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PREFACE

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Mario Fasani's approach to the legal issues, which arise from the notions of equality and non-discrimination, directly linked to that of freedom, follows a multidisciplinary one. This volume examines the main aspects of such a complex legal area. It begins by analysing the different aspects around the issues of equality and non-discrimination against the background of international law. The latter characterized by a multiplicity of sources of law and notions of equality, discrimination and freedom.

Although equality has been a powerful political ideal for many years, the problem of defining equality has been somewhat overlooked. In the twentieth century, the notion reached the status of an international legal basis. Through the years, the notion of equality has become more relevant. Nowadays, the juridical sphere takes systematically into account the importance of equality.

In this regard, the author rightly so looks at the European Union law. Equality and non-discrimination are prevalent concepts that cut across the legal spectrum of the European Union law. The notion of non-discrimination based on nationality and gender (e.g. the principle of equal pay for men and women), has evolved into the prohibitions of discrimination for a wide range of other social factors. In this manner, the notion of equality and non-discrimination has broadened the scope of action and application.

In a system in which the content of Article 2 of the Treaty on the European Union remains substantially vague – as it is rightly stressed in this book –, the principle of equality appears as a solid guiding principle of the European Union. The provisions on equality before the law, which belong to the constitutional traditions of the Member States, stand out, also thanks to the case law of the Court of Justice of the European Union. The latter has recognised equality and non-discrimination as key instruments for the protection of European values and fundamental rights.

The examination of the European directives on non-discrimination reveals a multiplicity of rules, differentiated from case to case, accompanied

by new anti-discrimination instruments, new types of prohibited grounds of discrimination and a long list of exceptions to pre-set rules. Anti-discrimination law in the years has developed and today it constitutes a solid legal pillar.

Also from a terminological viewpoint, the term “equality” is accompanied by that of “non-discrimination”. An explanation of this evolution is certainly given by the complexity of the social fabric. In a context in which society is increasingly multi-ethnic, multi-religious and multi-lingual, it seems not adequate to move into the field of equality by relying on a single approach. Since each situation is characterised by its own specificity and requires an accurate response, legislation intervenes not with a single general principle, but with a variety of rules and, if necessary, with due exceptions to the rule.

After all, one of the most challenging issues today is to eliminate discrimination without sacrificing diversity. Preserving identities and differences without causing discrimination and disadvantages to vulnerable groups is a task comparable to squaring the circle. It is well understood that any legal right takes new trajectories and approaches.

However, the numerous roads that the anti-discrimination law follows intersect frequently with tortuous paths that cross peoples affected by constant migration. This is a phenomenon that calls into question various sectors of the legal system, raising new questions, new needs for protection and reforms. All this pushes us to rethink the very foundations of human coexistence.

It is a fact in the history of humanity that people move, meet, interact more intensely, live together on the same territory, and learn from each other. Such a trajectory has effects on the economic interests and social cohesion, and inevitably on the legal system. For example, this was the case in the European Union through the Treaties and the rules of secondary legislation on non-discrimination based on the nationality of people who move from one country to another in search for jobs. In addition to this phenomenon, over time, in the European Union, as in various other countries in the world, there has been the migration of foreign citizens fleeing wars and persecution in search of a better future. Yet such a phenomenon is represented as a “social danger” and several national authorities require that this phenomenon be governed with instruments of “public order”.

The presence of a population that does not have the same origin, language, religion and ethnicity, on the other hand, poses new questions for inclusion in political and social life and requires adaptation and flexibility from the legal and political structures with a view to facing problems that are often unprecedented and have long remained unanswered.

In this context, the problem of racial discrimination, which was thought to belong to the past, returns to the present, even if in different forms but equally damaging the dignity of the human being.

Today, discrimination is the dark and problematic side of societies that are faced with the acceptance of the “diversity”. Faced with this phenomenon, the reactions (not only of private citizens) are sometimes irrational and need to be re-directed towards the positive remedies which should prevent the phenomena of intolerance, inhospitality, if not exclusion from community life.

