

The EU Legal Framework on Equality

ERA – Academy of European Law
September 2016
Copenhagen

Dr Panos Kapotas
Senior Lecturer
University of Portsmouth



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

Presentation Outline

1. Terminology and theoretical background

2. EU legal framework: Primary and secondary EU law

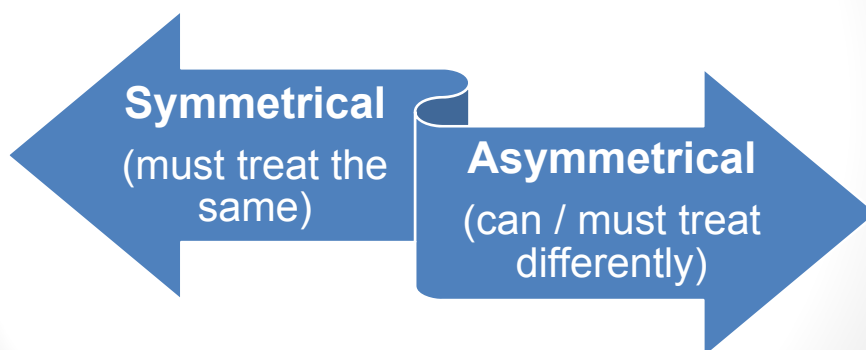
3. The bigger normative picture: ECHR, UN instruments, ILO Conventions

TERMINOLOGY AND THEORETICAL BACKGROUND

Equality Law jargon

- **Equality** as the underlying concept.
 - ✓ Core European / democratic value but different conceptions of equality at play.
- **Equal treatment** as the norm / general principle.
 - ✓ Must be ensured across grounds and across areas of policy / activity.
 - ✓ NB: *treatment* (direct discrimination) v. *impact* (indirect discrimination)
- **Discrimination** as the individual (justiciable) right (not to be discriminated against).
 - ✓ NB: non-discrimination also as a general principle of EU law.
 - ✓ NB: *open-ended* protection (e.g. Art. 14 ECHR) v. *protected grounds* (e.g. EU law)

Conceptions of equality: Taxonomy [I]



Conceptions of equality: Taxonomy [II]

Formal equality

- ⑩ "Treating likes alike" – same treatment
- ⑩ Levelling up / down permissible
- ⑩ Primacy of the individual / state neutrality
- ⑩ Negative obligations

Equality of opportunities

- ⑩ "Levelling the playing field"
- ⑩ Ensuring equal access (to jobs, decision-making bodies, public office etc) in principle
- ⑩ Prevalence of individual merit

Substantive equality

- ⑩ Link with distributive justice
- ⑩ Accommodation of differences
- ⑩ Positive equality obligations

Theoretical background: Key points

❑ **Symmetrical** (equality as treating the same) v. **asymmetrical** (equality as treating differently) conceptions of equality.

❑ Equality of opportunities as the term / conception of choice in EU law (but no single conception underpinning all instruments).

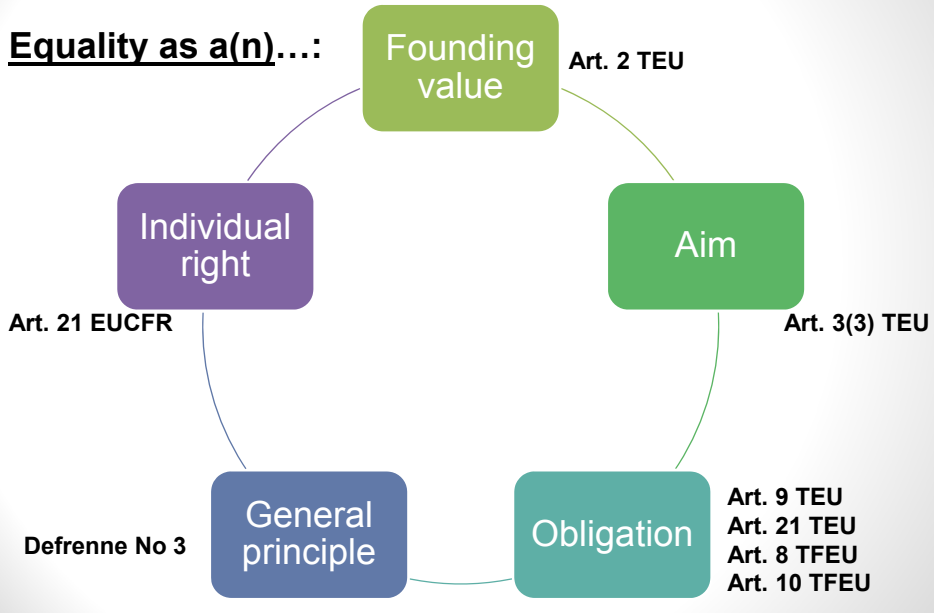
Gradual shift in EU law towards a (more) substantive equality paradigm (e.g. legitimacy of positive action).

