



17 May 2018

Anti-Discrimination Law: Global and European Perspectives

Background Reader

Prof. Dr. Thomas Giegerich, LL.M. (Univ. of Virginia)

Europa-Institut, Jean Monnet Chair for European Integration, Antidiscrimination, Human Rights and Diversity, Saarland University, Germany

Part One: GLOBAL LEVEL

I. Legal framework

A. UN Level

a. General Human Rights Documents (selection)

- **UN Charter (1945)***

Art. 1: The Purposes of the United Nations are: ... 3. To achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Art. 55: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations

shall promote: ... c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Art. 56: All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

* 193 parties

- **Universal Declaration of Human Rights (1948)***

Art. 1: All human beings are born free and equal in dignity and rights.

Art. 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Art. 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.

*Adopted by the GA by 48 States out of the then 58 States; since then reaffirmed many times by consensus.

- **Convention on the Prevention and Punishment of the Crime of Genocide (1948)***

Art. I: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Art. II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

* 149 parties

- **Convention Relating to the Status of Refugees (1951)***

Art. 3: The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

*145 parties

Introductory Note by the UNHCR [2010]:

The Convention is both a status and rights-based instrument and is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization and *non-refoulement*. Convention provisions, for example, are to be applied without discrimination as to race, religion or country of origin. Developments in international human rights law also reinforce the principle that the Convention be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination.

Source: <http://www.unhcr.org/3b66c2aa10.pdf>

- **International Covenant on Economic, Social and Cultural Rights (ICESR) (1966)***

Art. 2(2): The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(3): Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Art. 3: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Art. 7: The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: **(a)** Remuneration which provides all workers, as a minimum, with: **(i)** Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; **(c)** Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence ...

Art. 10(3): Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. [...]

*166 parties

UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (2009):

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires State parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.

8. In order for State parties to “guarantee” that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively.

(a) **Formal discrimination:** Eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

(b) **Substantive discrimination:** Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2. The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. [...] For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help overcome discrimination against women and girls children and persons living in informal settlements and rural areas.

9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities. [...]

Source: <http://www.refworld.org/docid/4a60961f2.html>

- **International Covenant on Civil and Political Rights (ICCPR) (1966)***

Art. 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights rec-

ognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Art. 3: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Art. 14(1): All persons shall be equal before the courts and tribunals. ...

Art. 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*169 parties

CCPR General Comment No. 18: Non-discrimination (1989):

6. The Committee notes that the Covenant neither defines the term “discrimination” nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

12. While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an au-

onomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Source: <http://www.refworld.org/docid/453883fa8.html>

- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)***

Art. 1(1): For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, *or for any reason based on discrimination of any kind*, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. ...

*163 parties

- **Convention on the Rights of the Child (1989)***

Art. 2:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

*196 parties

**UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003):
General measures of implementation of the Convention on the Rights of the
Child**

12. [...] the following articles in the Convention [are] identified by the Committee as general principles:

Article 2: the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. This non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes. It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment. A general comment by the Human Rights Committee has underlined the importance of taking special measures in order to diminish or eliminate conditions that cause discrimination.

Source: <http://www.refworld.org/docid/4538834f11.html>

- **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)***

Art. 7: States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

*51 parties

- **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)***

Art. 3

1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.
2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration.

* UN General Assembly Resolution A/RES/47/135 of 18 Dec. 1992 (adopted without vote)

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

Art. 1: Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 2: Definitions

For the purposes of the present Convention: [...]

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms; [...]

Art. 3: General principles

The principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4: General obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake: [...]

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities; [...]

(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise; [...]

Article 5: Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 12: Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. [...]

*175 parties

- **United Nations Declaration on the Rights of Indigenous Peoples (2007)***

Art. 2: Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

* UN General Assembly Resolution A/RES61/295 of 13 September 2007 (adopted by 143 against 4 votes with 11 abstentions)

b. International Humanitarian Law Documents (selection)

aa. Documents concerning International Armed Conflicts

- **Convention (III) relative to the Treatment of Prisoners of War – 3rd Geneva Convention (1949)***

Art. 16: Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.

*196 parties

- **Convention (IV) relative to the Protection of Civilian Persons in Time of War – 4th Geneva Convention (1949)***

Art. 13: The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

Art. 27: ... Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion. However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

*196 parties

- **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977)***

Art. 75: Fundamental guarantees:

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons. ...

*174 parties

bb. Documents concerning Non-International Armed Conflicts

- **Common Article 3 (common to all four Geneva Conventions of 1949)*:**

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. ...

*196 parties

- **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977)***

Art. 4 Fundamental guarantees:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. ...