Even in countries with a great democratic tradition and an ancient juridical civilization, therefore, the question of discrimination re-emerges under new and less noble clothes. In turn, this leads to the application of equality in law and practice. A political and economic system based on inequality offends all individuals. The individual interest and equality represents two sides of the same coin. By valuing equality and committing ourselves to the realization of equality through the law, the individual persons look at the possibility for everyone to live an autonomous life in the respect freedom. The path is difficult but the final goal is not impossible to achieve. In this sense, we must give credit to Fasani’s book for its positive accents, which look for a brighter legal future.

Although in the past, freedom and equality were considered competing principles, in today societies, defined as “post-modern”, freedom is understood as autonomy of choice and equality. In a nutshell, it is understood as non-discrimination. They feed each other and assume (or should assume) a leading role in any national legal system. The interaction between the principle of non-discrimination and freedom of choice should aim to protect diversity without producing inequalities. If the heart of the 21st century system is to highlight that the differences do not affect the legal world (thus preventing them from being an obstacle to individual autonomy) then the principle of non-discrimination takes on fundamental importance because it tends exactly to make all differences irrelevant before the law. In this perspective, non-discrimination becomes the cure of the legal order.

Autonomy of individual choices, as the qualifying element of the human person and his/her dignity, and neutrality, as the essential character of legislation, generate a trajectory towards the legal equality by diminishing (or neutralising) all the differences. In other words, the law proceeds towards equality understood as “indifference to differences”, that is, towards a way of understanding equality in which differences are removed in legal indifference.

INTRODUCTION

The notions of equality and non-discrimination have for decades been part of the international community's key principles. Enshrined in numerous international instruments – many of which have been adopted within the framework of the United Nations, while others have been adopted by specialized UN agencies such as the ILO, and still some others by regional organizations such as the Council of Europe, the Organization of American States and the African Union – these concepts are rooted in universal principles of human rights, fundamental freedoms and equality.

General provisions envisaging equality and prohibiting discrimination on the basis of particular grounds are contained in the Universal Declaration of Human Rights (UDHR, 1948) and the 1966 Covenants. The grounds enumerated in these instruments are race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. This is not considered a closed list, and a number of other grounds have been considered. With particular reference to discrimination in employment and occupation, specific provisions are contained in the ILO Convention on Equal Remuneration No. 100 (1951), the ILO Convention on Discrimination (Employment and Occupation) No. 111 (1958), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW, 1990), and the UN Convention on the Rights of Persons with Disabilities (CRPD, 2006).

At EU level, there is a considerable body of anti-discrimination law. The Treaty of Rome of 1957 required equal pay between men and women. In the 1970s, the Equal Pay Directive (1975) and the Equal Treatment Directive (1976) prohibited discrimination on grounds of gender in access to employment, vocational training and promotion, and working conditions. Other bases of discrimination (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation) were mentioned for the first time in the Amsterdam Treaty (1997). In the context of non-discrimination in the area of

employment, the Employment Equality Directive (2000/78/EC) introduced the prohibition of discrimination on the basis of sexual orientation, religion or belief, age and disability; while the Racial Equality Directive (2000/43/EC) introduced the prohibition of discrimination on the basis of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, as well as goods and services. In 2009, the Lisbon Treaty introduced a horizontal clause with a view to integrating the fight against discrimination into all EU policies and actions (Article 10 TFEU). In this area of the fight against discrimination, a special legislative procedure is to be used: the Council must act unanimously and after obtaining the European Parliament's consent. In addition to the above, mention should be made to the body of judge-made laws developed by the Court of Justice of the European Union (CJEU), known as the "general principles" of Community Law. According to the CJEU, these general principles would reflect the content of human rights protection found in national constitutions and human rights treaties, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights (ECHR, 1950).

CHAPTER 1

UN treaties on human rights

Human rights are rights inherent to all human beings, regardless of their nationality, origins, colour of the skin, gender, sexual orientation, age, language, religion, or any other status (principle of non-discrimination). Human rights are universal. They are inalienable, which means that they should not be taken away (except in specific circumstances as a result of a due process). Likewise, they are indivisible and interdependent, because one cannot fully enjoy a right without enjoying the others.

During the early years of the twentieth century, the protection of human rights had begun to develop as an issue of concern to the international community. Under the League of Nations established at the conclusion of the First World War, attempts were made to develop an international legal framework to protect minorities. Yet, it was only with the Second World War that the international community started to work systematically for the establishment of an international system of human rights protection.