Equal treatment (comparison) v. special treatment (no comparison, e.g. pregnancy).

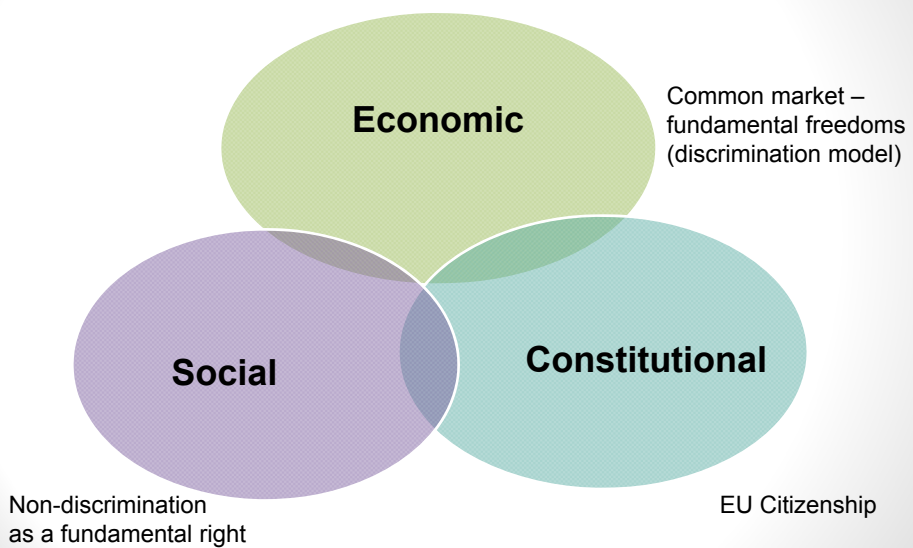
EU LEGAL FRAMEWORK:
PRIMARY AND SECONDARY EU
EQUALITY LAW

The nature and functions of EU Equality law [I]

Equality as a(n)...:



The nature and functions of EU Equality law [II]



A brief history of EU Equality law [I]

Gradual expansion from a single equal pay provision

- ⑩ Art. 119 EEC (now Art. 157 TFEU) as harmonisation of the social costs of production.
- ⑩ Defrenne litigation before the CJEU (direct effect of Art. 119 EEC).
- ⑩ Non-linear expansion.

Pivotal role of the CJEU

- ⑩ Defrenne No 2 → economic and **social aim** of Art. 157 (ex Art. 119)
- ⑩ Defrenne No 3 → equal treatment / non-discrimination as a **general principle** of EU law
- ⑩ Deutsche Telekom (C-50/96, 2000) → equal pay as an expression of a **fundamental human right**

A brief history of EU Equality law [II]

EU Charter of Fundamental Rights (EUCFR)

- ⑩ Proclaimed in Nice – not legally binding (until Lisbon) [more on the EUCFR later]

Treaty of Amsterdam

- ⑩ Essential task of the Community (ex Art. 2 EC).
- ⑩ More protected grounds post-Amsterdam (only nationality and gender protected until then).
- ⑩ Art. 13 EC (now Art. 19 TFEU) considerably increased EU competence – provided legal basis for Dir 2000/43, Dir 2000/78 and Dir 2004/113.

Treaty of Lisbon

- ⑩ Confirms the post-Amsterdam position and the central importance of equality / non-discrimination for the Union.

Protected grounds under EU Equality law

NATIONALITY

- Prohibition of discrimination on grounds of nationality has an **economic** and a **constitutional** function.

Sex

- Ⓞ First and most developed ground of protection (alongside nationality). Treaty provisions + EUCFR + Directives.
- Ⓞ Gender mainstreaming.

Part-time and temporary employment

- Ⓞ Directive on Part-Time Work (Dir 97/81) and Directive on Fixed Term Work (Dir 99/70)

Racial or ethnic origin

- Ⓞ Race Directive (Dir 2000/43)

