

The EU legal framework on equality

Marjolein van den Brink
SIM & UCERF
Utrecht School of Law



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

outline

- The equality principle (very briefly)
- International instruments
- European instruments: ECHR & ESC
- EU instruments:
 - Charter & treaties
- Directives
- EU & ECtHR – (no) accession



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*
- EU Charter (art. 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.



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, children, persons with disability, migrants + family

Equality approaches UN hr treaties

■ Equality provision to ensure equal protection for all re 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)



ECHR & ESC

- 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



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

1. what's the EU got to do with equality?





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)



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...



TFEU (previously: TEC)

- 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.



directives

- 'race directive': 2000/43/EC
 - Material scope: employment & occupation, social protection, education, goods & services
- 'general framework directive': 2000/78/EC
 - Material scope: employment & occupation
- Recast Directive: 2006/54/EC
 - Material scope: employment & occupational social security
- Statutory Social Security schemes: 79/7/EEC
- Self-employment: 2010/41/EU
- Goods and services: 2004/113/EC.
- Focusing on specific groups:
 - Pregnancy Directive (92/85/EEC),
 - Parental Leave Directive (2010/18/EU)
 - Part-time Work Directive (97/81/EC).



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 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.



Charter & European Convention on Human Rights (ECHR)

art. 52(3): "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."



EU accession to ECHR

- 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

Questions:

- 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?



"Harris, when I said 'any questions' I was using only a figure of speech."

m.vandenbrink@uu.nl