

# Should Discrimination Law Have Any Limits?<sup>1</sup>

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## I. Introduction to the main issue

My research is motivated by the European case law on discrimination, which widens the scope of the legislation through flexible judicial interpretations. Judges develop such an attitude when the discrimination is self-evident in the present case, but the scope of the law in application is limited.

Consider the following example: X was dismissed from her job as a childminder because of being obese. In the case, it is evident that X was discriminated. Yet, the statutory law regulates an exhaustive list of discrimination grounds, i.e. limits the characteristics that the law protects. In this regard, somebody can only claim to be discriminated on the grounds of gender, disability, religion, sexual orientation, and age. What should the Court do?

Such a case, *Kaltoft v Municipality of Billund* (2014), was brought before the European Court of Justice (ECJ). The Court was not allowed to extend specified discrimination grounds by analogy, i.e. to acknowledge obesity as a free-standing discrimination ground. Therefore, the Court related obesity to disability which is an existing protected ground. The Court first addressed the definition of “disability” and found that obesity can amount to “disability” within the meaning of the directive in question if the person’s obesity is a long-term problem and if the obesity limits some of her daily activities. This case is of particular importance because the Court demonstrated its openness to “new grounds” insofar as they can be linked to the definition of an existing protected ground.<sup>3</sup> To my mind, this case is also important because it makes us question why the discrimination grounds are exhaustive in EU law? If the obesity of the person did not hinder her daily activities, but if it was just a problem of appearance, would discrimination law be incapable of addressing an evident discriminative treatment?

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Note: My doctoral research aims to test the boundaries of discrimination law. The research will test this through environmental cases since it is the widest domain that we can imagine to test boundaries of this law. Moreover, environmental injustices concern many different groups and the use of discrimination law in climate cases has been gaining currency. I want to explore whether discrimination law can be useful in environmental matters. For this reason, many of my examples in this paper is related to an environmental issue.

<sup>3</sup> Kaya R. Environmental vulnerability, age and the promises of anti-age discrimination law. *RECIEL*. 2019;00:1–13. p 7. <https://doi.org/10.1111/reel.12279>

This paper develops that there could be at least two stances on the nature of limitations in discrimination law: internal limitations and external limitations. Internal limitations are the limitations that come from discrimination law's own methodology. These limits are put by the legislator or developed by the Courts while applying the law. Currently, many discrimination laws have such internal limits which are practical and decision-oriented. External limitations are theoretical limitations. It uses the resources of extra-legal disciplines to assess when discriminating is wrong: unjust, oppressive or demeaning. The use of law is only limited when discrimination is not wrongful.

Following part briefly introduces the main internal limitations of discrimination law and the tools that were developed through case law to overcome these limitations. Then, the paper questions this phenomenon in the theoretical level by asking: Should Discrimination Law have any limits?

## II. Main Limitations (Internal)

The scope of the discrimination law can be limited by constitutional law or by statutory law. In the EU level, it can be limited by primary legislation or by secondary legislation, for example by specifying domains or grounds that the law can apply.<sup>4</sup> Moreover, judges can limit the application of the law by specifying certain tools to prove discrimination, for example by demanding the proof of an intention, a comparator group or a discriminatory action. In this part, I will introduce some of the limitations that I have identified and some legal approaches to overcome such limitations.

### 1- The personal scope of the discrimination law (Ground)

-One possible way to limit the scope of discrimination law is restricting the grounds which can be protected.

The grounds that are protected by discrimination law can be regulated in an illustrative or in a restrictive in the law. For instance, Article 14 of the ECHR and Article 21 of the EU Charter of Fundamental Rights include an illustrative list.<sup>5</sup> On the other hand, Article 19 of the Treaty on the Functioning of the European Union has a closed list of discrimination grounds: sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation.<sup>6</sup> Only these grounds separately feature

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<sup>4</sup> In EU law, primary legislations are treaties. Secondary legislations are regulations, directives and decisions. See: [https://europa.eu/european-union/law\\_en](https://europa.eu/european-union/law_en) In State laws primary legislato

<sup>5</sup> *ECHR: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground **such as** sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

*The Charter: Any discrimination based on any ground **such as** sex, 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 or sexual orientation shall be prohibited.*

[http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>6</sup> *Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining*

under the non-discrimination directives of the EU. Moreover, each directive defines its own personal scope, i.e. to whom the relevant law applies, e.g. 2000/78/EC, 2004/113/EC.

