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Old limbs, new twigs: From classic to novel forms of protected characteristics in European anti-discrimination law**

Abstract:

This essay is dedicated to the ever growing tree of the anti-discrimination system of the European Union. It starts with the roots of primary and secondary legislation and arrives to the various branches of protected characteristics. The characteristics can be grouped into two clusters: (1) those linked to the employee as a human being and (2) those linked to the status (contract). Prohibition of discrimination is a duty which covers heterogeneous areas, each category has its own characteristics. The essay points out the inter- and intra-cluster differences and displays three ways of interactions between the different protected characteristics, namely: (1) connection, (2) collision, and last but not least (3) competition. Special attention is paid to emerging types of discrimination. These new cases are sometimes connected to the changes in the interpretation of work ethos (employee smoking ban), other times they are natural by-products of the rapid changes in information technology (Facebook termination cases).

Initial thoughts

The anti-discrimination system of the European Union is similar to a hundred-pronged, ever growing tree. The roots grow deep in the soil, the trunk is strong, the branches are diverse, some thick and sturdy, others more fragile, in need of extra support. Buds appear from time to time and it is not always easy to foresee which of them will turn into fruit. This essay is dedicated to the ever growing tree of European anti-discrimination law. It starts with the roots of primary and secondary legislation and arrives to the different branches of protected characteristics. The characteristics can be grouped into two clusters (1) those linked to the employee as a human being, and (2) those linked to the status (contract). The essay points out the differences between and within the clusters and displays ways of interactions between them. Near the old limbs new twigs appear. Though 'lifestyle discrimination' cases (smoking ban, Facebook terminations, etc.) fell under the first cluster, they deserve special attention, thus these novel, emerging forms will be discussed under a separate heading.

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I. Roots

The equality principle is deeply imbedded in contemporary legal culture. As Luhmann puts it, it is the most abstract preference of the legal system, the last criterion for assigning disputes to right and wrong. The ‘alike must be treated alike’ norm is the bottom-line, a commonly agreed starting point for justice.¹ Legal protections against different forms of discrimination is a key pillar of the constitutional architecture of contemporary liberal democracies.² All EU Member States³ have included the general principle of equal treatment or specific grounds of discrimination either in their Constitution and/or in their national anti-discrimination legislation.

At EU level protection against discrimination is one of the most important elements of European labour law, one that was present from the very beginning of integration and keeps growing ever since, influencing other areas of law. According to Article 2 TEU the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Also noteworthy is Article 3 TEU on aims. This article states that the Union’s aim is to promote peace, its values and the well-being of its peoples. The Union shall combat social exclusion and discrimination, and shall promote social justice. It shall promote economic, social and territorial cohesion, and solidarity among Member States. Solidarity appears in its relations with the wider world. This article also refers to the strict observance and the development of international law, including respect for the principles of the UN Charter.⁴

International documents and the constitutional heritage of the Member States are also sources of the EU’s anti-discrimination law. Article 6 TEU states that the Charter of Fundamental Rights of the European Union of 7 December 2000 has the same legal value as the founding Treaties. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession, however shall not affect the Union’s competences as defined in the Treaties. This article also states that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

In the Treaty on the Functioning of the European Union we find both general regulations and regulations related specifically to European labour law. From outside

¹ On the other hand, when defining what is considered ‘alike’ for the purpose of equal treatment one enters the realm of controversies and contesting ideas.

² Nicholas Bamforth, *Conceptions of Anti-Discrimination Law*, *Oxford Journal of Legal Studies*, Volume 24, Issue 4, 2004, pp. 693-716.

³ Obviously except the UK for it lacks a written constitution.

⁴ Edit Kajtár, *Life outside the bubble: International and European legal framework of disability discrimination in employment*. *Pécsi Munkajogi Közlemények*, Volume 6. Special edition 2013. pp. 5-21.

labour law Art. 18 TFEU provides for a general discrimination prohibition. 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.' Discrimination is also prohibited in relation to the freedom to provide services (Art. 56 TFEU), free movement of goods (Art. 36 TFEU) and free movement of capital (Art. 65 (3) TFEU). These rules do not only prohibit discrimination on grounds of nationality but also non-discriminatory restrictions that, even though applicable without discrimination on grounds of nationality, are liable to hamper or to render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty.⁵ Labour law benefitted from the case law related to prohibition of discrimination regarding the four freedoms, for example the concept of indirect discrimination was exported from judgements on service provision.⁶ Amongst the employment-specific rules Art. 45 (2) TFEU is relevant which states that freedom of movement for workers shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

Finally and without going into details it is important to mention that hard law is but one tool within the anti-discrimination scene. There is a growing body of studies on the mix of the afore-mentioned hard law instruments with soft law tools (e.g. Green Papers) to address inequalities.⁷ Soft law may aid hard law in three ways and thus has three functions: pre, post and para law. It may serve as preparatory to hard law, as a compliment to it or as an alternative.⁸ Certainly, without investment in training and education as well as regularly reviewed positive action schemes progress is impossible. The art lays in balancing the hard and soft measures.