*168 parties

c. Antidiscrimination Documents (selection)

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

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

- (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
 - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

*179 parties

Committee on the Elimination of Racial Discrimination (CERD), General recommendation No. 32 (2009):

7. The principle of enjoyment of human rights on an equal footing is integral to the Convention's prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin. The "grounds" of discrimination are extended in practice by the notion of "intersectionality" whereby the Committee addresses situations of double or multiple discrimination – such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of the Convention. Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect. Discrimination is constituted not simply by an unjustifiable "distinction, exclusion or restriction" but also by an unjustifiable "preference", making it especially important that States parties distinguish "special measures" from unjustifiable preferences.

9. The principle of non-discrimination, according to article 1, paragraph 1, of the Convention, protects the enjoyment on an equal footing of human rights and fundamental freedoms "in the political, economic, social, cultural or any other field of public life". The list of human rights to which the principle applies under the Convention is not closed and extends to any field of human rights regulated by the public authorities in the State party. The reference to public life does not limit the scope of the non-discrimination principle to acts of the public administration but should be read in the light of the provisions in the Convention mandating measures by States parties to address racial discrimination "by any persons, group or organization".

Source: <http://www.refworld.org/docid/4adc30382.html>

- **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)***

Art. 1: For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment

or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Art. 2:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Art. 4:

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods; [...]

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. [...]

Art. 15:

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

*189 parties (but numerous reservations)

The Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (1992) – Violence against women

General comments

6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It

includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.

Article 2(f), 5 and 10(c)

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.

12. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.

Article 11

17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

Source: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

- **Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)***

Article 2

1. No one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief.

2. For the purposes of the present Declaration, the expression “intolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 3

Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.

Article 4

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or belief in this matter.

* UN General Assembly Resolution A/RES/36/55 of 25 Nov. 1981 (adopted without vote)

B. Regional Level

- **American Convention on Human Rights (ACHR) (1969)***

Art. 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. [...]

Art. 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

*ratified by 25 out of the 35 members of the Organization of American States (OAS). Trinidad and Tobago and Venezuela later denounced the Convention.

Note: The Inter-American Court has very limited case-law on the principles of equality and non-discrimination, but contributes to the development of the field through its Advisory Opinions. Particularly noteworthy are:

- Advisory Opinion OC-4/84 (1984) on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica;
- Advisory Opinion OC-18/03 (2003) on Juridical Conditions and Rights of Undocumented Migrants.

The advisory opinions do not create legal obligations for the States, but rather encourage them to take a specific course of action.

See also

- **Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of 9 June 1994** (32 parties)
 - **Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities of 8 June 1999** (17 parties)
 - **Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance of 5 June 2013** (not yet in force)
 - **Inter-American Convention against All Forms of Discrimination and Intolerance of 5 June 2013** (not yet in force)
 - **Inter-American Convention on Protecting the Human Rights of Older Persons of 15 June 2015** (5 parties)
-
- **African Charter on Human and Peoples' Rights (1981)***

Art. 2: Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Art. 3:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Art. 18:

3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Art. 28: Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

* ratified by 54 States

See also

- **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)** (39 parties)
- **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (2016)** (not yet in force)
- **Revised Arab Charter on Human Rights (ACHR) (2004)***

Art. 1(b): Racism, zionism, occupation and foreign domination pose a challenge to human dignity and constitute a fundamental obstacle to the realization of the basic rights of peoples. There is a need to condemn and endeavour to eliminate all such practices.

Art. 2: Each State Party to the present Charter undertakes to ensure to all individuals within its territory and subject to its Jurisdiction the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status and without any discrimination between men and women.

Art. 4(a): No restrictions shall be placed on the rights and freedoms recognized in the present Charter except where such is provided by law and deemed necessary to protect the national security and economy, public order, health or morals or the rights and freedoms of others.

Article 12: The death penalty shall not be inflicted on a person under 18 years of age, on a pregnant woman prior to her delivery or on a nursing mother within two years from the date on which she gave birth.

Art. 32: The State shall ensure that its citizens enjoy equality of opportunity in regard to work, as well as a fair wage and equal remuneration for work of equal value.

Art. 35: Citizens have a right to live in an intellectual and cultural environment in which Arab nationalism is a source of pride, in which human rights are sanctified and in which racial, religious and other forms of discrimination are rejected and international cooperation and the cause of world peace are supported.

* ratified by 13 of the 22 members of the Arab League

Note: Upon its entry into force in January 2008, the Office of the United Nations High Commissioner for Human Rights (OHCHR) **declared the Charter as incompatible with international standards** for women's, children's and non-citizens' rights and in that it continues to equate Zionism to racism.

→ GA Resolution 48/86 of 16 December 1991 revoked Resolution 3379 of 10 November 1975 determining Zionism as a form of racism and racial discrimination.

- **Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (2012)***

2. Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.

