

# The EU Legal Framework on Equality

Maria Y. Lee

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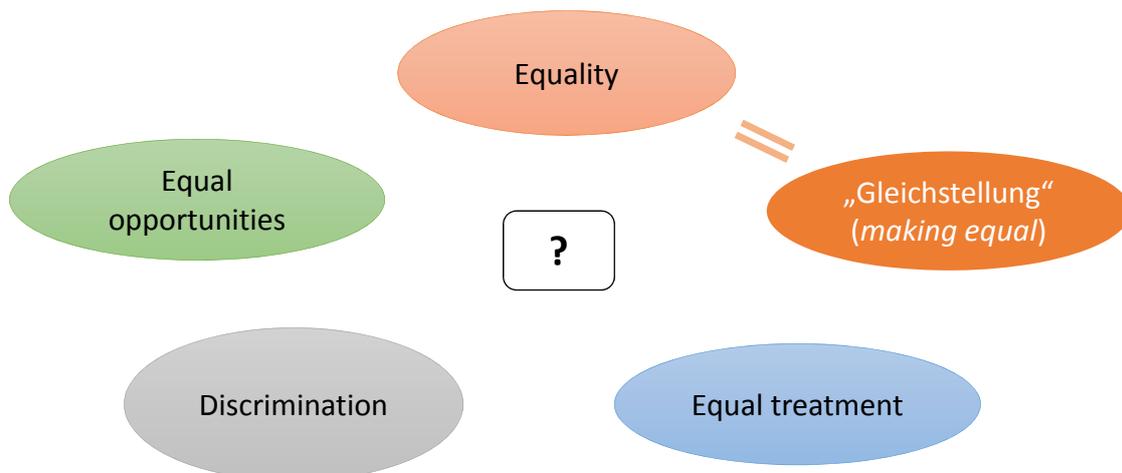
## Presentation Outline

- Terminology
  - Incl. overview of equality concepts
- EU legal provisions
  - Treaty of the European Union (TEU)
  - Treaty on the Functioning of the European Union (TFEU)
  - Charter of Fundamental Rights of the European Union (EUCFR)
  - Directives
- Overview
  - Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
  - European Social Charter
  - Other international instruments

## Aim of the Presentation

- Not:
  - Read every single legal provision
  - Too many details
- Rather:
  - Understanding of „equality“ in the EU
  - Understanding of structure of EU equality law
  - „Where do I look it up?“

## Terminology



## Equality

- Everyone is equal before the law. (Art. 20 EUCFR)  
„...[the prohibition to discriminate] is merely a specific expression of the **general principle of equal treatment**, a fundamental principle of Community law, which requires that comparable situations are not to be treated differently and different situations are not to be treated alike unless such treatment is objectively justified“  
[EARL de Kerlast, emphasis added]
- Aristotelian Formula
  - Distributive justice
  - Deserts ← value judgement

## Equality Concepts

formal ←————→ substantive

### Formal equality

- Equal treatment
- Levelling up/down both allowed
- Undifferentiated sameness? ← no
- Difficult:
  - Persons with and without disabilities
  - Non-pregnant persons (women and men) and pregnant persons
  - Women and men re positiv action measures (e.g. quotas) – not permissible

## Equality Concepts

### **Equality of outcomes**

- Focus on end result
- Compensation for past injustices
  - E.g. fixed quotas
  - E.g. assigning children to different schools on the basis of race
- Individual vs. group

## Equality Concepts

### **Equality of opportunities**

- Level playing field
- Equal access to work, positions, goods and services
- Individual merit relevant
- Examples
  - Direct & indirect discrimination
  - Disability:
    - Asymmetrical wording
    - Reasonable accommodation (Art. 5 Framework Directive 2000/78/EG)
  - ECJ case law on positive action measures (*Kalanke, Marshall, Badeck, Abrahamsson*)

