

THE RELATIONSHIPS BETWEEN EU ANTI-DISCRIMINATION LAW AND THE EU CHARTER, THE EUROPEAN CONVENTION, AND UNITED NATIONS HUMAN RIGHTS TREATIES

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Applying EU Anti-Discrimination Law: Seminar for Members of the Judiciary

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I. “Constitutional” anti-discrimination law vs. “statutory” or “legislative” anti-discrimination law

A. “Constitutional” anti-discrimination law (including international human rights treaties)

1. states a brief, general principle, without specific exceptions (justification is always possible) or enforcement procedures or remedies
2. is more difficult to amend than an ordinary law
3. contains an open-ended list of grounds of discrimination
4. generally applies only in vertical situations, ie, it imposes obligations on public authorities (with regard to all of their acts and omissions) but not on private parties

Charter of Fundamental Rights of the EU - 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.

European Convention on Human Rights – Article 14 - Prohibition of discrimination

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.

European Convention on Human Rights – Protocol No. 12 - Article 1 – General prohibition of discrimination

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.

Ratified by 18 Council of Europe member states (8 European Union member states): Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Macedonia, Montenegro, Netherlands, Romania, San Marino, Serbia, Slovenia, Spain, Ukraine

B. “Statutory” anti-discrimination law

1. states detailed rules, with specific exceptions (justification not always possible), enforcement procedures and remedies
2. is easier to amend than a constitution or treaty
3. contains a closed list of grounds of discrimination
4. applies in both vertical and horizontal situations (including Article 157 TFEU but not EU directives), ie, it imposes obligations on public authorities and on private parties, but only in specific areas (employment, education, healthcare, housing, access to other goods and services, but not private and family life)

II. Levels of legal protection against discrimination (there might be statutory and constitutional protection at each level)

1. national level
2. European Union level
3. European Convention on Human Rights level (constitutional only)
4. United Nations level (constitutional only)

III. Order of exhaustion of levels of protection

1. national legislation that implements the EU anti-discrimination directives (and Article 157 TFEU) and might provide greater protection than EU law requires

2. national constitutional law

3. national implementation of the European Convention on Human Rights and United Nations human rights treaties

4. reference to the Court of Justice of the European Union, unless “no scope for any reasonable doubt” (without one, access to CJEU generally impossible for private parties)

(a) for an interpretation of a directive

(b) to determine whether a directive violates the Charter of Fundamental Rights of the EU: C-236/09, *Association Belge des Consommateurs Test-Achats* (CJEU, 1 March 2011): Art. 5(2) of Directive 2004/113 is incompatible with Articles 21 and 23 of the EU Charter

5. application to the European Court of Human Rights (after exhaustion of national and EU remedies)

6. an alternative to the ECtHR is an application to a United Nations treaty body (after exhaustion of national and EU remedies, if your country permits such applications): Human Rights Committee (ICCPR), CERD (racial discrimination), CEDAW (discrimination against women), CRPD (discrimination against persons with disabilities)

IV. Order of supremacy of levels in the event of a conflict of rights

1. United Nations treaty? but no direct effect (except CRPD) and no sanctions for failure to comply, eg, *Waldman v. Canada* (694/1996, UN Human Rights Committee, 5 Nov. 1999)

2. European Convention on Human Rights (ultimate sanction for failure to comply with a judgment of the ECtHR is expulsion from Council of Europe)

3. EU law

4. national law