

# **EU EQUALITY AND NON-DISCRIMINATION LAW UNDER THE TREATY OF LISBON AND THE CHARTER OF FUNDAMENTAL RIGHTS**

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## **Background**

New law?

- Treaty of Lisbon consolidates and emphasises importance of equality.

International law?

- EU law creates directly enforceable rights for individual and has primacy over contradictory national law.

The concepts of non-discrimination and equality:

- Discrimination occurs in many ways, not merely deliberately. 'Institutional' discrimination results from 'The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people. It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease': *The Stephen Lawrence Inquiry* (conducted under the chairmanship of Sir William MacPherson), Cm 4262-I (HMSO, London, 1999), paragraph 6.34.
- Formal and substantive equality.
- The recognition of diversity.
- Direct discrimination and the merit principle.
- In order not to force the dominant paradigm on all, modern EU law also focuses on differences via (i) indirect discrimination, (ii) the law on discrimination against the disabled, (iii) positive action, and (iv) provisions to raise awareness, support victims, and monitor prevalence of disadvantage, and mainstreaming.

## **The Treaty of Lisbon**

The lead-up:

- Nice Declaration on the Future of the Union 2000.

- Declaration of Laeken in 2001 established Convention to draft discussion document for Inter-Governmental Conference.
- Draft Constitution for Union 2003.
- Rejected by France and the Netherlands in 2005.
- Modified version agreed in 2007. This became the Treaty of Lisbon, which entered into force on 1 December 2009.

#### General contents:

- Pillar structure removed.
- Union now founded on consolidated version of the Treaty on European Union (TEU) and the new Treaty on the Functioning of the EU (TFEU) which replaces the old Treaty establishing the European Community (TEC).
- TFEU 'organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences': Article 1(1).
- TEU and TFEU are renumbered.
- TEU and TFEU have equal legal value: TFEU, Article 1(2).
- The Union replaces and succeeds the European Community.

#### Non-discrimination and equality:

- TFEU Article 19 (ex Article 13 TEC) confers power to legislate to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Enhanced role of European Parliament. Contained in Part Two of TFEU on 'Non-Discrimination and Citizenship of the Union'.
- TFEU Article 157 (ex Article 141 TEC).
- TEU Article 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 Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.
- Second recital of the Preamble to the TEU: the Member States draw 'inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'.
- TEU Article 3(1) is concerned with the aim of the Union, namely to promote peace, the Union's values and the well-being of its peoples.
- Second indent of TEU Article 3(3) pledges the Union to 'combat social exclusion and discrimination' and to 'promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child'.
- TEU Article 9: 'In all its activities, the Union shall observe the principle of the equality

of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies’.

- TEU Article 21(1): ‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law’.
- TEU Article 6(1): ‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties’.
- TEU Article 6(2): ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms...’
- TEU Article 6(3): ‘Fundamental Rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’.
- TEU Article 7 sets out procedure for dealing with a ‘clear risk of a serious breach’ by a Member State of the values referred to in Article 2.

## **The Charter of Fundamental Rights**

Contents:

- Second recital of the Preamble: the Union is based *inter alia* on the principle of equality.
- Title I: ‘Dignity’. Covers such matters as the right to life.
- Title II: ‘Freedoms’. Article 10 protects freedom of thought, conscience and religion using the same wording as the ECHR; it adds that ‘the right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right’.
- Title III: ‘Equality’. Article 21 prohibits ‘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’; Article 22 pledges the Union to respect cultural, religious and linguistic diversity; Article 23 sets out the principle of sex equality in all areas, including employment, work and pay, and it preserves the legality of measures providing for specific advantages in favour of the under-

represented sex; Article 25 recognises the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life; and Article 26 similarly pledges the Union to respect the rights of the disabled.

- Provisions protecting mothers in relation to the world of work and social security.
- Title IV: 'Solidarity'.
- Title V: 'Citizens' Rights'.
- Title VI: 'Justice'.

#### Effects:

- Title VII: the interpretation and application of the Charter. Article 51(1): 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law'. Article 52(5): 'The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. Article 51(2): 'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. Article 52(2): Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'. Article 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'. Recital 5 of the Preamble and Article 52(7): the Charter is to be interpreted in accordance with the explanations provided by the Praesidium of the Convention which drafted it (see OJ [2007] C 303/17).
- Note disparity between wording of Article 21 of the Charter and TFEU Article 19.
- Reliance on the Charter by the ECJ to give broad interpretation to human rights: Case C-391/09 *Runevi-Vardyn v. Vilnius*, judgment of 12 May 2011, (nyr); and Case C-159/10 *Fuchs and Köhler v Land Hessen*, judgment of 21 July 2011, (nyr).
- Use of Charter by ECJ to quash EU legislation which breaches a Charter principle: Case C-92/09 *Volker v Land Hessen*, judgment of 9 November 2010, (nyr); and Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres*, judgment of 1 March 2011, (nyr).

## **Conclusions**

- Content of Treaty of Lisbon and Charter not very radical but a spur for ECJ?
- Special importance of Article 21 of the Charter?
- Much responsibility now rests with the ECJ.