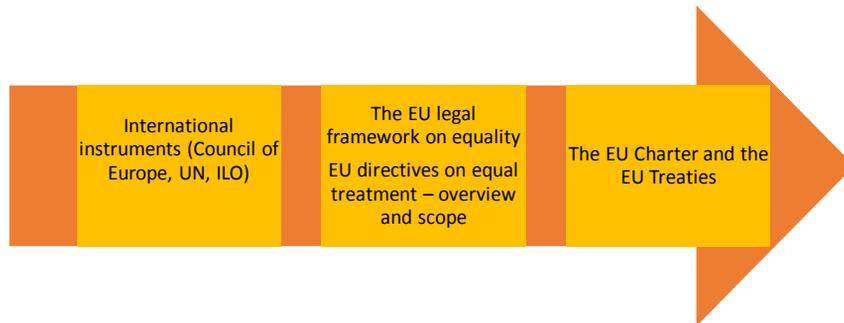


The EU legal framework on equality

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The EU legal framework on equality Outline

Overview of International Law:

UN Treaties:

- International instruments
- UN Treaties, International Labour Organisation, Council of Europe

Overview of EU Law :

- EU Charter and the EU Treaties
- EU Directives on equal treatment – overview and scope

Introduction: Cross-Fertilization between International and EU equality Law

- **Old ideas?**
- International legal instruments on equality, notwithstanding their goal of substantive equality
- might be **perceived as less effective in enforcement** than EU law that has played a role in developing an equality model by increasing legal norms (primary and secondary sources) and enforcement in Member states (preliminary rulings).

- **New trends?**
- **More cross-fertilization** between international equality and human rights law and EU law
- EU law is inspired by international equality law as a positive benchmark in its reports (Commission, Parliament and case law) to promote future change (**concept of reasonable accommodation** in CRPD)
- Incorporates equality principle drawn from International law in EUCJ case law (ECJ Mangold) citing Int. Conventions (UDHR, CEDAW, UN Covenants, ECHR, ILO)

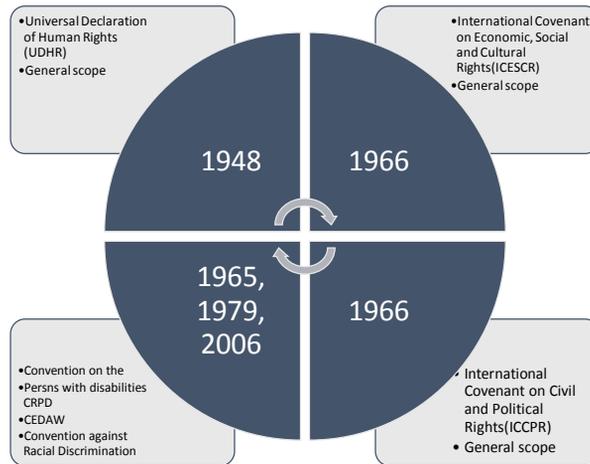
Overview of International Law:

UN Treaties

International Labour Organisation Conventions

Council of Europe Convention and Charters

Overview of International Law: UN Treaties ENFORCEMENT



United Nations

- **Universal Declaration of Human Rights:**
- Article 1: "All human beings are born free and equal in dignity and rights."
- Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as [...] or other status.[...]"
- Article 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."
- **ICCPR and ICESCR (Two Covenants):**
- Art. 2(1) ICCPR and Art. 2(2) ICESCR: Prohibition of discrimination in the enjoyment of rights
- Art. 26 ICCPR: Equality before the law
- **Article 18, ICCPR**
- 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
- 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
- 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Overview of International Law: Applicability UN Norms

UN Applicability

Treaty ratification binds states but applicability depends on domestic framework (monist, dualist)

Monitoring tools for covenants and treaties (reporting procedures, individual and collective complaints)

Treaties Covenants

The Universal Declaration of Human Rights is a recommendation but is seen as legally binding and **referred as a basis for EU directives**

Example of complaints:

Covenant on Civil and Political Rights (in Art. 2 of the Universal Declaration of Human Rights) is used to recognize **intersectional discrimination (sex and religion)** in individual complaint won in 2018, regarding **Babyloup French case** in front of Human Rights Committee

Overview of International Law: Applicability of CRPD

- the United Nations Committee on the Rights of Persons with Disabilities made up of experts from around the world.
- States parties obligated to submit regular reports to the Committee on implementation of CRPD rights.

