Article 20

Article 20
Equality Before the Law
Everyone is equal before the law.

Text of Explanatory Note on Article 20

This Article corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law (judgment of 13 November 1984, Case 283/83 *Racke* [1984] ECR 3791, judgment of 17 April 1997, Case C-15/95 *EARL* [1997] ECR I-1961, and judgment of 13 April 2000, Case C-292/97 *Karlsson* [2000] ECR 2737).

Select Bibliography

There are few examples of an in-depth examination of Article 20 in the existing academic literature. There are, though, many publications that contain analysis of the general principle of equal treatment found in Article 20. Some examples include the following.

A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (London, Sweet & Maxwell, 1997).

E Ellis, *EU Anti-Discrimination Law* (Oxford, Oxford University Press, 2005).

G More, 'The Principle of Equal Treatment: from Market Unifier to Fundamental Right' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999) 517.

L Waddington, 'The expanding role of the equality principle in European Union law' (2003/04) Policy Papers (Series on Constitutional Reform of the EU) (Florence, European University Institute, 2003) 11.

J Wouters, 'Constitutional Limits of Differentiation: the Principle of Equality' in B de Witte, D Hanf, and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Antwerp, Intersensia, 2001) 301.

A. Field of Application of Article 20

Although Article 20 is one of the most succinct provisions in the Charter, its field of application is amongst the broadest. By proclaiming 'everyone' to be equal before the law, Article 20 potentially allows anyone to mount a challenge to any difference in treatment that arises in the activities of the Union's institutions and other bodies, or within EU legislation and national implementing measures. Highly diverse areas of law can be touched by the principle of equality, and this is reflected in the existing case law of the Court of Justice on the general principle of equal treatment. Frequently, this case law concerns the differences of treatment that are inherent in the distribution of scarce **20.01**

social goods. A typical example is *Karlsson and Others*,[1] which is cited in the explanations attached to Article 20. This case concerned three farmers in Sweden who were subject to milk quotas following the accession of Sweden to the EU. Mr Torarp had his milk quota withdrawn when it was discovered that he had ceased keeping milk cows, due to an accident he had suffered. His application for a new milk quota was denied, because there was a requirement to be continuously engaged in production. The difference in treatment here was between those who had continuously produced milk and those who had not. In a nuanced decision, the Court held that it was not, per se, contrary to the principle of equal treatment to require continuous production, because this prevented speculative acquisition of milk quotas with a view to selling the business (including the quota) to someone else.[2] Evidently, public bodies are continuously making distributive decisions in areas such as employment (eg appointment, promotion, dismissal), social welfare (eg granting benefits), and healthcare (eg access to treatment). Even where the activity does not involve distributive choices, inequalities can arise in the operation of the law. EU criminal law is an obvious area where an individual might claim that her selection to be subjected to a police or judicial process reflected an unjustified difference of treatment.

20.02 Given the breadth of application of Article 20, it is not specifically connected to certain pieces of EU legislation. There is, of course, an obvious resonance between Article 20 and EU anti-discrimination legislation. As discussed below, this legislation seems to be even more closely linked to Articles 21 to 26 of the Charter. Nevertheless, Article 20 is not unlimited in its field of application, and it is circumscribed by Article 51 of the Charter. A difference of treatment without any apparent link to the scope of EU law will fall outside Article 20. An illustration is provided in *Ministerul Justiţiei şi Libertăţilor Cetăţeneşti v Agafiţei and Others*.[3] The case concerned differences in treatment between certain types of public prosecutors that had consequences for their salaries. The Court of Justice described this as a difference of treatment based on socio-professional category, and rejected the preliminary reference as inadmissible. While the case did not concern the applicability of Article 20, it underscores the obvious point that there must be some connection between the difference of treatment and the scope of EU law, if the latter is to be engaged.

B. Interrelationship of Article 20 with Other Provisions of the Charter

20.03 As discussed above, issues relating to unequal treatment are likely to intersect with a wide range of other rights. A typical scenario is where a claimant might allege a breach of another Charter provision in combination with a claim of discrimination due to the nature of that breach. For example, *Kamberaj* concerned the restriction of housing

[1] Case C-292/97 *Karlsson* [2000] ECR 2737.
[2] Ibid [57].
[3] Case C-310/10 *Ministerul Justiției și Libertăților Cetățenești v Agafiței and Others* (Judgment of 7 July 2011).

benefits for third country nationals.[4] The referring court queried whether this was compatible with the rights to social security and social assistance found in Article 34 in combination with Article 21 on the right to non-discrimination. While Article 20 was not raised, it offers an example of the way in which equality rights interrelate with other provisions of the Charter.

