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Abstract

Article 21 EUCFR is a pivotal Charter provision outlawing nationality and status discrimination. Our analysis explores the two-limb structure of Article 21 of the Charter whereby nationality discrimination is treated separately, and differently, from status discrimination. It explores interesting changes in the uses of Article 21 of the Charter by the Court of Justice and examines issues relating to its scope, its direct effect and its relationships with other sources of EU law and human rights law.

Keywords

Article 21 EU Charter of Fundamental Rights; nationality discrimination; third-country nationals; status discrimination and its concepts; intersectional discrimination; scope and horizontal direct effect.

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Article 21

Article 21

Non-Discrimination

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

Text of Explanatory Note on Article 21

Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.

There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.

Paragraph 2 corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that Article.

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A. Field of Application of Article 21

21.01 Article 21 has two limbs, a status discrimination limb (Art 21(1)) and a nationality discrimination limb (Art 21(2)). Although nationality can also be viewed as a status ground, the very two-limb structure of Article 21 of the Charter, whereby nationality discrimination is treated separately, and differently, from discrimination on other status grounds, signals the distinctive contours nationality discrimination has been given in the EU. In order to highlight and interrogate that difference, all the grounds other than nationality will be referred to as 'status discrimination', covered by Article 21(1), whilst nationality discrimination, covered separately in Article 21(2), will be considered as a special category in EU law. Nonetheless, their juxtaposition can open new interpretative channels between the grounds and across the two limbs.[1]

21.02 Both limbs of Article 21 place considerable emphasis on delimiting their fields of application. However, it can be seen that for Article 21(1) these limitations are set out only in the Explanations, whilst for Article 21(2) they are contained primarily in the Charter text itself. Whether this makes a difference depends on how the Explanations mesh with the horizontal provisions of the Charter, an issue we turn to later.[2]

21.03 Article 21(1) links to the large body of EU equality and anti-discrimination legislation on a range of status grounds (race, gender, sexual orientation, disability, religion and belief and age).[3] This large body of legislation, mainly contained in directives,[4] is required to be transposed at national level. Much of that legislation has been adopted under the anti-discrimination legal basis added by the Treaty of Amsterdam (now Art 19 TFEU) in addition to the specific legal basis for some of the gender equality provisions (Art 157(3) TFEU).

21.04 Yet Article 21(1) EUCFR is expressed in much more expansive terms than these legal bases, in two different ways. First, it expressly names many more status grounds than those covered in the TFEU's legal bases: to give two examples, genetic features and membership of a national minority. Second, through its use of the phrase 'such as', Article 21(1) EUCFR creates an open-ended rather than a closed list of status discrimination grounds, so that it can extend to any ground of discrimination.[5]

21.05 For that reason, the Explanations place extended emphasis on stressing that Article 21(1) does not extend the field of application of EU law. It neither provides a legal basis to adopt EU legislation nor a basis for striking down national legislation which does not implement

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[1] For instance how Advocate-General Kokott sustains that the prohibition of discrimination on grounds of language in Article 21(1) is an expression of the general prohibition on discrimination on grounds of nationality in Case C-566/10 P *Italy v Commission* (Judgment of 27 November 2012, Grand Chamber) [77].

[2] Below section IV.

[3] See, in particular, Directive 2000/43/EC [2000] OJ L180/22 (the Race Equality Directive, or RED); Directive 2000/78/EC [2000] OJ L303/16 (the Framework Equal Treatment Directive, or FETD); Directive 2004/113/EC [2004] OJ L373/37 (Gender Equality in Goods and Services Directive); Directive 2006/54 [2006] OJ L204/23 (the Gender Equality in Employment Directive, or GEED); Directive 79/7 on gender equality in social security [1979] OJ L6/24; Directive 2010/41/EU on gender equality in self-employment [2010] OJ L180/1.

[4] For a different kind of source, see e.g EU Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L328/55. On this as a part of a growing EU criminal discrimination law acquis focused particularly on discriminatory hate speech and acts see Giao-Hanek and Farkas, Select Bibliography. See relatedly the EU's moves to ratify the Council of Europe Istanbul Convention on gender-based violence discussed below para 21.26.

[5] See for instance how the Court in principle considers 'length of service' as a discrimination ground falling within Article 21(1) in Case C-49/18 *Escribano Vindel* (7 February 2019) [58] and AG Cruz Villalón in his Opinion suggesting immigration status as a discrimination ground in Joined Cases C-443/14 and C-444/14 *Alo & Osso* (1 March 2016).

EU law. Rather, it provides a basis to review acts of EU institutions and bodies when they are exercising powers conferred under the treaties. For instance, in *Kaltoft*, a challenge to a national action whereby a public sector employee was dismissed from his work on grounds of obesity, which is not listed as an enumerated ground in the Framework Equal Treatment Directive (FETD), was considered out of the scope of Article 21(1).[6] Furthermore, the stance taken in the Explanations would mean, for example, that a challenge to a national law distinguishing on the basis of genetic features could not be taken on the basis of Article 21(1) in the absence of a relevant link to EU law, nor could it provide the basis for a piece of EU legislation outlawing discrimination concerning genetic features. However, a challenge to discrimination against an EU staff member on the basis of genetic features could be.[7]

21.06 Of course, in relation to Member State action, even taking the relevant test to be that the Member State is 'implementing' EU law still leaves a wide range of situations that could fall within the scope of the status discrimination provisions of the Charter. Imagine, for instance, access to cross-border health care using the Patients Rights' Directive[8] being denied on grounds of morbid obesity (either covered by disability or as a non-enumerated ground). Article 21 EUCFR would be engaged. Since *Fransson,* where EU law applies the Charter does too, without distinction between a narrower option of 'implementing EU law' for Charter applicability and a broader sphere of 'falling within the scope of EU law'. Hence, national law not adopted to transpose EU law, but which nonetheless serves to deliver an EU law obligation, falls within the scope of the Charter.[9]

21.07 Article 21(2) which concerns discrimination on grounds of nationality expressly limits its field of application to the relevant provisions of the treaties, stating additionally that it is 'without prejudice to the special provisions of those Treaties'. The EUCFR Explanations expressly link Article 21(2) EUCFR to Article 18(1) TFEU, which provides 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.' Indeed the wording of Article 21(2) EUCFR and Article 18 TFEU is, in all important respects, identical. The link between Article 21(2) and a particular provision of the treaties can therefore be seen as more tightly drawn than the Charter-treaties link in respect of Article 21(1).

21.08 It is important to note that this construction accordingly is silent on a very large number of EU nationality discrimination sources, those relating to third-country nationals.

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[6] Obesity was however ultimately qualified as a disability when certain conditions are met and as such covered by the FETD. Case C-354/13 Kaltoft (Judgment of 18 December 2014).

[7] See Case F-51/07 *Bui Van* (FP-I-A-1-289) in which the Civil Service Tribunal made clear that the EU Staff Regulations must be read in light of the Charter; for applications of Art 21 EUCFR see Case F-86/09 W v Commission (Judgment of 14 October 2010) (sexual orientation); Case C-566/10 P *Italy v Commission* (Judgment of 27 November 2012), in which the Grand Chamber invoked the prohibition of language discrimination in Art 21 EUCFR to annul competitions focused on only three official languages.

[8] Directive 2011/24 on the application of patients' rights in cross-border health-care [2011] OJ L88/45. See below Section IV for an example of a case concerning access to cross-border health-care in which Article 21 of the Charter is applied.

[9] Case C-617/10 *Fransson* (Judgment of 26 February 2013). Note also that *Mangold* made it clear that the (non-Charter derived) fundamental right not to be discriminated against on grounds of age could be applied once the disputed situation fell within the scope of national laws implementing the EU Fixed-term Work Agreement and Directive: Case C-144/04 [2005] ECR I-9981. It did not matter that the disputed German rule (excluding older workers from the normal fixed-term contract protection regime) was added as a subsequent derogation to the German law implementing the Fixed-Term work Directive: 'The term "implementation" … does not refer only to the original transposition of Directive 1999/70 … but must also cover all domestic measures intended to ensure that the objective pursued by the directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted.'

These include the nationality discrimination guarantees in the EU's Association Agreements[10] with certain countries and Directives on third-country nationals.[11] This distinction between nationality discrimination between EU nationals and nationality discrimination between EU and non-EU nationals is a central one in EU law, and is an issue to which we return later.[12]

B. Interrelationship of Article 21 with Other Provisions of the Charter

21.09 The Charter articles with most resonance in relation to Article 21(1) are its immediate predecessor, Article 20, providing a general guarantee of equality before the law, and Article 23 on equality between men and women. The Court regularly makes omnibus references to Articles 20 and 21 EUCFR as together enshrining the principle of equal treatment and non-discrimination.[13] Both Article 20 and Article 23 share with Article 21 the structure of equality and non-discrimination. Indeed, in some significant gender equality cases, the Court of Justice has used both Articles 21 and 23 of the Charter.[14] According gender equality its own free-standing Charter provision in Article 23, in addition to including it in Article 21, reflects the historical importance of gender as a ground of status discrimination in EU law and its extensive policy development. Prior to the new wave of EU status discrimination legislation from 2000 onwards, which followed from the introduction of the broad status discrimination legal basis in the 1997 Amsterdam Treaty now contained in Article 19 TFEU, gender equality was the sole protected ground of status discrimination in EU law and this commitment dates from the Rome Treaty's guarantee of equal pay for equal work between women and men. In successive treaty revisions, the EU's commitment to gender equality has been substantially enriched.

