

The EU legal framework on equality

Marjolein van den Brink
Utrecht University School of Law
ERA, Trier, 26 October 2020



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

outline

1. a (very) few words on the equality principle
2. the EU legal framework for equality:
 - primary law (EU Charter, TEU and TFEU)
 - secondary law (equality directives)
 - status EU law
3. the European Convention on Human Rights and the European Social Charter
4. Further afield: equality and non-discrimination in international instruments (UN human rights treaties & ILO Conventions)
5. time permitting: relationship between the EU & ECHR

1. Equality

- Equality as protection against arbitrariness
- Equality of people on the basis of specific characteristics

Protected grounds

- UDHR (art. 2) + ICCPR (art. 2(1) + art. 2(2) ICESCR): *such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*
- ECHR (art. 14): *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*
- ESC (revised; Part V – Art. E): EU Charter (art. 21) *such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status*
- . 21(1): *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***
- EU Charter (art. 21(2)): *discrimination on grounds of **nationality** shall be prohibited*

what makes a ground suspect?

- Immutable identity trait?
- Identity marker?
- (History of) marginalisation?
- Prejudice, stereotyping, stigmatisation?

Universal Declaration of Human rights (1948)

Principle of equality

Art. 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood [sic].

Universal Declaration

Non-discrimination

Art. 2: Everyone is entitled to all the rights and freedoms [...] without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Equality & non-discrimination in EU law

- Charter of Fundamental Rights of the EU (2000 / 2009)
- Treaty on European Union (TEU)
- Treaty on the Functioning of the European Union (TFEU)
- Equality directives

2. The EU legal framework: #what's the EU got to do with equality?

[recommended reading: Anna van der Vleuten; 'Pincers and Prestige: Explaining the implementation of EU gender equality legislation; *Comparative European Politics*, 2005, vol. 3, p. 454-488]

EU Charter: Equality (title III)

- Art. 20: equality before the law
- Art. 21: non-discrimination
- Art. 22: cultural, linguistic & religious diversity
- Art. 23: equality men / women
- Art. 24: rights of the child
- Art. 25: rights of the elderly
- Art. 26: integration of persons with disabilities

EU Charter: scope

Art. 51(1). The provisions of this Charter are **addressed to the institutions and bodies of the Union** with due regard for the principle of subsidiarity and **to the Member States only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

Charter scope (art. 52(1))

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

EU Charter: art. 20 & 21

- Art. 20: Everyone is equal before the law
- Art. 21: non-discrimination
 1. Any discrimination based on grounds such as race shall be prohibited
 2. Within the scope of application of the Treaty ... and without prejudice ... any discrimination on grounds of nationality shall be prohibited

Focus of art. 20 Charter

- In judicial practice:
 - Art. 20 seems to be used as protection against arbitrary distinctions:
 - 2 approaches:
 - Equality as rationality: very marginal assessment of justification of unequal treatment:
 - Objective reasons for difference?
 - Scientific data to support chosen course of action?
 - Example: Case C-127/07 on EU Greenhouse gas emissions trading scheme (2008): scheme applied to steel industry but not plastics & aluminium sectors
 - Equality & employment relations: stricter test:
 - Example: departures from equality principle (e.g. because of part-time employment or atypical contracts) to be carefully scrutinised

Focus of article 21 Charter

- 21(1): general non-discrimination clause
- 21(2): nationality
- Examples:
 - 21(1) Test Achats (C-236/09), Zoi Chatzi (C-149/10)
 - 21(2) Kamberaj (C-571/10)

Treaty on European Union (TEU, 2010)

- Art. 2: 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 MS in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
- Art. 3(3): ... It shall combat exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
- Art. 9: In all its activities, the Union shall observe the principle of the equality of its citizens...

Treaty on the Functioning of the EU (TFEU)

- Art. 8: In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.
- Art. 10: In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

EU law: status

- Directly applicable in domestic law & priority over domestic law
- Art. 288 TFEU (ex 249 TEC): A **directive shall be binding, as to the result** to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the **choice of form and methods**.