20.04 The lack of citation of Article 20 in *Kamberaj* brings to the fore the question of its relationship to Article 21, as well as the other provisions located in the equality chapter of the Charter. Whereas Article 20 enounces a universalistic claim that 'everyone is equal before the law', Article 21 prohibits 'any discrimination based on any ground'. This is accompanied by a non-exhaustive list of examples of prohibited grounds, such as sex or ethnic origin. Given that Article 21 is non-exhaustive in its prohibition of discrimination, this leaves considerable ambiguity over whether there is a distinction in the ambit or meaning of Articles 20 and 21.

20.05 To date, the greatest focus of litigation and academic literature has been Article 21. This is unsurprising. Article 21 clearly echoes Article 14 of the European Convention on Human Rights (ECHR) and the well-established body of Strasbourg case law under that provision. Moreover, Article 21 is directly connected to EU anti-discrimination legislation, namely the various Directives on discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.[5] As a consequence, Article 21 has been invoked in high-profile litigation surrounding the interpretation of those Directives.[6] In contrast, there has been less attention to the role to be played by Article 20. It is typically not cited in cases arising under EU anti-discrimination legislation.

20.06 It seems artificial to construct a strict boundary between Articles 20 and 21. Whereas the former sets out a general principle of equal treatment with wide-ranging application, the latter applies this in specific situations. In this view, Article 21 emerges as a type of *lex specialis* in contrast to the *lex generalis* found in Article 20. The distinction lies in the type of differences in treatment that each covers. As discussed above, Article 20 potentially applies to any situation where the law differentiates between categories in its application. This encompasses categories that are transient in nature with no wider social meaning, such as the distinction between those who were continuously involved in milk production and those who had discontinued milk production. Article 21 is more specifically focused upon important personal characteristics that often give rise to inequalities across different aspects of social life, such as employment, education, housing, healthcare, or access to services. Many of the characteristics mentioned in Article 21 are linked to well-known sources of social prejudice where there is a history of stigma and disadvantage. While the characteristics found in Article 21 are not all immutable in nature, they are often intrinsic to personal identity, such as religion or sexual orientation. Nevertheless, it must be acknowledged that this way of distinguishing between Articles 20 and 21 remains troubled by ambiguities. In particular, 'property' is included as a prohibited ground of discrimination in Article 21. Yet property is a much less

[4] Case C-571/10 *Kamberaj v IPES and Others* (Judgment of 24 April 2012).

[5] For an overview, see E Ellis, *EU Anti-Discrimination Law* (Oxford, Oxford University Press, 2005); C Barnard, *EU Employment Law,* 4th edn (Oxford, Oxford University Press, 2012).

[6] Eg Case C-555/07 *Kücükdeveci v Swedex GmbH & Co KG* (Judgment of 19 January 2010); Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* (Judgment of 1 March 2011).

stable feature of personal identity; individuals acquire (and lose) property throughout their lives.

20.07 The significance of distinguishing between Articles 20 and 21 only arises if there are different meanings attached to each provision. One possible explanation is that Article 21 identifies certain grounds of discrimination as particularly suspect and hence requiring a heightened level of judicial scrutiny in comparison to the general principle of equal treatment in Article 20. This dichotomy can be likened to the analysis of age discrimination by Advocate-General Sharpston. She has argued that irrational distinctions based on age were always captured by the general principle of equal treatment from the outset of Community law. Changed social attitudes led to a subsequent transition where distinctions based on age moved from 'unthinking acceptance to focussed examination'.[7] Accepting this dichotomy implies that some types of distinction are not caught by Article 21. This interpretation runs up against the apparently non-exhaustive list of prohibited grounds of discrimination. An interesting parallel can be found in the approach of the European Court of Human Rights (ECtHR) to its reading of Article 14 ECHR. While Article 14 is also non-exhaustive in its enumeration of prohibited discrimination grounds, the Strasbourg Court has placed limits on its ambit:

> Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or 'status', by which persons or groups of persons are distinguishable from one another.[8]

20.08 If this interpretation were applied to Article 21, then arguably it would assist in identifying a zone where Article 20 applies, but Article 21 does not. To continue the original example, it seems unlikely that ad hoc distinctions between different types of milk producer would cross the threshold test created by the Strasbourg Court. Such distinctions would fall into the ambit of Article 20, but not Article 21.

C. Sources of Article 20 Rights

I. ECHR

20.09 There are connections between Article 20 and Article 14 ECHR. The Strasbourg Court has adopted a broad definition of discrimination that is similar in nature to the formulation of the general principle of equal treatment adopted by the Court of Justice (discussed further in section D). As mentioned in the preceding section, it may be more appropriate to view Article 14 ECHR as paralleling Article 21 of the Charter. This view is reinforced by the Explanations attached to the Charter, which expressly link Article 14 ECHR to Article 21, but not Article 20.