II. Different branches

In the Treaty besides nationality six grounds of prohibited discrimination are listed: sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. The EU Charter of Fundamental Rights of the European Union (representing a "genuine departure from the economic orientation of European integration"⁹) contains 17 grounds: 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 (Article 21 (1)). Impressive list. However it was not always like this. The equality domain expanded on a long time scale step by step. It is possible to talk about two clusters of regulation. The protection was

⁵ Case C-19/92 Dieter Kraus v Land Baden-Württemberg [1993] ECR I-1663.

⁶ Case 152/73 - Sotgiu v. Deutsche Bundespost [1974] ECR 153. Tax benefits granted only to residents of a Member State may constitute indirect discrimination by reason of nationality.

⁷ Mieke Verloo, Multiple Inequalities, Intersectionality and the European Union, *European Journal of Women's Studies*, Volume 13, Issue 3, 2006, pp. 211-228, p. 214.

⁸ Linda Senden, *Soft law in European Community Law*, Hart Publishing, Oxford, 2004, p. 457.

⁹ Mark Bell, *Anti-discrimination Laws and the European Union*, Oxford University Press, Oxford, 2002, p. 23.

traditionally linked to a certain characteristic of worker as a human being (such as sex, race, ethnic origin, religion, belief, disability etc.), later on the protection was extended to a different field, namely the status (contract) of the worker. It is to be seen to what other realms will open in the future.

II.1. First cluster: characteristic of worker as a human being

Before 1997 only few expressed Treaty regulations existed on discrimination: one was related to nationality, the other to equal pay for male and female workers. The pioneer directive was related to the latter. On the basis of Art 119 EC Treaty (now Art 157 TFEU) the Directive 75/117/EEC (currently Directive 2006/54/EC) and 76/207/EEC (now Directive 206/54/EC) were built. Later on came Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.¹⁰ Only with the Amsterdam Treaty was the list of grounds extended. Based on this regulatory ground Directive 2000/78/EC established a general framework for equal treatment in employment and occupation and extended the ground for protection to religion or belief, disability, age or sexual orientation. Council Directive 2000/43/EC implemented the principle of equal treatment between persons irrespective of racial or ethnic origin.

Though the range of prohibited grounds of discrimination has been always expanded by the Treaty amendments, within the framework provided by the Treaty the CJEU felt (feels) empowered to offer a broader approach and opened up the range of cases which might be brought within one of those fixed categories by interpretation. The scope of application of the measures concerning the protected categories may vary somewhat, and some room may be left for judicial interpretation of the range of litigants or groups who can claim protection.¹¹ The CJEU plays a prominent and activist role. For instant in *P v. S*¹² the sex equality Directive was interpreted as applicable to a case involving unequal treatment of a transsexual person, arguing that the measure was ‘simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law. Consequently even before the Framework Directive the case law¹³ established that discrimination on the basis of gender identity was a form of impermissible sex discrimination. It was stated that the Treaty provisions (such as Articles 34(2) or 49) and Directives concerning equal treatment between men and women are considered by the Court as specific manifestations of an unwritten general principle which is binding on the Community. The Mangold judgement raised high expectations concerning advancement of other grounds of discrimination as well. Here the Court

¹⁰ As it was pointed out earlier, on a more general level (European Law as a whole not only European Labour Law) prohibition of discrimination based on sex was preceded by prohibition of discrimination based on nationality.

¹¹ Nicholas Bamforth–Maleiha Malik–Colm O’Cinneide, *Discrimination Law: Theory and Context*, Sweet and Maxwell, London, 2008, pp. 98-118.

¹² Case C-13/94, *P v. S and Cornwall County Council* [1996] ECR I-2143, para. 18

¹³ The other two cases of the famous trio besides *P v. S and Cornwall County Council* are *C-249/96 Grant v South-West Trains* and *Joined Cases C-122/99 P C-125/99 PD and Sweden Council*.

stated that ‘the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law’.¹⁴

The change was not confined to growth in the number of protected characteristics, there was also a shift in perception, anti-discrimination was no longer seen as mere instrument of economic integration. The expansion in the list of prohibited grounds of discrimination at EU level has been tied to a shift in the general purpose of EU law.¹⁵ In the Schröder case¹⁶ the CJEU ruled that the economic aim is secondary to the social aim and that the principle of equal pay is an expression of a fundamental human right.’ ‘...as the EU’s self-perception changed from a European Economic Community to a European Union, so its task and objectives have been broadened to take into account a broader range of policies which may complement but may also obstruct free trade.’¹⁷ Mark Bell describes the development of competences in the realm of racial and sexual orientation discrimination as a dialogue between two evolving policy: the market integration and social citizenship.¹⁸