- The Optional Protocol to the Convention gives the Committee competence to examine individual complaints with regard to alleged violations of the Convention by States parties to the Protocol.

11 April 2013 HK Danmark, Cases C-335/11 and C-337/11

Reference to international legal context:

- **Difference of treatment on grounds of disability: Dismissal, Existence of a disability, Employee absent because of disability BUT Obligation to provide accommodation through Part-time work**
- **The United Nations Convention on the Rights of Persons with Disabilities**, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 ('the UN Convention'), states in recital (e) in its preamble:
- 'Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.'
- **Under Article 1 of the UN Convention:**
- 'The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'
- Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'
- Under the fourth indent of Article 2 of the Convention, "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'
- **See also C-354/13 Kaltoft [53]**

International Labour Organisation Conventions ILO Treaties

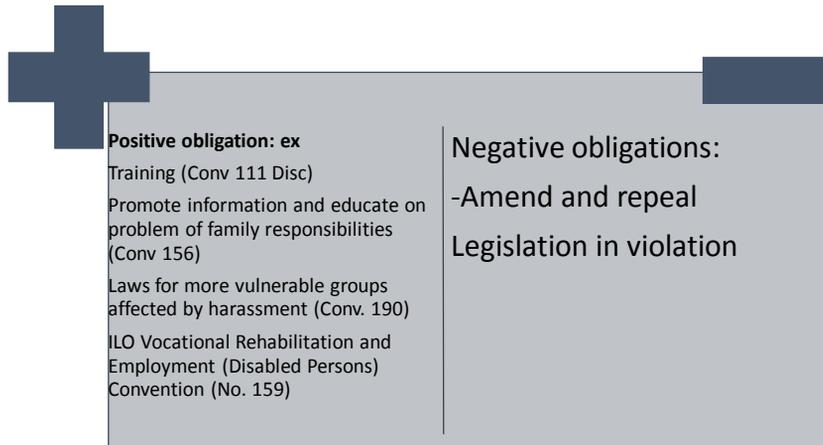
Equality at Work:

- Convention no. 100 on Equal Remuneration, 1951
- Convention no. 111 on Discrimination in Employment and Occupation, 1958
- NEW ! Convention no. 190 on Violence and Harassment 2019 (emphasis on **intersectional discrimination** against domestic workers)
- •Part-Time Work Convention (No. 175)

Women and Families:

- Convention no. 156 on Workers with Family Responsibilities, 1981
- Convention no. 183 on Maternity Protection, 2000

Overview of International Law: Applicability of ILO Conventions



Council of Europe Convention and Social Charter

- **Art 14 ECHR:**
- Prohibition of discrimination. **Not autonomous equality clause** only used in conjunction with other rights (“in the enjoyment of”).
- •Indicative (“such as...”) and open-ended (“...or other status”) list of protected grounds. **Objective justification** → legitimate aim + proportionality.
- **Protocol 12 ECHR: autonomous**
- Reference to “full and effective equality” in the Preamble. Only binding on states that ratify it.
- **Revised European Social Charter (1996):**
- Art. 15: For people with physical and mental disabilities: duty to take adequate measures for the provision of training facilities, including, where necessary, specialised institutions, public or private; 2 to take adequate measures for the placing of disabled persons in employment, such as specialised placing services, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment.
- **Art 16:** Right of the family to social, legal and economic protection
- **Art 20:** – The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex
- **Art 27:** Take measures to protect the “right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers”
- **Maternity protection: Art 8:** Right of employed women to protection of maternity

