

# **The broader EU equality law framework: The Charter of Fundamental Rights, Accession to the ECHR, International treaties**

**Presentation by  
Jackie Jones  
Professor of Law**

# Outline of speech

- ECtHR
- EU Charter
- Correlation with ECHR articles
- International Conventions
- EU Commission: legislative process
- EU Charter provisions on equality
- 3 examples of the intersectionality and interpretative possibilities
- Conclusion

- EU Charter

- ECHR

International treaties

Domestic laws

National  
constitutions/labour  
laws

Fundamental  
principles/values

- **Interpretation**
- CJEU
- National courts

- **Interpretation**
- ECtHR
- National courts

# EUROPEAN COURT OF HUMAN RIGHTS

# ECtHR interpretative method

- The ECtHR is not strictly bound by its previous decisions, but the Grand Chamber has emphasised that
  - ‘it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, **without good reason**, from precedents laid down in previous cases’.

# ECtHR interpretative method

- Article 31(1) Vienna Convention on the Law of Treaties requires that the ECtHR should assess the **‘ordinary meaning’** of the provisions of the Convention, and in the light of its object and purpose.
- The ECtHR has also emphasised that the Convention should be read **‘as a whole’**, and interpreted so as to promote consistency and harmony between its provisions.
- **But ‘living instrument’**

# Note

- Margin of appreciation – national law
- Proportionality
- Legitimate expectation
- European consensus required?
  - *Goodwin*.

# EU LAW



# EU fundamental rights: equality

According to Article 6 of the Treaty on European Union (TEU), the three sources of fundamental rights law are:

1. the Charter,
2. the general principles of EU law, as established by the Court of Justice of the European Union (CJEU), and
3. the European Convention on Human Rights (ECHR).
  - Article 14 and Protocol 12
  - Accession negotiations; Agreement.

# Preamble of EU Charter

reaffirms, with due regard to the EU's limited competence, the rights as they result from the constitutional traditions and international obligations common to the Member States, the EU Treaties, the **ECHR, the Social Charters adopted by the Community and the Council of Europe, and the case law of the CJEU and the European Court of Human Rights (ECtHR).**

# Significance of EU accession & ECHR

- It will entitle any person (**non citizens as well**), NGO or group of individuals to submit the acts, measures & omissions of the EU & MS to external control of the ECtHR.
- The CJEU can apply the ECHR directly in its cases without regard to general principles & before going to the ECtHR.
- ECtHR judgments will be binding on EU where EU is a party.
- ECHR & Protocols 1 & 6 only – ratification by MS.
- **Awaiting Opinion 2/13.**

- The ECHR will continue to play an important role, not only because of the obligation laid down in **Article 52 (3) EU Charter**, but also in view of the future EU accession to the ECHR as required by Article 6 of the TEU.

**A 52 – if wording different or the same.**

See *McB*:

**in so far as Charter contains rights corresponding to rights guaranteed by ECHR, their meaning & scope are to be the same as those laid down by the ECHR.**

# Significance

- Close examination of wording in Charter & ECHR.
- National courts must disapply domestic law that conflicts with Conv. rights in their manifestation as Union law.
- Employment: can and should apply case law of ECtHR and EU Charter provisions – which *may* be broader in scope.
- Relationship with national constitutional law (see [Bunderverfassungsgericht 1 BvR1215/07](#) 24 April 2013 paras. 88-91).

- As judges there has to be an awareness of ECHR case law ‘where EU law applies’
- Where EU law is more conservative, the ECtHR to expand its remit.
- Can work the other way as well.

# When is EU Charter applicable?

C-617/10 *Akerberg Fransson* – EU Charter applies whenever MS legislation falls within the **‘scope of EU law’**.

- Very wide

C-399/11 *Melloni*:

Where an EU legal act calls for national implementing measures, national authorities & courts remain 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, & the primacy, unity & effectiveness of EU law are not thereby compromised.

# EU Commission the legislative process

- *A Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, with the overall policy objective of making “the fundamental rights provided for in the Charter as effective as possible”.



- The strategy envisages a strengthened fundamental rights culture in the **European Commission** when legislative proposals are prepared (such as for impact assessments and Charter-compliance checks of draft legislative texts), during the legislative process, as well as ensuring that Member States respect the Charter when implementing Union law

**EU Charter –  
equality provisions  
Title iii – 20-26**

# **CHAPTER III EQUALITY**

## **Article 20**

### **Equality before the law**

**Everyone is equal before the law.**

# Explanation

- This Article corresponds to a principle which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law.

*(Case 283/83 Racke [1984] ECR 3791, Case 15/95 EARL [1997] ECR I-1961, Case 292/97 Karlsson [2000] ECR 2737).*

## Article 21

### Non-discrimination

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 Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of **nationality** shall be prohibited.

