

International and European Legal Framework on Freedom of Expression and Equality

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Freedom of Expression and Equality: A Training Course

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Outline

1. Introduction
2. International Human Rights Law
3. ECHR Law
4. EU Law

1. Introduction: (a) Key Rights

Key human rights:

- Freedom of opinion and expression
- Freedom from discrimination and the right to treatment on protected grounds
- Also, freedom of religion or belief

(b) Legal Principles

All human rights are **universal, indivisible and interdependent and interrelated**. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Vienna Declaration and Programme of Action, 25 June 1993

Legal Effects In Domestic Law

- **IHR law: ratification means that state authorities must ensure that the state's international treaty commitments are implemented into domestic law**
- **Application of ECHR law in domestic law**
- **Direct effect of EU law in 27 EU M/S**

Practical Consequences

- National courts are required to apply protections under IHR law ECHR and EU law, particularly the non-discrimination directives, irrespective of whether a party to proceedings invokes them
- Practitioners can rely on relevant instruments and pertinent case-law before national courts and authorities
- Practitioners need to understand the systems in place, application and how apply in particular situations

(c) Complementary systems?

- Protection of freedom of expression and equality in Europe can be found in IHR, ECHR and EU
- Legal systems are complementary and mutually reinforcing, some differences do exist which practitioners may need to be aware of
- In Europe, there is significant overlapping law on equality – through the Racial Equality Directive (as well as other EU Directives on the principle of equal treatment)

EU M/S and ECHR

- All 27 EU M/S are States Parties to the ECHR
- ECJ (General Court) looks to ECHR for inspiration when determining the scope of human rights protection under EU law
- EU Charter reflects (but is not limited to) the range of rights in the ECHR
- Though EU not yet signatory to ECHR, EU law is largely consistent with ECHR
- EU's Lisbon Treaty and Protocol 14 ECHR allows EU to join ECHR as a party
- Currently individual cannot make a complaint about EU failing to guarantee human rights (eg FoE) before ECHR; must either make complaint before national courts which can refer the case to ECJ through preliminary reference procedure OR complain about EU indirectly before ECtHR while bringing an action against a M/S

EU M/S and IHR treaties

- All 27 EU M/S are States Parties to IHR treaties all of which contain prohibitions on discrimination (and some protections on freedom of expression): ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC
- EU ratified UNCRPD in December 2010, placing EU under supervision of CRPD
- Individual can complaint to treaty bodies provided the state has accepted jurisdiction of treaty body to hear individual complaints and there is jurisdiction

2. IHR law

- **Universal Declaration on Human Rights 1948**
 - Non-discrimination/Equal Treatment: Articles 2, 7
 - Freedom of expression: Article 19
- **International Covenant on Civil and Political Rights 1966 (ICCPR)**
 - Non-discrimination/Equal Treatment: Articles 2, 3, 26, 27
 - Freedom of expression: Articles 19, 20
- **International Convention on the Elimination of Racial Discrimination 1964 (ICERD)**
- ICCPR and ICERD are binding international legal instruments

(i) ICCPR

- **Prohibition of Discrimination**

Article 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 recognized 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.

Article 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.

- **Freedom of expression**

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the **right to freedom of expression**; this right shall include **freedom to seek, receive and impart information and ideas of all kinds**, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it **special duties and responsibilities**. It may therefore be **subject to certain restrictions**, but these shall only be such as are provided **by law and are necessary**:
 - (a) For **respect of the rights** or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

- This implies that all restrictions to FoE – including on the grounds of the right to equality – are:
 - **Clearly and narrowly defined** and respond to a **pressing social need**
 - Are the **least intrusive measure available** in the sense that there is no other measure which would be effective and **yet less restrictive of freedom of expression**
 - Are not overbroad in the sense that they do not restrict speech in a wide or untargeted way, or go beyond the scope of harmful speech and rule out legitimate speech
 - Are **proportionate in the sense that the benefit to the protected interest outweighs the harm to freedom of expression**, including in respect to the sanctions they authorise.

- **Prohibition of Incitement**

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any **advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.**

3. ECHR law

- **European Convention on Human Rights 1950**
- All rights must be guaranteed equally to all persons falling within the jurisdiction of “Contracting Parties”

- **Prohibition of discrimination**

Article 14

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.