II.2. On the heterogeneity of the protected characteristics in the first cluster

Prohibition of discrimination is a duty which covers various areas. Each category has its own characteristics. Age for instance stands out for two reasons. Firstly, because it could affect everyone (provided they live long enough) and secondly because at times it is very difficult to identify the groups against whom discrimination takes place and consequently to single out who the comparator shall be. Young entrants are often discriminated against but so are those near the child bearing age, as well as ‘older’ workers (and where do we set the limits? Over 45, 50, 60?). The consequences of discrimination are also different for the different age groups. The same failed job application which is a missed opportunity for a young college graduate can very well mean the end of a working career for someone in his late 50’s.¹⁹

The difficulty around coining a uniform definition captures well the complexity of the protected grounds. The Racial Equality Directive and the Employment Equality Directive require Member States to prohibit discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation, however it do not contain any definition of these grounds. Or going back to the afore-mentioned

¹⁴ Case C-144/04, *Mangold v. Helm* [2005] ECR I-9981 para 75

¹⁵ *Bamforth–Malik–O’Cinneide*, p. 99.

¹⁶ Case C-50/96, *Schröder* [2000] ECR I-743 para 57

¹⁷ Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford Univ. Press, Oxford, 2004, p. 23.

¹⁸ *Bell*, 2002, p. 6.

¹⁹ Malcolm Sargeant, *Age Discrimination in Employment*, Ashgate Gower Pub Co, Aldershot, 2007, p. 4.; See also: Erika Kovacs–Mario Vinković, Are older workers second-class? - The case of Croatia and Hungary. In: Timea Drinoczi et al. (eds.), *Contemporary Legal Challenges: EU–Hungary–Croatia*, Faculty of Law Pécs, Faculty of Law Osijek, Pécs, 2012, pp. 671-695.; Monika Schlachter, Mandatory Retirement and Age Discrimination under EU Law, *The International Journal of Comparative Labour Law and Industrial Relations*, Volume 27, Issue 3, 2011, pp. 287-299.

category of age, it is generally assumed to be an objective characteristic with a natural meaning and hence it is not defined in national legislations.²⁰

Although race is also a well-established prohibited ground, the exact meaning of race is extremely contested. Especially social science scholarship challenges essentialist and biological definitions.²¹ Some countries argue that even inclusion of the terms 'race' or 'racial origin' in anti-discrimination legislation reinforces the perception that humans can be distinguished according to 'race'. Austria is one of the prominent examples. 'Race is substituted with 'ethnic affiliation'. Hungary refers to 'racial affiliation' and 'belonging to an ethnic minority'. It is questionable to what extent characteristics such as colour, national origin, membership of a national minority, language or social origin fall within the scope of 'racial or ethnic origin'. The boundary between ethnic origin and religion is blurred.

The concept of religion and belief is similar to race and ethnicity, and also overlaps with these protected characteristics.²² Regarding the definition of these terms no Member State has a definition fixed in the law. The Netherlands includes 'philosophy of life' into the definition, giving a broad interpretation of the concept. In Austria, the explanatory notes for the Federal Equal Treatment Act refer back to that the Framework Directive which states that the terms religion and belief must be interpreted broadly. Matter of interpretation by national courts or some countries provide further guidance in accompanying explanatory notes to legislation, such as in Belgium, France and Germany.²³

Very few states have defined sexual orientation within anti-discrimination legislation. Generally defined as 'heterosexual, homosexual or bisexual orientation' (e.g. Bulgaria, Germany, Ireland and Sweden).²⁴ The 2006 German General Law on Equal Treatment adopts the term 'sexual identity' while the Federal German Constitutional Court refers to both sexual identity and sexual orientation, going beyond sexual orientation and encompassing protection against discrimination for transsexual people. In France and the Netherlands, the concept of sexual orientation has not been interpreted in a way that covers transsexuality and transvestism, in contrast with Denmark. Discrimination on these grounds is regarded as sex discrimination.²⁵

We find many variations on disability definition at national level, but these mostly come from the context of social security legislation rather than anti-discrimination law. As it was said before, disability is not defined in the Framework Directive. This

²⁰ Developing Anti-Discrimination Law in Europe – the 25 EU Member States compared II. http://migpolgroup.com/public/docs/21.DevelopingAntidiscrimination-Comparativeanalysis_II_EN_11.06.pdf pp. 20-24

²¹ *Bamforth–Malik–O'Cinneide*, p. 755.

²² *Bamforth–Malik–O'Cinneide*, p. 956.