Religion or belief

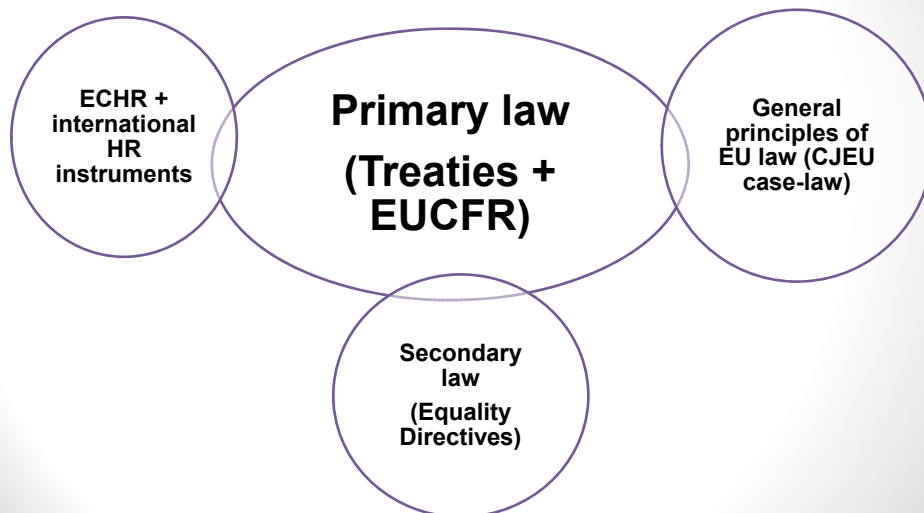
Disability

Age

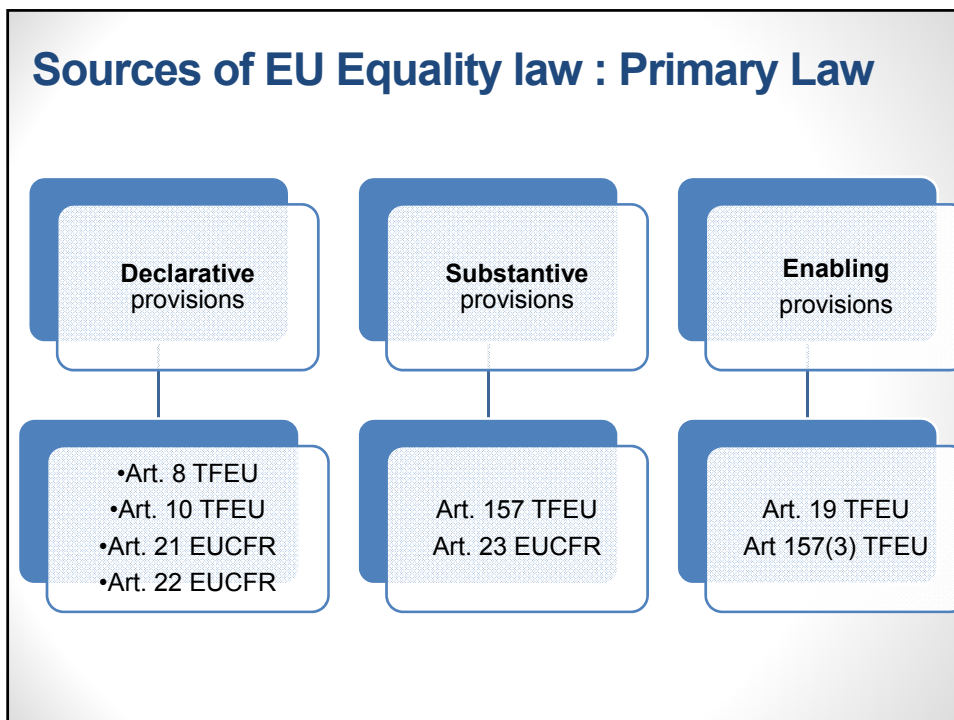
Sexual orientation

- Ⓞ Framework Directive (Dir 2000/78)

Sources of EU Equality law: Overview



Sources of EU Equality law : Primary Law



EU Equality Directives: Scope

Recast Directive (Directive 2006/54)

⑩ Prohibits discrimination on grounds of **sex** in matters of pay (Art. 4), occupational social security schemes (Art. 5), and access to employment, vocational training and promotion and working conditions (Art. 14)

Race Directive (Directive 2000/43)

⑩ Prohibits discrimination on grounds of **race or ethnic origin** in matters of employment & occupation, vocational training, membership of employer and employee organisations, social protection, including social security and health care, education, access to goods and services which are available to the public, including housing.

Employment Equality Directive or Framework Directive (Directive 2000/78)

⑩ Prohibits discrimination on grounds of **religion and belief, age, disability and sexual orientation** in matters of employment & occupation, vocational training, membership of employer and employee organisations.

Goods and Services Directive (Directive 2004/113/EC)

⑩ Prohibits discrimination on grounds of **sex** in the access to and supply of goods and services.
 ⑩ Covers all people and organisations (both public and private sector) that make goods and services available to the public and / or goods and services offered outside the area of private and family life.