3. Every person has the right of recognition everywhere as a person before the law. Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law.

4. The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.

6. The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. [...]

7. [...] At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.

8. [...] The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.

9. In the realisation of the human rights and freedoms contained in this Declaration, the principles of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation, should always be upheld. The process of such realisation shall take into account peoples' participation, inclusivity and the need for accountability.

Note: Upon adoption, the OHCHR welcomed the renewed commitment by ASEAN States to universal human rights, but expressed concerns that the **language is not consistent with international standards**. The Declaration itself has been criticized by ASEAN civil society and international human rights organizations.

*ASEAN counts 10 members comprising 640 million people. ASEAN is an official United Nations Observer

II. A Brief Commentary

As shown above, international human rights instruments typically contain two types of provisions protecting equal treatment:

- (i) Provisions on prohibition of discrimination in the enjoyment of rights provided by the respective instrument (e.g. Art. 2 ICCPR, Art. 1(1) ACHR, Art. 2(2) ICESR); and
- (ii) Provisions on a general requirement of equal treatment and equality before the law (Art. 26 ICCPR, Art. 24 ACHR, Art. 5(1) CRPD).

The majority of the international human rights instruments operate with the same definition of discrimination, as explained in the CCPR, General Comment No. 13, understanding as discrimination “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.

From the practice of the human rights supervisory bodies it becomes clear, however, that not all distinctions in treatment constitute discrimination. In the words of the Human Rights Committee, as expressed in General Comment 18 “the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance”. Clear criteria have been developed to establish when distinctions amount to discrimination and when not. According to the same General Comment 18, “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.

The case-law of various supervisory bodies clearly demonstrates that the list of prohibited grounds of discrimination enshrined in the majority of instruments is non-exhaustive; other similar grounds are covered by the catch-all criterion “other status”.

Part Two: EUROPEAN LEVEL

I. Introduction

Both the Council of Europe and the European Union adhere to and try to implement the principle of equal rights and non-discrimination for all. Their respective efforts reinforce and complement one another. Since 1950, Art. 14 of the European Convention on Human Rights (ECHR) of 1950 (see below II.) has set out an accessory prohi-

bition of discrimination based on a non-exhaustive list of problematic grounds. The exact content of this provision has been clarified by numerous decisions of the European Court of Human Rights (ECtHR). All the EU Member States are bound by the ECHR whose provisions are used by the Court of Justice of the EU (ECJ) as a means to interpret EU law. It took the Council of Europe Member States fifty years to draw up an independent and comprehensive prohibition of discrimination which is included in Protocol No. 12 of 2000. While the Protocol has meanwhile entered into force only a minority of the Convention States (and only ten of the EU Member States) have ratified it. Apparently, many of them are disinclined to give the ECtHR the final say on whether or not distinctions they make in their laws are “reasonable”. The European Union is about to accede to the ECHR, but not Protocol No. 12.

The anti-discrimination law of the EU (see below III.) reaches much further and is much better implemented. The Treaties as such have always included prohibitions of discrimination on grounds of nationality that are directly applicable in national court proceedings and override contrary national legislation. Their exact scope has been clarified by the case-law of the ECJ that tends to be strict.

With the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the EU (ChFR) was promoted to the rank of primary EU law, on a par with the Treaties and to be enforced by the ECJ. The Charter includes several provisions on equality before the law and non-discrimination (Art. 20 – 26). Where these correspond to rights guaranteed by the Treaties, they shall be exercised under the conditions and within the limits defined therein (Art. 52 (2) ChFR). Where the Charter rights correspond to rights guaranteed by the ECHR, their meaning and scope shall be no less extensive than those laid down by the Convention (Art. 52 (3) ChFR). It must always be remembered, however, that the Charter rights are primarily addressed to the institutions etc. of the EU. The Member States are only subject to those rights where they are implementing Union law (Art. 51 (1) ChFR).

The Treaty of Amsterdam of 1997 introduced the provision now contained in Art. 19 (1) of the Treaty on the Functioning of the EU (TFEU). That provision does not as such prohibit discrimination based on other grounds than nationality which are set forth in an exhaustive list including the most problematic grounds (such as sex, racial or ethnic origin and sexual orientation). It only identifies kinds of discrimination that deserve to be combated and empowers the Council of the EU and the European Parliament jointly to enact secondary legislation for that purpose. The fact that any legislation based on Art. 19 (1) TFEU requires unanimity in the Council (consisting of a minister from each Member State) shows that the Member States wanted to keep EU anti-discrimination under their control.

Meanwhile, several anti-discrimination directives have been enacted on the basis of Art. 19 (1) TFEU or other Treaty provisions (for an overview, see below III. 2.). The Council has, however, not yet been ready to pass a general directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation which the European Commission proposed already in 2008 (see below III. 2. C).