## Equal Treatment - Discrimination

- Synonymous: unequal treatment & discrimination
  - Requirement to treat equally & prohibition to discriminate (see definitions in Directives, *Chemi-Con C-422/02*)
- Requirement to treat like cases alike – prohibition to treat like cases differently
- Comparable situations
  - Actually affected person not necessary (*Feryn C-54/07*)
  - Actual person being compared to not necessary (see definitions in Directives)
  - Who is being compared?
    - Pregnancy (pregnant vs. non-pregnant persons, *Geduldig Aliello* 417 U.S. 484)
    - Women and men with same-sex partners (*Grant v. S-W Trains C-249/96*, discount fares)

## Provisions of EU Law Treaties

### Declarative provisions

Art. 20 EUCFR  
Art. 22 EUCFR  
Art. 24-26 EUCFR  
Art. 2 TEU  
Art. 3(3) TEU  
Art. 9 TEU  
Art. 21(1) TEU  
Art. 8 TFEU  
Art. 10 TFEU

### Substantive provisions

Art. 21 EUCFR  
Art. 23 EUCFR  
Art. 157(1) TFEU

### Enabling provisions

Art. 19 TFEU  
Art. 157(3) TFEU

## General Principles of EU Law

- Principle of equal pay between men and women (Art. 157 TFEU)
  - Horizontal direct effect (*Defrenne II* 43/75)
- Principle of equal treatment: sex
  - EU institutions (*Defrenne III* C-149/77)
- Principle of equal treatment: age
  - Horizontal direct effect (*Mangold* C-144/04, *Kücükdeveci* C-555/07)
- Principle of equal treatment: sexual orientation (*Römer* C-147/08)
  - No statement about horizontal direct effect

## Directives

- Binding on Member States (Art. 288 TFEU)
- Transposition into national law by Member States
- Direct effect
  - vertical ✓ (*Vun Duyn* 41/74; *Ratti* 148/78)
  - horizontal ✗ (*Marshall* 152/84, *Faccini Dori* 91/92)
- Indirect effect
  - vertical ✓ (*von Colson* 14/83)
  - horizontal ✓ (*Marleasing* C-106/89)
- Lays down a general framework for the realisation of the general principles of equal treatment (*Mangold*, *Kücükdeveci*)

## Directives

	Race, ethnic origin	Sex	Religion, belief	Disability	Age	Sexual orientation
<b>Enabling provision</b>	Art. 19 TFEU	Art. 19, 157(3) TFEU	Art. 19 TFEU	Art. 19 TFEU	Art. 19 TFEU	Art. 19 TFEU
<b>Work</b>	✓	✓	✓	✓	✓	✓
<b>Social security</b>	✓	✓	— Draft	— Draft	— Draft	— Draft
<b>Goods and services</b>	✓	✓	— Draft	— Draft	— Draft	— Draft
<b>Education</b>	✓	—	— Draft	— Draft	— Draft	— Draft
<b>Advertisement, media content</b>	✓	—	— Draft	— Draft	— Draft	— Draft

## Directives

- Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work
- Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP
- Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

## Multiple Grounds?

### E.g.

- Young Muslim men
- Muslim women with headscarf
- *Marshall* 152/84, age and sex
- „Black women“ (Crenshaw)

### Multiple discrimination

- Preambles of Directives 2000/43 and 2000/78
- Cumulative and/or intersectional discrimination?
- E.g. *Achbita* C-157/15, *Bougnaoui* C-188/15