20.10 Article 14 ECHR is now accompanied by Protocol 12, which created a free-standing general prohibition of discrimination (whereas Article 14 requires a connection between

[7] Case C-427/06, *Bartsch v Bosch und Siemens Hausgeräte Altersfürsorge GmbH* [2008] ECR I-7245 [58], Opinion of Advocate-General Sharpston. See also Case C-227/04 P *Lindorfer v Council* [2007] ECR I-6767 [58], Opinion of Advocate-General Sharpston.

[8] *Kiyutin v Russia* App no 2700/10 (10 March 2011) [56].

the alleged discrimination and another provision of the ECHR). Although Protocol 12 is similar in language to Article 14 ECHR, its preamble refers to 'the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law'. This is very similar to the language found in Article 20 of the Charter, although it should be noted that the Strasbourg Court has confirmed that the meaning of discrimination under Protocol 12 is identical to that under Article 14 ECHR.[9]

II. UN Treaties

20.11 Equality before the law is a principle contained, in varying forms, within all the principal UN human rights treaties. Space does not permit a detailed analysis of each, but they draw inspiration from Article 7 of the Universal Declaration of Human Rights: 'all are equal before the law and are entitled without any discrimination to equal protection of the law'. This sentiment is reflected in the International Covenant on Civil and Political Rights[10] and the International Covenant on Economic, Social and Cultural Rights.[11] A commitment to equality before the law can also be found within the specialised treaties on equality and discrimination.[12]

III. Council of Europe Treaties

20.12 As with the UN treaties, there are a variety of Council of Europe instruments that include a commitment to equality before the law. This is stated expressly within the Framework Convention on National Minorities: 'the Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law'.[13] The Revised European Social Charter contains a horizontal clause prohibiting discrimination in 'the enjoyment of the rights set forth in this Charter'.[14]

IV. Other Sources

20.13 While there are an array of international instruments that could have been cited as inspirations for Article 20, in fact the Explanations attached to the Charter refer only to two sources: national constitutions and the general principles case-law of the Court of Justice.

20.14 The Explanations proclaim that equality before the law is 'a principle of law which is included in all European constitutions'. For those with written constitutions, it is

[9] *Sejdic and Finic v Bosnia and Herzegovina* [GC] App nos 27996/06 and 34836/06 (22 December 2009) [55].
[10] Specifically in Art 26, but also elsewhere, eg Art 14(1).
[11] Art 2(2).
[12] Art 5, International Convention on the Elimination of All Forms of Racial Discrimination; Art 2, Convention on the Elimination of All Forms of Discrimination Against Women; Art 5(1), Convention on the Rights of Persons with Disabilities.
[13] Art 4(1).
[14] Art E.

true that equality clauses are common, albeit expressed in slightly different terms. The wording found in Article 20 of the Charter approximates closely to Article 3(1) of the German Constitution. Notably, some constitutions only declare 'citizens' to be equal before the law,[15] in contrast to the universal language ('everyone') found in the Charter. In some, qualification of the equality principle is only implicit, while in others potential restrictions are more overt. For example, Article 1 of the Dutch Constitution states that 'all persons in the Netherlands shall be treated equally in equal circumstances'.[16] A textual comparison of constitutional equality clauses is, though, merely a superficial exercise; the essence of what these mean in each national context demands a more detailed investigation of national constitutional law. It is, though, rare for the Court of Justice to engage in detailed examination of national constitutional case-law relating to the principle of equality.

20.15 Given that equality before the law is a common constitutional tradition, it is unsurprising that this is firmly embedded within the case law of the Court of Justice on the general principles of EU law. Many cases have cited the existence of a general principle of equal treatment, which has been applied across a broad spectrum of EU law.[17] In a variety of cases, the Court and its Advocates-General have confirmed that the general principle of equal treatment is now enshrined in Article 20 of the Charter.[18] In this respect, the main message emerging from the Court to date seems to be one of continuity; Article 20 represents a crystallisation of the unwritten general principle of equal treatment. So although there are other points of reference, such as international treaties or national constitutions, the predominant influence appears to be the Court's own well-worn case law on the general principle of equal treatment.

D. Analysis

I. General Remarks

20.16 From the above discussion, it can be seen that 'equality before the law' is a norm that commands widespread support in national and international legal instruments, as well as being a transversal principle that can be applied across many different fields of law. While the consensus surrounding the core idea facilitates its broad applicability, there is a lingering fuzziness about how the principle should be applied in a specific case. The remainder of this section focuses on fleshing out the meaning attached the principle.

---

[15] Eg Art 3, Constitution of the Italian Republic; Art 40(1), Constitution of Ireland.

[16] Translation of the Constitution of the Kingdom of the Netherlands 2002 published by the Ministry of the Interior and Kingdom Relations: http://legislationline.org/documents/section/constitutions.

[17] G More, 'The Principle of Equal Treatment: from Market Unifier to Fundamental Right' in P Craig and G de Búrca (eds), *The Evolution of EU law* (Oxford, Oxford University Press, 1999) 517.