It should also be remembered that there are further anti-discrimination provisions in various treaties concluded by the EU with third States (see below III. 3.). Those provisions prohibit discrimination of third-state nationals on grounds of nationality. According to the case-law of the ECJ, they are usually directly applicable and override both contrary secondary EU law and national law.

II. Legal Framework (CoE) (selection)

- **European Convention on Human Rights (ECHR) (1950)***

Art. 14 + Protocol No. 12

See also Art. 52 (3) of the Charter of Fundamental Rights of the European Union. See also Art. 6 (2), (3) TEU.

1. Art. 14 ECHR (1950)

a) Prohibition of All Distinctions or Only Discriminations?

See the two equally authentic (English and French) versions of Art. 14 (emphasis added):

Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms

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.

Art. 14 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales

La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, *sans distinction aucune, fondée notamment sur* le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.

b) Accessory Nature of Art. 14 ECHR

European Court of Human Rights, judgment of 30 Sept. 2003 – Koua Poirrez v. France (No. 40892/98)

36. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the “rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts in issue fall within the ambit of one or more of the latter ...

c) Non-Exhaustive Character of List of Problematic Distinctions

Other problematic grounds of distinction recognized in the case-law of the European Court of Human Rights: marital status, nationality, disability, age, sexual orientation, genetic heritage.

d) Justification of Problematic Distinctions

European Court of Human Rights, judgment of 30 Sept. 2003 – Koua Poirrez v. France (No. 40892/98)

46. According to the Court's case-law, a distinction is discriminatory, for the purposes of Article 14, if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised ...

e) Differing Scope of Convention States' Margin of Appreciation

Under the case-law of the European Court of Human Rights a certain margin of appreciation is allowed to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background.

European Court of Human Rights, judgment of 30 Sept. 2003 – Koua Poirrez v. France (No. 40892/98)

46. ... Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment ... However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention ...

European Court of Human Rights, judgment of 24 July 2003 – Karner v. Austria (No. 40016/98)

41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion.

f) Protective Duty of Convention States (Art. 1 ECHR "shall secure") vis-à-vis private discrimination gives rise to certain positive obligations whose scope is unclear

2. Protocol No. 12 (2000)

From the **Explanatory Report**:

16. The third recital of the preamble refers to measures taken in order to promote full and effective equality and reaffirms that such measures shall not be prohibited by the principle of non-discrimination, provided that there is an objective and reasonable

justification for them ... The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of de facto inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected. Indeed, there are several international instruments obliging or encouraging states to adopt positive measures (see, for example, Article 2, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4, paragraph 2, of the Framework Convention for the Protection of National Minorities ...). However, the present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable. [...]

21. Article 1 provides a general non-discrimination clause and thereby affords a scope of protection which extends beyond the "enjoyment of the rights and freedoms set forth in [the] Convention".

22. In particular, the additional scope of protection under Article 1 concerns cases where a person is discriminated against:

i. in the enjoyment of any right specifically granted to an individual under national law;

ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;

iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);

iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

23. In this respect, it was considered unnecessary to specify which of these four elements are covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all four elements are covered by Article 1. It should also be borne in mind that the distinctions between the respective categories i-iv are not clear-cut and that domestic legal systems may have different approaches as to which case comes under which category.

24. The wording of Article 1 reflects a balanced approach to possible positive obligations of the Parties under this provision. This concerns the question to what extent Article 1 obliges the Parties to take measures to prevent discrimination, even where discrimination occurs in relations between private persons (so-called "indirect horizontal effects"). The same question arises as regards measures to remedy instances of discrimination. While such positive obligations cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals.

25. On the one hand, Article 1 protects against discrimination by public authorities. The Article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons. An additional protocol to the Convention, which typically contains justiciable individual rights formulated in concise provisions, would not be a suitable instrument for defining the various elements of such a wide-ranging obligation of a programmatic character. Detailed and tailor-made rules have already been laid down in separate conventions exclusively devoted to the elimination of discrimination on the specific grounds covered by them (see, for example, the Convention on Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, which were both elaborated within the United Nations). It is clear that the present Protocol may not be construed as limiting or derogating from domestic or treaty provisions which provide further protection from discrimination (see the comment on Article 3 in paragraph 32 below).

26. On the other hand, it cannot be totally excluded that the duty to "secure" under the first paragraph of Article 1 might entail positive obligations. For example, this question could arise if there is a clear lacuna in domestic law protection from discrimination. Regarding more specifically relations between private persons, a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of the Protocol could come into play (see, *mutatis mutandis*, the judgment of the Court of 26 March 1985 in the case of X and Y v. the Netherlands, Series A, No 91, paragraphs 23-24, 27 and 30).