The Charter of the United Nations of 1945 proclaims that the peoples of the Organization express their determination “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”.

According to Articles 1(2) and (3) of the Charter, the purposes of the United Nations are, inter alia, “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” and “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. While Article 2(1) expressly confirms that the “Organization is based on the principle of the sovereign equality of all its Members”, the principle of non-discrimination in the observance of human rights is reaffirmed in Articles 13(1)(b), 55(c) and

76(c). The Charter of the United Nations testifies to the fact that international peace and security depend to a large extent on “*universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion*” (Art. 55(c)).

After the adoption of the Charter of the United Nations, a significant body of international human rights law has been created through the United Nations. The main instruments that contain a prohibition on discrimination are: the International Covenant on Civil and Political Rights (ICCPR, 1966), the International Covenant on Economic Social and Cultural Rights (ICESCR, 1966), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965), the Convention on the Elimination of Discrimination Against Women (CEDAW, 1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989), the Convention on the Rights of Persons with Disabilities (CRPD, 2006).

Traditionally, human rights treaties have been open to membership only for States. However, as States cooperate more through inter-governmental organisations (IGOs), to which they delegate significant powers and responsibilities, there is a pressing need to make sure that IGOs also commit themselves to give effect to the human rights obligations of their Member States. The CRPD is the first UN level human rights treaty that is open to membership by regional integration organisations, and which the EU ratified in December 2010. The CRPD contains an extensive list of rights for persons with disabilities, aimed at securing equality in the enjoyment of their rights, as well as enforcing a range of obligations on the State to undertake positive measures. In addition, individual Member States are currently in the process of acceding to the UNCRPD in their own right, which will also impose obligations upon them directly. The UNCRPD is likely to become a reference point for interpreting both EU and ECtHR law relating to discrimination on the basis of disability.

CHAPTER 2

Selected Universal Legal Provisions Guaranteeing the Right to Equality before the Law and the Right to Non-discrimination

Summary: 2.1. Universal Declaration of Human Rights, 1948. – 2.2. International Covenant on Civil and Political Rights, 1966. – 2.3. International Covenant on Economic, Social and Cultural Rights, 1966. – 2.4. International Convention on the Elimination of All Forms of Racial Discrimination, 1965. – 2.5. Convention on the Rights of the Child, 1989. – 2.6. Convention on the Elimination of All Forms of Discrimination against Women, 1979. – 2.7. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981. – 2.8. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.

2.1. Universal Declaration of Human Rights, 1948

Following the prohibition of discrimination based on race, sex, language and religion in the Charter of the United Nations, the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly at its third session on 10 December 1948, became the next important step in the legal consolidation of the principle of equality before the law and the resultant prohibition of discrimination. Article 1 of the Universal Declaration proclaims that “*All human beings are born free and equal in dignity and rights*”, while, according to Article 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". With regard to the right to equality, Article 7 of the Universal Declaration stipulates that: *"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."* It is noteworthy that Article 2 of the Universal Declaration prohibits *"distinction[s] of any kind"* (emphasis added), which means that no differences at all can be legally tolerated. However, as will be seen below, such a restrictive interpretation has not been adopted by the international monitoring bodies.

2.2. International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights was adopted by the UN General Assembly in 1966, and entered into force on 23 March 1976.

The right to equality and freedom from discrimination is protected by various provisions of the International Covenant on Civil and Political Rights.¹

In Article 2(1) each State party: *"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 of the Covenant is the cornerstone of protection against discrimination. It reads: *"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"*. Contrary to Article 2(1), which is linked to the rights recognized in the Covenant, Article 26 provides *"an autonomous right"* of equality and *"prohibits discrimination in law"*

¹ On the question of non-discrimination, see General Comment No. 18 of the Human Rights Committee in UN doc. HRI/GEN/1/Rev.5, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, pp. 134-137 (hereinafter referred to as United Nations Compilation of General Comments).

or in fact in any field regulated and protected by public authorities”.²

Article 20(2) obliges States to prohibit, by law, any “*advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*”. Gender equality is emphasized in Article 3, according to which States parties “*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*”.³

Article 14(1) provides that “all persons shall be equal before the courts and tribunals”, an important guarantee which may in certain cases oblige States to provide legal aid in order, for instance, to ensure fair court proceedings for indigent persons. In addition, Article 14(3) stipulates that “*in the determination of any criminal charge against him, everyone shall be entitled ... in full equality*” to the minimum guarantees enumerated therein.