[18] Eg Case C-21/10 *Nagy v Mezgazzdasági és Vidékfejlesztési Hivatal* (Judgment of 21 July 2011) [47]; Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* (Judgment of 14 September 2010) [54]; Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann von Wien* (Judgment of 22 December 2010) [89]; Case C-566/10 P *Italy v Commission* (21 June 2012) [89] Opinion of Advocate-General Kokott; Case C-174/11 *Finanzamt Steglitz v Zimmerman* (19 July 2012) [60] Opinion of Advocate-General Mazák.

II. Scope of Application

20.17 Article 20 provides that 'everyone' is equal before the law. In terms of personal scope, this clearly covers differences in treatment between natural persons. For example, in *Zoi Chatzi*,[19] the Court of Justice invoked Article 20 when considering the rules surrounding parental leave entitlement in respect of parents of twins compared with parents whose children are not born simultaneously. It appears from the case law that the principle can be applied to differences of treatment between persons in their professional capacity or legal persons. In *Akzo Nobel Chemicals*,[20] the Court cites Article 20 in relation to a distinction in the application of legal professional privilege between correspondence with in-house lawyers and that with external lawyers. Article 20 has also been applied to differences in the procedures applicable to different types of farmers with regard to awarding public funding.[21] Advocate-General Mazák relied upon Article 20 in a case concerning the criteria applied in Germany for VAT exemption, where this distinguished between different types of provider of out-patient care.[22] Admittedly, none of these cases consider purely corporate organisations and in each identifiable natural persons could be identified. This is slightly different to some earlier cases under the general principle of equal treatment; for example, a challenge from the European Low Fares Airline Association to the rules on compensating passengers for delay or cancellation of flights.[23] Nevertheless, the existing cases do not suggest that legal persons cannot invoke Article 20. In contrast, the use of the word 'everyone' in Article 20 would seem to be a stumbling block to disputes that purely related to differences in the treatment of goods or services. Such cases are not unusual in EU agricultural law or EU internal market law,[24] although even here, Article 20 might be relevant insofar as any distinction impacted upon the business interests of legal persons.[25]

20.18 Another issue relating to the scope of application concerns the possibility for Member States to invoke Article 20 vis-à-vis the EU institutions and other Member States. Wouters notes that although this issue has rarely reached the Court of Justice, sovereign equality between states is a general principle of international law and it can be seen in the constitutional architecture of the Union (such as the representation of all states in the key EU institutions).[26] This notion is particularly salient in the light of the financial crisis, which has created new relationships of dependence for those states that have had recourse to EU financial assistance. In a case pending before the Court of Justice, Advocate-General Kokott was disposed to apply Article 20 in a similar context.[27] The

[19] Case C-149/10 *Zoi Chatzi v Ipourgos Ikonomikon* (Judgment of 16 September 2010) [63].
[20] *Akzo Nobel Chemicals* (n 18) [54].
[21] *Nagy* (n 18) [47].
[22] *Zimmerman* (n 18) [60].
[23] Case C-344/04 *R (on the application of International Air Transport Association and European Low Fares Airline Association) v Department for Transport* [2006] ECR I-403. The airlines argued that it was contrary to equal treatment to apply these rules only to the airline sector and not to other modes of transport; this was rejected by the Court of Justice.
[24] G de Búrca, 'Unpacking the Concept of Discrimination in EC and International Trade Law' in C Barnard and J Scott (eds), *The Law of the Single Market* (Oxford, Hart Publishing, 2002) 183.
[25] Eg Case 114/76 *Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & Co KG* [1977] ECR 1211.
[26] J Wouters, 'Constitutional Limits of Differentiation: the Principle of Equality' in B de Witte, D Hanf, and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Antwerp, Intersentia, 2001) 301, 315.
[27] Case C-566/10 P *Italy v Commission* (Opinion of 21 June 2012).

case concerned the publication of recruitment notices on behalf of the Commission where there was a requirement to have a thorough knowledge of one of the EU official languages *and* satisfactory knowledge of either English, French or German. Italy argued that the requirement relating to knowledge of these three languages breached the principle of multilingualism, reflected in Article 22 of the Charter. Significantly, Advocate-General Kokott took the view that this had to be read 'in conjunction' with the principle of equal treatment found in Article 20.[28] While 'equal opportunity' militated in favour of using all EU official languages, this could be constrained by the need for 'efficient internal communications'.[29] In that regard, she argued that English, French and German were sufficiently different from other languages because of their widespread usage as second languages, and this meant that treating them differently was not contrary to the principle of equal treatment. From the perspective of Article 20, this case suggests that 'equality before the law' can be applied in respect of issues that pertain to the equality of Member States within the EU institutional system.