27. Nonetheless, the extent of any positive obligations flowing from Article 1 is likely to be limited. It should be borne in mind that the first paragraph is circumscribed by the reference to the "enjoyment of any right set forth by law" and that the second paragraph prohibits discrimination "by any public authority". It should be noted that, in addition, Article 1 of the Convention sets a general limit on state responsibility which is particularly relevant in cases of discrimination between private persons.

28. These considerations indicate that any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc). The precise form of the response which the state should take will vary according to the circumstances. It is understood that purely private matters would not be affected. Regulation of such matters would also be likely to interfere with the individual's right to respect for his private and family life, his home and his correspondence, as guaranteed by Article 8 of the Convention.

Protocol No. 12: Status as of 2/4/2018

	Signature	Ratification	Entry into force
Albania	26/5/2003	26/11/2004	1/4/2005
Andorra	31/5/2007	6/5/2008	1/9/2008
Armenia	18/6/2004	17/12/2004	1/4/2005
Austria	4/11/2000		
Azerbaijan	12/11/2003		
Belgium	4/11/2000		
Bosnia and Herzegovina	24/4/2002	29/7/2003	1/4/2005
Bulgaria			
Croatia	6/3/2002	3/2/2003	1/4/2005
Cyprus	4/11/2000	30/4/2002	1/4/2005
Czech Republic	4/11/2000		
Denmark			
Estonia	4/11/2000		
Finland	4/11/2000	17/12/2004	1/4/2005
France			
Georgia	4/11/2000	15/6/2001	1/4/2005
Germany	4/11/2000		
Greece	4/11/2000		
Hungary	4/11/2000		
Iceland	4/11/2000		
Ireland	4/11/2000		
Italy	4/11/2000		
Latvia	4/11/2000		
Liechtenstein	4/11/2000		

Lithuania			
Luxembourg	4/11/2000	21/3/2006	1/7/2006
Malta	8/12/2015	8/12/2015	1/4/2016
Moldova	4/11/2000		
Monaco			
Montenegro	3/4/2003	3/3/2004	6/6/2006
Netherlands	4/11/2000	28/7/2004	1/4/2005
Norway	15/1/2003		
Poland			
Portugal	4/11/2000	16/1/2017	1/5/2017
Romania	4/11/2000	17/7/2006	1/11/2006
Russia	4/11/2000		
San Marino	4/11/2000	25/4/2003	1/4/2005
Serbia	3/4/2003	3/3/2004	1/4/2005
Slovakia	4/11/2000		
Slovenia	7/3/2001	7/7/2010	1/11/2010
Spain	4/10/2005	13/2/2008	1/6/2008
Sweden			
Switzerland			
The former Yugoslav Republic of Macedonia	4/11/2000	13/7/2004	1/4/2005
Turkey	18/4/2001		
Ukraine	4/11/2000	27/3/2006	1/7/2006
United Kingdom			

Total number of signatures not followed by ratifications:	18
---	----

Total number of ratifications/accessions:	20
---	----

See also

- 3rd preambular paragraph of the **European Social Charter (1961)** (27 parties)
- Art. 4 of the **Framework Convention for the Protection of National Minorities (1995)** (39 parties)
- Part V, Art. E of the **European Social Charter (Revised) (1996)** (34 parties)
- Art. 11 of the **Convention for the Protection of Human Rights and Dignity with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997)** (29 parties)
- Art. 5 of the **European Convention on Nationality (1997)** (21 parties)
- **Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (2003)** (29 parties)
- **Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011)** (29 parties)

III. Antidiscrimination Law of the European Union

1. Primary Law

a) General Provisions on EU Objectives and Principles

TEU: Art. 2, Art. 3 (3) (2), Art. 9 sentence 1

TFEU: Art. 8, Art. 10 (so-called horizontal clauses)

Charter of Fundamental Rights of the EU: Art. 22, Art. 25, Art. 26 (to be read together with Art. 52 (5))

b) Directly Applicable Prohibitions

aa) Direct Applicability of Treaty Provisions

ECJ, Case 26/62 – van Gend & Loos, ECR 1963, 1, 12: “[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Members States, Community law therefore not only imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.”