In the first part, I exemplified the case of obesity. Here, as an example, I will introduce “children”. I will present how certain discrimination laws are limited on the ground of “age”. Therefore, they limit the use of law on addressing age and birth cohort discrimination against children. Later, I will introduce a current trend in the EU which widens the scope of “age” to cover “birth cohort” discrimination.

## ***Children***

In EU Law, a comprehensive regulation about discrimination against children does not exist. Yet, European discrimination law also applies to children. Among other protected grounds such as race and gender, children can be protected on the grounds of age. For the implication of anti-age discrimination law to children, it is crucial to highlight the following issue:

U.S. anti-age discrimination law only protects individuals above the age of 40. By doing so, it excludes two things: (1) children as age group and (2) cohortal reading of the law for any groups.

This is an unfavorable exclusion. The reason is that the empirical literature renders very plausible claims of special vulnerability of children to environmental degradation both as an age group and also as a birth cohort. These are two distinct categories. For example, international health organizations’ reports which reveal that children experience certain chemicals multiple times higher than adults,<sup>7</sup> illustrate discrimination of children as an age group. On the other hand, birth cohort discrimination toward children may be illustrated through two types of studies. First, through the studies which try to understand whether the date of birth of a generation is correlated with its exposure to certain risks, e.g. children who are recently born will experience the negative effects of certain chemicals that are not being controlled during last decades.<sup>8</sup> Secondly, through the cohort studies which follow children who are already exposed to an environmental bad, e.g. chemicals, and identify the negative consequences that they face as they grow up.<sup>9</sup>

Interestingly enough, European Law does not set an age limit within age discrimination law. The ECtHR and the ECJ age discrimination case law reveal that the children can be protected as an age

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*the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

<sup>7</sup> CEC(2006). Toxic Chemicals and Children’s Health in North America. CEC; WHO (2016). Chemical Safety and Children’s Health - Protecting the World’s Children from Harmful Chemicals Exposures. WHO.

<sup>8</sup> Trasande, L., Landrigan, P. J., & Schechter, C. (2005). Public health and economic consequences of methyl mercury toxicity to the developing brain. *Environmental health perspectives*, 590-596. Vrijheid, M., et al. (2012). European Birth Cohorts for Environmental Health Research. *Environmental health perspectives*, 120(1), 29-37.

<sup>9</sup> WHO: Long Term Studies on Children’s Health and the Environment: Identifying, Assessing and Following up the Effects of Exposure to Environmental Factors. <http://www.who.int/ceh/research/longtermstudies/en/>  
Landrigan, P. J., et al (2006). The National Children’s Study: a 21-year Prospective Study of 100 000 American Children. *Pediatrics*, 118(5), 2173-2186.

group.<sup>10</sup> And there are at least two legal strategies to avoid birth cohort discrimination toward children. Firstly, a cohortal reading of the age discrimination law received a legal support in the 2012 *Commission v Hungary* ECJ case.<sup>11</sup> Secondly, even if the birth cohort is not a protected ground *per se*, the ECJ reveals an openness to involve ‘new grounds’ within existing protected grounds. As it is exemplified in the first part, in 2014 *Kaltoft v Municipality of Billund* ECJ case, the Court recognised that, in some cases, differential treatment on the basis of obesity can amount to disability discrimination because of obesity’s particular relation with disability.<sup>12</sup> Considering the ‘*very straightforward connection between a concern for age discrimination and issues of fairness between birth cohorts*’<sup>13</sup>, there could be a chance of claiming birth cohort discrimination toward children by using EU age discrimination law.

So, there are open avenues to include children in the personal scope of European discrimination law both as an age group and a birth cohort. But, as it seems, judges have to develop strategies to expand a particular discrimination law which is limited on certain grounds.

## **2- Material scope of the Discrimination law (Domain)**

-Another way to limit the use of discrimination law is specifying the situations which law applies.