III. Specific Provisions

20.19 Advocate-General Ruiz-Jarabo described 'equality before the law' as an 'abstract concept'.[30] This reflects the indeterminacy of the norm and Westen's famous critique of the 'empty idea of equality'.[31] Equality is traditionally viewed as a relational concept; this assumes that whether an individual, or a group, is being treated equally can only be assessed by looking at how others are treated. Yet the fact that others may be receiving different treatment does not, in itself, indicate a violation of the principle of equality. If, for example, the state provides financial assistance to disabled people in order to help in meeting additional costs relating to travelling, not providing such assistance to non-disabled persons would not, prima facie, breach the principle of equality before the law. On the other hand, if the state grants a mobility allowance to wheelchair users but not to those who are visually impaired, then there might be a breach of the principle as arguably visually impaired persons may also incur obstacles that lead to additional travelling costs. Trying to unravel the knotty question of when persons should be treated in the same way or differently lies at the heart of the equality principle.

20.20 Through its prodigious case-law on the general principle of equal treatment, the Court of Justice has formulated a consistent definition of this concept. In 2007, it used the same definition when considering the meaning of equality under Article 20 of the Charter:

> The principle of equality and non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[32]

---

[28] Ibid [88].

[29] Ibid [93]–[94].

[30] Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3672 [88] (Opinion of 12 September 2006).

[31] P Westen, 'The Empty Idea of Equality' (1982–83) 95 *Harvard Law Review* 537.

[32] Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3672 [56]. See also ibid [46], where the Court cites Art 20 of the Charter.

20.21 This expression is often described as reflecting the Aristotelian idea that 'likes should be treated alike'.[33] It is criticised for its tendency to lead to an emphasis on formal equality and the sameness of treatment, without tackling the root causes of inequality.[34] This is connected to the pivotal question of what constitutes a 'comparable situation'. If no suitable comparator can be located, then an equality claim falls at the first hurdle. For example, in *Österreichischer Gewerkschaftsbund*,[35] workers were entitled to a payment on the termination of their employment dependent upon their length of service. In calculating length of service, periods of voluntary parental leave were not taken into account, yet periods of leave for military service were included. When challenged, the Court of Justice held that men taking military service were not in a comparable position to women taking parental leave, on the basis that military service was compulsory, while parental leave was voluntary. Consequently, a claim that this rule discriminated against women foundered on the stumbling block of the comparator test.

20.22 Cases such as the above illustrate how formal equal treatment can be superficial in its analysis of whether the rule perpetuates inequality. Academic scholars have criticised the way in which formal equal treatment can be used to legitimise social and legal practices that reproduce disadvantage.[36] Formal equal treatment leans in favour of assimilation to the pre-existing social order.[37] In the above case, the underlying message is that women could only receive equality in termination payments by conforming to male patterns of life where leave is taken for military purposes rather than caring responsibilities.

20.23 The comparator test is also problematic due to inconsistencies in the way in which it is applied. It is difficult to identify any objective yardstick or coherent legal doctrine that determines when situations will be deemed to be comparable. This has been acknowledged by Advocate-General Sharpston: 'it is therefore clear that the criteria of relevant resemblances and differences vary with the fundamental moral outlook of a given person or society'.[38] In a detailed analysis of how 'age' has been treated by equality law, she frankly recognised that our sense of what constitutes a relevant or irrelevant difference depends on a host of value judgements that are culturally and historically contingent.[39] This fluidity draws into question the supposedly objective nature of the principle of equal treatment and exposes the degree to which the application of the principle necessarily entails a subjective evaluation on the part of the judiciary. As such, it can be difficult to predict how the comparator test will be applied to a given set of facts. While there are plenty of examples in the law reports, these do not provide easy roadmaps for future litigants.

20.24 Two examples will suffice to give some indication of the way in which judicial reasoning has been applied. First, in *Akzo Nobel Chemicals*, a Commission competition law

---

[33] D Schiek, 'Torn between arithmetic and substantive equality? Perspectives on equality in German labour law' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 149, 150.

[34] Eg S Fredman, *Discrimination Law,* 2nd edn (Oxford, Oxford University Press, 2011) 11.

[35] Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich* [2004] ECR I-5907. The case concerned alleged sex discrimination in pay under former Art 141 EC (now Art 157 TFEU).

[36] L Betten, 'New Equality Provisions in European Law: Some Thoughts on the Fundamental Value of Equality as a Legal Principle' in J Bridge et al (eds), *Fundamental Values* (Oxford, Hart Publishing, 2000) 69.

[37] Fredman (n 34) 12.

[38] *Bartsch* (n 7) [44].