## Directives

### Prohibition of discrimination

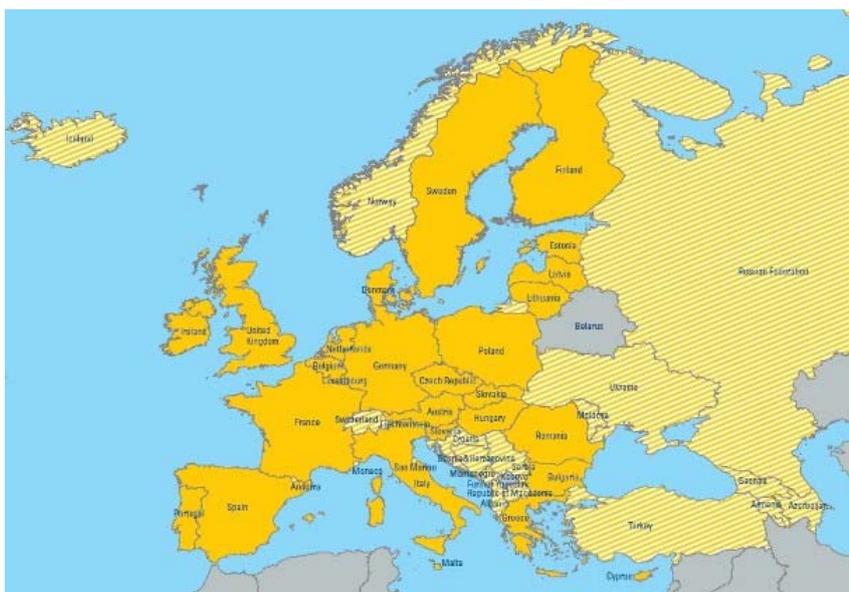
- Direct: on the grounds of certain protected characteristics
- Indirect: apparently neutral provision, criterion, or practice would put certain persons at a particular disadvantage
- Harassment
- Instruction to discriminate
- Sex
  - Sexual harassment (work, self-employed, goods and services)
  - Pregnancy, maternity leave (work) or maternity (goods and services)

## Directives

### Exceptions

- Positive action measures: all grounds
- Reasonable accommodation: disability (Art. 5 Directive 2000/78/EC)
- Occupational requirements: all grounds
  - E.g. *Sirdar C-273/97*, *Kreil C-285/98*
  - Religion/belief: regard to organisation's ethos (Art. 4(2) Directive 2000/78/EC)
- Legitimate aim
  - Sex: goods and services (Art. 4(5) Directive 2004/113/EC)
  - Age: employment (Art. 6 Directive 2000/78/EC)
- General clause
  - Public security, public order, crime prevention, health, rights and freedoms of others (Art. 2 Abs. 5 RL 2000/78/EG)

## Council of Europe



<http://de.strasbourg-europe.eu/mitgliedstaaten,44987.de.html>

## ECHR

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

### **Article 14:** Accessory right of equal treatment

- Actual violation of Convention rights not necessary (*PB and JS v. Austria* 18984/02 )
- No objective and reasonable justification
  - Legitimate aim
  - Reasonable relationship of proportionality
- Margin of appreciation of the States
  - Broad where ethical question on which there is no consensus among the States

### **Protocol No. 12**

- Any right set forth by law shall be secured without discrimination
- Signed by 18 States, ratified by 20 States

## ECHR

### **Link to EU law**

- Art. 52(3) EUCFR
  - Meaning and scope of corresponding rights shall be the same as in ECHR
  - Case law of the ECtHR relevant for the interpretation of EUCFR
- Art. 6 (2) TEU & Art. 59(2) ECHR
  - Accession of EU to ECHR
  - Draft accession treaty (2013)
  - ECJ Opinion 2/13 (18.12.2014)
    - Specific characteristics and autonomy of EU law
    - Possible ECtHR rulings on matters of EU law and common foreign and security matters
    - Co-respondent mechanism criticised

## European Social Charter

- 1961, in force 1965
- Social and economic fundamental rights
- 1961-Charter: 9 EU-MS .      Revised Charter 1996: 19 EU-MS
- No monitoring court
- Monitoring by the European Committee of Social Rights
  - Annual reports by the States
  - Collective complaints (Protocol 1995)
- Recommendations by the Committee of Ministers
- Interpretation of Art. 1(2): prohibition of discriminations

## Other International Instruments

### **United Nations**

- See handout
- No Treaties particularly dealing with religion, sexual orientation
- Convention on the Rights of Persons with Disabilities: ratified by the EU 2010

### **International Labour Organization**

- Work
- See handout

= International treaties

- Binding on States
- Ratification or monist system

## Conclusion

- Legal provisions scattered widely
- Different levels of protection for different grounds
- National regulations → EU equal treatment Directives → EU Treaties  
incl. EUCFR & ECHR → international treaties

Thank you for your attention!

maria.lee@univie.ac.at