²³ http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf p. 2 (03.10.2014)

²⁴ Developing Anti-Discrimination Law in Europe – the 25 EU Member States compared II. http://migpolgroup.com/public/docs/21.DevelopingAntidiscrimination-Comparativeanalysis_II_EN_11.06.pdf p. 23.

²⁵ http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf p. 4 (03.10.2014)

deficiency means that at national level the term may be interpreted in many ways and this eventually may lead to curtailing the rights provided by the Directive. For this reason the elaboration of a uniform concept rests on the CJEU.²⁶ In its infamous decision *Chácon Navas*²⁷ the CJEU conceptualises disability as an impairment that hinders participation in working life for a substantial period. The approach to the meaning of disability used a medical rather than a social model of disability. The definition used in *Chácon Navas* represented a step backwards compared to the definition used in the UNCRPD.²⁸ In joined Cases C-335/11 and C-337/11 (11 April 2013) the CJEU luckily modified this outdated view.²⁹ This decision is groundbreaking, with it the CJEU introduced the social model into the directive's concept of disability. The main reason for it was the fact that in the meantime the EU ratified the UNCRPD. The Court started by explaining that the concept of disability must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable, if that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The Court observed that the concept of disability does not necessarily imply complete exclusion from work or professional life.³⁰

II.3. The second cluster: the status (contract) of the worker

Disadvantage may stem not only from characteristics attached to the employee as a human being, but also from disadvantaged position due to the specific nature of the employees' contract. So far the following categories have been singled out: part-time work, fixed term work, temporary agency work and telework.³¹ The issue of discrimination in temporary agency work is covered by Directive 2008/104/EC and the area of telework is tackled by the 2002 Framework Agreement. Directive 97/81/EC embodies the non-discrimination principle for part-time work 'unless different treatment is justified on objective grounds and Directive 1999/70/EC does the same for fixed-term work.

The idea behind these rules is that certain employment relationships, different from what we call 'typical' or 'standard' (in other words full-time, permanent employment) are precarious and persons employed under atypical contracts deserve

²⁶ For details see: Catherine Barnard, *The Changing Scope of the Fundamental Principle of Equality?* *McGill Law Journal*, Volume 46. Issue 4. 2001. pp. 955-77.; Mark Bell-Lisa Waddington, *Reflecting on Inequalities in European Equality Law*, *European Law Review*, Volume 28. Issue 3. 2003. pp. 349-369.

²⁷ *Chácon Navas v Eures Colectividades SA*. C-13/05.

²⁸ See the Opinion of Advocate General Kokott in the later cases, delivered on 6 December 2012.

²⁹ *Ring v Dansk almennyttigt Boligselskab DAB, Skouboe Werge v Dansk Arbejdsgiverforening* Cases C-335/11 and C-337/11 ECJ.

³⁰ *Kajtár*, 2013.

³¹ Zoltán Bankó, *Experiences of the regulation of the status of employees in atypical employment*. [Az atipikus munkajogviszonyban álló munkavállalók státuszának szabályozási tapasztalata.] *Tudásmenedzsment*, Volume 14. Special Issue 1. 2013. pp. 14-20.; Zoltán Bankó, *Az atipikus munkajogviszonyok* [*Atypical labour law circumstances*] Dialóg Campus, Budapest–Pécs, 2010.

protection.³² Anti-discrimination law aims at inclusion of disadvantaged groups. Typically, the hourly wages of part-time workers are lower, they are not eligible for certain social benefits, and have limited career prospects.³³ The key factor regarding the fixed term worker and temporary agency worker (the latter being in principal and in many ways the most flexible type of atypical workers) status is the limited duration of the employment relationship. Discrimination in relation to access to training is especially common. Nienhüser and Matiaske points out that implementation of the Temporary Agency Workers Directive may be a necessary but insufficient tool to improve the terms and conditions of temporary agency workers. In countries where the principle of non-discrimination is in force, discrimination increases significantly in the area of employer-provided training. Firms, because of higher costs for workers, invest less in training to compensate for the (possible but empirically insignificant) increase in wage expenses.³⁴ Regarding teleworkers the risk factor lies in the isolated work location. The disconnectedness may very well result in discrimination with regard to working time, workplace standards or access to training.

II.4. On the distinct nature of protected characteristics in the second cluster

While the prohibition of discrimination based on a certain feature of the individual (e.g. sex, age, etc.) is a classic category directly connected to human dignity, when the protected characteristic is a status assessment is more complicated. I would like to highlight three points.

Firstly and most importantly, the use of traditional discrimination argument is very difficult. These forms of employment are meant to be flexible, and flexibility lays in the possibility to apply different conditions. If this feature is taken away the employer is no longer motivated to employ on a part time or on a fixed-term basis, through temporary agency etc. Consequently the directives give room for justifications for different treatment and allow a wide range of exemptions. As we see these categories cannot be fitted into the traditional framework of anti-discrimination, or only with major adjustments.