In this regard, the main domains that EU discrimination law covers are: employment, education, social protection (which covers social security and health care) and access to public goods and services (particularly housing). Goods and services that come free and financed by taxes are not included in the scope of European law.<sup>14</sup>

Yet, there are wider legislation in Europe. For example, UK’s 2010 Equality Act, defines the scope of ‘public goods and services’ in an extensive way. Even the ‘environmental health’ is a sub-category of the public goods and services.<sup>15</sup>

## **3- Discriminatory Intent: What does discriminatory intent amount to and is it *sine qua non* of discrimination law?**

Discriminatory intent is commonly understood as an act that is improperly motivated by prejudices, stereotypes, hostilities, etc. Discriminatory intent requirement could be a significant difficulty for addressing many inequalities. For example, from the U.S. practice, it appears that proving improper

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<sup>10</sup> *T. v. UK*, 1999, ECtHR, 24888/94. *Parliament v. Council*, 2006, Case C-540/03

<sup>11</sup> *Commission v Hungary*, 2012, C-286/12. also see: Gosseries, (2015). Environmental Degradation as Age Discrimination. *e-Pública: Revista Eletrónica de Direito Público*, 2, 25-39.

<sup>12</sup> *Kartolf v. Municipal.* 2014, C-354/13.

<sup>13</sup> This idea is presented in A. Gosseries’ paper: supra note 35.

<sup>14</sup> See: Gender Equality Directive 2004/113/EC (in relation to goods and services), Racial Equality Directive 2000/43/EC.

<sup>15</sup> <https://www.citizensadvice.org.uk/discrimination/discrimination-in-the-provision-of-goods-and-services/discrimination-in-services-provided-by-a-public-authority/discrimination-in-services-and-public-functions-what-s-meant-by-public-functions/>

motives, especially in environmental matters, is not easy. So, discriminatory intent requirement makes discrimination law less applicable especially in certain domains.

Unlike U.S. Law, EU Law considerably departs from the intent requirement as long as a 'sufficiently close link' between 'discrimination' and 'consequences' in a certain field can be proved.<sup>16</sup> In this regard, admissible justification for both direct and indirect discrimination are broad enough to allege discrimination without having to prove intent. In 2015 CHEZ Case, the ECJ developed an indirect element of intent for the first time.<sup>17</sup> Even if a treatment on face looks like indirect discrimination, if one can show that there could have been unintentional prejudices and stereotypes that lead to a certain way of treatment, it can be considered as direct discrimination. For example, a climate policy's adverse effect on children is more likely to be considered as indirect discrimination as such effect is caused by a neutral policy which does not explicitly put a constraint on children. Yet, there is a possibility of claiming direct discrimination if it can be shown that such policies are actually not neutral since there are unacknowledged prejudices against children that lead to careless environmental policies. In this respect, a close link between discrimination toward children and its possible results in their living environment need to be established-and it can be done. There is no need to prove 'discriminatory intent' to show such connections.

#### **4-Comparators in Discrimination: What does the comparable situations amount to and should we identify a comparator group in discrimination law cases?**

-Another important limitation in the use of discrimination law is the requirement of identifying comparators.

Legal theorists draw attention to two different values within anti-discrimination litigation which corresponds to two different rights that are protected under discrimination law: right to equality and right to liberty. While the former approach expresses that 'a law discriminates when it fails to treat people as equals (comparative dimension), according to the latter approach, a law discriminates when it deprives some of liberty which all are entitled to (non-comparative dimension).<sup>18</sup>

With regard to the definition and practice of discrimination law, to my mind, this distinction does appear as two different kinds of approaches. Either comparability can be treated as an essential element of discrimination or as a heuristic instrument to help perceiving whether discrimination has occurred. The need for a comparator has not been consistently required by the ECtHR's Case Law under Article 14.<sup>19</sup> On the other hand, EU anti-discrimination directives and ECJ Case Law explicitly require a comparator test for discrimination to occur (both in direct/indirect discrimination), therefore adopt the former approach.

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<sup>16</sup> *Bilka-Kaufhaus GmbH v. Weber von Hartz*, E.C.R. 1607 (1986).

<sup>17</sup> *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*. C-83/14. (2015).

Thanks to C.Tobler for explaining this new element in CHEZ case in detail.

<sup>18</sup> Hellman, D. (2013). Equality and Unconstitutional Discrimination: Chapter 3 in *Philosophical Foundations of Discrimination Law*. Philosophical Foundations of Discrimination Law, Oxford University Press.

<sup>19</sup> Gerards, J. (2005). *Judicial Review in Equal Treatment Cases*. Martinus Nijhoff Publishers. Leiden.