- Discrimination re: ECHR right = a potential violation of Article 14
- Substantive rights of ECHR include CPR (and some ESCR) including right to life, prohibition on torture, right to liberty and security, right to respect for private and family life, freedom of thought, conscience and religion, and freedom of expression

- **Protocol 12** extends this prohibition to cover discrimination in **any legal right**, even when that legal right is not protected under the Convention, so long as it is provided for in national law
- Protocol 12 principally protects individuals against discrimination from State, it also relates to relations between private persons which State is expected to regulate (eg access to work, restaurants, services to the public eg medical care or utilities)
- Protocol No 12 a “general prohibition of discrimination” *Sejdic and Finci v Bosnia and Herzegovina*
 - Prohibition of discrimination becomes free standing
 - Entered into force in 2005
 - But ratified by only 17/47 CoE M/S, out of which 6 are EU M/S
 - Different levels of protection in “EU anti-discrimination” law

- ECtHR: Religion, language, nationality and culture may be indistinguishable from race
- *Timishev v Russia* (2005): “Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by a common nationality, tribal affiliation, religious faith, shared language or cultural traditions and backgrounds”
- *Sejdić and Finci v Bosnia and Herzegovina* (2009): “discrimination on account of a person’s ethnic origin is a form of racial discrimination”

- **Freedom of expression**

Article 10

1. Everyone has the right to freedom of expression. This right shall include **freedom to hold opinions and to receive and impart information and ideas** without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it **duties and responsibilities**, may be subject to such formalities, conditions, restrictions or penalties as are **prescribed by law and are necessary in a democratic society**, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or **rights of others**, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Relevant case-law

- In *Bączkowski and Others v Poland* (2007) refusal of permission to hold a march to raise awareness about sexual orientation discrimination, coupled with publicly made homophobic remarks of the mayor, amounted to a violation of freedom of assembly (Article 11) together with Article 14
- In *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* (1994) ECtHR concluded there was a violation of Article 10 when the State failed to distribute *Der Igel* to Austrian soldiers because it was not permitted to discriminate between types of publication based on content

4. EU Law: (a) EU Charter

(i) Overview

- Intended to:
 - bring together rights found in national and EU laws, as well as in international conventions of the Council of Europe and UN
 - Make fundamental rights clearer and more visible to create legal certainty within the EU
- Preamble and 54 Articles, grouped in seven chapters

EU Charter – (ii) Drafting

- Agreement by EU M/S in Conclusions of Cologne European Council June 1999 to develop a charter including (1) general principles set out in ECHR; (2) those derived from the constitutional traditions common to EU M/S; (3) fundamental rights of EU citizens; (4) economic, social and cultural rights; (5) principles of case-law of ECJ and ECtHR
- Convention on Drafting of Charter encompassing representative from each EU M/S , EU Parliament and Commission, and national parliaments
- Charter officially proclaimed at Nice in December 2000 by the European Parliament, Council and Commission
- In December 2009, with the entry into force of the Lisbon Treaty, Charter was given binding legal effect equal to the Treaties

EU Charter – (iii) Titles

- Title I: **dignity**
- Title II: **freedoms**: freedom of expression and information (Article 11)
- Title III: **equality**: equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly, integration of persons with disabilities
- Title IV: **solidarity**
- Title V: **citizens' rights**
- Title VI: **justice**
- Title VII: **general provisions**

EU Charter – (iv) Scope

- Applies to the **European Institutions**, subject to the principle of subsidiarity, and may under **no circumstances extend the powers and tasks conferred on them by the Treaties**
- Applies to **EU M/S when they implement EU law**
- If M/S have not delegated powers to the EU, Charter has no effect
- If any of the rights correspond to rights guaranteed by ECHR, the meaning and scope of those rights is to be the same as defined by the convention, though EU law may provide for more extensive protection.
- Any of the rights derived from the common constitutional traditions of EU countries must be interpreted in accordance to those traditions

EU Charter – (v) Protocol No 30

- Protocol No 30 to the Treaties on the application of the Charter to Poland and the UK **restricts the interpretation of the Charter by the Court of Justice and the national courts of these two countries**, in particular regarding rights relating to solidarity (chapter IV)

EU Charter – (vi) Expression

- **Article 11**

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

EU Charter – (vii) Equality

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

(b) Article 19 TFEU (ex 13 TEC)

- Article 19 of the Treaty on the Functioning of the European Union (Ex Article 13 of the Treaty Establishing the European Community)
- **Article 19**
 1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, **may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**
 2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

(c) “Racial Equality Directive”

- **Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“Racial Equality Directive”)**
 - **Binding**
 - Requires domestic implementing measures
 - Can be relied upon in national courts by individuals only against State or agents of the state if certain conditions are met
 - Member States can be liable for non-implementation or imperfect transposition
 - **Prohibit discrimination by natural or legal persons in public and private sector**
 - Does not prevent M/S from introducing more favourable conditions under national law