# Explanation

- Paragraph 1 draws on Article 13 EC Treaty (now A 19 TFEU), Article 14 ECHR and Article 11 Convention on Human Rights and Biomedicine as regards genetic heritage. **Insofar as this corresponds to Article 14 of the ECHR, it applies in compliance with it.**

See

- Paragraph 2 corresponds to Article 18 TFEU and must be applied in compliance with the Treaty.

There is no contradiction or incompatibility between paragraph 1 and Article 19 TFEU which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article.

Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas.



Instead, it only addresses discrimination by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.

See Marzia's presentation:

- Case C-176/12 ***Association de Mediation Sociale***

- A 21(1)

- 'Can confer an individual right which may be invoked as such.'

## Article 23

### Equality between men and women

**Equality between men and women must be ensured in all areas, including employment, work and pay.**

**The principle of equality shall not prevent the maintenance or adoption of measures **providing for specific advantages in favour of the under-represented sex.****

**See CEDAW.**

# Explanation

- The first paragraph is based on Articles 2 and 3(2) EC Treaty (now A 3 TEU & A 8 TFEU), which impose the objective of promoting equality between men and women on the Community, and on Article 141(3) EC Treaty (now A 157(1) TFEU). It draws on Article 20 European Social Charter of 3 May 1996 and on point 16 of the Community Charter on the rights of workers.

# Explanation

- It is also based on Article 141(3) EC Treaty (now A 157(3) TFEU) and Article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

# Explanation

- It is also based on Article 157(3) TFEU & Article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

# Explanation

- Paragraph 2 takes over in shorter form Article 141(4) EC Treaty (now A 157(4)) which provides that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. In accordance with Article 51(2) (now A 52(2)), the present paragraph does not amend Article 141(4) EC (now A 157(4)).

# Article 24

## The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the **child's best interests** must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.



# Explanation

- This Article is based on the New York **Convention on the Rights of the Child** signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3 (obligation to work towards what is best for children), 9 (non-separation from parents), 12 (right to speak on separation from parents) and 13 (information sharing) thereof.
- Entered into force in 1992.

# Explanation

- Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 TFEU confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents.
- **Child protection. See *McB.***

## **Article 25**

### **The rights of the elderly**

**The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.**

# Explanation

- This Article draws on Article 23 of the revised **European Social Charter** and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. Of course, participation in social and cultural life also covers participation in political life.

## Article 26

### Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

**See:** CJEU decisions of *Skouboe Werge & Z.*

- The principle set out in this Article is based on Article 15 of the **European Social Charter** and point 26 of the Community Charter of the Fundamental Social Rights of Workers.

**NB: UN Conv. on the Rights of Persons with Disabilities entered into force May 2008.**

**++ See L Waddington's presentation.**

**Signing a Conv means State promises not to do anything that contravenes its provisions.**

# Note

- Human Dignity (Article 1 EU Charter) and other articles can and are also used in conjunction with the equality articles.

# EU Treaties & Directives

- Article 19 TFEU – EU anti-discrimination article (ex Article 13 TEC)
- Article 157 TFEU – equal pay (ex Article 141)
- **Directive 2000/43 prohibits all forms of discrimination based on race or ethnic origin in a number of areas.**
- **Directive 2000/78 prohibits all forms of discrimination in employment and occupation based on religion or convictions, handicap, age and sexual orientation.**
- **Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).**
- **And others.**



# International treaties: intersecting obligations

- UN CEDAW (<https://www.youtube.com/watch?v=OCtnD-6R2so>)
- UN CRC (<https://www.youtube.com/watch?v=OwxalMjG04w>)
- UN Convention on Rights of Persons with Disabilities (<https://www.youtube.com/watch?v=UYsplGqnRTU>)
- ECHR
  - Protocol 12
- But note use of human dignity (Also in national constitutions) to underpin equality arguments.
  - Paris Principles

# Examples

Women on company boards

Marriage

Pensions

# Women on company boards

## November 2012

Draft Dir. on improving the gender balance among non-exec. directors of companies listed on stock exchanges and related matters COM (2012) 614/5

40% for the under-represented gender.

NB: this could be men.

**Compare to: CEDAW: A 5: special temporary measures**

# Raison d'être

- Equality between women and men is one of the Union's **founding values and core aims** under Articles 2 and 3(3) TEU. In accordance with Article 8 TFEU the Union shall **aim to eliminate inequalities, and to promote equality,** between men and women **in all its activities**. (p.6 draft Dir.)

- The proposal is **consistent with the EU Charter**. It will help to promote fundamental rights, particularly those related to equality between women and men (Article 23) and to the freedom to choose an occupation (Article 15). The proposal also touches upon the freedom to conduct a business (Article 16) and on the right to property (Article 17).