Article 25 guarantees the equal participation in public life of every citizen “*without any of the distinctions mentioned in Article 2 and without unreasonable restrictions*”.⁴

Article 27 of the Covenant provides express protection for ethnic, religious and linguistic minorities. According to Article 27, “*persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language*”.⁵

2.3. International Covenant on Economic, Social and Cultural Rights, 1966

The International Covenant on Economic, Social and Cultural Rights was adopted by the United Nations General Assembly in 1966, and entered into force on 3 January 1976.

Under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights the States 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*”. In line with

² Ibid., p. 136, para. 12.

³ Ibid., General Comment No. 28 (Equality of rights between men and women), pp. 168-174.

⁴ Ibid., General Comment No. 25 (Article 25), pp. 157-162.

⁵ Ibid., see also General Comment No. 23 (Article 27), pp. 147-150.

the terms of the International Covenant on Civil and Political Rights, the States which are parties to the International Covenant on Economic, Social and Cultural Rights also undertake, by virtue of Article 3, “*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*”.

The principle of non-discrimination is also contained in Article 7(a)(i), which guarantees “*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*”.

Article 7(c) of the Covenant secures the right to “*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*”.

2.4. International Convention on the Elimination of All Forms of Racial Discrimination, 1965

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the United Nations General Assembly on 21 December 1965 and entered into force on 4 January 1969. For the purposes of the International Convention on the Elimination of All Forms of Racial Discrimination, “*the term ‘racial discrimination’ shall mean*”, according to Article 1(1), “*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*”.

The Convention does not, however, “apply to distinctions, exclusions, restrictions or preferences made by a State Party ... between citizens and non-citizens” (Article 2), and nothing in the 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*” (Article 3). It is also noteworthy that the Convention is only applicable to discrimination that takes place in the “field of public life” and that it does not, in principle, extend to discrimination carried out in private.

The Convention regulates in some detail the obligations of States to eliminate racial discrimination and lists, in Article 5, the major civil, political, economic, social and cultural rights that must be enjoyed “*without distinction as to race, colour, or national or ethnic origin*”.

2.5. Convention on the Rights of the Child, 1989

The United Nations Convention on the Rights of the Child was adopted on 20 November 1989 and entered into force on 2 September 1990. It sets out the civil, political, economic, social, health and cultural rights of children.

Article 2(1) of the Convention provides that: *“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”*.

The term “disability” has been added with a view to eliminate any discrimination on this ground.

Under Article 2(2) of the Convention, States parties are required to 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 opinion, or beliefs of the child’s parents, legal guardians, or family members”*.

With regard to the child’s education, the States parties agree in Article 29(d) that it shall be directed, inter alia, to: *“(d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin”*.

Article 30 of the Convention on the Rights of the Child protects minority rights in terms that are similar to, but not identical with, Article 25 of the International Covenant on Civil and Political Rights.

It reads as follows: *“In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language”*.

2.6. Convention on the Elimination of All Forms of Discrimination against Women, 1979

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted on 18 December 1979 by the UN General Assembly and entered into force on 3 September 1981. It is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against wom-

en and sets up an agenda for national action to end such discrimination.

Article 1 describes “*discrimination against women*” as meaning: “*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*”.

The field of applicability of this Convention is wider than that of the International Convention on the Elimination of All Forms of Racial Discrimination, in that it also covers acts falling within the private sphere.

2.7. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981

The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief is a United Nations resolution, passed on November 25 1981. Article 1(1) guarantees to everyone “*the right to freedom of thought, conscience and religion*”, a right which “*shall include freedom to have a religion or whatever beliefs of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching*”. Article 1(2) provides that “*no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice*,” while Article 1(3) allows for limitations on the freedom “*to manifest one’s religion or belief*” on condition that such limitations “*are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others*”.

The right not to be subjected to discrimination “*by any State, institution, group of persons, or persons on the grounds of religion or other belief*” is laid down in Article 2(1) of the Declaration. For the purposes of the Declaration, Article 2(2) specifies that: “*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*”.