(i) “Racial or Ethnic Origin”

- No definition of racial or ethnic origin
- RED expressly excludes nationality from concept of race or ethnicity
 - RED – like Employment Equality Directive – does NOT create any right to equal treatment for third country nationals (TCNs) in relation to conditions of entry and residence
 - RED states it does not cover “any treatment which arises from the legal status from third-country nationals”
 - But preamble states that TCNs shall be protected by the directive, except in relation to access to employment
 - Gender Equality Directive and Gender Goods and Services Directive do not exclude protection for TCNs
- Religion expressly protected as a ground under Employment Equality Directive
 - But RED is broader in scope

(ii) Concept of Discrimination

- **Article 2**
- **Direct Discrimination:** where one person is treated less favourably than another in a comparable situation on grounds of racial or ethnic origin
- **Indirect Discrimination:** where apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons unless it is objectively justified by a legitimate aim and means of achieving aim are appropriate and necessary
- **Harassment:** when unwanted conduct related to racial or ethnic origin takes place with purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment
- **Instruction to discriminate**

(ii) Material Scope

- **Article 3**
- Within **limits of powers conferred upon Community**, Directive shall apply to **all persons in public and private sectors** in relation to:
 - Access to employment, self-employment and occupation (including promotion)
 - Access to vocational guidance and training
 - Employment and working conditions, including dismissal and pay
 - Membership of workers', employers' or professional organisations
 - Social protection, including social security and health care
 - Social advantages
 - Education
 - Access to and supply of goods and services which are available to the public, including housing

(iii) Genuine + Determining Occupational Requirements

- **Article 4**
- Exception for genuine occupational requirements
- Employer may select a person for a particular post where, due to nature of work involved or context it is a “genuine and determining occupational requirement” that the person should have a characteristic related to racial or ethnic origin

(iv) Positive Action

- **Article 5**
- Principle of equal treatment does not prevent any Member State from **maintaining or adopting specific measures to prevent or compensate** for disadvantages linked to racial or ethnic origin
- Examples: training people; additional, planned targeted steps when seeking to recruit new employees, publicising posts in different ways in order to encourage members of such groups and support if necessary
- RED requires a higher level of protection – guaranteeing equal and effective protection if necessary by the adoption of positive action measures in response to situations of structural discrimination

(v) Minimum Requirements

- **Article 6**
- M/S should introduce provisions which are more favourable to principle of equal treatment
- But M/S should not reduce level of protection against discrimination

(vi) Remedies

- Article 7
 - judicial and/or administrative procedures for enforcement of obligations
 - Organisations with a legitimate interest may support individuals
- Article 8: reversal of burden of proof when de facto case (in civil proceedings)
- Article 8: protection from victimisation
- Article 10: dissemination of information
- Article 11: promote social dialogue to foster equal treatment through monitoring, collective agreements, codes of conduct, research and exchanges
- Article 12: dialogue with appropriate NGOs

(vii) Bodies for Promotion of Equal Treatment

- **Article 13**

Obligation on each M/S to designate a body to promote equal treatment to provide assistance to victims of discrimination, conduct independent surveys and studies, publish independent reports and make recommendations

(viii) Implementation

- **Article 14:** Any contrary laws, regulations, administrative provisions abolished
- **Article 15:** Sanctions include payment of compensation to victim, must be effective, proportionate and dissuasive
- **Article 16:** Implementation by 19 July 2003
- **Article 17:** M/S report to Commission by 19 July 2005 and every five years

(d) EU Council Framework Decision

- EU Framework Decision on combating racism and xenophobia (2008) under the criminal law defines racism and xenophobia to include violence or hatred directed against groups by reference to “race, colour, religion, descent or national or ethnic origin”
- Publicly – including via the media – inciting violence or hatred against a group of people or a member of such a group defined by reference to race, colour, religion, descent or other material should be punishable in the M/S by a maximum of sentence of 1-3 years in prisonment

Concluding Comments

- States should **give effect to the IHR treaties, ECHR and EU law** instruments guaranteeing rights to FoE and expression
- States should **have a domestic legal framework** for the protection of FoE and Equality
 - Clear permissible restrictions on FoE (ie provided by law, narrowly defined to serve a legitimate interest, be necessary in a democratic society)
 - Guarantees of equality before the law and equal protection of the law, right to non-discrimination on range of ground
- States should establish a **clear legal and policy framework** for combating discrimination in its various forms, including harassment, and for promoting equality in practice, including through freedom of expression
- **Accessible and effective remedies** (judicial and non-judicial) should be available.