

# General European Legal Framework on Equal Treatment

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## Outline

- Charter of Fundamental Rights
  - General points
  - Title III “Equality”
- European Convention on Human Rights
  - General points
  - Article 14 ECHR and Protocol 12
- Some other international treaties
  - ICCPR and ICESCR
  - “Sectoral” Conventions



# I. Charter of Fundamental Rights

- A. General points
- B. Title III "Equality"



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## A. General points

- In force since 1st December 2009
- Same legal value as the Treaties (Art. 6(1) of the TEU)
- Binding on *all* the Member States
- In principle, a constant-law codification
- No strict separation between first and second generation rights
- Distinction between rights and principles (Art. 51(1) and 52(5))



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## A. General points

- Interpretation complies with the ECHR and common constitutional traditions (Art. 52(3) and (4)), which cannot be restricted by the Charter in their fields of application (Art. 53)
- “Explanations” must be given due regard in the interpretation of the Charter
- Binding on the EU and Member States “when they are implementing Union law” (Art. 51)
  - No second ECHR



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In principle, no direct horizontal effect

## B. Title III “Equality”

- General principle of equality and non-discrimination (Articles 20-21)
- Cultural, religious and linguistic diversity (Article 22)
- Equality between men and women (Article 23)
- Rights of the child (Article 24)
- Rights of the elderly (Article 25)
- Integration of persons with disabilities (Article 26)



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## B. Title III “Equality”

- Equality and non-discrimination (Articles 20-21)
  - Art. 20: “Everyone is equal before the law.”
  - Art. 21: “1. 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. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”



## B. Title III “Equality”

- Equality and non-discrimination (Articles 20-21)
  - Explanation of an old general principle of Community law which:
    - “requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such different treatment is objectively justified.”
    - “A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.”
    - E.g. C-101/12 *Schaible*: electronic identification system which is imposed only on breeders of sheep and goats (and not on breeders of cattle and pigs)



## B. Title III “Equality”

- Equality and non-discrimination (Articles 20-21)
  - *Lex generalis* applies only when there is no *lex specialis* (freedoms of movement, provisions on equality between men and women, on non-discrimination on the grounds of nationality, anti-discrimination directives, etc.)
  - See Art. 19 TFEU: power to adopt secondary legislation measures (Directive 2000/43 (race), Directive 2000/78 (employment), Directive 2004/113 (gender equality in access to goods and services))
  - Sometimes invoked alone, sometimes in order to guide interpretation of another provision. E.g. C-528/13 *Léger* (blood donation and homosexuals)
  - Source of a degree of horizontal effect?
    - Invocability of exclusion (national law set aside within the framework of a private litigation) of the general principle of non-discrimination on the grounds of age: C-144/04 *Mangold*; C-555/07 *Küküdeveci*
    - Preferential treatment compared with other provisions of the Charter: right to annual leave (C-282/10 *Dominguez*); right of workers to information and consultation (C-176/12 *Association de Médiation sociale*)



## B. Title III “Equality”

- Equality between men and women (Article 23)
  - Dates back to the origins of the European construction (economic objective)
  - Broader scope than Article 157 TFEU
  - Has already led to a verification of the invalidity of a norm of secondary legislation: C-236/09 *Test-achats*
  - Also direct horizontal effect? Cf. C-43/75 *Defrenne*
  - Also covers discrimination against transsexuals (C-117/01 *K.B.*, C-423/04 *Richards*)



## B. Title III “Equality”

- Equality between men and women (Article 23)
  - Was implemented in part by
    - Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
      - Recent example: C-222/14 *Maïstrellis*
      - Includes sexual harassment
      - Allows for the adoption of positive discrimination measures in favour of the under-represented sex “with a view to ensuring full equality in practice between men and women in working life” ... provided that that discrimination is not “automatic” (CJEU, C-450/93 *Kalanke*, C-409/95 *Marschall*; C-407/98 *Abrahamsson*)



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## B. Title III “Equality”

- Equality between men and women (Article 23)
  - Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services
    - Article 5(2), declared invalid in the aforementioned *Test-Achats* case.
    - Also includes sexual harassment and permits positive discrimination
  - Directive 79/7 on equal treatment in matters of social security
  - Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in a self-employed activity



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## B. Title III “Equality”

- Integration of persons with disabilities (Art. 26)
  - Within the meaning of Directive 2000/78: “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.” (C-13/05 *Chacon Navas*)
  - It is evident from Judgment C-356-12 *Glatzel* that this is a *principle*, not a right. In other words:
    - No positive obligation to implement it
    - Can serve as review standard only for a measure intended to implement it ... and provided that it has itself been the subject of a more specific legislative provision
    - Conclusion: it now appears to act as only an interpretative compass.
  - It is evident from the *Glatzel* and C-363/12 *Z* judgments that the United Nations Convention on persons with disabilities (see *below*) cannot serve as a standard of review of instruments of secondary legislation either.