Secondly, discrimination regulations deal with potentially disadvantaged group of workers. Perhaps one of the most important questions is as follows: is precarious always precarious? Though work arrangement of employees in high position (i.e. manager) are very flexible they cannot be labelled as precarious. Also, atypical forms of employment may serve both parties (employers and employees). Oftentimes part time workers for personal reasons (e.g. family commitments) want to work under

³² See for instance: Guy Davidov–Brian Langille, *Boundaries and Frontiers of Labour Law. Goals and Means in the Regulation of Work*, Hart Publishing Limited, Oxford, 2006.

³³ For instance a recent study in Austria issued by the Federal Ministry of Labour, Social Affairs and Consumer Protection has shown that on average, part-time workers earn 24.2% less per hour than full-time workers. <http://www.eurofound.europa.eu/eiro/2013/09/articles/at1309031i.htm> (03.10.2014)

³⁴ Werner Nienhüser–Wenzel Matiaske, Effects of the 'principle of non-discrimination' on temporary agency work: compensation and working conditions of temporary agency workers in 15 European countries, *Industrial Relations Journal*, Volume 37. Issue 1. 2006. pp. 64-77.

atypical contracts. Agency work on the other hand is in most cases involuntary. There is a need for differentiation!

Last but not least we have to ask ourselves what is the real reason of precariousness? Is it the status (contract) of the employee or some other typically (first cluster characteristic)? Is fixed term work for instance really a risk factor or is it more the interplay of fixed term and other factors such as gender, age, nationality, level of education etc. that deserves heightened attention?

III. Interaction between branches: combination, collision and competition

The different grounds of discrimination interact in various ways. They are (1) combined with one another (discrimination on more than one ground), (2) collide and oftentimes also (3) compete.

Regarding combination: the European Union is moving towards policies that address multiple inequalities. Originally the concept of intersectionality (discrimination on more than one ground) was developed mainly in relation to the intersection between race and gender, and to some extent class.³⁵ Arguable the combination of certain protected characteristics is more ‘explosive’ than others, however the concept may combine all the protected characteristics. In addition, race, culture, religion and belief often overlap. It is a question of risk accumulation. Intersectionality or multiple discrimination is a burning issue, this approach however is not without its dangers. The assumption that social categories connected to inequalities as well as the mechanisms and processes that constitute them are the sameness or equivalent is false. Inequalities have differentiated character and dynamics, not to mention the political dimension of equality goals. There is a clear need for a tailor made approach.

Regarding collision: religion and belief very often clash with other prohibited grounds of discrimination such as sex and sexual orientation and is likely to remain one of the most controversial areas of discrimination law in the future.³⁶

Last, but not least: competition. While gender equality has the status of a well-established principle of European Law surrounded by enormous case law³⁷, disability discrimination for instance had been treated as the foster child of both international and EU law sources and a neglected subject of the legal curricula up till the opening decade of the millennium.³⁸ Age has gained increased attention in the last decade.³⁹ Also, with anti-discrimination legislation the focus is on groups that are perceived as

³⁵ Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, *University of Chicago Legal Forum*, Volume 1989, pp. 139-168.

³⁶ *Banforth–Malik–O’Cinneide*, p. 973.; Herbert Hopf–Klaus Mayr–Julia Eichinger, *GlBG Gleichbehandlung - Antidiskriminierung*, MANZ Verlag, Wien, 2011, pp. 532-543.

³⁷ On the complexity of the case law on indirect discrimination against women see: Bruno Mestre, Comparators and Indirect Discrimination: an Illustration of the Difficulties, *European Law Reporter*, Issue 12. 2011, pp. 372-379.

³⁸ *Kajtar*, 2013, p. 5.

³⁹ Tamás Gyulavári–Botond Bitskey, Age discrimination in employment (chapter on Hungary), In: Malcolm Sargeant (ed.), *The law on age discrimination in the EU*, Kluwer Law International, Alphen aan den Rijn, 2008. pp. 135-158.

in need of extra protection. But what is perceived as vulnerable or precarious varies. Also policy and law makers prioritise. Grounds ‘compete’ with one another at EU as well as national level. On EU level the CJEU applies diverse testing standards when checking on a law’s compatibility with the general equality clause. Its approaches range from low through heightened and then to strict scrutiny.⁴⁰ The Rosenbladt ruling⁴¹ suggests that there are almost no limits to the discretion of Member States in adopting mandatory retirement rules. As Monika Schlachter points out, the general labour market policy of Member States will probably continue to be exempt from strict judicial scrutiny when it comes to long-standing, common features of employment law. However, in relation to rules for specific occupations or specific age-related entitlements, the margin of discretion left to the Member States is narrowed down significantly.⁴²