A comparator group needs to be in materially similar circumstances with the discrimination victim(s), but without the protected characteristics. Numerous cases stumble at this hurdle of finding a symmetrical group. In EU Law, the only apparent exception of applying the comparator test is the discrimination on the ground of pregnancy.<sup>20</sup> Moreover, two other types of discrimination which are recognized by the EU Law, namely harassment and victimization, do not require a comparability test for discrimination to occur. The possibility of extending the exception made for pregnancy situation or the usage of harassment and victimization can be discussed if identifying comparators turn out to be a tough obstacle in the present case.

### **5- Discriminatory Action: Does discrimination law only prohibits a certain action?**

-Discriminatory action –which potentially includes an act or omission-, is presented as a key element of discrimination claims.

The issue is, requiring an action could be a possible obstacle because discrimination can also stem from inaction, e.g. the state can decide to take no action in regard to a water scarcity which hits the district that minorities live, or may not give funding to a region for cleaning contaminated water which makes women residents ill. Insisting on proving an action can limit the usage of discrimination law.

There could be two strategies to overcome this challenge: *Firstly*, certain successful anti-discrimination cases could be re-described as inaction problems. For example, most of the indirect discrimination cases rely on the fact that no action was taken to correct an injustice that results from a neutral rule. *Secondly*, Aristotelian conception of equality which received legal support in the 2000 *Thlimmenos v. Greece* ECtHR Case, also considers inaction problems. Both the EU Law and the ECtHR case law acknowledge that differences in individuals must be treated differently.<sup>21</sup> So the law does not only prohibit discriminatory treatment. Discrimination in the form of equal treatment, as well, is prohibited by the law. And in such cases what gives rise to discrimination is not solely an action but an inaction. So, there is not a clear line of separation between action and inaction as anti-discrimination literature draws it. For example, State's climate inaction consists affirmative conduct to allow the pollution coming out of fossil fuel system. Here, at first sight, State seems inactive but this inactiveness involves an active element of allowing disparate impact resulting from environmental degradation.

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<sup>20</sup> ECJ, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, Case C-177/88 [1990] ECR I-3941. ECJ, *Webb v. EMO Air Cargo (UK) Ltd*, Case C-32/93 [1994] ECR I-3567.

<sup>21</sup> See Article 5 of the Race Directive. *Thlimmenos v. Greece*, 31 E.H.R.R. 411 (2000). *Pretty v. United Kingdom*, 35 E.H.R.R. 1 (2002).

### **III. Two hypotheses on the limits of discrimination law**

Considering all these internal limits and extensions to overcome them, what should we anticipate about the future direction of discrimination law? Should these extensions keep spreading towards a more inclusive discrimination law or should they settle down at a certain point? What should we do with discrimination law and what should we not do with it?

Two hypotheses will be explored to answer these questions.

First, discrimination law should have limits. Because, discrimination law is a legal discipline and it will not be useful without a concrete methodology. I call this efficiency ideal.

Second, discrimination law should not have any limits. Because, equality is a core value relevant to all legal subjects, and, equality cannot be realized without discrimination law argumentation. I call this social justice ideal.

In this part, I will present these two stances, which both have a normative value, and make my own proposal.

#### **1- Efficiency ideal: discrimination law with internal limits only**

In order to use discrimination law efficiently, it needs to have a specific methodology. If the methodology is specific, it cannot do everything. Therefore, discrimination law cannot address every inequality problem.

There are at least two types of internal limits: First, limits that are put by legislator (constitutions, statues), such as enumerated discrimination grounds. These are the limits which are more definite. Second, limits that are put by the Courts (judicial opinions) while applying the law, e.g. interpreting discriminatory treatment in an action-limited way. Such limits are less definite.

There could be various ways to defend such limitations:

First, the judges would not have capacity to pay attention to everything. Internal limitations facilitates the judgement process since it introduces certain substantive tools which helps to identify discrimination without a theoretical scrutiny.

Second, discrimination law should have certain priorities to be able to address the most urgent social justice problems. Legislators and courts should define these priorities. By this way, the law needs to be applied narrowly but it will be effective to deal with the urgent issues at hand.