Since 1987, a Special Rapporteur appointed by the United Nations Commission on Human Rights has been examining acts in all parts of the world that are inconsistent with the provisions of the Declaration and has suggested remedial measures. It is noteworthy that the right to freedom of thought,

conscience and religion is also protected by Article 18 of the International Covenant on Civil and Political Rights, which, according to Article 4(2), can never in any circumstances be derogated from. For the States parties to the Covenant the provisions on discrimination are, of course, fully applicable also with regard to this freedom.

2.8. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities has been adopted by the UN General Assembly on 18 December 1992, by resolution No. 47/135. In the sixth preambular paragraph to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the General Assembly of the United Nations emphasizes: “*that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States*”.

The United Nations thus recognizes that a democratic constitutional order respectful of the rule of law and the rights of minorities plays a crucial role in furthering international peace and security.

Article 1(1) of the Declaration provides that “*States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity*”. To achieve these ends, they shall, according to Article 1(2), “*adopt appropriate legislative and other measures*”. Articles 2 and 3 give details of the rights of persons belonging to the protected minorities, while Articles 4 to 7 identify the measures that States are required to take in order to fulfil the objectives of the Declaration, either alone or in cooperation with each other.

Suffice it to mention by way of example that, according to Article 2(1) of the Declaration, “*Persons belonging to national or ethnic, religious and linguistic minorities ... have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination*”.

CHAPTER 3

Selected Regional Legal Provisions Guaranteeing the Right to Equality before the Law and the Right to Non-discrimination

Summary: 3.1. African Charter on Human and Peoples' Rights, 1981. – 3.2. African Charter on the Rights and Welfare of the Child, 1990. – 3.3. American Convention on Human Rights, 1969. – 3.4. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988. – 3.5. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994. – 3.6. Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999. – 3.7. The European Convention on Human Rights (ECHR). The European Social Charter, 1961, and the European Social Charter (revised), 1996. – 3.7.1. The unity and indivisibility of fundamental rights, including civil and political rights on the one hand and social and economic rights on the other hand, has been recognised since the adoption in 1948 of the United Nations Universal Declaration of Human Rights. – 3.7.2. The prohibition of discrimination under the European Convention on Human Rights, 1950.

Beginning with the adoption in Europe of the European Convention on Human Rights in 1950 and the European Social Charter in 1961, the trend to elaborate regional standards continued with the adoption of various other regional treaties such as the American Convention on Human Rights in 1969, the African Charter on Human and Peoples' Rights in 1981, the African Charter on the Rights and Welfare of the Child in 1990, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women in 1994, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in 1999. These regional instruments are of paramount importance, as they played a

central role for the recognition of basic human rights worldwide and, in addition, contributed significantly to the legal consolidation of the principle of non-discrimination and equality in international law.

3.1. African Charter on Human and Peoples' Rights, 1981

The adoption of the African Charter on Human and Peoples' Rights in 1981 was the beginning of a new era in the field of human rights in Africa. It entered into force on 21 October 1986.

Article 2 of the African Charter on Human and Peoples' Rights reads as follows: "*Every individual shall be entitled to the enjoyment of the rights and freedoms recognized 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 other status*".

Article 3 expressly states that: "*every individual shall be equal before the law*" and "*shall be entitled to equal protection of the law*" (Article 3(1) and (2)).

Under Article 18(3) of the Charter, States parties further undertake to ensure "*the elimination of every discrimination against women*". Considering that the African Charter also deals with the rights of peoples, it is logical that Article 19 stipulates that "*all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another*".

This list is not exhaustive. The Charter prohibits discrimination based on "*other status*", which would include discrimination based on sexual orientation, age or disability. This part of the Charter also means that the authorities must offer the same protection to everyone. It is therefore illegal for the police or courts to treat people differently because, for instance, they have different ethnic backgrounds or religious views, or because they are rich or poor.¹

3.2. African Charter on the Rights and Welfare of the Child, 1990

The African Charter on the Rights and Welfare of the Child was adopted

¹ *A Guide to the African Charter on Human and Peoples' Rights*, Amnesty International Publications, London, 2006.

in 1990, and entered into force on 29 November 1999. The Charter spells out a long list of rights of the child and establishes an African Committee of Experts on the Rights and Welfare of the Child.

