

The wider legal framework on equality in Europe

Nicola Countouris – Applying EU Anti-discrimination Law – Seminar for Members of the Judiciary – Paris, 19-21 October 2015

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Structure of the Presentation

1. Introduction – Equality and the Fragmentation of supranational sources
2. EU Law - The constitutional value of the principle of equality and non-discrimination
3. Council of Europe - Equality and anti-discrimination in the ECHR and the Social Charter
4. ILO and equality in the workplace
5. UN Conventions – Equality as a universal principle
6. Key common principles
7. Relationship between legal orders and obligations of states - Pluralism, dialogue, or hierarchy?
8. Conclusions

1. Introduction – Fragmentation of sources

- About two dozens different regional and international instruments/sources shape the legal framework on equality in Europe!
 - EU Treaties, Charter, General Principles, Directives
 - Council of Europe Instruments (ECHR and Social Charter)
 - ILO Conventions (esp. C-100 and C-111)
 - UN Conventions and Covenants (at least 5 of them!)
- What are their key characteristics, mutual relationship, and relationship with national legal orders?

2. EU Law - The constitutional value of equality

- Treaty (or equivalent)
 - Article 157 TFEU – equal pay, treatment, and positive action
 - Article 19 TFEU – general legal base
 - Article 8 TFEU – horizontal sex equality clause
 - Article 45 TFEU - FMW
 - Article 20 CFREU – equality before the law
 - Article 21 CFREU - general
 - Article 23 CFREU – sex equality specific
- Directives
 - Racial Equality Directive 2000/43
 - ‘Framework’ Equality Directive 2000/78
 - ‘Recast’ (Gender) Equality Directive 2006/54
 - Access to Goods and Services Directive 2004/113
 - Equal-treatment in self-employment Directive 2010/41
 - Pregnancy Directive 92/85 and Parental Leave Directive 2010/18

EU - continued

- General principle of EU Law - Case C-144/04, *Mangold* [2005] ECR I-9981 paras 75:

'The principle of non-discrimination ... must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law [...] the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle'

- 'Age', but other grounds too, Case C-83/14, *Nikolova*, para 42:

'As the Court has already held, in the light of the objective of Directive 2000/43 and the nature of the rights which it seeks to safeguard, and in view of the fact that that directive is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of EU law, as recognised in Article 21 of the Charter, the scope of that directive cannot be defined restrictively.'

EU - continued

- Although some cases suggest a narrow scope for the general principles enshrined in the Charter e.g. C-198/13, *Hernandez*, para 36

'...the Court has already held that Article 13 EC (now Article 19 TFEU) could not, as such, bring within the scope of EU law, for the purposes of the application of fundamental rights as general principles of EU law, a national measure which does not come within the framework of the measures adopted on the basis of that article. Consequently, the mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable'

EU - continued

To sum up:

- Several Treaty and secondary instruments
- Some provisions capable of direct effect
- A wide (but finite) range of grounds covered
- A general principle of EU Law
- A fundamental right
- An expanding jurisprudence
- No reverse discrimination
- Application vis-à-vis national legal orders limited to the scope of EU law

Council of Europe - ECHR and Social Charter

The ECHR

- Article 14 – Prohibition of discrimination
... in respect of 'rights and freedoms' protected by the Convention ('parasitic' nature of A 14 – problem with social/labour rights)
- Where a breach of another Article is invoked (even in conjunction with A 14) the ECtHR may limit itself to assessing the infringement of that provision (*Smith and Grady v UK* 1999)
- But a breach of A 14 can occur even if there is not breach of another Article (*Belgian Linguistic case* 1968)

Council of Europe - continued

- Note – long/non-exhaustive list of grounds – ‘any ground such as sex, race, colour... *or other status*’
 - Used to include other grounds such as sexual orientation, health, trade union, military status...
 - list of grounds often used in conjunction with ‘open interpretation’ of other rights to reduce ‘parasitic’ nature (e.g. *Sidabras v Lithuania*, 2004)
 - Some categories subject to ‘intensive scrutiny’ (all those specifically referred to + sexual orientation)
- Tolerates reverse discrimination (*Belgian Linguistic case*)
- The (potential) contribution of Protocol 12

Council of Europe - continued

The European Social Charter (1996)

- 1961 Charter – Preamble and A4
- 1996 revised Charter:
 - Article 4(3) – equal pay
 - Article 20 – equal opportunities and sex discrimination
 - Article 24 – Termination of employment and discrim.
 - Article 8 – maternity protection and leave
 - Article 27 – workers with family responsibilities
 - Article 15 – Rights of persons with disabilities
 - Article 19 – Rights of migrant workers
 - Article E – more extensive, modelled on A 14 ECHR
- Interpretation by Committee of
 - Article 1(2) – right to choose one’s work