[39] Ibid [45].

investigation led to the seizure of some emails between the company's Director General and one of its in-house lawyers. The firm insisted that these should be covered by legal professional privilege in the same way in which correspondence with an external lawyer would be treated. The Court of Justice, however, held that in-house and external lawyers were not comparable for the purposes of Article 20 of the Charter. While in-house lawyers have the same professional ethical obligations as external lawyers, the Court felt that the economic dependence resulting from their employment relationship placed them in a 'fundamentally different position from external lawyers'.[40]

20.25 Secondly, the European Low Fares Airline Association argued that they were not comparable to other airlines and that it was a breach of the principle of equal treatment to apply to them the same rules on compensation for passengers without regard to the type of service that each airline sought to offer to its customers.[41] This was rejected by the Court of Justice, which felt that the relevant consideration was the nature of the damage suffered by the passenger and in this respect low fares airlines were comparable to other types of airlines.[42] These examples illustrate the extent to which determining what constitutes a comparable situation remains highly dependent on the facts of the specific case.

20.26 While the Court's definition of equal treatment most frequently equates to the concept of formal equality, it is important to acknowledge that it is not limited to treating likes alike. The other side of the coin is a requirement to treat different situations differently. By itself, this does not necessarily lead to a more progressive concept of equality. The supposedly different nature of, for example, same-sex couples can become an alibi for the perpetuation of inequality. Nevertheless, different treatment of different situations can be harnessed as a mechanism to recognise that situations that appear to be similar on the surface are, in fact, different in practice.[43] An alternative reading of the facts in the *Österreichischer Gewerkschaftsbund* case could have concluded that although the rule appeared to be gender neutral (ie parental leave was discounted from length of service whether taken by men or women), in social reality, taking parental leave is often not a free 'choice' for women, as confirmed by the statistics that showed that 98 per cent of parental leave was taken by women.[44]

20.27 A promising example of the Court using Article 20 in a more nuanced fashion can be found in *Zoi Chatzi.* The case concerned the entitlement to parental leave in respect of the birth of twins. The Court rejected the argument that the Parental Leave Directive should be interpreted as conferring an entitlement in respect of each child born, rather than in respect of each birth.[45] This meant that parents of twins would only be entitled to three months' leave in respect of their twins, whereas parents who had two children in succession would acquire an entitlement to six months' leave under the Directive (ie three months in respect of each birth). Nevertheless, the Court went on to consider whether this was consistent with Article 20 of the Charter. It concluded that parents of

[40] *Akzo Nobel Chemicals* (n 18) [58].
[41] *R (on the application of International Air Transport Association and European Low Fares Airline Association)* (n 23) [94].
[42] Ibid [98].
[43] *Cf Thlimmenos v Greece* [2000] Reports of Judgments and Decisions 2000-IV (ECtHR).
[44] *Österreichischer Gewerkschaftsbund* (n 35) [24].
[45] *Zoi Chatzi* (n 19) [40] and [61].

twins were not in a comparable situation to those raising a single child and, as a result of this 'specific situation', national schemes of parental leave needed to be adjusted to take account of the 'particular needs' of parents of twins.[46] The contribution of this judgment to advancing equality should not be over-stated. The Court stepped timidly as regards what adaptation of the parental leave regime is required for parents of twins; this was left to the national legislature, which was accorded a 'wide freedom of action'.[47] Perhaps, therefore, the most significant aspect of the case lies in the Court's willingness to examine this issue through the lens of different situations requiring different treatment and using that to seek (very gently) an enhancement of the social provision for parents of twins. Moreover, it is also striking that the Court did so under the auspices of Article 20 of the Charter, rather than Article 21.

IV. Limitations and Derogations

20.28 There are no express limitations found within Article 20, but the definition of equal treatment adopted by the Court of Justice (see section D.III) provides for the possibility to provide objective justification of departures from equal treatment. The flexibility of the objective justification test will have to be read in the light of Article 52(1) of the Charter, which provides that 'limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union'.

20.29 As described earlier, Article 20 can be applied to highly diverse issues. Its capacity to regulate such disparate fields rests on its inherent malleability. McCrudden argues that, in this guise, equality is interpreted as mere rationality.[48] It acts as a brake on public bodies from acting in an arbitrary or inconsistent manner. This gives it the capacity to be applied to any form of differentiation, even though the categories concerned may have no wider social significance, such as distinctions between different types of agricultural producer. The corollary of this sweeping scope is a generous margin of discretion for the justification of unequal treatment. If the courts are only concerned with ensuring that a public body has not acted irrationally, the level of judicial scrutiny applied can be rather light. This is certainly evident in the approach of the Court of Justice to equal treatment issues that relate to public policy choices, especially in relation to economic regulation.[49] Yet there are some situations where the Court adopts a stricter standard of scrutiny, notably in relation to employment law. Broadly speaking, therefore, two approaches can be identified in the Court's application of the justification test.