21.10 If, rather than focusing on a shared structure of equality and non-discrimination, one instead focuses on the prohibited ground as constituting the basis of the relevant association with Article 21, a much larger range of Charter provisions come into view. For example, age structures the rights of the child in Article 24 and the rights of the elderly in Article 25. The integration of persons with disabilities is the focus of Article 26. Respect for cultural, religious and linguistic diversity in Article 22 links with a number of the enumerated grounds in Article 21(1).[15]

21.11 Further, some of the freedoms and rights protected elsewhere in the Charter have been used, within their analogues in the European Convention of Human Rights combined with its non-discrimination Article 14, to protect against discrimination. For instance, the protection of assembly and association in Article 11 ECHR has been used to protect against discrimination on grounds of trade union membership. The same can be said of the protection of freedom of thought, conscience and religion in relation to discrimination based on religion (Art 10 ECHR) as well as the protection against sexual orientation discrimination developed in

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[10] See EU Association Agreement with Turkey [1977] OJ L261/60; the Euro-Med Agreements with Tunisia [1998] OJ L97, Morocco [2000] OJ L70 and Algeria [2005] OJ L265.

[11] See Directive 2003/109 on long-term resident third-country nationals [2004] OJ L16/44; Directive 2003/86 on Family Reunion [2003] OJ L251/12.

[12] See below section II.

[13] C-195/12 *Industrie du Bois de Vielsalm* (Judgment of 26 September 2013) [48] and Case C-634/18 *Criminal proceedings against JI*, (Judgment of 11 June 2020) [43].

[14] See Case C-236/09 *Test-Achats* [2011] ECR I-773.

[15] See AG Kokott's Opinion in *Italy v Commission* (n 1) linking language and nationality discrimination in Art 21 EUCFR with the principle of multi-lingualism reflected in Art 22 EUCFR.

relation to the right to protect family and private life (Art 8 ECHR) and racial discrimination in relation to education (Protocol 1, Art 2).[16]

21.12 The judicial development of status discrimination has also linked it to certain Charter provisions. The most striking linkage has been developed in the area of age discrimination between the justification of retirement regimes and the right to work in Article 15 EUCFR.[17]

21.13 Although looked at historically and in terms of development of the TFEU's citizenship guarantees, Article 21(2) has most source resonance with Chapter V of the Charter on citizens' rights, those rights are not rendered in the Charter in terms linking them to the principle of non-discrimination on grounds of nationality. Indeed, there is an interesting contrast between the juxtaposition of non-discrimination and citizenship in the post-Lisbon TFEU and their separation in the EU Charter of Fundamental Rights. Nonetheless, Article 45 of the Charter sets out the right to move and reside freely within the EU for both EU citizens and, in more restrictive language, for legally resident third country nationals. The interpretation of equivalent treaty provisions, including Article 21 TFEU, has been closely linked to prohibiting nationality discrimination for EU citizens. Article 15(3) of the Charter is also relevant in that, under the broader rubric of protecting freedom to pursue an occupation and right to engage in work, it provides a form of equal treatment guarantee for the working conditions of those third country nationals allowed to work in the EU.[18]

C. Sources of Article 21 Rights

I. ECHR

21.14 The Explanations relating to Article 21(1) EUCFR expressly refer to Article 14 ECHR. This is the general non-discrimination provision, which provides: '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.' Article 21(1) EUCFR adds to this list ethnic or social origin, genetic features, belief, disability, age and sexual orientation. Although the Explanations refer to Article 14 ECHR a closer equivalent, because its discrimination prohibition is not linked to other Convention rights,[19] is Article 1 of Protocol No 12 to the ECHR, agreed in 2000 with entry into force in 2005, according to which:

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.

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[16] See eg *Wilson, NUJ and others v UK* (2002) 35 EHRR 20 (trade union membership discrimination); *Eweida v UK* (Judgment of the European Court of Human Rights of 15 January 2013) (religious discrimination); *EB v France* (Judgment of the European Court of Human Rights of 22 January 2008) (sexual orientation discrimination); *DH v Czech Republic* (2008) 47 EHRR 3 (racial discrimination).

[17] See C Kilpatrick, 'A new EU Law Discrimination Architecture' in Select Bibliography for the origins of this linkage; C-141/11 *Hörnfeldt* (Judgment of 5 July 2012) [37].

[18] 'Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.'

[19] Art 14 ECHR has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by the Convention.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

21.15 However, to date this has been ratified by only ten of 27 Member States. Although Article 21(2) does not refer to the ECHR, and nationality is not listed in Article 14 of the Convention, the European Court of Human Rights has made clear that it encompasses discrimination on grounds of nationality.[20]

II. UN Treaties

21.16 There are multiple relevant reference points. Article 1(3) UN Charter of 1945 includes among the purposes of the UN 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Article 2 UDHR of 1948 provides, '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.' Both 1966 Conventions on Civil and Political and Economic, Social and Cultural Rights provide: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[21] Article 26 ICCPR 1966 further provides: '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.'

21.17 To this can be added the core Conventions concerning some of the status grounds listed in Article 21(1): the Convention on the Elimination of Racial Discrimination (CERD 1965); the Convention on the Elimination of Discrimination Against Women (CEDAW 1979);22 and the Convention on the Rights of Persons with Disabilities (CRPD 2006). The last of these is noteworthy for having been the first international human rights treaty to be ratified by the EU.

21.18 The International Labour Organization provides an important relevant specialised part of the UN system. ILO Convention No 100 of 1951 deals with equal pay, whilst Convention No 111 of 1958 prohibits discrimination in the field of employment and occupation. These Conventions, ratified by all the EU Member States, are central to one of four fundamental principles and rights at work contained in the ILO's 1998 Declaration on Fundamental Rights and Principles at Work.

21.19 It is perhaps more revealing to trace how these sources are referenced in EU status discrimination sources, especially legislation. Tracking this legislation over time evidences a marked trend towards a richer embedding of these instruments in international human rights sources. Hence the rich body of gender equality legislation from the 1970s until the millennium

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[20] *Gaygusuz v Austria* (1996) IV 23 EHRR 364 [42]–[52]; *Luzcak v Poland* App no 77782/01 (Judgment of 27 November 2007); *Andrejeva v Latvia* App no 55707/00 (Judgment of 18 February 2009); *Ponomaryovi v Bulgaria* App no 5335/05 (Judgment of 21 June 2011).

[21] Art 2(1) ICCPR 1966 and Art 2(2) ICESR 1966.

[22] These have been acceded to by all Member States and ratified by almost all. The three Baltic states need still to ratify most of these instruments and France also has a low ratification pattern.

is notable for its lack of references to any international human rights instruments.[23] This contrasts sharply with the new generation of post-2000 Directives across the grounds. Hence the two Directives in 2000 introducing protection against race, disability, religion/belief, age and sexual orientation, as well as the 2004 Directive extending gender discrimination protection to goods and services, all note that the right to equality before the law and protection against discrimination constitutes a universal right recognised by the UDHR and the UN Covenants of 1966, as well as referencing CEDAW and, for the race discrimination directive alone, the CERD.[24]

21.20 However, the Court of Justice did reference international human rights sources from an early stage in status discrimination (gender equality) cases and has continued to do so, albeit in a non-systematic fashion.[25] Linked to EU ratification of the CRPD, it has made extensive use of it to embrace a progressive understanding of a range of disability discrimination issues.[26] Yet the Court of Justice has held that the CRPD is too 'programmatic' to be used to assess the validity of EU legislative acts.[27]

III. Council of Europe Treaties

21.21 Both the 1961 ESC and the Revised ESC of 1996 provide that its substantive rights should be enjoyed without discrimination, the latter expanding the range of named rights to include, for example, health and association with a national minority and making clear that the enumerated grounds are non-exhaustive.[28]

21.22 Two of the 'new' status grounds in the Charter which are not mentioned in Article 19 TFEU, nationality minority membership and genetic features, link with recent Council of Europe Conventions.

21.23 Article 4(1) of the 1995 Framework Convention for the Protection of National Minorities (FNCM) provides that '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. In this respect, any discrimination based on belonging to a national minority shall be prohibited'.[29]

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[23] There are no such references in the 1975 Equal Pay Directive (75/117), the 1976 Equal Treatment Directive (76/207), the 1979 Statutory Social Security Directive (79/7) or the 1986 Occupational Social Security Directive (86/378). The Pregnant Workers' Directive (92/85) and the Burden of Proof Directive (97/80) reference only the 1989 Community Charter of Fundamental Social Rights of Workers. OJ references above at n 3.

[24] Preamble (4) FETD (2000/78); Preamble (3) RED (2000/43); Preamble (2) Directive 2004/113. However, Directive 2006/54 (the consolidating Gender Equality in Employment Directive) does not follow this trend limiting itself to referencing Arts 21 and 23 of the EU Charter. Nor does Directive 2010/41 which replaces and repeals Directive 86/613/EEC on equal treatment for self-employed men and women which makes no reference to human rights sources, including the EU Charter. OJ references above at n 3.

[25] See eg Case 43/75 *Defrenne* [1976] ECR 455 [20], where the Court of Justice drew on ILO Convention No 100.

[26] Joined Cases C-335/11 and C-337/11 *Ring and Werge* (Judgment of 11 April 2013); Case C-354/13 *Kaltoft* (Judgment of 18 December 2014); C-395/15 *Daouidi* (Judgment of 1 December 2016) on the understanding of disability; Case C-406/15, *Milkova* (Judgment of 9 March 2017) on positive action and disability. See also C-679/16, *A* (Judgment of 25 July 2018), where the Convention is evoked but not used. See further Miller, Select Bibliography.