At Member State level, we can observe very different political hierarchies of inequalities. To trace the competition or hierarchy of grounds it is worth taking a look at the structure of national equality bodies. A study by Andrea Krizsan, Hege Skjeie and Judith Squires identifies four types of equality institutionalization regimes. The first type, named as ‘layered’ characterises several countries, including Hungary, Romania, Slovenia, Denmark, Germany, France and Sweden. While these countries provide symmetrical institutional protection under their anti-discrimination bodies, they have a favoured one. Slovenia, Germany, France and Sweden privilege gender, while Hungary and Romania ethnicity. In the second, ‘hierarchical’ model gender-equality has a separate institutional structure and all the other inequality categories are bundled together on the assumption that they are similar in relevant aspects. Belgium, Finland and Spain follow this pattern. The third model, illustrated most consistently by Portugal, is a ‘dual’ model in which the two inequality grounds, gender and ethnicity, are placed on the top of the hierarchy, while other grounds such as disability or sexual orientation are in the back row.⁴³ Lastly, the ‘integration’ model represented by Britain and Norway stands on a strong affirmation of the need to address different inequalities in integrated ways under integrated institutions serving the various functions of anti-discrimination and political administrative bodies.⁴⁴ This segmentation reflects the fact that while the Member States’ legislation derives from the very same set of EU rules on non-discrimination, the de facto application is substantially influenced by national priorities and different levels of legal awareness,

⁴⁰ Johanna Croon, Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination-or-Alternative Tales on Equality Reasoning, *European Law Journal*, Volume 19. Issue 2. 2013. pp. 153-173. pp. 154-158

⁴¹ Rosenbladt v Oellerking Gebäudereinigungsges mbH Case C-45/09. The CJEU said that a German law allowing employers to agree with employees under a collective agreement that they must retire when they become entitled to a pension could be justified and that the Government had in mind the legitimate aim of seeking to promote access to employment by means of “better distribution of work between the generations”.

⁴² Monika Schlachter, Mandatory Retirement and Age Discrimination under EU Law, *International Journal of Comparative Labour Law and Industrial Relations*, Volume 27. Issue 3, 2011. pp. 287-299

⁴³ Teresa Coelho Moreira, *Igualdade e Não Discriminação—Estudos de Direito do Trabalho*, Almedina, Coimbra, 2013.

⁴⁴ Andrea Krizsan—Hege Skjeie—Judith Squires, The changing nature of European equality regimes: explaining convergence and variation, *Journal of International and Comparative Social Policy*, Volume 30. Issue 1. 2014. pp. 53-68, p. 54.

both of which is shaped by the unique cultural, historical and political context of the given states.

IV. New twigs

IV.1. Opening the list

The EU Directives use closed lists, however numerous Member States decided to opt for a more elastic system. Hungary alongside with Belgium, Bulgaria, Cyprus, Poland, Romania, Spain, and Sweden does not restrict their anti-discrimination laws to the grounds found within the Directives. The prohibited grounds include nationality which is explicitly not included in the scope of the Directives, health condition, colour, language, marital status.⁴⁵

The list of the Hungarian Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities is open Article 8 provides that provisions that result in a person or a group is treated less favourably than another person or group in a comparable situation because of his/her a) sex, b) racial origin, c) colour, d) nationality, e) national or ethnic origin, f) mother tongue, g) disability, h) state of health, i) religious or ideological conviction, j) political or other opinion, k) family status, l) motherhood (pregnancy) or fatherhood, m) sexual orientation, n) sexual identity, o) age, p) social origin, q) financial status, r) the part-time nature or definite term of the employment relationship or other relationship related to employment, s) the membership of an organisation representing employees' interests, t) other status, attribute or characteristic (hereinafter collectively: characteristics) are considered direct discrimination. The last category opens the door for protection against new types of discrimination. 'Other status, attribute or characteristic' may refer to the fact that the employee was previously involved in a court case with the employer or has higher level of education.⁴⁶ The category of "other status, attribute or characteristic" leads us to the next subchapter and the field of lifestyle discrimination.

IV.2. Lifestyle discrimination (drinking, smoking, motorcycling, getting a butterfly tattoo on the shoulder and commenting on all the above on Facebook)

Lifestyle discrimination cases can be grouped under the first cluster, however because of their novelty it is worth to discuss them under a separate heading. The best place to look for insight is the United States. Unfortunately however, these cases do not only occur Overseas.

⁴⁵ http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf (03.10.2014) p. 3

⁴⁶ Tamás Gyulavári, Egyenlő bánásmód törvény – célok és eredmények. In: Majtényi B (szerk.), *Lejtős pálya. Antidiszkrimináció és esélyegyenlőség*, L'Harmattan Kiadó, Budapest, 2009. pp. 9-26.