Direct applicability of a Treaty provision means that private persons can invoke them in proceedings in national courts and in the Court of Justice of the EU. The competent court will thereupon use the relevant provision as a standard of review of the legality of a national or EU measure. The direct applicability makes the Treaty provision judicially enforceable upon the application of private persons whose private interest in compliance with that provision is utilized by EU law in order to secure effective enforcement of the Treaties.

bb) Overview of Antidiscrimination Provisions in the Treaties

TFEU: Art. 18 (1) (general prohibition of discrimination on grounds of nationality “within the scope of application of the Treaties” [accessory nature]) – see also the special provisions of Art. 34, 45 (2), Art. 49, Art. 56, Art. 63 which take precedence over Art. 18;

Art. 22 (no discrimination on grounds of nationality with regard to municipal elections and elections to the European Parliament);

Art. 23 (no discrimination on grounds of nationality with regard to diplomatic and consular protection);

Art. 95 (no discrimination by carriers on grounds of the country of origin or destination of goods);

Art. 110 (1) (no higher internal taxation of similar products of other Member States – neither directly nor indirectly);

Art. 157 (1), (2) and (4) (equal pay for male and female workers for equal work or work of equal value)

Charter of Fundamental Rights of the EU: Art. 20, Art. 21, Art. 23, Art. 24, Art. 39, Art. 40, Art. 46 (to be read together with Art. 51 (1) and Art. 52 (2), (3))

cc) Prohibition of Overt (Direct) and Covert (Indirect) Discrimination

ECJ, Case C-209/03, judgment of 15 March 2005 – The Queen on the application of Dany Bidar v. London Borough of Ealing etc.)

“51 ... the principle of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria [such as residence in the national territory for a certain period of time, holding of certificates issued by school or university in the particular state], lead in fact to the same result ...

53 Such requirements risk placing at a disadvantage primarily nationals of other Member States ... [because they] are likely to be more easily satisfied by United Kingdom nationals.”

dd) Justification of Differential Treatment

ECJ, Case C-209/03, judgment of 15 March 2005 – The Queen on the application of Dany Bidar v. London Borough of Ealing etc.)

“54 Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions ...”

The ECJ permits that justification both in cases of covert (indirect) and overt (direct) discrimination, but in the latter case only on the basis of an explicit authorization by the Treaties.

c) Enabling Provisions (authorizing the EU institutions to enact directly applicable prohibitions also with regard to behaviour of private persons)

TFEU: Art. 18 (2)

Art. 19 (1)

Art. 19 (2)

Art. 157 (3)

2. Secondary Law

a) Overview of Important EU Antidiscrimination Directives

COUNCIL DIRECTIVE 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180/22; based on Art. 13 EEC Treaty, now replaced by Art. 19 (1) TFEU) (**Race Equality Directive**)

COUNCIL DIRECTIVE 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303/16, based on Art. 13 EEC Treaty, now replaced by Art. 19 (1) TFEU) (**Framework Directive**)

COUNCIL DIRECTIVE 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373/37, based on Art. 13 (1) EEC Treaty, now replaced by Art. 19 (1) TFEU) (**Goods and Services Directive**)

DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

(recast) (OJ L 204/23, based on Art. 141 (3) EEC Treaty, now replaced by Art. 157 (3) TFEU) (**Equal Treatment Directive**)

DIRECTIVE 2010/41/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity ... (OJ L 180/1; based on Art. 157 (3) TFEU)

b) Relevant Provisions of the Antidiscrimination Directives:

- **Race Equality Directive (Directive 2000/43/EC)**

CHAPTER I: GENERAL PROVISIONS

Article 1: Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2: Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3: Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

- (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
 - (e) social protection, including social security and healthcare;
 - (f) social advantages;
 - (g) education;
 - (h) access to and supply of goods and services which are available to the public, including housing.
2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 4: Genuine and determining occupational requirements

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Article 5: Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Article 6: Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II: REMEDIES AND ENFORCEMENT

Article 7: Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 8: Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 9: Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 10: Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

Article 11: Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.

2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

Article 12: Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate nongovernmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

CHAPTER III: BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER IV: FINAL PROVISIONS

Article 14: Compliance

Member States shall take the necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.

Article 15: Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 16: Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003 or may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements. In such cases, Member States shall ensure that by 19 July 2003, management and labour introduce the necessary measures by agreement, Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 17: Report

1. Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
 2. The Commission's report shall take into account, as appropriate, the views of the European Monitoring Centre on Racism and Xenophobia, as well as the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, *inter alia*, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.
- [...]

- **Framework Directive (Directive 2000/78/EC)**

CHAPTER I: GENERAL PROVISIONS

Article 1: Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2: Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
 - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
 - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
 - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
 - (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.
3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 3: Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

Article 4: Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Article 5: Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Article 6: Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Article 7: Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating

or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Article 8: Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II: REMEDIES AND ENFORCEMENT

Article 9: Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 10: Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 11: Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any

legal proceedings aimed at enforcing compliance with the principle of equal treatment.
[...]

- **Goods and Services Directive (Directive 2004/113/EC)**

CHAPTER I: GENERAL PROVISIONS

Article 1: Purpose

The purpose of this Directive is to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.

Article 2: Definitions

For the purposes of this Directive, the following definitions shall apply:

- (a) direct discrimination: where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;
- (b) indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;
- (c) harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
- (d) sexual harassment: where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 3: Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.
2. This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.
3. This Directive shall not apply to the content of media and advertising nor to education.
4. This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.