20.30 The first approach demonstrates a high level of judicial deference in the application of the principle of equal treatment. An example of this can be found in a challenge to the EU's greenhouse gas emissions trading scheme.[50] This was initially applied to the steel industry, but not to the plastics and aluminium sectors. The Court of Justice accepted

[46] Ibid [68] and [71].
[47] Ibid [71].
[48] C McCrudden, *Buying Social Justice—Equality, Government Procurement, and Legal Change* (Oxford, Oxford University Press, 2007) 513.
[49] P Craig and G de Búrca, *EU Law—Text, Cases and Materials,* 5th edn (Oxford, Oxford University Press, 2011) 551–53.
[50] Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v Premier Ministre and Others* [2008] ECR I-9895.

that these producers were in a comparable situation because the greenhouse gases emitted by each were equally damaging to the climate.[51] As regards the potential justification for the different treatment of similarly situated economic sectors, the Court held:

> in the exercise of the powers conferred on it the Community legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations …
>
> However, even where it has such a discretion, the Community legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question … taking into account all the facts and the technical and scientific data available at the time of adoption of the act in question.[52]

20.31 On the facts, the Court accepted that the creation of an emissions trading scheme was sufficiently complex to warrant a gradual expansion of its activities and that commencing with the steel industry was based upon statistical evidence that demonstrated much higher levels of carbon dioxide emissions from this industry compared to those from the chemical and non-ferrous metal sectors.[53] The Court's approach to the standard for judicial review conforms to the idea of equality as rationality. It is concerned to ensure that the legislature has acted for objective rather than subjective reasons, and that there is scientific data that supports the course of action taken. In essence, once the Court was assured that treating the steel industry differently was not an arbitrary or wholly irrational choice, then it was not in breach of the principle of equal treatment.

20.32 Light touch judicial scrutiny is even more starkly in evidence in an early challenge to the European Arrest Warrant.[54] One of the traditional obstacles to extradition was the application of a requirement of 'double criminality'; it needed to be established that the offence in respect of which the request for extradition had been issued was contrary to the criminal law of both the requesting state and the surrendering state. The European Arrest Warrant established a list of 32 offences where states would not apply the principle of double criminality as long as the offence was punishable in the requesting state by a maximum sentence of at least three years' detention.[55] The Court of Justice was asked to consider whether there was a breach of the general principle of equal treatment in the differentiation made between the 32 listed offences and those that were not listed. In a curt response, the Court skips over the question of whether offences inside and outside the list were comparable, concluding that even if they were comparable, the distinction was objectively justified.[56] In supporting this finding, the Court cites the 'view' of the Council that 'the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality'.[57] The Court's willingness to accept at face value the appropriateness of the political choice of the Council indicates that, in some cases, establishing objective justification is far from demanding.

---

[51] Ibid [34].
[52] Ibid [57]–[58].
[53] Ibid [52].
[54] Case C-303/05 *Advocaten voor de Wereld VZW* (n 32).
[55] Art 2(2), Council Framework Decision (EU) 2002/584 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.
[56] Case C-303/05 (n 32) [58].
[57] Ibid [57].

20.33 The second approach evident in the Court's case law on the justification test finds it applied with more rigour. This is well-established in relation to differences of treatment based on personal characteristics, such as sex, where the general principle of equal treatment is complemented by detailed EU anti-discrimination legislation. As discussed earlier, such cases are now more frequently addressed under the auspices of Article 21 of the Charter. There are, though, other forms of unequal treatment where the Court has also been disposed to apply a stricter standard of objective justification. This seems particularly evident in relation to unequal treatment of different categories of workers. In *Cordero Alonso*,[58] the Spanish guarantee fund dealing with the liabilities of insolvent employers covered payments due to workers in respect of judicially awarded compensation for dismissal, but not where such compensation arose from a judicial conciliation process. The Spanish Constitutional Court had previously held that such workers were not in a comparable situation, so there was no breach of the principle of equal treatment in Spanish constitutional law.[59] Nevertheless, the Court of Justice reached the opposite conclusion and held that these were comparable situations and there was no objective justification for such a difference in treatment.[60] The impression that the Court applies a stricter standard of scrutiny in employment relations is even more evident in its emerging case law on equal treatment of atypical workers. When considering EU Directives on part-time and fixed-term work, it has characterised their provisions on non-discrimination as 'merely a particular expression of a fundamental principle of Community law, namely the general principle of equality'.[61] Based on this constitutional foundation, the Court has emphasised the need for careful scrutiny of any departures from the principle of equal treatment. In particular, it has rejected the idea that a 'general, abstract national norm' can constitute sufficient justification, even if enshrined in law or within a collective agreement.[62] The approach to objective justification in this context seems to be more penetrating than a simple assessment of whether the distinction conforms to a basic sense of rationality.