A general prohibition of discrimination is contained in Article 3 of the African Charter on the Rights and Welfare of the Child, according to which: *“Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, relation, political or other opinion, national and social origin, fortune, birth or other status”*.

In addition, under Article 21(1) of the Charter, the States are required to take *“all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular ... those customs and practices discriminatory to the child on the grounds of sex or other status”*.

3.3. American Convention on Human Rights, 1969

The American Convention on Human Rights, 1969, also commonly called the Pact of San José, Costa Rica, since it was adopted in that capital city, entered into force on 18 July 1978.

Under Article 1 of the American Convention on Human Rights, the States *“undertake to respect the rights and freedoms recognized”* in the treaty *“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, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”*.

Contrary to the International Covenants, the term *“property”* is not contained in Article 1 of the American Convention. However, the term *“economic status”* would seem to cover a wider range of situations than *“property”*.

The notion of *“equality”* is found in Article 8(2) of the Convention, according to which every person accused of a criminal offence is entitled *“with full equality”* to certain minimum guarantees during the court proceedings against him or her. Lastly, Article 24 stipulates that *“all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law”*.

3.4. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also called the “Protocol of San Salvador”, adds a number of rights to the original Convention such as the right to work, social security, health, food and education, as well as the right to special protection of the elderly and the handicapped.

The obligation of non-discrimination is contained in Article 3, according to which the States parties “undertake to guarantee the exercise of the rights set forth” in the Protocol “without discrimination of any kind for reasons related to race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition”.

3.5. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, also called “Convention of Belém do Pará”, was adopted in 1994 by the General Assembly of the Organization of the American States (OAS) and entered into force on 5 March 1995. This Convention is the only international treaty that exclusively aims at the elimination of gender-based violence in both the public and private spheres, and specifies in Article 6(a) and (b) that *“the right of every woman to be free from violence, includes, among others ... the right of women to be free from all forms of discrimination [and] the right of women to be valued and educated free of stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination”*.

Articles 7 and 8 of the Convention give details of the duties of the States to prevent, punish and eradicate all forms of violence against women. When adopting the required measures, the States shall, moreover, according to Article 9, *“take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar considerations shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom”*. This Convention is of particular interest in that it is an international treaty that explicitly addresses the serious problem of violence against women.

3.6. Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999

The objectives of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities are, as stated in Article II, “to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society”. For the purpose of the Convention, the term “discrimination against persons with disabilities” “means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms” (Article I(2)(a)). However, “*a distinction or preference adopted by a state party to promote the social integration or personal development of persons with disabilities does not constitute discrimination provided that the distinction or preference does not in itself limit the right of persons with disabilities to equality and that individuals with disabilities are not forced to accept such distinction or preference*” (Article I (2)(b)).

3.7. The European Convention on Human Rights (ECHR). The European Social Charter, 1961, and the European Social Charter (revised), 1996

The unity and indivisibility of fundamental rights, including civil and political rights on the one hand and social and economic rights on the other hand, has been recognised since the adoption in 1948 of the United Nations Universal Declaration of Human Rights.

When it came to giving binding legal force to the rights in the Universal Declaration, *the Council of Europe* adopted two separate treaties, at an interval of about 10 years:

- The *European Convention on Human Rights (ECHR)* (“the Convention”), guaranteeing civil and political rights, adopted in 1950;
- The *European Social Charter* (1961), designed in its revised version, 1996, as “the Charter”, guaranteeing social and economic rights.

As a result, the development of the normative systems relating to these

rights has followed a different time and brought to some substantial differences in the relevant monitoring mechanisms.

Despite these differences, the above-mentioned systems are complementary and interdependent and many of the rights protected under the Convention and its Protocols are also regulated, sometimes with greater detail, under the 1961 Charter, its Additional Protocol of 1988 and the Revised Charter, adopted in 1996.

This is the case as regards trade unions rights, which are generically protected as freedom of assembly and association under Article 11 of the Convention, and more specifically through positive obligations to be fulfilled under Articles 5 and 6 of the 1961 Charter and Article 28 of the Revised Charter.