Article 4: Principle of equal treatment

1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that
 - (a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;
 - (b) there shall be no indirect discrimination based on sex.
2. This Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.
3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.
4. Instruction to direct or indirect discrimination on the grounds of sex shall be deemed to be discrimination within the meaning of this Directive.
5. This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

[...]

Article 6: Positive action

With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

Article 7: Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between men and women than those laid down in this Directive.
2. The implementation of this Directive shall in no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

[...]

Article 9: Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence, which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 8(3).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.

Article 10: Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect persons from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment.

[...]

- **Recast Equal Treatment Directive (Directive 2006/54/EC)**

TITLE I: GENERAL PROVISIONS

Article 1: Purpose

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

- (a) access to employment, including promotion, and to vocational training;
- (b) working conditions, including pay;
- (c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

Article 2: Definitions

1. For the purposes of this Directive, the following definitions shall apply:

- (a) ‘direct discrimination’: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;
- (b) ‘indirect discrimination’: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;
- (c) ‘harassment’: where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
- (d) ‘sexual harassment’: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;
- (e) ‘pay’: the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer;
- (f) ‘occupational social security schemes’: schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security⁽¹⁶⁾ whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sec-

tor or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

2. For the purposes of this Directive, discrimination includes:

- (a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;
- (b) instruction to discriminate against persons on grounds of sex;
- (c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

Article 3: Positive action

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

TITLE II: SPECIFIC PROVISIONS

CHAPTER 1: Equal pay

Article 4: Prohibition of discrimination

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

CHAPTER 2: Equal treatment in occupational social security schemes

Article 5: Prohibition of discrimination

Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

- (a) the scope of such schemes and the conditions of access to them;
- (b) the obligation to contribute and the calculation of contributions;
- (c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

Article 6: Personal scope

This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

Article 7: Material scope

1. This Chapter applies to:
 - (a) occupational social security schemes which provide protection against the following risks:
 - (i) sickness,
 - (ii) invalidity,
 - (iii) old age, including early retirement,
 - (iv) industrial accidents and occupational diseases,
 - (v) unemployment;
 - (b) occupational social security schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment.
2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect.

Article 8: Exclusions from the material scope

1. This Chapter does not apply to:
 - (a) individual contracts for self-employed persons;
 - (b) single-member schemes for self-employed persons;
 - (c) insurance contracts to which the employer is not a party, in the case of workers;
 - (d) optional provisions of occupational social security schemes offered to participants individually to guarantee them:
 - (i) either additional benefits,
 - (ii) or a choice of date on which the normal benefits for self-employed persons will start, or a choice between several benefits;
 - (e) occupational social security schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.
2. This Chapter does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational social security scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.

Article 9: Examples of discrimination

1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:

- (a) determining the persons who may participate in an occupational social security scheme;
 - (b) fixing the compulsory or optional nature of participation in an occupational social security scheme;
 - (c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;
 - (d) laying down different rules, except as provided for in points (h) and (j), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;
 - (e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;
 - (f) fixing different retirement ages;
 - (g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;
 - (h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;
 - (i) setting different levels for workers' contributions;
 - (j) setting different levels for employers' contributions, except:
 - (i) in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more nearly equal for both sexes,
 - (ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;
 - (k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.
2. Where the granting of benefits within the scope of this Chapter is left to the discretion of the scheme's management bodies, the latter shall comply with the principle of equal treatment.
- [...]

CHAPTER 3: Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 14: Prohibition of discrimination

1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

Article 15: Return from maternity leave

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

Article 16: Paternity and adoption leave

This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

[...]

c) Should a General Antidiscrimination Directive be Enacted?

(1) Proposal for a COUNCIL DIRECTIVE on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (presented by the Commission on 2 July 2008 – COM(2008) 426 final – but never enacted due to lack of unanimity in the Council; the legal base was to be Art. 13 (1) EEC Treaty, now replaced by Art. 19 (1) TFEU)

From the Explanatory Memorandum accompanying that Commission proposal (footnotes omitted):

“The aim of this proposal is to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside

the labour market. It sets out a framework for the prohibition of discrimination on these grounds and establishes a uniform minimum level of protection within the European Union for people who have suffered such discrimination.

This proposal supplements the existing EC legal framework under which the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation applies only to employment, occupation and vocational training ... This proposal builds upon Directives 2000/43/EC, 2000/78/EC and 2004/113/EC⁶ which prohibit discrimination on grounds of sex, racial or ethnic origin, age, disability, sexual orientation, religion or belief. Discrimination based on race or ethnic origin is prohibited in employment, occupation and vocational training, as well as in non-employment areas such as social protection, health care, education and access to goods and services, including housing, which are available to the public. Discrimination based on sex is prohibited in the same range of areas, with the exception of education and media and advertising. However, discrimination based on age, religion and belief, sexual orientation and disability is prohibited only in employment, occupation and vocational training. ...

