

THE EU LEGAL FRAMEWORK ON EQUALITY

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Dr Panos Kapotas
Senior Lecturer
University of Portsmouth



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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

- Underlying (abstract / philosophical) concept and core constitutional (concrete / legal) principle.
- **NB:** Core European / democratic value but *different conceptions of equality* at play.

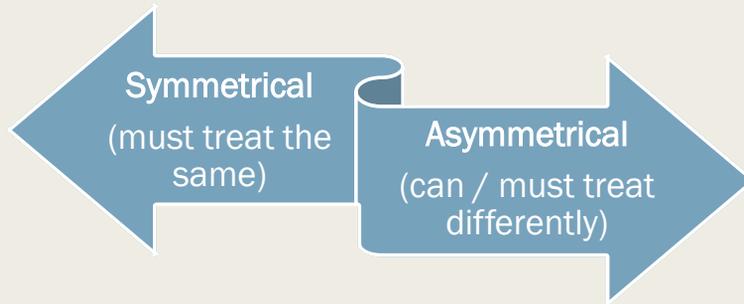
Equal treatment

- Legal norm / general principle; must be ensured across protected characteristics and across areas of policy / activity.
- **NB:** *treatment* (direct discrimination) v. *impact* (indirect discrimination)

(Non-) Discrimination

- Individual (justiciable) right (not to be discriminated against) and a general principle of EU law.
- **NB:** *open-ended* protection (e.g. Art. 14 ECHR) v. *protected characteristics / grounds* (e.g. EU law)

Conceptions of equality: Taxonomy



Conceptions of equality: Taxonomy



Formal equality

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



Equality of
opportunities

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



Substantive equality

Link with distributive justice
Accommodation of differences
Positive 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).

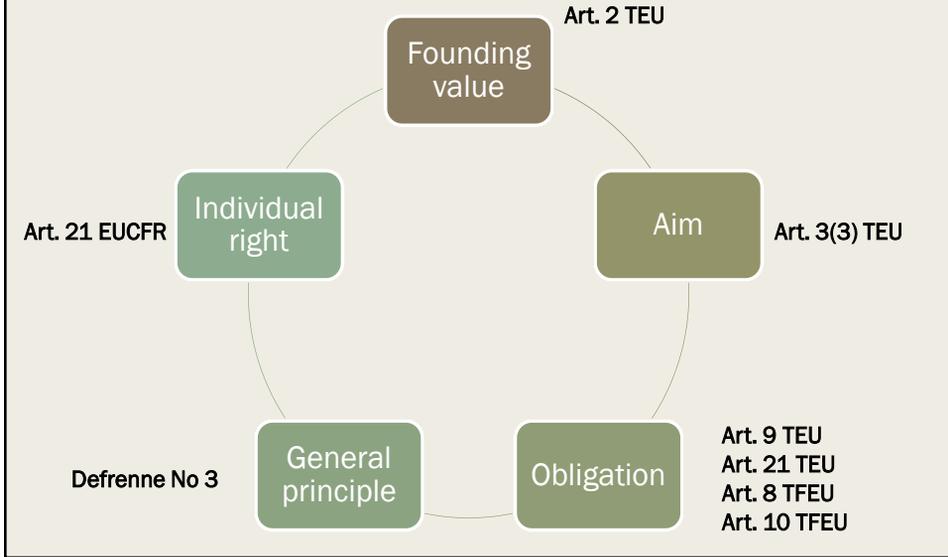


Equal treatment (comparison) v. special treatment (no comparison, e.g. pregnancy).