EU equality directives

directive	ground(s) protected	material scope
2000/43 ('race directive')	race	employment & occupation; social protection, education, goods & services
2000/78 ('general framework directive')	religion or belief, disability, age, sexual orientation	employment & occupation
'horizontal anti-discrimination directive' (https://data.consilium.europa.eu/doc/document/ST-12956-2018-INIT/en/pdf)	religion or belief, disability, age, sexual orientation	social protection, education, goods & services, including housing (explicitly <i>explicitly excluded, among others, family law related issues; organisation and funding of social protection and education systems</i>)
<i>other directives, esp. those related to sex equality issues may also be relevant, e.g. in cases of intersectional discrimination:</i>		
79/7 on sex equality & statutory social security; 2004/113 on sex equality & goods and services; 2006/54 ('recast sex equality directive) on employment & occupation; 2010/41 on sex equality & self-employment Directives focusing on specific groups: 92/85 on pregnant workers; 97/81 on part-time work; 2008/104 on temporary workers; 2010/18 on parental leave		

EU law & domestic law

- Art. 19(3) TEU: The Court of Justice of the European Union [CJEU] shall, in accordance with the Treaties
 - (b) give **preliminary rulings**, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

Art. 267 TFEU

- The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
 - (a) the interpretation of the Treaties;
 - ... [national] court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
 - Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court.

4. the European Convention on Human Rights & the European Social Charter

- ECHR: art. 14 (accessory right) + Protocol no. 12
- ESC:
 - Equality of workers with nationality of State Parties (e.g. part I, no. 18, part II art. 12, 13)
 - Sex equality (part I, no. 20, part II, art. 4, art. 20)
 - Workers with family responsibilities (part II, art. 27)
 - General non-discrimination provision re provisions covered by ESC (part V art. E)

Major differences ECHR / ESC

- ECtHR binding, ECSR not (but decisions of both monitored by Committee of Ministers)
- ESC: 'supermarket treaty': upon ratification accept a specified minimum number of provisions (part III, art. A)
- ESC: only collective complaints
- ESC: no need to exhaust domestic remedies

4. UN human rights treaties

- General application:
 - Civil & political rights (ICCPR) & economic, social & cultural rights (ICESCR)
- Specific issues:
 - race (CERD), torture (CAT), enforced disappearances (CED)
- Specific groups:
 - Women (CEDAW), children (CRC), persons with disability (CRPD), migrant workers + family (CRMW)

Equality approaches UN hr treaties

- **Equality provision to ensure equal protection for all, limited to treaty provisions**
 - e.g. art. 2(1) ICCPR: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction **the rights recognized in the present Covenant**, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- **Equality protection per se:**
 - E.g. art. 26 ICCPR: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall **prohibit any discrimination and guarantee to all persons** equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Similar distinction: art. 14 ECHR & Protocol no. 12 to ECHR

Equality approaches UN hr treaties

- Non-discrimination treaties: e.g. CEDAW convention:
 - Entitles women to same rights as men (not more, nor less)
- CERD convention:
 - prohibits differences in treatment on the basis of race
- tension EU directives / UN standards, esp. in context of positive action and preferential treatment



Main non-discrimination instrument: C-111: Discrimination (Employment and Occupation) Convention, 1958 (175 ratifications)

States undertake to:

- adopt national policies to promote equal opportunities & treatment in the sphere of employment and occupation, in order to eliminate discrimination (art. 2)
- to enact legislation to secure acceptance and observance of such policies (art. 3(b))
- to repeal legislation that contravenes the Convention's purpose (3(c))
- Discrimination: both direct and indirect discrimination (art. 1)
- Special measures to meet particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination (art. 5(2))

5. other European instruments

What the EU law says about the European Convention on Human Rights:

- art. 52(3) Charter: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."
- Art. 6(2) TEU:
 - The Union shall accede to the European Convention** for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
- Art. 59(2) ECHR: The European Union may accede to this Convention.
- But: OPINION 2/13 OF THE COURT (Full Court), 18 December 2014

Why EU accession to ECHR?

- Accountability EU institutions; possibility of conflicting obligations for MS

complicated issues:

- who has the final say?
- Differing standards for ECHR States Parties that are and those that are not EU members?
 - presumption of equivalent protection (*Bosphorus v Ireland*, appl.no. 45036, 2005)

Difference in focus

- EU: focus on internal market; harmonisation
- ECHR: protection of minimum human rights standards

Intrinsic tension?

- CJEU C-399/11, 26 February 2013, *Stefano Melloni v Ministerio Fiscal*: CJEU (Para 60):
“[MS]... free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised” (60)

Thank you, any questions?

m.vandenbrink@uu.nl