The rights to life and protection from inhuman or degrading treatment, covered by Articles 2 and 3 of the Convention are also taken into account in several provisions of the 1961 Charter and Revised Charter, dealing for example with concrete measures to be implemented in the working place to preserve the life and health of workers, including maternity or young or disabled workers (Articles 3, 7, 8, 15), the protection of women against domestic violence (Article 16), the right to emergency social and medical assistance (Article 13), as well as in relation to sexual or moral harassment (Article 26 of the Revised Charter) and any other right dealing with the protection of human dignity (Articles 26, 30, 31 of the Revised Charter).

The protection of health and the environment, which under the case-law developed under the Convention has been covered mainly under Articles 2, 3 and 8, has a specific protection under Article 11 of the 1961 Charter and Revised Charter. In the same framework, Article 13 sets criteria for the concrete measures needed to ensure an effective medical assistance.

The prohibition of slavery and forced labour, set forth by Article 4 of the Convention, is also covered by Article 1 of the 1961 Charter and Revised Charter. The procedural rights relating to liberty and security, to fair trial and to the lawfulness of sanctions, covered by Articles 5, 6 and 7 of the Convention, are taken into account by Article 17 as regards the treatment of young offenders and by Article 19 as regards the expulsion of migrant workers. More generally, the requirements of a fair trial and of the effectiveness of remedies, set forth by Articles 6 and 13 of the Convention, are also applicable to any provision of the Charter's normative system where the availability and effectiveness of remedies is monitored.

Several aspects falling under Article 8 of the Convention (respect for private and family life) form the object of specific rights and concrete positive obligations under the 1961 Charter and Revised Charter, for example as regards the workers' right to privacy under Article 1, the status of children

born outside wedlock under Article 17, or the placement of children under Article 16.

The right to education, set forth by Article 2 of Protocol No. 2 to the Convention is developed in details in Articles 7, 9, 10, 15, 19 of the 1961 Charter and Revised Charter.

Certain aspects relating to the rights covered by Articles 9 and 10 of the Convention (freedom of thought, conscience and religion, freedom of expression) are taken into account in the Charter's normative system for example with regard to the right to be informed on health risks, workers' rights to information or migrant workers' rights to education in their own language (1961 Charter, Additional Protocol to the 1961 Charter and Revised Charter).

While the Convention protects under its Article 12 the right to marry and under Article 5, Protocol No. 7 the equality between spouses, the rights and obligations of spouses are covered by Article 16 of the 1961 Charter and Revised Charter.

Certain rights related to freedom of movement and expulsion from the territory of a State (Articles 2, 3 and 4 of Protocol No. 4 to the Convention, Article 1 of Protocol No. 7 to the Convention) are covered by Articles 18 and 19 of the 1961 Charter and Revised Charter.

The prohibition of discrimination is set forth by Article 14 of the Convention and in its Protocol No. 12. In this respect, specific provisions of the 1961 Charter and Revised Charter explicit protection against discrimination based on property status (Article 13), disability (Article 15), nationality (Article 19), sex and age (Article 1 of the Additional Protocol of 1988 to the 1961 Charter and Article 20 of the Revised Charter), as well as family status (Article 27 of the Revised Charter). The prohibition of discrimination is specifically ensured by virtue of Article E of the Revised Charter.

Some further connections exist in respect of the right to protection of property, covered by Article 1 of Protocol No. 1 to the Convention and by many provisions of the 1961 Charter and Revised Charter dealing for example with salary, benefits, etc. (Articles 4 and 12 of the 1961 and Revised Charter), as well as with housing evictions (Article 31 of the Revised Charter).

The connections between the Convention and Charter normative systems are taken into account by the European Court of Human Rights and the European Committee of Social Rights in their assessment of the cases submitted to them and the criteria applied are very similar: both the Court and the Committee assess the implementation in practice of the protected rights and check that the restrictions are provided by law and necessary in a democratic society.

Through their ever-developing case-law, the European Court of Human Rights and the European Committee of Social Rights ensure that all human rights – be them civil and political rights or social and economic rights – are effectively protected in a complementary and progressive way.

3.7.1. *The prohibition of discrimination under the European Convention on Human Rights, 1950*

The *Council of Europe*² Member States adopted the Convention for the Protection of Human Rights and Fundamental Freedoms, calling on the ECHR to help achieve these aims. The ECHR was the first of the modern human rights treaties drawing from the United Nations Universal Declaration of Human Rights. It sets out a legally binding obligation for its members to guarantee a list of human rights to everyone within their jurisdiction, not just citizens. The implementation of the ECHR is reviewed by the European Court of Human Rights (ECtHR) (originally assisted by a Commission), which hears cases brought against Member States. The Council of Europe currently has 47 members and any State wishing to join must also accede to the ECHR.