*.... (more justifications will be developed)*

#### **2- Social justice ideal: discrimination law with external limits only**

In the EU, officially, the purpose of discrimination law is stated as following:

“The aim of non-discrimination law is to allow all individuals an equal and fair prospect to access opportunities available in a society.”<sup>22</sup>

Yet, in the EU the scope of discrimination law is limited as some of the limitations presented above. Social justice ideal argument put forwards that, to achieve such purpose, the law should not address limited cases of inequalities. Judges should be free to pose certain questions without any restrictions, such as: “does the given discrimination potentially undermine social justice”; “when discriminating is unjust, oppressive or demeaning” in every present case. All the problems that can be *prima facie* characterized as an equality issue can be judged by such questions.

There could be various arguments for supporting this account.

First, discrimination law can be used as an instrument for promoting social justice: social equality and fairness. Equality issues raise in many areas. If we want to use discrimination law as an instrument to achieve equality, then discrimination law should be open to cope with every possible inequality issue that may arise. The law should be flexible and adaptive.

Second, the case in hand can be judged more fairly if the Courts have more freedom of interpretation. Discrimination law is distinct from other legal fields in a sense that discrimination is not always substantive but also perceptive. Since it is less substantive, the tools to apply the law should be less substantive and more interpretative.

.... (*more justifications will be developed*)

### **Proposal: Less Internal More External Limits**

Currently, internal limits predominate in the context of discrimination law. External limits are applied in more exceptional situations. I defend the composite of the two. A less internal more external limit composition. Moreover, I defend that internal limits should be re-stated in an interpretation-friendly way.

My main reasons for defending more external limits are:

The flexibility of the scope of discrimination law is needed to increase the credibility of legislation. Because, individuals perceive experiencing discrimination based on many different reasons. For example, most of the people can feel discriminated against because of being poor. Some can feel discriminated against because of being honest. Discrimination law would gain credibility and accepted well by the public if it is useful for everyone who claims to experience discrimination. The law gaining credibility will help the law’s aim to become a tool to achieve social justice. In other words, it is important that discrimination law is accepted as a tool to bring social justice.

On the other hand, the existence of internal limits is also important.

Internal limits help the law getting mobilize, since it makes clear for claimants to recognize when this law can be applied. Social groups may wish to view legal discrimination rules not as a base of

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<sup>22</sup> [https://eur-lex.europa.eu/summary/glossary/nondiscrimination\\_principle.html](https://eur-lex.europa.eu/summary/glossary/nondiscrimination_principle.html)

prediction but as standards of behavior. Moreover, the discretionary power of the judges can be used in a non-ideal way. For example, there were judges in the U.S. who ruled that segregation of the blacks was not against equality. For these reasons, it is important to have some limits which define what kind of behavior is wrong. Yet, the main problems with current internal limits are as follows:

*Law should not be limited with regard to grounds:*

Because the law should be sensitive to new-emerging identities. Every arbitrary or insulting categorization can be considered as a potential ground for discrimination. Making hierarchy between them, e.g. prioritizing not-chosen characteristics to chosen ones, obstructs realizing grounds which are crucial for the self-integrity or self-respect of some individuals.

*Law should not be limited with regard to domain:*

Because discrimination can potentially occur in every environment. Just limiting it to certain domains, like employment, will not solve the general discrimination problem. If an individual face discrimination in one domain, the same individual is more likely to experience discrimination in other domains as well.

*Law should not always require a comparator test:*

Because finding symmetrical comparative group can be a big obstacle even in evident discrimination cases. For example, some multiple discriminations cannot be addressed by the law when there is a comparator test requirement.

*Law should not interpret discriminatory treatment as “actions”:*

Inaction can be discriminative as well, especially when an existing inequality is not corrected, e.g. affirmative action.

Therefore, the existing internal limits are not compatible with the social justice aim of discrimination law. Yet, to make sure law can be mobilized and also judges handle the cases justly and efficiently there could be other internal limits. There could be instruments that are inspired by the methodology of external limits. For example, the law can define that discrimination is bad when it is demeaning. We see such legal approaches. For instance, tort law potentially applies to everything but certain limitations like “causation requirement” are developed in order to help determining when there is an illegal breach.

To conclude, the limits of discrimination law should be balanced. Internal limits should not limit the potential of the law to support social justice. On the other hand, current external limits should be embodied so they help the law getting mobilized. This will eventually lead to a system where there are external limits and internal limits which are inspired by the method of external limits. So, external limits will be valued more.

*I am currently developing my ideas on this last part. That is why it looks incomplete. I would be very glad to hear your comments and suggestions.*