on the Charter as a key instrument for interpreting EU law, such as in *Egenberger* and *Coman* their approach is not necessarily reflected in CJEU rulings. The overview shows that the CJEU uses the Charter for three distinct purposes:

- a) to maintain the (domestic) *status quo*, such as in *Kaltoft*, *Bougnaoui* and *Achbita*
- b) to reinforce the salience of EU law, as a catalyst of change and a source of autonomous concepts, such as in *CHEZ* and *Egenberger*
- c) to legitimate an unjustifiably narrow reading of EU anti-discrimination law, such as in *Test Achats* and *Jyske Finans*.<sup>75</sup>

The CJEU's approach to Article 21 of the Charter has enabled the simultaneous advancement of opposing stances on equality and non-discrimination in different Member States, perpetuating inconsistencies between protected characteristics. The “list” of protected grounds has become a central theme of contestation in some countries precisely because of the CJEU's threefold approach to certain grounds, particularly racial or ethnic origin, religion and belief, gender, and to some extent disability.

#### **4.2 The Charter and Member States' international obligations**

Several (international) courts, tribunals and agencies have competence to adjudicate claims relating to the principle/right to equal treatment, which is guaranteed by distinct legal regimes and a plethora of legal norms, including the Charter of Fundamental Rights of the EU. Article 21 and other Charter rights may be invoked before national courts applying EU law or the Court of Justice of the EU interpreting EU law.<sup>76</sup> Important sites of enforcement include equality bodies, i.e. bodies established to promote racial and gender equality under the relevant directives.<sup>77</sup> So far, the CJEU has relied on the Charter in

---

<sup>73</sup> *Shreya Atrey*, ‘Race discrimination in EU law after *Jyske Finans*, Case C-668/15, *Jyske Finans A/S v. Ligebehandlingsnævnet*, acting on behalf of *Ismar Huskic*, Judgment of the Court (First Chamber) of 6 April 2017 EU:C:2017:278’ (2018) 55 (3) *Common Market Law Review* 627.

<sup>74</sup> *Lilla Farkas*, ‘Throwing the babies out with the bathwater: the CJEU, xenophobia and equality bodies after *Jyske Finans*’ 2018/1, [European Equality Law Review](#) 20.

<sup>75</sup> Subsequently in Case C-457/17 *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV* [2018] ECLI:EU:C:2018:912 the CJEU reiterated its overly narrow approach adopted in *Jyske Finans*.

<sup>76</sup> On the various remedial paths, see, Mark Dawson, *Elise Muir and Monica Claes* ‘Enforcing the Rights Revolution in the EU: the Case of Equality’ (2012) 3, [European Human Rights Law Review](#), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2177929](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2177929).

<sup>77</sup> Interestingly, despite direct access to the European Ombudsperson via complaints and her power to open own initiative inquiries into systemic issues, Article 21 of the Charter and discrimination-relevant EU norms have rarely been invoked before or by this institution. Considering that legislation and adjudication form but one pillar of EU governance in the field of equal treatment and non-discrimination, it seems somewhat surprising that non-legal measures and tools have so far remained largely unchallenged.

cases referred to it by national courts in the so called preliminary reference procedure.<sup>78</sup> An important characteristic of these proceedings is that the anti-discrimination regime in EU Member States is multi-sourced and interordinal, meaning that the norms stem from a host of United Nations and Council of Europe treaties, as well as the relevant EU *acquis*. National anti-discrimination laws seek to render coherent and consistent these normative sources, of which EU anti-discrimination law constitutes but one part. This coherence and consistency then give rise to a continuum of equality at the national level.

The Charter mandates the CJEU to ‘correct’ shortcomings and inconsistencies that may occur vis-à-vis international human rights treaties.<sup>79</sup> This follows, on the one hand, from Article 53, pursuant to which the Charter shall not ‘be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party’. On the other hand, pursuant to Article 52(3), insofar as a right is protected under the ECHR, the meaning and scope laid down by the Convention will govern interpretation, unless Union law provides more extensive protection.<sup>80</sup> As mentioned in Section 2, this is the case in relation to the investigation of hate crimes, both in terms of personal scope and the positive obligations of national authorities.

The coexistence of parallel normative sources may trigger legal uncertainty or inconsistent legal interpretation as described in Part 2.<sup>81</sup> Courts naturally seek to overcome these hurdles through judicial dialogue. By safeguarding the principle of equal treatment in general and ensuring coherent interpretation with reference to international treaty law, the Charter can play a significant role in guaranteeing that the ‘continuum of equality’ travels safely from the national to EU level adjudication.

Reasons that may discourage victims from pursuing a criminal discrimination case include procedural difficulties such as a higher threshold of evidence concerning ‘bias motivation’ and the relative ineffectiveness of remedies. In hate speech cases the perpetrator seeks to harm a group or community, therefore an individual victim may run into difficulties when seeking compensation available under criminal law. As the *Feryn* and *ACCEPT* cases show, discriminatory speech acts – based on racial or ethnic origin and sexual orientation respectively – can effectively be sanctioned under the civil branch of EU anti-discrimination law.<sup>82</sup> Indeed, unlike courts in criminal cases the CJEU did not dwell on the motive of biased speech when deciding whether discrimination occurred in these cases. This is because it is not necessary to establish motive or intent behind hate speech as a civil wrong, which contrasts with criminal discrimination, in which case the level of proof is ‘beyond reasonable doubt’.