[27] Case C-363/12 Z (Judgment of 18 March 2014).

[28] 1961 ESC, Preamble; Art E Revised Social Charter 1996. Seven Member States have not ratified the Revised ESC, remaining bound by the 1961 ESC (Croatia, Czech Republic, Denmark, Germany, Luxembourg, Poland and Spain).

[29] France has not signed this Convention and three EU Member States have signed but not ratified it (Belgium, Greece and Luxembourg).

21.24 The inclusion of genetic features as a listed prohibited ground in Article 21 EUCFR is expressly identified in the Explanations as being drawn from the 1997 Council of Europe Convention on Human Rights and Biomedicine, Article 11 of which provides: 'Any form of discrimination against a person on grounds of his or her genetic heritage is prohibited'.

21.25 Comparing these two Conventions illustrates well the absence of any strong correlation between EU Member State ratification of a human rights measure and its inclusion in the Charter Explanations. Hence, the 1995 FCNM with a much higher ratification record and a complete roster of Member State signatures is not referred to, whilst the 1997 Biomedicine Convention is, although five Member States have not even signed it and a further five have signed but not proceeded to ratification.

21.26 Moreover, the 2011 Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence is signed by all 27 EU Member States and the EU and ratified by 21 Member States.[30] The Istanbul Convention aims to contribute to the elimination of discrimination against women by specifically providing a framework for combatting different forms of violence against women. In its preamble the convention exemplifies violence against women as 'domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honour" and genital mutilation'. Having been adopted after the EUCFR came into force there is naturally no mention of the Istanbul Convention in the Charter Explanations. However, it should be noted that the Charter Explanations do not specifically mention violence against women either in relation to Article 21 or Article 23 of the Charter. However, the Charter Explanations mention 'sexual exploitation networks' in relation to Article 5 EUCFR. The Istanbul Convention, in contrast, conceptualised sexual trafficking as part of a broader structure of inequality between men and women.[31]

D. Analysis

I. General Remarks

21.27 Article 21(1) EUCFR is a pivotal Charter provision and can be seen as a significant bridge between its civil and social components. A testament to the importance of Article 21 in the Court of Justice of the European Union's overall use of the Charter is the Commission's annual report on the Charter. For example, in 2017 the Charter was invoked by the Court in 195 cases, of which 7% primarily concerned Article 21 (in third place after Article 47 on the right to an effective remedy and Article 41 on the right to good administration).[32] Its rich links with other international human rights sources, as outlined above, underline how a broad provision outlawing status discrimination is a central feature of human rights Charters.

21.28 The anti-discrimination on grounds of nationality limb of Article 21(2) has a more distinctive EU flavour, reflecting its long and exceptional history of opening the borders of its states to the movement of EU people, goods and services. It is well known that prohibiting

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[30] The Istanbul Convention has entered turbulent political waters in recent years with Poland which ratified in 2015 announcing its intention to withdraw from the Convention in July 2020 and challenges for the continuing commitment by the EU to ratify.

[31] It should be noted that the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, does not, differently from the Istanbul Convention, frame human trafficking as a manifestation of discrimination based on sex.

[32] COMMISSION STAFF WORKING DOCUMENT Staff Working Document on the Application of the EU Charter of Fundamental Rights in 2017 Accompanying the document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; 2017 Report on the Application of the EU Charter of Fundamental Rights {COM(2018)396final}.

discrimination on grounds of nationality is a central foundational element of the treaties, with the current formulation in Article 18 TFEU essentially unchanged from its formulation in Article 7 of the 1957 Rome Treaty.

21.29 Nonetheless the very two-limb structure of Article 21 of the Charter whereby nationality discrimination is treated separately, and differently, from status discrimination, signals the distinctive contours nationality discrimination has been given in the EU. On the one hand, it has been a central (indeed gushing) well for developing very extensive protection for EU citizens, although in order to fall within the scope of EU law there has normally been a need for a cross-border dimension before it is engaged,[33] and recently the Court of Justice has moved to further curtail equal treatment protection for non-economically active, albeit lawfully residing, EU citizens.[34] Throughout the development of EU citizenship rights, a restrictive approach has been taken by the Court by denying its protection to third-country nationals.

21.30 In what follows (II), we first analyse some central issues concerning the scope of application of Article 21. We begin by examining its application to discrimination on the basis of third-country nationality. The juxtaposition of a broad range of prohibited grounds of discrimination in Article 21 raises important issues. We consider how Article 21 is used in relation to issues of overlapping grounds and intersectional discrimination, especially in cases where nationality, ethnicity and race overlap. Finally, an important part of EU discrimination protection concerns its structures and concepts, notably the distinction between direct and indirect discrimination.

21.31 We then turn to examine an interesting development (III). Status and nationality discrimination, the subject-matter of Article 21, have a strong record of being thickly and innovatively developed by the Court of Justice, the EU legislature and the treaty-makers. While the Court of Justice has taken bold steps to develop the constitutional principles of status discrimination and discrimination on grounds of nationality, until recently Article 21 EUCFR was not the primary source supporting either development. However, that has now changed with the recognition in 2018 that Article 21 has horizontal direct effect.[35] This raises further interesting and important questions about Article 21's place in the emerging EU fundamental rights landscape.

II. Scope of Application

21.32 The personal scope of Article 21(1) is exceptionally broad. All persons within the EU suffering any form of status discrimination potentially fall within its scope. Moreover, since *CHEZ* it has been clarified that one does not have to 'possess' the discriminated ground in order to be encompassed by the protection against such discrimination provided for in Article 21(1).[36] In *CHEZ,* an electricity company had placed its electricity meters in an urban area with a predominantly Roma population at an inaccessible height. According to the referring court, it was apparent from the context that the company considered that **'**persons of Roma origin make unlawful connections' to electricity meters. The litigant in the main proceeding was not of Roma origin herself but ran a convenience store in that area. She successfully claimed that

[33] For an exposition of the 'wholly internal' situation, see Case C-256/11 *Dereci* (Judgment of the Court (Grand Chamber) of 15 November 2011).

[34] Case C-333/13 *Dano* (Judgment of 11 November 2014, Grand Chamber) and Case C- 67/14 *Alimanovic* (Judgment of 15 September 2015, Grand Chamber).

[35] Case C-414/16 *Egenberger* (Judgment of 17 April 2018, Grand Chamber).

[36] Case C-83/14 *CHEZ* (Judgment of 16 July 2015, Grand Chamber).

she had suffered from discrimination based on ethnic origin under both the Race Equality Directive (RED) and Article 21(1).[37]

21.33 It has been clear from an early stage that the prohibition of discrimination on grounds of nationality applies across all the treaty freedoms to natural persons.38 A question arises as to whether Article 21(2) applies only to natural persons or whether its protections extend to legal persons too, or even beyond persons to goods and services in the same way as Article 18 TFEU. On the basis of the Charter jurisprudence to date,39 which emphasises the need to assess each Charter provision separately, it seems likely that a broad approach to the personal scope of Article 21 will be taken.

(a) Applying Article 21 EUCFR to Discrimination on the Basis of Third-Country Nationality

21.34 A central question in relation to the scope of application of Article 21(2) is whether it applies to the EU citizen/third-country national interface so that differences in treatment on this basis can be challenged. This is also a central question in relation to Article 18 TFEU which it mirrors. Neither provision textually limits itself to application to EU citizens only. In relation to Article 18 TFEU, this outcome has instead been achieved by means of judicial interpretation, notably in *Vatsouras*[40] where the interface between EU citizens and TCNs was raised in a novel fashion as the national rule in question, in its access to social assistance, treated certain EU citizens worse than certain TCNs. The Court confirmed that the treaty's prohibition of nationality discrimination:

> 52 … concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries.

21.35 Post-Lisbon, the possibility of using the now legally binding nationality prohibition in Article 21(2) of the Charter to modify this position became more clearly available. In *Kamberaj* the Court was asked about the compatibility with EU law of a regional Italian law discriminating between EU citizens and third country nationals in the availability of housing benefit. The national court framed its questions around two centrally relevant Charter provisions, Articles 21 and 34:

> Does European Union law, in particular, Articles 2 [TEU] and 6 TEU, Articles 21 and 34 of the Charter and Directives 2000/43 … and 2003/109, preclude a provision of national [more correctly: regional] law … inasmuch as that provision, with regard to the allowances concerned, and in particular the so-called 'housing benefit', attaches importance to nationality by treating long-term resident workers not belonging to the European Union or stateless persons worse than resident Community nationals (whether or not Italian)?

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[37] Article 2(2)(b) RED (2000/43/EC).

[38] Case 48/75 *Royer* [1976] ECR 497 [12]: 'Nevertheless comparison of these different provisions shows that they are based on the same principles both in so far as they concern the entry into and residence in the territory of Member States of persons covered by Community law and the prohibition of all discrimination between them on grounds of nationality'; Case 118/75 *Watson and Belmann* [1976] ECR 1185 [9].

[39] For discussion of this in the context of Art 47 EUCFR (effective judicial protection) see Case C-279/09 DEB [2010] ECR I-13849 where the Court concluded that it was 'not impossible' for a legal person to obtain legal aid; in relation to other Charter provisions (right to property in Art 17 and freedom to conduct a business in Art 16) their application to legal persons has been assumed: Case C-283/11 *Sky Österreich* (Judgment of 22 January 2013).