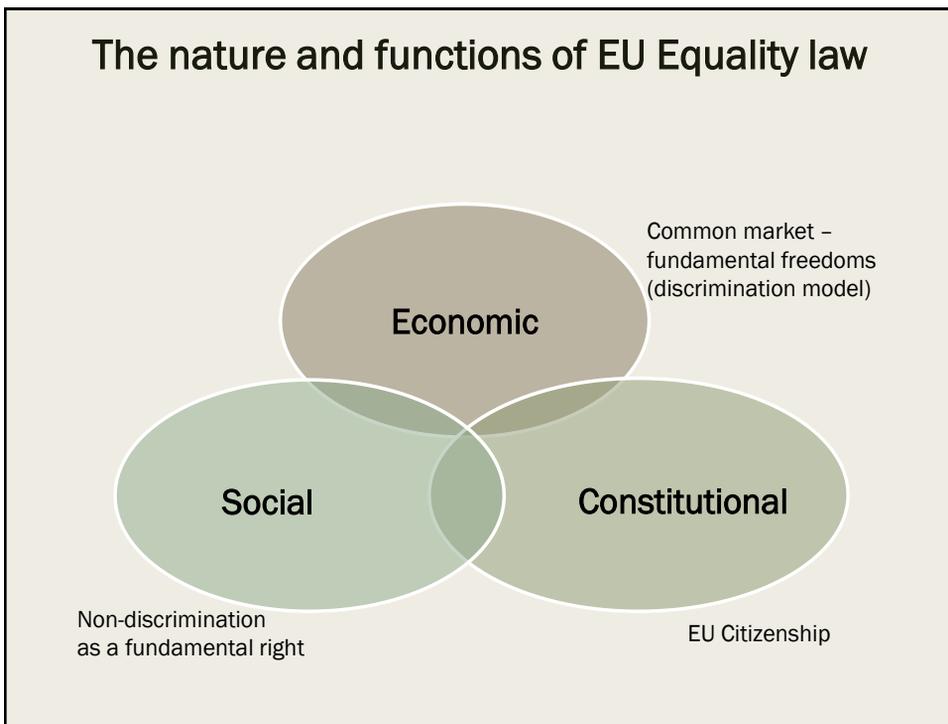
EU LEGAL FRAMEWORK: PRIMARY AND SECONDARY EU EQUALITY LAW

The nature and functions of EU Equality law

Equality in EU Law



The nature and functions of EU Equality law



A brief history of EU Equality law

Gradual expansion from a single Treaty provision

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

Pivotal role of the CJEU

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

A brief history of EU Equality law

EU Charter of Fundamental Rights (EUCFR)

Proclaimed in Nice – not legally binding (until Lisbon).
[NB: more on the EUCFR later]

Treaty of Amsterdam

Essential task of the Community (ex Art. 2 EC).
More protected grounds post-Amsterdam (only nationality and gender protected until then).
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

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.
- **Directive 2004/38** [Citizenship Directive]

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)

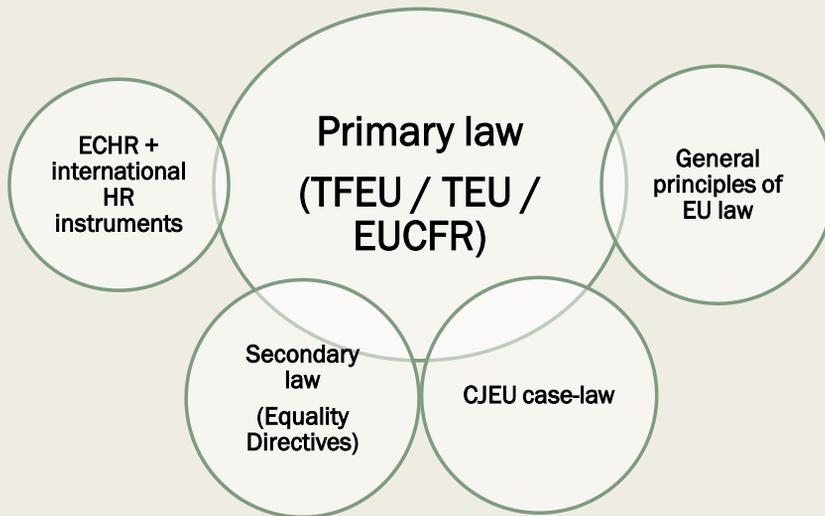
Racial or ethnic origin

- Race Directive (Dir 2000/43)