The principle of subsidiarity applies insofar as the proposal does not fall under the exclusive competence of the Community. The objectives of the proposal cannot be sufficiently achieved by the Member States acting alone because only a Community-wide measure can ensure that there is a minimum standard level of protection against discrimination based on religion or belief, disability, age or sexual orientation in all the Member States. A Community legal act provides legal certainty as to the rights and obligations of economic operators and citizens, including for those moving between the Member States. Experience with the previous directives adopted under Article 13(1) EC is that they had a positive effect in achieving a better protection against discrimination. ...

Moreover, national traditions and approaches in areas such as healthcare, social protection and education tend to be more diverse than in employment-related areas. These areas are characterised by legitimate societal choices in areas which fall within national competence. The diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level. The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues. Nor does it affect national rules governing the activities of churches and other religious organisations or their relationship with the state. So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, or prohibit or allow the wearing or display of religious symbols in schools, whether to recognize same-sex marriages, and the nature of any relationship between organised religion and the state."

(2) Jean-Claude Juncker, Candidate for President of the European Commission: A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the next European Commission, Strasbourg, 15 July 2014, p. 8

“Discrimination must have no place in our Union, whether on the basis of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, or with regard to people belonging to a minority. I will therefore maintain the proposal for a directive in this field and seek to convince national governments to give up their current resistance in the Council.

(Available at http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf)

IV. Further Reading:

Arnardóttir, Oddný Mjöll, *Equality and Non-Discrimination under the European Convention on Human Rights*, 2003

Carlson, Laura, *Comparative Discrimination Law*, 2017

Chalmers, Damian/Davies, Gareth & Monti, Giorgio, *European Union Law: Text and Materials*, 3rd ed. 2014, Chapter 13: Equal Opportunities Law and Policy, pp. 569 et seq.

Collins, Hugh/Khaitan, Tarunabh (eds.), *Foundations of Indirect Discrimination Law*, 2018

De Schutter, Olivier, *International Human Rights Law*, 2nd ed. 2014, Chapter 7: The prohibition of discrimination, pp. 632 et seq.

Dovidio, John F. and others (eds.), *The SAGE Handbook of Prejudice, Stereotyping and Discrimination*, 2013

Ellis, E. & Watson, P., *EU Anti-Discrimination Law*, 2nd ed. 2012

Freeman, Marsha A., Chinkin, Christine and Rudolf, Beate (eds.), *The UN Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, 2013

Givens, Terry/Case, Rhonda Evans, *Legislating Equality: The Politics of Antidiscrimination Policy in Europe*, 2014

Handbook on European non-discrimination law – 2018 edition (co-published by the European Union Agency for Fundamental Rights and the Council of Europe), available at https://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG.pdf (accessed on 27 March 2018)

Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights*, 3rd ed. 2014 (by David Harris, Michael O’Boyle and others), pp. 783 et seq.

Hellman, Deborah/Moreau, Sophia (eds.), *Philosophical Foundations of Discrimination Law*, 2013

Hellum, Anne/Sinding Aasen, Henriette (eds.), *Women’s Human Rights: CEDAW in International, Regional and National Law*, 2013

Mulder, Jule, *EU Non-Discrimination Law in the Courts*, 2017

Peers, Steve/Hervey, Tamara/Kenner, Jeff/Ward, Angela (eds.), *The EU Charter of Fundamental Rights: A Commentary*, 2014, pp. 563 et seq. (Art. 20), pp. 579 et seq. (Art. 21), pp. 605 et seq. (Art. 22), pp. 633 et seq. (Art. 23)

Solanke, Iyiola, *Discrimination as Stigma: A Theory of Anti-Discrimination Law*, 2017

Thornberry, Patrick, The International Convention on the Elimination of All Forms of Racial Discrimination – A Commentary, 2016

Tobler, Christa, Equality and Non-Discrimination under the ECHR and EU Law – A Comparison Focusing on Discrimination against LGBTI Persons, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law) 74 (2014), pp. 521 et seq.

Verbist, Valérie, Reverse Discrimination in the European Union, 2017

Wintemute, Robert, ‘Within the Ambit’: How Big *Is* the ‘Gap’ in Article 14 European Convention on Human Rights?, *European Human Rights Law Review* vol. 9 (2004), pp. 366 et seq.

Wintemute, Robert, Filling the Article 14 ‘Gap’: Government Ratification and Judicial Control of Protocol No. 12 ECHR, *European Human Rights Law Review* vol. 9 (2004), pp. 484 et seq.