[40] Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585.

21.36 Yet, while finding in favour of the TCNs, the Court firmly turned down this invitation to use Article 21 as a means of dealing with the discrimination between EU citizens and TCNs. Instead, it based itself on the equal treatment guarantee for third country nationals found in the 2003 Long-Term Residents Directive, Article 11(1)(d) of which provides that long-term residents are to enjoy equal treatment with nationals as regards social security, social assistance and social protection, as those concepts are defined by national law.[41] Its willingness to use Article 34 of the Charter in this case serves to highlight its reluctance to use Article 21 in the context of TCNs.

21.37 Even if it can be argued that the use of Article 21(2) to cover discrimination against TCNs is difficult to sustain because of its tight linkage to Article 18 TFEU, and the jurisprudence limiting Article 18 TFEU to EU nationals, that still leaves open the use of the open-ended list in Article 21(1) as a possible means of providing nationality discrimination protection for TCNs. In fact, there are signals that the Court might be considering Article 21(1) as a possible means of protection for TCNs, although not on the basis of nationality.[42] All of this demonstrates why the TCN-EU national discrimination interface is a crucial one for understanding the structure of Article 21: is Article 21(2) a lex specialis which rules out the use of Article 21(1) for nationality discrimination not covered by Article 21(2)? In the next section we will return to the increased importance of this question.

21.38 While well-established, this restrictive position on the personal scope of the nationality discrimination prohibition has been challenged by many.[43] In particular, the move into EU law post-Amsterdam of provisions on visas, asylum and immigration, and the subsequent adoption of significant legislative texts relating to third-country nationals using these new competences, is argued to have made the traditional interpretation of the treaty's non-discrimination on grounds of nationality guarantee untenable, as a range of rights, including mobility rights, now apply under the treaty to third-country nationals as well.[44]

21.39 An additional argument is the compatibility of this restriction on the reach of the EU nationality discrimination guarantee with the ECHR. As noted earlier, the Strasbourg Court has made it clear that nationality discrimination, although not expressly prohibited by Article 14 of the ECHR, falls within it. More importantly, the European Court of Human Rights has subjected nationality discrimination to strict review so that: 'As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.'[45]

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[41] The same position has been taken to the equal treatment provision (article 12) of the Single Permit Directive (Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State OJ 2011 L 343, p. 1). The case, *Martinez Silva*, concerns discrimination in access to cash benefits for households with more than three minor children. The referring court did not mention the Charter, nor did the Court of Justice. Case C-449/16 *Martinez Silva* (Judgement of 27 June 2017).

[42] In his Opinion in Joined Cases C-443/14 and C-444/14 *Alo & Osso* (1 March 2016) Advocate General Cruz Villalón argued that the Court should use Article 21(1) to address discriminatory treatment of different immigration statuses, i.e. refugees and subsidiary protection holders in Germany. The Court declined to use Article 21(1) as the Advocate General suggested. For further analyses see Cunniffe in Select Bibliography.

[43] See Groenendijk, Hublet, Peers, in Select Bibliography.

[44] See, centrally, the family reunification Directive (Council Directive 2003/86/EC on the right to family reunification (2003) OJ L251/12–18) and the Long Term Resident's Directive: Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, (2004) OJ L16/44–53.

[45] *Gaygusuz v Austria* (n 19) [42]; see also *Luczak v Poland* (access to farmers' social security scheme restricted to Polish nationals pre-EU accession) n 19 [48]

21.40 However, this strict stance on nationality discrimination sits alongside a long-standing commitment by the European Court of Human Rights to recognise as lawful the EU distinction between nationals of EU Member States and third-country nationals.[46] This has been repeated and elaborated in subsequent judgments applying a strict review to nationality discrimination,[47] but applying that review to areas falling outside EU law. This then creates the interpretative space within which arguments about the legitimacy of the EU distinction within ECHR jurisprudence can be made: it could, for instance, be argued, that as the EU order changes, the sharp distinction between EU and non-EU nationals no longer holds true to the same extent.

(b) Juxtaposition of Prohibited Grounds in Article 21: Overlaps and Intersectional Discrimination

21.41 The relationship between the status discrimination grounds of race and ethnic origin in Article 21(1), and the prohibition of nationality-based discrimination in Article 21(2), relates to the efforts to keep nationality discrimination as a distinct and separate regime in EU law. While the two-limb structure of Article 21 reflects this position, the juxtaposition of race, ethnic origin and nationality discrimination haunts contemporary case law.

21.42 Hence, one key question is whether EU citizens or third-country nationals who suffer nationality-based disadvantage can claim racial origin discrimination. This is not permitted by the Race Equality Directive (RED),[48] Article 3(2) of which provides that it 'does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned'. However, Article 21's juxtaposition of racial, ethnic origin and nationality discrimination, could open up a new textual space in which discrimination on these three grounds might be related more closely. A particular argument for doing so in relation to third-country nationals is that they do not, as we have seen, so far benefit from Article 18 TFEU. Already in *Kamberaj*, the Court refused to go beyond the limits laid down by RED to consider the applicability of the racial discrimination prohibition to third-country nationals. However, and again demonstrating the close links between racial and nationality discrimination, the Court was prepared to find that a refusal to employ 'immigrants' constituted direct racial discrimination under RED.[49]

21.43 In cases concerning EU citizens, the Court's (and notably AG Wahl's) conceptual struggle with overlaps between the protected grounds of race, ethnicity and nationality surfaces in *Jyske Finans*.[50] In this case Mr Huskic and his partner, both Danish nationals, wanted to finance a car purchase with a loan from Jyske Finans. The credit institution

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[46] *Moustaquim* App no 12313/86 (Judgment of 18 February 1991).

[47] Eg *Ponomaryovi v Bulgaria* (n 19) [54], where the establishment of EU citizenship is stressed: 'It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of Member States of the European Union—some of whom were exempted from school fees when Bulgaria acceded to the Union … may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship.'

[48] RED (2000/43/EC). This restriction is mirrored in Art 3(2) FETD (2000/78).

[49] Case C-54/07 *Feryn* [2008] ECR I-5187.

[50] Case C-668/15 *Jyske Finans* (Judgment of 6 April 2017). For a thorough and piercingly critical analysis of the core components of AG Wahl's Opinion see Ward, Select Bibliography.

requested additional identity documentation from Mr Huskic, but not his partner, by reference to the fact that the place of birth indicated on his driver's licence was 'Bosnia and Herzegovina', thus outside of the EU and EFTA. The Court does not make clear in what way the situation falls within RED's substantive scope. We can only presume it is Article 3(1)(h) RED on access to and supply of goods. The Court does not refer to the Charter, however, it hinges its reasoning on paragraph 46 of the Grand Chamber case *CHEZ* from 2015*,* which develops a definition of ethnic origin 'within the meaning of Directive 2000/43 and of Article 21 of the Charter' as being 'the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds'.[51] With reference to *CHEZ*, which concerns discrimination against the Roma population in Bulgaria, in *Jyske Finans* the Court asserts that first, discrimination can only be established in relation to 'a certain' ethnicity.[52] However, as Ward points out there is no reason to deduce from *CHEZ* that it is a necessary requirement that 'a certain ethnicity' is discriminated against for the establishment of discrimination on grounds of ethnicity.[53] Second, the Court held that the argument that the 'neutral criterion at issue in the main proceedings, namely a person's country of birth, is generally more likely to affect persons of a 'given ethnicity' than 'other persons' cannot be accepted'.[54] This is where the ghost of Articles 21's two limb structure appears to make itself present, obscuring the relation between 'ethnic origin' and 'nationality' in a case where two EU citizens are treated differently.

21.44 Had Mr Huskic been born somewhere within an EU Member State his case would have been caught by Article 21(2). To take an example, Article 21(2) would have encompassed a case in which a German citizen born in Warsaw is asked to provide additional documentation in order to receive a loan in Germany on the grounds that he or she was born in Warsaw. Indeed, within the broader structure of EU law, there is a noteworthy overlap between possessing an 'EU nationality' and the *CHEZ* definition of 'ethnic origin'. The main example is found in the preambles to the TEU and the EUCFR, which emphasise the diversity of the history, culture and traditions of the 'peoples' of the EU Member States. Thus, 'nationality', while not an autonomous concept of EU law, is intertwined with the *CHEZ* definition of what constitutes an ethnicity in EU primary law. Given, however, that Huskic's 'place of birth' is not within an EU Member State, the Court acknowledges no link between ethnic origin understood as a nexus of nationality, culture, history and traditions, and what the Court imprecisely, inaccurately and variously refers to as Huskic's 'sovereign state', 'nationality' and 'country of birth'.[55] The Court's conclusion that there is no way of understanding 'place of birth' as related to ethnic origin in the case at hand is perplexing in at least two ways. First, Mr Huskic, as an EU citizen born outside of the EU, is deprived of the thick discrimination protection attributed to an EU citizen born within the EU. Second and relatedly, the crucial question that the Court of Justice fails to pose is what characteristic of Mr Huskic's person actually triggers the additional requirement imposed by Jyske Finans, if it is not where he lives, works, or even his citizenship?

21.45 Does a reading of Article 21's placement of 'ethnic origins' in paragraph 1 and 'nationality' in paragraph 2 as requiring a separation between discrimination based on 'nationality' and discrimination based on 'ethnic origin', haunt the Court's reasoning in *Jyske*

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[51] *CHEZ* (n 36) [46].