V. Remedies

20.34 Given the diverse fields of law to which the principle of equal treatment can be applied, the applicable remedies are likely to depend on the context of the case. In some cases, Article 20 may be invoked as a ground for judicial review of a legislative act, such as the greenhouse gas emissions trading scheme or the European Arrest Warrant. In such cases, the remedy could be annulment of the legislative act, or an element thereof.[63] Other cases are likely to concern the denial of a benefit to a specific individual, such as an agricultural grant, where the remedy may entail a reconsideration of the original decision, rather than an annulment of the underpinning legal act. One difficulty

[58] Case C-81/05 *Cordero Alonso v Fondo de Garantía Salarial* [2006] ECR I-7569.
[59] Ibid [23].
[60] Ibid [40]. See also Case C-442/00 *Rodríguez Caballero v Fogasa* [2002] ECR I-11915.
[61] Case C-313/02 *Wippel v Peek & Cloppenburg GmbH & Co KG* [2004] ECR I-9483 [56]. See also Case C-307/05 *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECR I-7109 [27].
[62] *Del Cerro Alonso* (n 61) [57].
[63] *Cf Test-Achats* (n 6).

in determining the remedies for unequal treatment lies in whether the solution is 'levelling-up' or 'levelling-down'. If, for example, a scheme for awarding agricultural grants is deemed to breach the principle of equal treatment because of the exclusion of certain types of producers,[64] then formal equal treatment will normally leave open the possibility that the situation is remedied by removing the benefit from the existing beneficiaries.[65] This creates the risk that applying equal treatment is perceived as socially regressive if it leads to the retrenchment of social benefits. In this regard, a potential response is to combine Article 20 with other provisions of the Charter, such as Article 34 on social security. Remedying breaches of Article 20 must also be compatible with protection of the substantive rights found elsewhere in the Charter.

20.35 In some cases, Article 20 may be invoked in conjunction with EU secondary legislation, such as *Zoi Chatzi*, which engaged the EU Directive on Parental Leave.[66] In these instances, the secondary legislation may provide greater specificity on the quality and nature of the remedies to be provided within national law. For example, in relation to gender equality legislation, there is a requirement for 'real and effective compensation or reparation'.[67]

E. Evaluation

20.36 The view adopted by the Court of Justice is that the general principle of equal treatment is now 'enshrined' in Article 20 of Charter. That outlook is consistent with the Explanations attached to the Charter and it suggests a seamless continuity between the position pre and post Charter. If Article 20 is simply a codification of the unwritten general principle, then its novelty is fairly faint. Two issues emerge as key future questions surrounding the Court's reading of Article 20: first, its relationship with Article 21; and second, the intensity of judicial review to be applied.

20.37 Whereas the general principle of equal treatment was an umbrella for all types of distinction, the Charter creates a bifurcation between Articles 20 and 21. This is not a mutually exclusive relationship; there is no reason in principle why Article 20 could not be applied to any of the discrimination grounds found in Article 21. Yet the emerging tendency of the Court is to cite Article 21 in cases relating to the protected personal characteristics listed in that provision, while Article 20 is more commonly cited in relation to other differences of treatment. This distinction is undoubtedly connected to the standard of scrutiny to be applied when assessing objective justification. Article 21 identifies 'suspect' categorisations that will often receive intense judicial scrutiny for

[64] Eg Case C-152/09 *Grootes v Amt für Landwirtschaft Parchim* (Judgment of 11 November 2010).

[65] Eg Case C-200/91 *Coloroll Pension Trustees v Russell and Others* [1994] ECR I-4389 [33]. This is circumscribed by the duty to extend the benefit to the currently disadvantaged category until such time as the benefit is removed or amended for all persons: Case C-401/11 *Soukupová v Ministerstvo zemedelství* (23 October 2012) [66] Opinion of Advocate-General Jääskinen.

[66] *Zoi Chatzi* (n 19).

[67] Art 18, Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23.

potential discrimination, even if some grounds seem more suspect than others (such as ethnic origin compared to property).

20.38 If Article 20 becomes, de facto, a residual provision for dealing with other types of distinction, including those of a purely transient nature, then that might lead the Court to apply a lower intensity of judicial scrutiny. This inclination can be particularly witnessed in cases seeking judicial review of EU legislation, where the Court seems reluctant to displace complex public policy choices due to an alleged infringement of the principle of equal treatment.[68] Yet there are signs that the Court is willing to intensify judicial scrutiny in relation to differences of treatment that inter-relate with the personal characteristics found in Article 21. Notably, the Court's deployment of Article 20 in *Zoi Chatzi* as the basis for requiring reasonable adjustments to parental leave regimes to meet the specific needs of parents of twins demonstrates the possibility to move away from a concept of equal treatment that focuses on sameness and assimilation. By giving greater weight to the need to ensure different treatment in response to different situations, there is the capacity to elaborate a more transformative understanding of equality.

[68] The *Test-Achats* case is a notable example of judicial reversal of a choice of the legislature, but this was based on Arts 21 and 23 of the Charter.