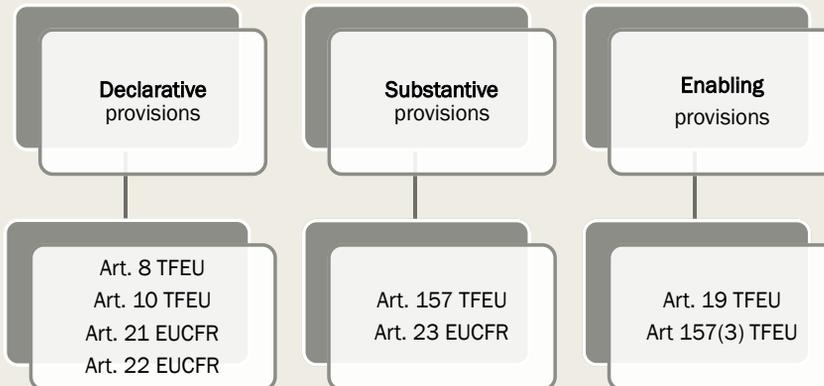
Religion or belief / Disability / Age Sexual orientation

- Framework Directive (Dir 2000/78)

Sources of EU Equality law Overview



Sources of EU Equality law Primary Law



Sources of EU Equality law EU Equality Directives: Scope

Recast Directive (Directive 2006/54)

- 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 Equality Directive (Directive 2000/43)

- 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)

- 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)

- Prohibits discrimination on grounds of **sex** in the access to and supply of goods and services.
- 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.

Sources of EU Equality law

EU Equality Directives: Key points



No horizontal direct effect

Vertical direct effect (Van Duyn, 1974) **but no horizontal** direct effect (Marshall, 1986).

CJEU case-law temporarily suggested some relaxation of the doctrine (e.g. Mangold, 2005; Kucukdeveci, 2008), but more recent judgments seem to reiterate the standard position (e.g. Dominguez, 2012)



General alignment of basic content

EU Equality Directives generally aligned in terms of **definition of key concepts** (direct / indirect discrimination, harassment, victimisation), **level of protection** etc.

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.

Sources of EU Equality law

EUCFR

- ❑ “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)?*



Sources of EU Equality law EUCFR

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

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

From formal to substantive equality

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.

Core UN gender equality instruments



Universal Declaration of Human Rights

Article 1: "All human beings are **born free and equal in dignity and rights.**"

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. [...]"

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

Prohibition of **discrimination** in the enjoyment of rights: Art. 2(1) ICCPR and Art. 2(2) ICESCR

Equality before the law (Art. 26 ICCPR)

Gender equality in the enjoyment of rights: Common Art. 3 (ICCPR and ICESCR)



UN Conventions

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

Convention on the Elimination of Discrimination Against Women (CEDAW) (1979)

Convention on the Rights of Persons with Disabilities (CRPD) (2006)

Core UN gender equality instruments

Convention on the Elimination of Discrimination Against Women (CEDAW)

- Committee on the Elimination of Discrimination against Women (CEDAW) → 23 experts on women's rights from around the world.
- States parties obliged to submit regular reports to the Committee on implementation of CEDAW rights.

CEDAW Optional protocol

- CEDAW Committee is mandated to:
 - Receive communications from individuals or groups of individuals submitting claims of violations of rights protected under the Convention to the Committee.
 - Initiate inquiries into situations of grave or systematic violations of women's rights.

Core ILO gender equality instruments



ILO facts and figures:

- ✓ ILO member States: 187
- ✓ ILO instruments adopted: 400
- ✓ Conventions: 189
- ✓ Protocols: 6
- ✓ Recommendations: 205

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

Equal Remuneration Convention, 1951 (No. 100) – fundamental convention

Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – fundamental convention

Workers with Family Responsibilities Convention, 1981 (No. 156)

Maternity Protection Convention, 2000 (No. 183)

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