[52] *Jyske Finans* (n 50) [27] [31].

[53] See further Ward, Select Bibliography. Also to be compared with the ECtHR's opposite reasoning in *Biao v. Denmark* App No 38590/10 (Judgment of 24 May 2016.)

[54] *Jyske Finans* (n 50) [33].

[55] *Jyske Finans* (n 50) [18] [21] [24].

Finans? The answer to this question is important, especially since the Court's reasoning is tied to both Article 21 EUCFR and RED, and given the growing number of EU citizens born outside of the EU.[56]

21.46 There are, however, signs that the Court of Justice is ambivalent about the path of *Jyske Finans.*[57] In relation to Article 21 of the Charter, the Grand Chamber seems to suggest a more sophisticated approach in *Hungary and Slovakia v Council*.[58] This case concerns a Council decision from 2015 seeking to allocate the revision of asylum application procedures of third-country nationals (so called 'binding quotas'), with a view to providing assistance to Greece and Italy. Poland is among the intervening states, arguing that it cannot participate in this procedure since Poland is 'virtually ethnically homogenous' and its population is different 'from a cultural and linguistic point of view, from the migrants to be relocated on their territory'.[59] The Grand Chamber answers that 'considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU law and, in particular, to Article 21 of the Charter (…)'.[60] Thus, it is notable that the Grand Chamber does not consider Poland's argument to be compatible with the protection guaranteed in Article 21 because of the fact that Poland refers to third-country nationals without specifying what 'certain' ethnicity these third-country nationals possess. It is enough that Poland singles out these third-country nationals as belonging to 'another ethnicity' and not being of Polish ethnicity for the argument to be contrary to the meaning of Article 21 EUCFR. *Hungary and Slovakia v Council* seems to indicate that the road taken in *Jyske Finans* whereby first a 'certain ethnicity' needs to be identified as disadvantaged to establish discrimination, and second the place where one is born outside of the EU is delinked from the concept of ethnic origin, is far from an established interpretation of Article 21(1).

21.47 More broadly, the multiplication of prohibited grounds of discrimination in EU law, including within the Charter, has led to the need to consider within EU law the phenomenon of intersectional discrimination.[61] By this is meant the specific disadvantage borne by those discriminated against on more than one ground. Importantly, it is not simply a matter of adding together the grounds of discrimination: hence a black woman suffers discrimination which is a distinctive melding of race and gender, at their intersection. Currently EU law does not expressly provide for intersectional discrimination protection. Article 21 of the Charter could potentially provide an important overarching resource for the adaption of EU discrimination legislation to the specificities of intersectional discrimination.

21.48 A recent example where this potential of Article 21 was not tested are the twin-cases *Achbita* and *Bougnaoui*, which concern female workers wearing headscarves because of their religious beliefs who had been dismissed by their respective employers for this reason.[62] The cases have the potential to engage multiple grounds protected by Article 21(1), namely sex, religion and ethnicity. The referring courts' respective preliminary questions only refer to FETD, which concerns discrimination based on religion or belief, disability, age or sexual orientation.

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[56] 'Recent Trends in EU Nationals Born Inside and Outside the EU' (The Migration Observatory at the University of Oxford; 2015).

[57] The First Chamber is upholding this reading in Case C-457/17 *Maniero* (Judgement of 15 November 2018) [47].

[58] Joined Cases C-643/15 and C-647/17 *Slovakia and Hungary v Council* (Judgment of 6 September 2017, Grand Chamber).

[59] ibid. [302].

[60] ibid. [305].

[61] See further Schiek, this volume; Schiek and Lawson (eds), Solanke and Xenidis, Select Bibliography.

[62] Case C-157/15 *Achbita* (Judgment of 14 March 2017, Grand Chamber) and Case C-188/15 *Bougnaoui* (Judgment 14 March 2017, Grand Chamber).

The circumstances of the dismissals differ and so does the Court's reasoning. What is similar however, is that both cases are conceived as merely concerning discrimination based on religion, and that neither of the cases mention Article 21(1) of the Charter. Underlining the Court's reluctance to use article 21(1) is the fact that in both cases the FETD is read together with Article 10(1) of the Charter on freedom of religion.[63] Article 10(1) does not, differently from 21(1), concern discrimination based on religion. Article 21(1) would have provided a more finely-tuned legal framework for assessing the topical issue of Muslim women's equal treatment in employment and occupation (in these cases in the private sector) within the EU. While refraining from speculating about the potential of a different outcome had Article 21(1)'s enumerated grounds been engaged, it should be noted that the Court of Justice has decades of experience in examining discrimination based on sex in employment and occupation. Given this background, it would have been worthwhile to assess discrimination on grounds of sex and religion together in these two cases, which concerned women's freedom of religion in the workplace.

(c) The Structure and Concepts of Discrimination and Article 21 EUCFR

21.49 Discrimination has a well-established, albeit evolving, EU law grammar, with distinctive configurations in relation to particular grounds. Its core components consist of the concepts of direct[64] and indirect discrimination.[65] In the classical structure, direct discrimination can usually not be justified or is subject to stricter and often legislatively defined justification, including requirements to possess a certain status to carry out given jobs (e.g. hiring someone of Maghreb origin to work in providing social assistance to Maghreb communities; permitting religious groups to have only male clergy) than indirect discrimination where a broader range of 'objective justifications' are generally permitted. Consideration is also given to departures from symmetrical equal treatment in relation to the disadvantaged group; this may range from requiring only the disadvantaged group to be covered by the discrimination protection (e.g. disability in EU law) to permitting certain kinds of positive action as a tightly construed exception to an otherwise symmetrical application of the status discrimination prohibition.[66] Other features include protecting complainants through special burden of proof regimes and victimisation protection[67] as well as requirements for special equality agencies[68] and constructing harassment as a specific form of discrimination.[69] Importantly, this family of

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[63] *Achbita* (n 62) [27] and *Bougnaoui* (n 62) [29]. In their respective Opinions both AG Kokott (Achbita) and AG Sharpston (Bougnaoui) referred to Article 21(1). Also note that the Court references Article 16 EUCFR on the freedom to conduct a business in Achbita [38].

[64] 'Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the [prohibited] grounds': Art 2(2)(a) FETD (2000/78) and RED (2000/43); Art 2(1)(a) GEED (2006/54).

[65] 'Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a [prohibited status] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary': Art 2(2)(b) FETD (2000/78) and RED (2000/43); Art 2(1)(b) GEED (2006/54).

[66] As in the Court of Justice's famous judgments on positive action in the context of gender equality, discussed by Schiek in this volume: Case C-450/93 *Kalanke* [1995] ECR I-3051; Case C-409/95 *Marschall* [1997] ECR I-6363; Case C-158/97 *Badeck* [2000] ECR I-1875.

[67] See Arts 10, 11 FETD (2000/78); Arts 8 and 9 RED; Arts 19, 24 GEED (2006/54).

[68] Race and gender only in EU law: Art 13 RED (2000/43); Art 20 Gender ETD (2006/54).

[69] 'Harassment shall be deemed to be a form of discrimination…when unwanted conduct related to any of the [prohibited] grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States': Art 2(3) FETD (2000/78) and RED (2000/43); Art 2(1)(c) and 2(2)(a) Gender ETD (2006/54).

discrimination concepts, although broadly shared, is also differentiated across the much broader set of grounds protected in EU legislative instruments since the millennium. In the EU, disability discrimination alone contains the obligation of 'reasonable accommodation'.[70] More generally there is a broader set of exceptions, justifications and derogations for the grounds other than race. Direct age discrimination, for example, is given a broad justification defence.[71]

21.50 What is Article 21 of the Charter's relationship to this family of discrimination concepts, shared but differentiated across the grounds protected in EU treaties and secondary legislation? This is an important question because, as we have seen, Article 21 makes no reference to any of the components of this family of discrimination concepts. A representative example of how the Court relates discrimination concepts can be found in *CHEZ,* where the Grand Chamber asserts that Article 21 is given specific expression in 'Article 1 and 2(1)' of RED, which address the concepts of direct and indirect discrimination.[72] A second representative example of the opposite, namely how the Court does not relate Article 21 to the discrimination concepts, can be found in *Fries* and *Léger* where the Court addresses the question of acceptable limits to Article 21(1) under Article 52(1) of the Charter without answering the question of whether the discrimination identified is direct or indirect.[73] Yet despite this characteristically nebulous referencing when read as a whole,[74] so strong is the connection of these concepts to status discrimination, especially within EU law where many of them have been extensively developed by the Court of Justice, we would suggest that Article 21 encompasses them too.[75] The family of status discrimination concepts will be most significant when the Court has to deal with those grounds in Article 21 EUCFR that are not protected under the EU treaties or in EU secondary legislation.[76] As we have seen, this covers grounds enumerated in Article 21 of the Charter but not elsewhere in EU law (such as genetic features discrimination) as well as those status discrimination grounds covered but not enumerated in Article 21 EUCFR (eg aesthetic appearance discrimination not covered by an enumerated ground).

21.51 Once again EU nationality discrimination stands somewhat apart from 'classic' status discrimination law. Mark Bell accordingly argues that 'the instrumental nature of EU law on nationality discrimination tends to detach it from the familiar concepts of anti-discrimination law'.[77]

21.52 Moreover, the EUCFR forms part of a broader pattern of constitutionalisation and institutionalisation of fundamental human rights and values in the EU. Status discrimination norms have been a central instance of these developments. Hence, in the TEU, non-discrimination is a core EU value (Art 2), and combating discrimination is a core objective (Art 3(3) TEU). Two horizontal clauses in the TFEU commit the EU to mainstreaming eliminating gender inequality (Art 8 TFEU) and combating discrimination on the other legislated EU grounds in all its policies and activities (Art 10 TFEU). The EU coordinates national equality

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[70] Art 5 FETD (2000/78).