- It does so in a justified manner: in line with the principle of proportionality the proposal's focus is on non-executive board members who – while being important actors in particular in relation to corporate governance – are not involved in the day-to-day running of operations.

- Article 21(1) of the Charter prohibits, in principle, any discrimination based on sex. Article 23 recognises, however, that the principle of equality **does not prevent** the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.
- This principle of **positive action** is also recognised in Article 157(4) TFEU.

# Legal base of draft Dir. In Treaties

- Article 157(3) TFEU is the legal basis for any binding measures aimed at ensuring the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
- **CEDAW Article 5 – temporary special measures**



# CJEU and positive action

- The Court of Justice of the European Union (CJEU) has established the criteria that need to be met in order to reconcile the two concepts of formal equality of treatment and positive action aimed at bringing about de facto equality, both of which are recognised in the Charter as well as in Article 157 TFEU and in Article 3 of Directive 2006/54/EC.

# The criteria are:

- (1) the measures must concern a sector in which women are under-represented;
- (2) they can only give priority to equally qualified female candidates over male candidates:
- (3) they must not give automatic and unconditional priority to equally qualified candidates, but must include a "saving clause" which includes the possibility of granting exceptions in justified cases which take the individual situation into account, in particular the personal situation of each candidate.

•The proposal is in compliance with these criteria (see Article 4(3)).

# Marriage: sexual orientation discrimination

- **Article 12 ECHR** (marriage and family)
  - *Goodwin and Karner* cases
  - Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity
- **Article 9 EU Charter** (marriage and family)
- Many international treaties
- National constitutions and civil codes.
- Religion

# Explanation of Article 9

to cover cases in which national legislation recognises arrangements other than marriage for founding a family. **This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex.** The right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.

# NOTE:

- ***Schalk and Kopf v Austria*** (Application no. 30141/04) 2010 in which it was clarified that the ECHR does not oblige member states to legislate for or legally recognize same-sex marriages because, *inter alia*, of the wording comparison with other articles ‘everyone’ rather than ‘women and men’ – but only if one looks at it in isolation. (see Emmanuelle’s presentation)

**A9 EU Charter does not include this wording. No mention of gender.**

# Same-sex marriage

- Denmark
  - Belgium
  - The Netherlands
  - Spain
  - Portugal
  - Sweden
  - France
  - UK
  - Luxembourg (1 Jan 2015)
  - Finland (earliest 2016)
  - \*\* Ireland – referendum in 2015
- Some form of civil union  
many more MS.

# Case law and interpretative methods

## **C-267/06 *Maruko* (pensions):**

At paragraph 59:

Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. **However**, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the **principle of non-discrimination**.

**Intersection btw traditional concepts/values and 21<sup>st</sup> cent. interpretation of a new Charter of Fundamental Rights for everyone in the EU.**

# Case C-236/09 Test-Achats

- Pensions
- Car insurance
- Articles 21 & 23 EU Charter **& Recitals**
- Transitional provisions for actuarial tables differentials for men and women
- No longer allowed so as to achieve the progressive equalisation of similarly situated situations.
- Thus cannot indefinitely postpone equalization.



# Equality and the EU Charter

- Judges' interpretation of the Charter provisions.
  - Common constitutional traditions
  - Values for the 21<sup>st</sup> century
  - Positive duties
  - Use both systems strategically
- Not bound by ECHR/ECtHR in most equality situations.
  - **Article 14 & Protocol 12**
- Substantive equality based on EU Charter provisions and human dignity.

# Think outside the box

## HUMAN TRAFFICKING/SLAVERY

- UN Palermo Protocol
- Council of Europe Trafficking Conv
- Directive 2011/36/EU
- EU Charter Article 5
- ILO Conventions
  - [Forced Labour Convention, 1930 \(No. 29\)](#)
  - [Abolition of Forced Labour Convention, 1957 \(No. 105\)](#)
  - [Worst Forms of Child Labour Convention, 1999 \(No. 182\)](#)

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**JACKIE.JONES@UWE.AC.UK**

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Draft Directive COM (2012) 614/5 – women on company boards

Case 283/83 *Racke* [1984] ECR 3791

Case 15/95 *EARL* [1997] ECR I-1961

Case 292/97 *Karlsson* [2000] ECR 2737

Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [1998] ECR I-621

*Goodwin v UK and I v. UK* (2002) 35 EHRR 18

*Karner v. Austria* (2004) 38 EHRR 24

C-236/09, *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres* [2011] 2 CMLR 38

C-400/10 *J.McB. v L.E.* [2010] ECHR I-8965

C-617/10 *Akerberg Fransson*

*Schalk and Kopf v Austria* (Application no. 30141/04)