Council of Europe - continued

To sum up:

- CoE instruments contain a range of instruments/provisions protecting against discrimination, on various grounds
- Interpretative role of ECtHR and ESC
- Legal status and supervisory mechanisms of ECHR v ESC (v EU)
- Obligations arise under international law (unless 'incorporated' domestically, or monist legal systems)

4. The ILO and equality in the workplace

- Two key Conventions:
 - C-100, Equal Remuneration Convention
 - C-111, Discrimination (Employment and Occupation) Convention
- 1998 ILO Declaration of Fundamental Rights at Work
- C-111, only in respect of 'employment' (and occupation) and in respect of 'specific grounds'
- Other relevant instruments: C-159, Vocational rehabilitation and employment (Disabled Persons) convention; C-103, Maternity Protection convention; C-169, The convention on indigenous and tribal people; C-175, the Part-time Work convention.

UN Conventions – ‘universal’ instruments

- (See above ILO)
- **The Universal Declaration of Human Rights (1984)**
 - 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 race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’
 - Article 3 – Equality before the law
- **Two main ‘supervision/enforcement’ mechanisms**
 - Periodic Reporting Obligations
 - Individual Complaint Mechanisms

UN Conventions – ‘universal’ instruments

- (See above ILO)
- **The International Covenant on Civil and Political Rights (ICCPR) 1966 (in force since 1976)**
 - Article 26 – Equality before the law (free-standing; and open ended grounds)
 - Article 2 – Enjoyment of protected rights without discrimination (‘dependent’ on ICCPR protections; open ended).
 - Article 3 – Equality between men and women
- Mostly civil and political rights, but A1 also refers to a right to self-determination and the free pursuit of ‘economic, social and cultural development’ (see *Broeks v NL* 172/1984).
- Role of HRC (esp. under Additional Protocol)

UN - continued

- **The International Covenant on Economic, Social, and Cultural Rights (ICESCR) 1966 (1976)**
 - Social rights (notice fewer signatories and Optional Protocol only coming into force in 2013)
 - Article 2(2) - Enjoyment of protected rights without discrimination ('dependent' on ICESCR protections; open ended grounds)
 - Article 3 – Equality between men and women
 - Permits 'positive action' to combat discrimination

UN - continued

- **The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965**
 - A1: 'race, colour, descent, or national or ethnic origin', but applies in any field /'free-standing'
 - A5: 'equality before the law'
 - Articles 1(4) and 2(2) support positive action
 - A14(1) individual complaints mechanism by way of an optional declaration (not through an additional optional protocol)

UN - continued

- **The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979**
 - Article 1 – discrimination ‘against women’ (including by ‘marital status’) ‘in the political, economic, social, cultural, civil *or any other field*’
 - Article 2 – State positive and negative obligations
 - Article 3 – ‘advancement of women’
 - Article 4 – ‘special measures’ for de facto equality permitted on a temporary basis (until equality achieved)
- The 1999 Optional also establishes an inquiry procedure through which the CEDAW committee can launch own initiatives inquiries into grave or systematic violations

UN - continued

- **The Convention on the Rights of Persons with Disabilities (CRPD) 2006 (2008)**
 - By and large a very modern instrument: e.g. denial of ‘reasonable accommodation’ is a form of discrimination (A2); ‘multiple discrimination’ (A3, e.g. a disabled woman);
 - Article 2: any field
 - Article 5: de facto equality and positive action
 - Article 12: Equality before the law and the enjoyment of ‘legal capacity’ through ‘supported decision making’ (not ‘guardianship’)
 - No reference to the concept of ‘comparator’ or even to the concept of ‘justification’!
- **Convention on the Rights of the Child (1989)**

6. Key common principles

- By and large all instruments prohibit:
 - Direct discrimination
 - Indirect Discrimination
- ... and contain sets of positive and negative obligations

- But by and large important differences remain in respect of
 - Use and concepts of comparators
 - The accepted concept of 'positive action'
 - Justifications and concept of 'genuine occupational requirement'
 - The 'material' and 'personal' scope of application of the provisions
 - The legal effects of the provisions and the relationship between national and supranational/international legal orders

7. Relationship between systems and State obligations

Relationship between supranational legal systems

- Pluralism?
- Dialogue?
- Hierarchy?

Relationship between supranational and national legal systems

- A matter of international law?
- A matter of constitutional law?
- The special case of EU law

8. Conclusions

- Fragmentation of sources
- A common core?
- Important differences
- The (crucial) role(s) of national courts