[71] Art 6 FETD (2000/78).

[72] Case C-83/14 *CHEZ* (n 35) [45] [50].

[73] Case C-528/13 *Léger* (Judgment of 29 April 2015) and Case C-190/16 *Fries* (Judgment of 5 July 2017). See further section IV below.

[74] See further section III c.

[75] A clear indicator being the way in which derogations to Article 21(1) is being continuously developed by the Court, see section IV.

[76] Differently from *CHEZ* (ethnic origin), *Léger* (sexual orientation) and *Fries* (age).

[77] 'The Principle of Equal Treatment: Widening and Deepening', above in Select Bibliography, p 613.

agencies (EQUINET), the creation of which are required by EU discrimination legislation, information-gathering and analysis is driven by, in particular, the EU Fundamental Rights Agency, and the EU both supports and gives institutional roles to national and transnational discrimination NGOs.[78] In this perspective, Article 21 EUCFR, especially its status discrimination limb, can be an additional source around which to frame a rich and recursive set of EU anti-discrimination practices. Of particular note is the European Parliament's resolution on protection and non-discrimination with regard to minorities in the EU Member States, and paragraph 21 of that resolution which links free movement and sexual orientation discrimination with Article 21 EUCFR.[79] Another example of the way in which Article 21 is used by the European Parliament is to guide EU spending to advance its objectives,[80] as well as in law making.[81]

III. Specific Provisions

21.53 The subject-matter of Article 21 EUCFR links it to a vast swathe of specific non-discrimination provisions in EU law, both in the treaties and in legislative instruments, covering indeed much of what is considered to be the heart of EU law. Further, both status discrimination and nationality discrimination have been the focus of intense, sustained and often expansive development by the Court of Justice, the treaty-makers and the legislature.

21.54 One significant feature of these developments was an intense linking and reworking of secondary legislation on the basis of it merely being an elaboration of a primary treaty prohibition of discrimination, thereby circumventing various limits on the applicability of those secondary sources. Hence, in early gender equality cases such as *Defrenne* and *Jenkins v Kingsgate,* the Equal Pay Directive was recast as a mere working-out of the treaty principle of equal pay, meaning that that principle could be applied in horizontal situations.[82] Similarly, the Court has historically viewed the economic freedoms as working out the implications of the overarching principle of nationality discrimination, itself an independent source of rights.

21.55 With this historic EU discrimination law trajectory in mind, and given the more recent legal developments we have seen so far, which certainly place the subject matter of Article 21 at the heart of the EU, the maturation of Article 21 EUCFR presents a stimulating puzzle. Where Member State, rather than EU action is at stake, after a long period of time Article 21 has been attributed horizonal direct effect (a) and Article 21 is continually used as a primary source concerning the validity of EU legislation (b). Meanwhile, there are cases in which Article 21 remains blatantly ignored (c). Briefly exploring these three stances tells further interesting and important stories about Article 21's place in the emerging EU fundamental rights landscape.

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[78] For analysis of these features as constituting an incipient democratic experimental framework, see de Búrca, above in Select Bibliography. See also Muir, Kilpatrick, Miller and De Witte (eds), above in Select Bibliography.

[79] European Parliament resolution of 7 February 2018 on protection and non-discrimination with regard to minorities in the EU Member States (2017/2937(RSP)).

[80] Regulation (EU) No 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020.

[81] Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. Recital 13 reads: 'Enforcement of that fundamental freedom [of movement for workers] should take into consideration the principle of equality between women and men and the prohibition of discrimination of Union workers and members of their family on any ground set out in Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter')'.

[82] Case 43/75 *Defrenne* [1976] ECR 455 [60]; Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911 [22].

(a) Article 21 and the General Principle of Non-Discrimination: From Supporting Role to Central Stage

21.56 The three cardinal components of post-Lisbon EU fundamental rights policy are set out in Article 6 TEU: (a) the binding Charter with due regard for its Explanations;[83] (b) the ECHR and the constitutional traditions common to the Member States which shall constitute general principles of the Union's law;[84] and (c) ECHR accession.[85] Status discrimination has been a primary Court of Justice locus for creative interpretation of the first two of these.

21.57 For many years the Court did not attribute horizontal direct effect to Article 21 EUCFR. Instead, from the 2005 case *Mangold* and onwards it used general principles to attribute horizonal direct effect first to age,[86] and later other status discrimination grounds.[87] The core innovation of *Mangold* was that the Court first 'uncovered' a general principle of non-discrimination on grounds of age, an unwritten source, and placed it at the centre of its judgment. Rather than asking whether such a general principle should be enforceable against a private individual, the Court reasoned that because the general principle was supreme, the national court was obliged to set aside any national law that conflicted with it. In subsequent cases, the Court confirmed this new function of the general principle.[88] Thus, for over a decade Article 21 was side-lined and subsumed by this use of a general principle of status discrimination.

21.58 Finally, in 2018 in *Egenberger* the Court took a large leap by fully equating the Charter with the non-discrimination guarantees in the treaties so that the former should also be horizontally directly effective.[89] The German Protestant Church had advertised a fixed-term job to write a parallel report on the UN CERD Convention. Relying on a provision of German law, the job required membership of the Protestant Church. The unsuccessful job applicant, Vera Egenberger, of no denomination herself, claimed discrimination based on religious belief. The Court of Justice instructed the national court that the 'occupational requirement' exception to equal treatment provided in Article 4(2) FETD, which the Church argued protected the membership requirement, needs to concern positions embodying the very ethos of the church. The Court went on to state that if the practice does not fall within Article 4(2), the national court needs to respect the prohibition of all discrimination based on religion, which is a general principle of EU law. Crucially, 'that prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between individuals'.[90] The Court continues:

> As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals (…).[91]

Hence, Article 21 of the Charter has, via a different path of reasoning, supplanted the role of the *Mangold* general principle jurisprudence. For the first time, Article 21 was used, in the words of the Court, 'in itself', in a dispute between two private parties enabling the nullification

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[83] Art 6(1) TEU.

[84] Art 6(3) TEU.

[85] Art 6(2) TEU.

[86] Case C-144/04 *Mangold* [2005] ECR I-9981. *Mangold* was the Court's first age discrimination decision.

[87] Case C-147/08 *Römer* (Judgment of 10 May 2011, Grand Chamber).

[88] Case C-555/07 *Kücükdeveci* [2010] ECR I-365.

[89] *Egenberger* (n 35).

[90] ibid. [76].

[91] ibid. [77].

of a provision of national law.[92] The language 'in itself' is noteworthy given how prior to 2018 the Court cited Article 21 in cases where it deployed the horizontal direct effect of unwritten general principles. In *Kücükdeveci* from 2010, for instance, after affirming the existence of unwritten general principles which prohibit discrimination, the Court added that Article 21 EUCFR 'should also be noted'.[93] This shift in language underlines the evolution in the Court's view of the horizontal direct effect of Article 21.

21.59 What explains the turn away from the use of unwritten general principle to the attribution of horizontal direct effect to Article 21 EUCFR? We would like to suggest two possible explanations. First, the Court of Justice may have taken note of the Danish Supreme Court's high-profile and determined resistance to using general principles to strike down provisions of national law in response to the Court of Justice's 2014 ruling in *Ajos*.[94] In *Ajos* the Court of Justice found that the Danish Supreme Court was obliged to strike down a provision of national law that violated the prohibition of discrimination based on age. In its preliminary references, the Danish Supreme Court had already raised concerns that unwritten general principles were at odds with the principles of 'legal certainty' and 'legitimate expectations'.[95] The Court of Justice rejected these arguments.[96] In response, once it gave its final verdict in 2016, the Danish Supreme Court refused to adhere to the Court of Justice's ruling, and justified this stance by concluding that the use of unwritten general principles was not foreseen by the Danish Law on Accession to the EEC from 1972.[97] We consider that this action by the Danish Supreme Court might have motivated the Court of Justice to turn to Article 21's written prohibition of discrimination.

21.60 A second, and not mutually exclusive explanation for why in 2018 the Court of Justice chose to base horizonal effect directly on Article 21, is that such a turn forms part of a broader shift in which the Court increasingly accords horizontal direct effect to Charter provisions, especially Article 31(2) on the right to annual paid leave.[98]

(b) Article 21 EUCFR as a Primary Source of Fundamental Rights Status Discrimination Protection

21.61 Since the Court of Justice used Article 21(1) to strike down a provision in an EU Directive in *Test-Achats* Article 21(1) has served a role as a primary source of status discrimination protection.[99] *Test-Achats* concerned the legality of a provision providing for an open-ended derogation from the principle of equal treatment between women and men for various

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[92] *Egenberger* was confirmed in Case C-68/17 IR (Judgment of 11 September 2018, Grand Chamber) and Case C-193/17 *Cresco Investigations* (Judgment of 22 January 2019, Grand Chamber), discussed below section V.

[93] *Kücükdeveci* (n 88) [22].

[94] Case C-441/14 *Dansk Industri (DI)*, acting on behalf of Ajos A/S (Judgment of 19 April 2016, Grand Chamber).

[95] ibid. [20].

[96] ibid. [43].