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## II. European Convention on Human Rights

- A. General points
- B. Article 14 and Protocol 12

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## A. General points

- Signed in 1950 within the confines of the Council of Europe
- Ratified by 47 States parties
- Submitted to the compulsory jurisdiction of the European Court of Human Rights
- Request admissible only if internal paths for appeal have been exhausted and recourse was instituted within six months of the date of the pronouncement of the last internal decision (Art. 35).
- Enjoys a direct “vertical” effect in almost all the States parties (specificity in the UK).
- Has been completed by a certain number of protocols (substantial and procedural)
- Contains mainly so-called “first generation” rights



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## B. Article 14 and Protocol 12

- Article 14
  - “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.”
  - Open-ended list of grounds for discrimination, broader than the EU directives
    - Has, for example, been extended to sexual orientation (*Fretté v France*, 26 February 2002) and to disability (*Glor v Switzerland*, 30 April 2009)
    - But the grounds must be a personal characteristic (*Aslan and Sancı v Turkey*, 4 October 2005)



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## B. Article 14 and Protocol 12

- Article 14
  - “Dubious” criteria recognised by the Court: sex, race and ethnic origin, nationality, religion, descent, sexual orientation: stricter control of justification.
  - Always in combination with another fundamental right ...
    - Even in the absence of “autonomous” infringement of that right
      - E.g. *E.B. v France*, 22 January 2008 (Art. 8 and adoption by a homosexual person)
    - And even if the prerogative does not come under a literal application of the ECHR
      - E.g. *Zarb Adami v Malta*, 20 June 2006 (Art. 4 and performing jury service in a criminal court)
      - E.g. *Koua Poirrez v France*, 30 September 2003 (Art. 1- P1 and allowance for a person with a disability)



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## B. Article 14 and Protocol 12

- Article 14
  - Also covers indirect discrimination
    - E.g. *D.H. v Czech Republic*, 13 November 2007 (education of Roma children in schools for children suffering from a mental handicap)
  - Has an *indirect* horizontal effect (obligation to protect placed on the State)
    - E.g. *Members of the Gldani Congregation of Jehovah's Witnesses et al. v Georgia*, 3 May 2007 (persecution for religious reasons).



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## B. Article 14 and Protocol 12

- Protocol 12, Article 1
  - “1 The enjoyment of any right set forth by law 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.
  - 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”
  - Came into force in 2005
  - Notion of discrimination the same as that of Article 14 ECHR



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## III. Some other international treaties

- A. ICCPR and ICESCR
- B. “Sectoral” conventions



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## A. ICCPR and ICESCR

- International Covenant on Civil and Political Rights (1966)
  - Article 2(1) and (3): comparable to Article 14 ECHR (non-discrimination in enjoyment of rights)
  - Article 26: general principle of non-discrimination, autonomous
    - E.g. *Ibrahima Gueye et al. v France*, 3 April 1989 (pension of retired soldiers of Senegalese nationality)
  - Article 27: protection of minorities
  - Entrusted to the supervision of the Human Rights Committee
    - Recommendations based on State reports
    - Findings following individual or State communications (optional jurisdiction)



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## A. ICCPR and ICESCR

- International Covenant on Economic, Social and Cultural Rights (1966)
  - Article 2(2), comparable to Article 14 ECHR
  - Article 3: Non-discrimination between men and women in the enjoyment of the rights established by the ICESCR
  - Entrusted to the supervision of the Committee on Economic, Social and Cultural Rights
    - Recommendations based on State reports
    - Findings following individual communications (optional jurisdiction)



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## B. “Sectoral” conventions

- Three key conventions
  - International Convention on the Elimination of all Forms of Racial Discrimination (1966)
    - Entrusted to the supervision of the Committee on the Elimination of Racial Discrimination
      - General recommendations based on State reports
      - Opinions following State or individual communications (optional jurisdiction)
  - Convention on the Elimination of All Forms of Discrimination against Women (1979)
    - Entrusted to the supervision of the Committee for the Elimination of Discrimination against Women
      - General recommendations based on State reports
      - Decisions following individual communications (optional jurisdiction)



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## B. “Sectoral” conventions

- Three key conventions
  - Convention on the Rights of Persons with Disabilities (2007)
    - Committee on the Rights of Persons with Disabilities
      - General recommendations based on State reports
      - Findings following individual communications (optional jurisdiction)



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## B. “Sectoral” conventions

- Prohibition of direct *and* indirect discrimination
- Positive obligation placed on the States:
  - To protect from discrimination
    - Can extend to discrimination and violence within the family (CEDAW).
    - Can compel to adopt penalties (CERD)
  - To adopt positive discrimination measures (provided they are temporary and necessary)
  - To make “reasonable accommodation” (CRPD)
- General problem: “multiple” discrimination and choice of forum.



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Thank you!



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