Council of Europe Conventions Violation of ECHR or non compliance (Charter)

ECHR:

Admissibility narrow by Court of Human Rights (5%)

Judgments: are binding; follow-up by Committee of Ministers after exhaust of domestic remedies

European Social Charter:

Collective complaints

No need to exhaust domestic remedies

No victim requirement

Conclusions are not binding; follow-up by Committee of Ministers

Overview of EU Law -EU Charter and the EU Treaties EU Directives on equal treatment – overview and scope

• ***The EU treaties: goals***

- **Article 2 TEU:** *The Union is founded on the values common to the Member States : 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*
- **Article 3(3) TEU**
- *The Union shall combat social exclusion and discrimination and shall promote social justice equality women / men*
- **Art 8 TFEU ‘mainstreaming’ (systemic action):** Promoting gender equality through transversal actions/policies
- **Article 18 TFEU:** *Prohibition of discrimination on grounds of nationality*
- **Art 157(4) TFEU: positive action (equality between men and women)**
- *With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*

EU Charter of Fundamental Rights:

Article 20: Equality before the law for national minorities

Art 21(1)

- **Prohibition of discrimination** based on sex (& other grounds):
- “Any discrimination based on any ground such as [...] shall be prohibited” (open ended)

Art 23

- “Equality between men and women must be ensured in all areas, including employment, work and pay.
- The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex

HOWEVER

Art 51(1): *The Charter is addressed to EU institutions/bodies and to MS when they are implementing EU law;*

Art 51(2): *The Charter does not create/modify the powers/tasks of the EU*

A Brief History of the EU Equality Model

The principle of EQUALITY and NON DISCRIMINATION are deeply anchored within EU law and the Treaties and now have given rise to a solid base of EU case law and laws interpreted in the Member States.

Equality is considered as a **fundamental principle** recognized as such by the ECJ:

«equal treatment between men and women is a fundamental right, part of the general principles of EU law which the Court must ensure the respect» (ECJ Defrenne III), recalled in ECJ Mangold 2005, Kucukdeveci 2010, Dansk Industri 2016.

Its legitimacy is generally reinforced by the EU Charter on fundamental rights which is now binding since the Lisbon Treaty (article 21)

This means that EQUALITY is a condition for the legality of any EU instrument or any action of EU institutions and agencies

A Brief History of the EU Equality Model

- **Initially, the EU Treaty only covered sex** discrimination with regards to equal pay (157 TFEU) and discrimination **based on nationality** (art. 18 after Lisbon Treaty) applying to persons, goods and services..) in order to **remove barriers within the internal market**
- It was not until the 1970's, that, on the grounds of sex equality, the ECJ case law (Defrenne I ECJ May 25 1971, Defrenne II April 8 1976, C-43/75, et ECJ Defrenne III June 15 1978, C-149/77)
- Standards for the concepts applied in the antidiscrimination legal framework of the member States.
- **The Treaty of Amsterdam of 1997, in its article 13 (art. 19)**, further impetus to this framework by expanding coverage of antidiscrimination law to other grounds
- **Article 13 invited « the Council acting unanimously** on a proposal from the Commission and after consulting the European Parliament, » to « take appropriate action to combat discrimination... »
- It is at that time that the other directives were adopted.....