The ECHR has been altered and added to since its inception in 1950 through what are known as ‘Protocols’. The most significant procedural change to the ECHR was Protocol 11 (1994), which turned the ECtHR into a permanent and full-time body, and abolished the Commission. This Protocol was designed to help the ECHR mechanisms cope with the growth in cases that would come from States in the east of Europe joining the Council of Europe after the fall of the Berlin Wall and the break-up of the former Soviet Union.

The ECHR differs from the other general human rights treaties in that it does not contain an independent prohibition on discrimination but only a prohibition that is linked to the enjoyment of the rights and freedoms guaranteed by the Convention and its Protocols. This means that allegations of discrimination that are not connected to the exercise of these rights and freedoms fall outside the competence of the European Court of Human Rights.

The prohibition on discrimination is guaranteed by Article 14 of the ECHR, which guarantees equal treatment in the enjoyment of the other rights set down in the Convention.

² The *Council of Europe* is an inter-governmental organisation that originally came together after the II World War with the aim of promoting, among other things, the rule of law, democracy, human rights and social development (see Preamble and Article 1 of the Statute of the Council of Europe).

Article 14 reads: “*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*”.

It is interesting to note that the prohibition of discrimination in Article 14 covers “association with a national minority”, which is not to be found *expressis verbis* in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights, Article 1 of the American Convention on Human Rights or Article 2 of the African Charter on Human and Peoples’ Rights. However, the latter provision, as seen above, uses the term “ethnic group”, which is of more limited scope than “minority”.

The member States of the Council of Europe have, however, taken important steps to remedy the above-mentioned lacuna in the Convention: on 4 November 2000, the fiftieth anniversary of the adoption of the Convention itself, they adopted Protocol No. 12 to the European Convention, which contains the following general prohibition of discrimination: “1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1”.

Protocol 12 (2000) to the ECHR, not yet ratified by all EU Member States,³ expands the scope of the prohibition of discrimination by guaranteeing equal treatment in the “enjoyment of any right set forth by the law” (not only to the rights guaranteed by the Convention) and “by any public authority”.

The commentary provided on the meaning of these terms in the Explanatory Report of Protocol No. 12 states that Article 1 of Protocol No. 12 relates to discrimination:

- 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);

³ For the actual number of EU Member States that ratified Protocol 12, see: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=diZ188wZ.

- iv by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).⁴

The Explanatory Report of Protocol No. 12 further states that, while that Protocol principally protects individuals against discrimination from the state, it will also apply to those relationships between private persons, which should normally be regulated by the state. These may include, ‘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’⁶⁶ Broadly speaking, Protocol No. 12 will prohibit discrimination outside purely personal contexts, where individuals exercise functions placing them in a position to decide on how publicly available goods and services are offered.

The principle of non-discrimination is a governing principle in a number of the Council of Europe documents. Importantly, the 1996 version of the European Social Charter includes both a right to equal opportunities and equal treatment in matters of employment and occupation, protecting against discrimination on the grounds of sex.⁵ Additional protection against discrimination can be witnessed in the Framework Convention for the Protection of National Minorities,⁶ in the *Council of Europe* Convention on Action Against Trafficking in Human Beings,⁷ and in the *Council of Europe* Convention on the Access to Official Documents. There is also protection against the promotion of discrimination in the Additional Protocol to the Convention on Cybercrime. The issue of non-discrimination has clearly been influential in the shaping of the legislative documents produced by the *Council of Europe* and is seen as a fundamental freedom that needs to be protected.⁸

⁴ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), Explanatory Report, para. 22.

⁵ See Article 20 and Article E in Part V of the European Social Charter.

⁶ See: Articles 4, 6(2) and 9 in the Framework Convention for the Protection of National Minorities.

⁷ See: Article 2(1) in the CoE Convention on Action Against Trafficking in Human Beings.

⁸ See, Handbook on European non-discrimination law, European Union Agency for Fundamental Rights, 2018.