[97] In translation: 'A situation such as this, in which a principle at treaty level under EU law is to have direct effect (thereby creating obligations) and be allowed to take precedence over conflicting Danish law in a dispute between individuals, without the principle having any basis in a specific treaty provision, is not foreseen in the Law on accession.' Sag 15/2014, Dansk Industri som mandatar for Ajos A/S mod Boet efter A (Højesterets dom, 6 december 2016), p. 45.

[98] Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (Judgment of 6 November 2018, Grand Chamber); C-569/16 *Bauer* (Judgment of 6 November 2018, Grand Chamber) and C-385/17 *Hein* (Judgment of 13 December 2018).

[99] *Test-Achats* (n 14).

insurance premiums and benefits in a Directive (2004/113) extending the gender equality guarantee to goods and services.

21.62 Interestingly, the Belgian Constitutional Court's reference expressly asked the Court of Justice not about the Charter but about Article 6(2) TEU (now Article 6(3) TEU), i.e. the provision respecting fundamental rights as general principles of Community law. However, instead the Court pushed it firmly towards the Charter and noted that as the 2004 Directive expressly refers to Articles 21 and 23 of the Charter, these provide the appropriate benchmark for assessing the validity of the challenged provision in the Directive. But it should be noted, as we have seen from our analysis of challenges to Member States' status discrimination laws, that this is neither a necessary nor a sufficient condition for use of the Charter. The Court ultimately used Articles 21 and 23 of the Charter to rule as invalid the challenged provision.

21.63 The role that Article 21(1) can play in reviewing the legality of EU secondary law is confirmed in *Glatzel* and *Fries*.[100] *Glatzel* concerned the question of whether Directive 2006/126/EC on driver's licenses, which provide for a minimum vision requirement to be able to drive heavy goods vehicles, was compatible with Article 21 (discrimination based on disability) and Article 26 of the Charter. *Fries* concerned the question of whether Regulation No 1178/2011 on air transport, which foresees an age-limit of 65 for commercial pilots, could be found compatible with Articles 21 (discrimination based on age) and 15 of the Charter. In *Glatzel* and *Fries* the challenged piece of EU secondary legislation was ultimately declared valid and the Court made reference to Article 52(1) EUCFR on the scope of the Charter. No reference was made to Article 52(1) EUCFR in *Test-Achats.* We will return to this use of Article 52(1) in relation to Article 21 in a moment.[101] Yet clearly, *Test-Achats, Glatzel* and *Fries,* when set against the other status discrimination cases we have discussed, show that the Court is especially keen to use the Charter in relation to status discrimination by the EU institutions. The question going forward is whether *Egenberger* signals a rapprochement by the Court of Justice in favour of using Article 21 to strike down Member States legislation, actions and practices.

21.64 A notable parallel development to those described above is that in the wake of the Eurozone crises, Article 21 EUCFR has been invoked in a series of cases concerning the legality of pay cuts resulting from EU sovereign debt programmes or excessive deficit decisions. All have been rejected either because the Court found it lacked jurisdiction as the referring national court had not shown how the measure challenged implemented EU law,[102] or because it found no breach.[103]

(c) Ignoring Article 21 EUCFR

21.65 Both limbs of Article 21 raise the important question of the nature of the added value which the Charter brings to existing EU law in its application to disputes involving Member State laws and practices.

21.66 Beginning with status discrimination, its added value has not been overstated in the Court's case record to date.[104] As already noted, Article 21(1) is frequently used in a near

[100] Case C-356/12 *Glatzel* (Judgment of 22 May 2014) and Fries (n 73). See also *Italy v Commission* (n 1), although the Court's judgment is based primarily on the Staff Regulation which reproduces Art 21(1) EUCFR.

[101] See below section IV.

[102] E.g. C-134/12 *Corpul Naţional al Poliţiştilor* (Order of 10 May 2012).

[103] E.g.C-49/18 *Escribano Vindel* (Judgment of 7 February 2019).

[104] See section II above.

declaratory sense to refer to FETD, GEED and to RED.[105] However, this has not developed into a standard and consistent declaratory practice so that in very many cases, the status discrimination directives are applied with no reference to Article 21 EUCFR.[106] Further, the Court sometimes explicitly excludes any potential application of Article 21(1) where the directives have been evoked and examined.[107] However, in cases not covered by EU discrimination directives there are signs that the Charter could have genuine added value.[108] This latter point, to add a further caveat, should be read together with our analysis in section II a on the modest discrimination protection of TCN's under either limb of Article 21.

21.67 The 'adds-little' view is also an important key through which to read Article 21(2). As noted, Article 21(2) is worded almost identically to the treaty's non-discrimination on grounds of nationality guarantee in Article 18 TFEU. This makes it interesting as, on one reading, it simply restates in a fundamental rights document the content and limitations of Article 18 TFEU as interpreted by the Court. If that is the case, it adds little to what is already a primary treaty right, as both the TFEU and the Charter have 'the same legal value'. This reading may underpin the Court's current ignorance of Article 21(2) in the many path-breaking cases engaging nationality discrimination since the Charter was given legal effect.

21.68 In cases concerning EU citizenship, *Coman* represents an interesting recent 'adds-little' example.[109] Mr Coman had married his American partner, Mr. Hamilton, in Belgium and wished to re-establish himself together with his spouse in his home country of Romania. They were informed by the Romanian immigration authority that Mr. Hamilton could not be considered Mr. Coman's spouse in the sense of the Citizens' Rights Directive as Romania does not recognise same sex marriages. The referring court asked three questions in relation to Article 21 EUCFR, the second one being whether 'Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union?' The Court of Justice builds its answer to this question, which is in the affirmative, solely with reference to the Citizens' Rights Directive and does not refer to Article 21 EUCFR. In *Coman*, casting into relief the Court's reluctance to use Article 21, both the first and second paragraphs of the judgment make reference to the rights to privacy and family life in Article 7 EUCFR.[110] As in *Achbita* and *Bougnaoui* discussed above, the Court's

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[105] E.g. that the directive is merely 'a specific expression' of the general prohibition of discrimination laid down in Article 21 of the Charter. See for examples of such declarations *CHEZ* (n 35) [42]; Case C-391/09 *Runevič-Vardyn and Wardyn* (Judgement of 12 May 2011) [43] and C-507/18 NH (23 April 2020) [38].

[106] E.g. Case C-267/06 *Maruko* [2008] ECR I-1757 and Case C-443/15 *Parris* (Judgment of 24 November 2016) (sexual orientation); Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, C-132/11, *Tyrolean Airways Tiroler Luftfahrt* (Judgment of 7 June 2012), Case C-258/15 *Sorondo* (Judgment of 15 November 2016), Case C-423/15 *Kratzer* (Judgment of 28 July 2016) and Case C-159/15 *Lesar* (Judgment of 16 June 2016) (age); Case C-54/07 *Feryn* [2008] ECR I-5187 and *Jyske Finans* (n 48) (race); Case C-152/11 *Odar* (Judgment of 6 December 2012) and Case C-270/16 *Ruiz Conejero* (18 January 2018) (disability).

[107] In *Vital Pérez* the Court, with reference to Article 21(1), states that it 'examines the question of discrimination 'solely' in the light of the directive (FETD) and in YS of the directives (FETD and GEED) 'alone'. C-416/13 *Vital Pérez* (Judgment of 13 November 2014) [25] and Case C-223/19 YS (Judgment of 24 September 2020) [25].

[108] This would follow the reasoning in *Léger* (n 73), where Member State legislation implementing EU law was assessed in light of the protection against discrimination based on sexual orientation as listed in 21(1) in a case where no equal treatment directive was applicable, the same pattern is visible in C-243/19 A (29 October 2020). See further section IV.

[109] Case C-673/16 *Coman* (Judgment of 5 June 2018, Grand Chamber).

[110] ibid. [49].

reasoning on the question of potential discrimination employs Charter articles (i.e. Article 7 in *Coman* and Article 10 in *Achbita* and *Bougnaoui*), which do not address the question of discrimination.[111]

21.69 On the topic of citizenship, the absence of Article 21(2) as a relevant source is further highlighted by examining key legislation on the free movement of EU citizens and immigration of third-country nationals. All make extensive reference to Article 21 but not to its nationality discrimination limb as one might have expected, especially in the Citizens' Rights Directive. While the Citizens' Rights Directive refers in its Preamble to the prohibition of nationality discrimination, this is not linked to Article 21. Yet all these Directives, concerned with granting their beneficiaries the right to be treated like a host-state national, instead extensively refer to the status discrimination limb of Article 21.[112]

IV. Limitations and Derogations

21.70 Many of these have already been discussed earlier in this analysis, so we limit ourselves here to highlighting two key issues. One key issue concerns when the Charter can overcome the limitations and derogations in EU discrimination law. A second, distinct though connected, issue is how Article 21 EUCFR is itself limited.

21.71 In relation to the first issue, as noted earlier when examining the structure of EU discrimination law, we saw that there is a wide and ground-differentiated set of justifications and derogations from the status discrimination prohibitions. While the justifications and derogations from gender and race discrimination are relatively tightly drawn (although the social security gender equality directive is a significant exception) those for age, sexual orientation, religion/belief and disability are set more widely.

21.72 In relation to the second issue, how the Charter itself is limited, we have seen that the expansive potential scope of Article 21 EUCFR is limited by the Charter itself in a number of ways. First, the nationality prohibition is expressly tied to the relevant treaty provisions, in both its own wording and in the Explanations. Moreover, this is reinforced by Article 52(2) which provides that 'rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'.