The main directives covering the scope of employment were adopted:

- **Directive 92/85/EEC** of October 19, 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding
- **Racial Equality Directive 2000/43** which covers race and ethnic origin (June 29 2000)
- **Employment Framework Directive 2000/78** which covers religion, disability, age and sexual orientation (Nov. 27 2000)
- **Recast Directive 2006/54** covers sex discrimination in employment (consolidating, among others, Directive 2002/73 and relevant EU case law)*
- **Directive 2010/41/EU** of July 7 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a **self-employed** capacity
- **Directive of the European Parliament and of the Council of 20 June 2019 on work-life balance**, repealing Directive 2010/18/EU on parental leave) (Impetus from EU Pillar of social Rights

Personal and Material Scope of EU Directives

Personal scope

2000/43/EC (employment included):
Race and ethnic origin

2000/78/EC (only employment):
Religion or belief, Disability, Age, Sexual
orientation

Material Scope:

Directive 2000/43/EC (race and ethnic origin): access and supply of goods and services, healthcare, education.

Directive 2004/113/EC (sex) – access and supply of goods and services (not for media, advertising and education)

Proposal COM(2008)462 (age, disability, sexual orientation, religion and believe) to protect outside of employment like other directives (race and sex)

Overview of EU Gender Equality Law

EU Directives on equal treatment – overview and scope

- Material scope
- **Directive 2006/54 on equal treatment in employment and occupation (recast)**
- •-covers access to employment, promotion, working conditions (dismissal, pay, etc.), vocational training, membership in worker / employer organisations, social security (occupational) schemes
- •-prohibits direct discrimination, indirect discrimination and harassment
- •-simplifies and updates several previous Directives
- •-incorporates case law of the Court of Justice of the EU
- **Scope: Directive 92/85 (health and safety around pregnancy and maternity); Directive 2010/41 (self-employment)**

Directives cover a variation of rights beyond the prohibition of discrimination and exceptions:

Principal concepts:

- * Direct and indirect discrimination, harassment
- * Reasonable accommodation (disability)
- * Justification for direct age discrimination
- * Positive actions, special protection (pregnancy and maternity) 92/85/EEC on maternity protection and 2019/1158/EU on work-life balance & parental leave
- * Exception for religious organisations (Egenberger C-414/16, Art. 4 (2) of Directive 2000/78
- * New forms of discrimination without a victim (C-54/07 Feryn), discrimination by association (C-83/14 CHEZ), appearance of discrimination (C-81/12 Accept)

Conclusion: cross-fertilization is useful as a transnational dialogue

- **International Treaties (UN, Council of Europe, ILO):**
- Model for more positive obligations Larger view of Reasonable Accommodation (CRPD), Positive action with more comprehensive measures, prevention- (CEDAW), New ILO Convention on Violence and harassment (intersectional discrimination)
- More effective enforcement:
- Periodic reports' system
- Complaints system:
- Committee monitoring
- ECHR: European Court of Human Rights; individual claims
- Revised European Social Charter: European Committee of Social Rights : collective complaints
- **European Union:**
- **New Directive on Work-Life Balance can reinforce international law pursuit to promote family and care rights and duties (for all workers including those who immigrate)**

Conclusion on the future agenda Statement by Equality Commissioner H. Dalli inspired by international law for disability rights:

- March 4 2020
- *“We must act to **strengthen LGBTI+ rights**. I will put forward a **comprehensive strategy** to tackle the discrimination still faced by LGBTI+ individuals on the basis of their sexual orientation, gender identity or expression, or sex characteristics.*
- *The situation of **transgender and intersex** people is particularly concerning. Overall, we see that they often face even higher levels of discrimination. While respecting national prerogatives, we shall address the specific challenges that trans and intersex people face.*
- ***We must prioritise the inclusion of persons with disabilities**. We will undertake an evaluation of our current strategy, and propose a new strategy in 2021. We will also focus on the implementation of the **UN Convention on the Rights of Persons with Disabilities**.*
- *The European Union and the Member States must deal with the particular challenges of **discrimination and exclusion faced by millions of Roma people in Europe**.*
- ***Anti-gypsyism and hate crime** against Roma continue to be a matter of great concern. I will put forward a new European framework for equality and inclusion of Roma people which will entail joint action at national and EU levels to improve their situation and close the gaps.”*
- **Much to think about considering the current scope of the EU legal framework.....**