IV.2. 1. *Smoking ban*

Here the best place to look for insight is the United States: twenty-eight US states and the District of Columbia passed so-called 'lifestyle discrimination statutes' in the 1990s. There are three main types of lifestyle discrimination statute: the simplest (and most narrow) one protect the freedom of employees to smoke when off duty, the widest one protecting employee freedom to engage in all lawful activity in general when off duty, while in the middle there are statutes protecting the freedom of off-duty employees to use lawful products. These statutes came as a response to the common practice of employers basing their hiring decision on what employees do off work. There is a clear discrimination smokers even if they only entertain this habit when off duty, but there are also cases on off-duty drinking, motorcycling, cholesterol levels and obesity⁴⁷ which clearly shows that the States is indeed the land of opportunities, at least for the employers.

Especially health care institutions, including academic health centres, have adopted policies excluding smokers from employment. This is more than a mere no smoking at work policy, it is a complete ban both at both work and home settings. In practice candidates for employment are tested for nicotine and those testing positive are not hired. As the US has an employment at will system, the employers do not need to justify their decision, however they do need to comply with the anti-discrimination provisions. For this reason it is useful to take a look at the arguments pro and contra the strict employee smoker ban. The advocates for this practice claim that exclusion of smokers from the workforce results in financial savings (reduced health costs, less working hours due to smoke breaks), a more productive workforce (better health condition). One justification is symbolic, to send a message of healthy living, i.e. employees must serve as role models for patients. A ban also serves as an incentive for smokers to quit.⁴⁸ Furthermore bans in health care institutions uphold professional norms in those institutions.

Opponents of employee smoker ban underline that the time saving argument do not readily justify categorical denial of employment to persons who smoke at home. The ban has clear ethical dimension and is strongly paternalistic in nature. It reflects a moralization of health.⁴⁹ Employers, interfere with the private lives of employees when private activities do not affect workplace performance. As to the argument on the incentive to quit, if legislative bans do not reduce population level active smoking, it seems probably employee bans will fail too. As to the professional norms: among the norms of medical practice care is more important than health. Health care workers exemplify an ethic of care, including care for those whose ill health might be their own doing. Regarding the message: the policy has another message: if allowing smokers to

⁴⁷ Astrid Sanders, The law of unfair dismissal and behaviour outside work, *Legal Studies*, Volume 34. Issue 2. 2014. pp. 328-352. 331.

⁴⁸ Allison Rose et al., The Role of Worksite and Home Smoking Bans in Smoking Cessation Among U.S. Employed Adult Female Smokers, *American Journal of Health Promotion*, Volume 26. Issue 1. 2011. pp. 26-36.

⁴⁹ Douglas P. Olsen, The Ethics of Denying Smokers Employment in Health Care, *American Journal of Nursing*, Volume 114. Issue 6. 2014. pp 55-58.

work in an institution conveys institutional support of smoking, how does allowing smokers to be cared for in the same institution not similarly convey such support? Also, in settings where large medical schools operate, it is likely to be the poor, including members of minority groups, who, under an employee smoker ban, will lose the opportunity to work for an employer that offers health insurance and other benefits. Not to mention the fact that smoking is addictive and therefore not completely voluntary.⁵⁰ It is common in European practice that certain specific types of employers, often called as ‘tendency’ undertakings (Tendenzbetrieb) (e.g. those with political, religious, military profile) place extra restriction and requirements on their employees. Art. 4(2) EFD stipulates that affiliation to a particular religion and/or belief can be demanded by organisations for which this is a justified requirement having regard to the organisation’s ethos. They wish to be distinguished by following specific norms and (and naturally within legal limits) they rightfully do so under EU law.⁵¹ However this US case is different. It invades private life or put it into anti-discrimination context, it discriminates on the basis of lifestyle even if it does not interfere with performance at work. Otherwise perfectly qualified job candidates are discriminated on the basis of their health-related behaviour.

IV.2. 2. Facebook terminations

A similar tendency is present in relation to monitoring of online activities of the employees. Scholars generally agree that the law in the United States fails to adequately protect private sector employees from technological monitoring by their employers.⁵² The Stored Communications Act of 1986 makes it unlawful to intentionally access without authorisation a facility through which an electronic communication service is provided; or intentionally exceed an authorisation to access that facility and thereby obtain, alter or prevent authorised access to a wire or electronic communication while it is in electronic storage. The protection provided by the act however is limited, the SCA provides the greatest protection to employees who place restrictive privacy settings on their Facebook profiles.⁵³ One of the roads for private sector employees is claiming discrimination. In an Internet-speech related wrongful termination case, as long as the employer has a valid reason to fire an employee the court will seldom rule against the employer. The exception being that the employer terminated the

⁵⁰ Thomas S. Huddle–Stefan G. Kertesz–Ryan Nash, Health Care Institutions Should Not Exclude Smokers From Employment. *Academic Medicine*, Volume 89. Issue 6. 2014. pp. 843-847.