21.73 As discussed in section II the bearing of the concepts of direct and indirect discrimination on Article 21(1) is still evolving. The use of these concepts is particularly important when defining justifiable derogations to Article 21(1). In *Léger, Fries, and Glatzel* the Court used article 52(1) EUCFR to define the acceptable limitations to the protection afforded under 21(1) EUCFR.[113] In all instances, and as noted above, without specifying whether the challenged piece of legislation is directly or indirectly discriminatory, the Court established *a priori* discrimination under Article 21(1). The Court then turned to Article 52(1) to evaluate whether this could be considered justified. Whereas *Fries* and *Glatzel* concerned the validity of EU secondary legislation, *Léger* concerned national law implementing EU law. Given, as noted earlier, the Court's track record of judicial review of EU legislation on the basis of Article 21(1), we examine its reasoning in *Léger*. In *Léger,* EU Directive 2004/33/EC concerning certain technical requirements for blood and blood components excluded blood donations from 'persons whose sexual behaviour puts them at high risk of acquiring severe infectious diseases than can be transmitted by blood'. The French law implementing this provision (found in Annex

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[111] Section II b.

[112] See Directive 2003/109 Preamble (5); Directive 2003/86 Preamble (5); Directive 2004/38 Preamble (5), (6) and (20) (nationality discrimination) and (31) (EU Charter and status discrimination).

[113] *Fries* (n 73), *Léger* (n 73) and *Glatzel* (n 100).

III to the Directive) defined this as encompassing 'permanent contraindication to blood donation for a man who has had sexual relations with another man'. The Court of Justice concluded that the French law, *a priori* 'may discriminate against homosexuals on grounds of sexual orientation within the meaning of Article 21(1) of the Charter'.[114] The Court immediately consulted Article 52(1) and affirmed that any limitation must be provided for by law and be proportionate in the sense that the limitation must be necessary and genuinely meet objectives of general interest recognised by the European Union. The Court of Justice then asserted that the limitation was provided by law and pursued the general interest of protecting public health. While overall the Court of Justice is deferential, it instructed the referring court that the French implementation law in question could only be proportionate if scientific and technological developments do not offer a less onerous method than the exclusion of all men who have sex with men from giving blood.

21.74 *Léger* concerns a discriminatory situation distinctly more evocative of direct discrimination than indirect, as the French law singles out men who have sex with men. Nonetheless, Article 52(1) and the method of justification that the Court draws from it is more reminiscent of the EU law wide method for assessing indirect discrimination (or even 'indistinctly applicable measures', to momentarily recall internal market law). In *A*, by contrast, the Court uses Article 21(1) to clearly establish an ultimately justifiable case of indirect discrimination based on religion.[115] The case concerns a Latvian Jehovah witness who wants his son to receive open-heart surgery without blood transfusion, a procedure available in Poland but not in Latvia. The Latvian authorities deny A's request for prior authorisation to seek healthcare in Poland under Regulation (EC) No 883/2004 on the coordination of social security systems, and prior authorisation for reimbursement of such medical treatment under Directive 2011/24/EU on patients' rights in cross- border healthcare. In both instances the Court finds that the rejections (in the case of reimbursement the hypothetical rejection) amount to indirect discrimination. The Court, scrupulously, goes on to examine Latvia's motivations referring to treatment capacity and medical competence and concludes that each of these are to be considered an 'objective and reasonable criterion', and that, in principle, the rejection of prior authorisation is an appropriate and necessary means of achieving that aim.

This means that as we discussed earlier, the Court's current use of justifiable derogations from Article 21(1), which unevenly engages with well-sedimented concepts of direct and indirect discrimination, complicates navigation within the terrain of EU equal treatment law. In the case of *Léger* this is exemplified by the Court of Justice allowing the national Court to justify what appears to be direct discrimination with a method of justification more similar to that traditionally used for indirect discrimination. In *A*, a textbook application of the method for establishing justifiable derogations to indirect discrimination is used in relation to Article 21(1). Ultimately, as the case law stands, this criss-crossing between methods of justification under the auspices of the Charter is to the detriment of those people it sets out to protect.

21.75 Further, while the status discrimination prohibition is limited only in the Explanations, these essentially stress at some length the implications of the horizontal provision contained in Article 51 EUCFR for status discrimination. Hence, echoing Article 51(2), Article 21(1) 'does not alter the extent of powers granted under Article 19 [TFEU] nor the interpretation given to that Article'. And, underlining Article 51(1), the Explanations relating to status discrimination also stress that the Charter applies to the EU institutions and to the Member States 'only when they are implementing Union law'. This belt-and-braces approach makes the legal status of the Explanations, in particular the requirement in Article 6(1) TEU to have 'due regard' to them, less critical than it might otherwise be.

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[114] *Léger* (n 73) [50].

[115] A (n 108).

21.76 Can Article 52 EUCFR provide some counterweight to this limiting approach in the sphere of status and nationality discrimination? Article 52(3) provides that Charter protection should be at least co-extensive with that provided by the ECHR, whilst Article 52(4) requires that Charter rights corresponding to fundamental rights as they result from the constitutional traditions common to the Member States should be interpreted in harmony with those traditions. Insofar therefore as greater protection is provided by either the ECHR or national constitutional traditions, Article 52 could provide a textual counterweight to the limitations on Article 21 EUCFR.

21.77 However, in the sphere of status discrimination, it is the EU which has generally been the front runner in developing protection, making it unlikely, though certainly not impossible, that ECHR or national constitutional protection might outpace it. In the sphere of nationality discrimination, as far as EU citizens are concerned and as the Explanations to Article 52 expressly note, EU law provides more extensive protection to them than the ECHR. Hence the limitations provided by Article 16 ECHR on the rights of aliens[116] do not apply to EU citizens, though this has also been established by the Strasbourg Court.[117] Earlier, we discussed whether the European Court of Human Rights' broader protection from nationality discrimination could be used to nudge the Court of Justice into a different position under EU law in relation to comparing EU and non-EU nationals.[118]

V. Remedies

21.78 Historically, status discrimination has been a key area of EU law for the development of strict and extensive requirements on the effectiveness of national remedies.[119] Article 21 provides an important demonstration of one of the key remedies a successful direct use of the Charter can afford. In *Test-Achats* it was used by the Court of Justice to invalidate provisions of a piece of EU legislation which contravened the Charter obligation not to discrimination on grounds of gender. In *Egenberger*, Article 21 was attributed horizontal direct effect to invalidate a national provision which violated the right to protection against discrimination based on religious belief in a dispute arising between two private parties.

21.79 In *Cresco Investigations*, the Grand Chamber built on the horizontal direct effect attributed to Article 21 in *Egenberger* by guaranteeing the right to compensation.[120] *Cresco Investigations* concerned a provision whereby members of certain Christian churches were entitled to paid leave on Good Friday, while employees without such membership had no right to paid leave. The Court, following *Egenberger*, ruled that Article 21 also prohibits discrimination based on religion when it derives from contracts between individuals. It goes on to state that the referring court would be obliged 'to guarantee individuals the legal protection afforded to employees under Article 21 of the Charter and to guarantee the full effect of that article.'[121] Accordingly, until the national law is altered the employer is obliged to guarantee paid leave on Good Friday to all its workers. *Egenberger* and *Cresco Investigations* represent

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[116] 'Nothing in Articles 10, 11 and 14 (art. 10, art. 11, art. 14) shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.'

[117] *Piermont v France* App nos 15773/89 and 15774/89 (Judgment of 27 April 1995).

[118] See above section II a.

[119] C Kilpatrick, 'Turning Remedies Around: A Sectoral Analysis of the European Court of Justice' in G de Búrca, and JHH Weiler (eds), *The European Court of Justice. Collected courses of the Academy of European Law* (11/2) (Oxford, Oxford University Press, 2001) 143.

[120] *Cresco Investigations* (n 92).

[121] ibid. [78].

a significant step towards placing Article 21 at the centre of legal claims to remedies for having suffered status discrimination in the EU.

E. Evaluation

21.80 Article 21 provides a highly productive vantage-point from which to analyse status and nationality discrimination in EU law. Analysis from this starting-point allows their evolving role and content as 'human rights' norms to be teased out temporally and in different EU institutional locations. The distinctive treatment of nationality discrimination in EU law, whereby it has not been used to test distinctions between EU and non-EU nationals, is cast in a different light when set against a broader human rights canvas and within a rapidly evolving EU legal order and European society. This is even more true when forms of intersectional and overlapping discrimination, like that of nationality, race and ethnicity, are taken into account.

21.81 The very juxtaposition in Article 21 of nationality and status discrimination in an omnibus fundamental right outlawing discrimination opens new questions and perspectives about their shared structure and field of application. We have suggested that the existence of a broad, and open-ended, discrimination Charter provision offers new possibilities and provides a resource to deal with overlapping as well as intersectional discrimination, and to develop innovative approaches to tackling discrimination. In this sense, Article 21 EUCFR may act as an important bridge for the development of EU discrimination protection.

21.82 While the non-use of Article 21 is still an important story to be told and examined, the article has by now been used to strike down a provision of an EU Directive as invalid, which itself raises many fundamental questions about the structure of EU law and the relationship between the Court and the EU legislature, and it has been attributed horizontal direct effect. This latter development opens the door for Article 21 EUCFR to play a significant role in shaping EU fundamental rights law, given the undoubted importance of both status discrimination and nationality discrimination as central and rapidly evolving areas of EU law.