EU Equality Directives: Key points

- ❑ **Vertical** (Van Duyn, 1974) **but no horizontal direct effect** (Marshall, 1986)
 - ✓ Recent case-law may suggest some relaxation of the doctrine (e.g. Mangold, 2005; Kucukdeveci, 2008)
- ❑ Equality / Non- Discrimination Directives generally aligned (to a large extent) in terms of basic content:
 - ✓ Protection from direct / indirect discrimination, harassment, victimisation.
 - ✓ Permit / require asymmetrical treatment (e.g. reasonable adjustments, positive action) under certain conditions.
 - ✓ Reversal of burden of proof applies to all discrimination claims under the Directives.

Equality in the EUCFR: Preliminary points

- ❑ **“Same legal value as the Treaties”** but **does not extend Union competences** [Art. 6(1) TEU and Art. 51 EUCFR]
- ❑ Binding to MS only when they act **within the scope of EU law** [Art. 51 EUCFR]
- ❑ Rights corresponding to the ECHR will have the **same meaning and scope** but EU law may provide “more extensive protection” [Art. 52(3) EUCFR]
 - ✓ Discrimination can be justified under the same general conditions of justification laid down by the ECHR / ECtHR.
 - ✓ Meaning of rights – positive obligations stemming from Art. 14 ECHR (Thlimmenos v. Greece)?

EUCFR TITLE III: Equality

Article 20 – Equality before the law

- “Everyone is equal before the law.”
- General principle of EU law [Racke (1984); EARL (1997); Karlsson (2000)]

Article 21 – Non-discrimination

- “Any discrimination based on any ground such as [...] shall be prohibited.”
- Cf Article 14 ECHR.

Article 22 – Cultural, religious and linguistic diversity

Article 23 – Equality between women and men

Article 24 – The rights of the child

Article 25 – The rights of the elderly

Article 26 – Integration of Persons with disabilities

THE BIGGER PICTURE: ECHR,
UN INSTRUMENTS, ILO
CONVENTIONS

Equality in the ECHR system [I]: Legal framework

☐ Art 14 ECHR: Prohibition of discrimination

- Ⓣ Not a general / self-standing equality clause – can only be 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
- Ⓣ **“Very weighty reasons”** needed to justify certain types of discrimination (most notably gender, e.g. Abdulaziz, Cabales and Balkandali v. UK, 1985)

Protocol 12 ECHR: Free-standing right to non-discrimination

- Ⓣ Reference to “full and effective equality” in the Preamble.
- Ⓣ Only binding on states that ratify it.

Equality in the ECHR system [II]: Selected case-law

☐ Abdulaziz, Cabales and Balkandali v. UK (1985)

- Ⓣ Narrow margin of appreciation, as gender equality is “major goal” of the CoE and “very weighty reasons” must be put forward to justify difference in treatment on grounds of gender. (para 78)
- Ⓣ Formal equality → gender discrimination can be rectified through levelling down (as was the case).

Thlimmenos v Greece (2000)

- Ⓣ “The right not to be discriminated against [...] is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.” (para 44)
- Ⓣ Positive obligation to treat different situations differently – shift to substantive equality?

✓ Konstantin Markin v. Russia (2012)

- Ⓣ Refusal of parental leave to military servicemen (when such leave is available to servicewomen) amounts to gender discrimination.
- Ⓣ Gender stereotypes cannot be used to justify different treatment.

Key UN equality instruments

Universal Declaration of Human Rights

- ⑩ Article 1: “All human beings are **born free and equal in dignity and rights.**”
- ⑩ 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. [...]”
- ⑩ 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

- ⑩ Prohibition of **discrimination** in the enjoyment of rights: Art. 2(1) ICCPR and Art. 2(2) ICESCR
- ⑩ **Gender equality** in the enjoyment of rights: Common Art. 3 (ICCPR and ICESCR)

UN Conventions

- ⑩ International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- ⑩ Convention on the Elimination of Discrimination Against Women (CEDAW) (1979)
- ⑩ Convention on the Rights of Persons with Disabilities (CRPD) (2006)

Key ILO instruments on equality

ILO Declaration on Fundamental Principles and Rights at Work (1998) (elimination of discrimination in respect of employment and occupation)

Equal Remuneration Convention (No. 100) – fundamental convention

Discrimination (Employment and Occupation) Convention (No. 111) – fundamental convention

Workers with Family Responsibilities Convention (No. 156)

Maternity Protection Convention (No. 183)

ILO facts and figures:

- ✓ ILO member States: 187
- ✓ ILO instruments adopted: 399
- ✓ Conventions: 189
- ✓ Protocols: 6
- ✓ Recommendations: 204

Dr Panos Kapotas
panos.kapotas@port.ac.uk