Preliminary referrals concerning the criminal branch of the EU anti-discrimination *acquis* or involving the criminal prosecution of discrimination under the civil branch have not yet been made. It remains to be seen how the CJEU will address stigmatisation stemming from or reinforcing asymmetric power relations between majority and protected groups in relation to discriminatory crimes. Having to face such phenomena – in terms already tackled by the Strasbourg court - may, on the long run, positively impact on the CJEU’s interpretation of Article 21 of the Charter.

---

<sup>78</sup> Article 267 TFEU. For details, see, Morten Broberg, ‘Acte Clair Revisited: Adapting the Acte Clair criteria to the demands of the times’ (2008) 45, *Common Market Law Review* 1383.

<sup>79</sup> These treaties are listed in the directives’ Preamble.

<sup>80</sup> See, for instance, Opinion of Advocate General Kokott delivered on 12 March 2015 in Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* ECLI:EU:C:2015:170 p. 24: ‘In so far as Article 21(1) corresponds to Article 14 of the Convention, ‘it applies in compliance with it’.

<sup>81</sup> Dean Spielmann, ‘Human rights case law in the Strasbourg and Luxembourg courts: conflicts, inconsistencies, and complementarities’, in Philip Alston (ed.), *The EU and Human Rights*, (Oxford University Press, 1999), 757.

<sup>82</sup> Case C-81/12 (n 52) and Case C-54/17 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECLI:EU:C:2008:397.

A key puzzle in relation to discriminatory crimes is whether preliminary references will seek to clarify the personal and material scope of the Victims' Rights Directive in view of Strasbourg case law. Victim status stemming from the Directive should be granted under national law in full compliance with the ECHR, as already stipulated in the Guidance Document of the Directive.

The list of grounds in international human rights law under which EU Member States should investigate and prosecute hate speech and hate crime is being clarified by courts in the Member States and in Strasbourg, setting the terms of dialogue with the CJEU later on. Caselaw trends have exceeded what an amendment to the Framework Decision may achieve. Simultaneously, the Victims' Rights Directive has widened the scope of protection from discriminatory crimes with reference to international human rights law. These developments suggest that rather than standard setting on substantive law, procedural harmonization building on the obligations of Member States under international human rights law may broaden the scope of protection also in relation to the civil branch of the EU anti-discrimination *acquis*.

## 5. Conclusions

The paper has traced the emergence of a 'continuum of equality' in the criminal branch of the EU anti-discrimination *acquis*, where the harmonization and cooperation on procedural safeguards broaden both the personal and material scope of protection from discrimination, opening gateways for claim making in and out of judicial processes. This silent evolution is approximating the EU anti-discrimination *acquis* to international human rights standards, offering a strategy to unlocking legislative deadlock in the civil branch.

Insufficient attention to trends in the criminal branch of EU anti-discrimination law has sparked our analytical interest in exploring the dynamic evolution of this branch in the context of multi-level governance, indicating the opportunity of broadening through procedural standard-setting. We have shown the expansion of Member States' obligations in this context and argued that this approach can fill gaps in the continuum of equality and lead to a coherent system of EU equality law.

With increased understanding of societal marginalization and vulnerability, recent years have witnessed the gradual broadening of the traditional protected grounds as concerns cooperation in criminal matters. In relation to preventing *racism* and *xenophobia* the *personal scope of EU law has widened* and the most comprehensive list of protected characteristics can now be found in the most recent instrument, the Victims' Rights Directive.

This Directive has redrawn the normative landscape by extending protection from criminal forms of discrimination to grounds and fields not covered by the EU anti-discrimination directives. Not only is the Victims' Rights Directive not amenable to a hierarchy of grounds, but it also widens the scope of adjudication in respect of characteristics protected by nature of Member State obligations under international human rights law.

Soft law measures perform a similar widening function, opening EU law to the influence of international human rights law through the Charter. The ECHR already exerts considerable influence on adjudication in the criminal branch, where norms not only codify Strasbourg jurisprudence thereby promoting consistency with international human rights law, but they also strengthen the clout of EU anti-discrimination law as concerns criminal forms of discrimination.

In contrast with trends in the criminal branch, the CJEU's approach to Article 21 of the Charter in the civil branch of EU anti-discrimination law has enabled the simultaneous advancement of opposing stances on equality and non-discrimination in different Member States, and across diverse protected grounds. The Charter has an increasingly important function, not necessarily an added value but a symbolic role that could be reinforced by embracing the ECtHR more consistent notion of discrimination across grounds and fields.

The Charter empowers the CJEU to ‘correct’ shortcomings and inconsistencies that may occur *vis-à-vis* international human rights norms, thus being instrumental in ensuring that the EU and Member States refrain from restricting human rights and fundamental freedoms enshrined in the core human rights treaties. With the European Convention providing the bottom line of protection, the Charter can contribute to the creation of a continuum of equality, particularly if it is brought to play in both the civil and criminal branches of EU anti-discrimination law. A bolder use of the Charter in and outside the preliminary reference procedure can, on the long run, positively impact on a profound and thorough exploration of the purpose of Article 21 by the CJEU, national courts and EU institutions.



**Author contacts:**

**Rita Gião Hanek**

Public affairs and legal consultant on international and EU law

ICJP-CIDP

Lisbon Law School, University of Lisbon

Alameda da Universidade

1649-014 Lisbon

Portugal

E-mail: ritahanekconsulting@gmail.com

**Lilla Farkas**

Legal consultant, race ground coordinator of the European Network of legal experts on gender equality and non-discrimination

Visiting faculty at Loránd Eötvös University Faculty of Social Sciences,

Institute of Political and International Relations

Hungary, 1117 Budapest, Pázmány Péter sétány 1/A

E-mail: Lilla.Farkas@eui.eu



With the support of the  
Erasmus+ Programme  
of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.