⁵¹ See: György Kiss, Alapjogi összeütközések a munkajogviszony teljesítése során a meggyőződés szabadsága és a munkáltatóhoz való lojalitás tükrében, In: Lehoczkyné Kollonay Csilla–Petrovics Zoltán (szerk.), *Liber amicorum: Studia Ida Hágelmayer dedicata. Ünnepi dolgozatok Hágelmayer Istvánné tiszteletére*. ELTE ÁJK, Budapest, 2005. pp. 271-332.

⁵² Ariana L. Levinson, Carpe Diem Privacy Protection in Employment Act, *Akron Law Review*, Volume 43. issue 2. 2010. pp. 331-433. 432.

⁵³ Catherine Crane: Social Networking v. the Employment-at-Will Doctrine: A Potential Defence for Employees fired for Facebooking, Terminated for Twittering, Booted for Blogging, and Sacked for Social Networking. *Washington University Law Review* Volume 89. Issue 3. 2012. pp. 639-672. p. 624.

employment relationship because (s)he the post was related to the employee's protected characteristic (religion, race, sexual orientation, etc.).⁵⁴

These cases are more and more common in Europe too. So-called Facebook dismissals are present in the European scene as well. Perhaps we find them under the heading of data protection or protection of employee privacy. Tracing the employee profile on social media sites is common practice. The posts, comments, pictures and music shared on Facebook reveals a multitude of information on the style and lifestyle, family status, sexual orientation of the employee. As we can see these are not work related, but concern private life, often the most private aspects, in terms of anti-discrimination law they are protected characteristics. Photos and comments posted for private reasons (to keep in touch with friends) are now used for a completely different reason without the authorisation or even previous knowledge of the owner of the profile. The consequence can very well be interference with personality (privacy) rights, discrimination and unethical practice.⁵⁵ We can put the employee's online activities into two categories: work-related and non-work related. The former includes comments, pictures, etc. that are independent from the employer, while the latter include activities that reflect upon the employer's activity (e.g. express criticism towards the firm, its management, clients). It is seemingly easy to draw the line, however in reality even non-work related comments may have an impact on the employer. For example expressing political views is a private act, but it can have an effect on the clientele of the employer. At times it is very difficult to classify the online actions of the employee.⁵⁶ The boundaries between working and private life are becoming more and more blurred.

V. Conclusions

Inclusion of disadvantaged groups is the very essence of anti-discrimination law. Disadvantage may stem from various sources. It can be connected to a certain characteristic attached to the employee as a human being (first cluster of protected characteristics e.g. sex, race, age and other classic grounds), but also from the atypical status created by the employees' contract (second cluster of protected characteristics e.g. telework, temporary agency work). We can also observe new, peculiar cases of discrimination. These forms can be grouped under the first cluster, however because of their novelty it is worth to discuss them under a separate heading. These new cases are sometimes connected to the changes in the interpretation of work ethos (employee smoking ban), other times they are natural by products of the rapid changes in information technology (Facebook termination cases). The various characteristics interact, sometimes they are combined, other times collide with one another. Finally, at both European and Member State level we can observe competition of protected

⁵⁴ Crane, 2012. p. 650.

⁵⁵ José João Abrantes, Algumas notas sobre o direito do trabalhador à reserva da vida privada, In: *Estudos Comemorativos dos 10 anos da Faculdade de Direito da Universidade Nova de Lisboa, Volume II*, Almedina, Coimbra, 2008. pp. 241-248.

⁵⁶ Edit Kajtár, *The 207th bone. Thoughts on labour law implications of the use of social media*. Manuscript, 2014.

characteristics as well. The structure of national equality bodies is but one example of the different political hierarchies.

The tree of European anti-discrimination is indeed hundred-pronged and ever growing. The EU Directives use closed lists, however this by no means indicate complete rigidity, there is room left for judicial interpretation and in fact, the CJEU does play an activist role through its case law. Also, numerous Member States decided to opt for a more elastic system. What we should not forget is the following: though they grow out from the same trunk, branches are diverse. Each category has its own characteristics, the inter- and intra branch differences has to be taken into consideration. The anti-discrimination framework is stretched, but there are limits to the elasticity of it. The use of traditional discrimination argument for the second cluster requires major adjustments.

Regarding the new twigs (lifestyle discrimination) the practice of the United States on employee smoker bans warns us about the potential negative consequences of stretching the employers discretionary power too far and provides us with an opportunity to contemplate on the potential meaning of “tendency undertakings”. The so- called Facebook termination cases are also worthy to our attention. While in Europe these cases are generally viewed within the framework of data protection law, the American academic literature conceives the issue as one of lifestyle discriminations. The combination of these two different approaches provides us with better understanding of the novel, emerging types of discrimination cases.