ERA Seminar: EU Gender Equality Law

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Introduction to Gender Equality Law

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Overview: International and EU framework on gender equality law

- International level
  - CoE, UN, ILO
- EU level
  - Treaties (TEU, TFEU, Charter of fundamental rights of the EU)
Questions to address

- Which are the legal instruments fighting gender discrimination at supranational level? Overview & Scope
- Why is there anti-discrimination law at international and EU level?
- Differences and similarities between the international, EU and national law?
- How is the international/EU legislation implemented at national level?
- Differences between various grounds of discrimination?

International level

- Article 26 ICCPR 1966 - International Covenant on Civil and Political Rights
- ICESCR 1966 - International Covenant on Economic, Social and Cultural Rights (Articles 2 & 7)
- CEDAW 1979 - The Convention on the Elimination of All Forms of Discrimination against Women
- ILO Conventions
  - Equal Remuneration Convention, 1951 (No. 100)
  - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
  - Workers with Family Responsibilities Convention, 1981 (No. 156)
Council of Europe

- Article 14 ECHR
- The European Social Charter (Articles 4, 20 & 27)
- Relationship EU – Council of Europe – Fundamental rights/general EU law principles

Article 6 TUE

- 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
- 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

EU level – Historical Developments

From economic reasoning (preventing social dumping) to a social aim: protection of a fundamental right – Schröder, C-50/96 Main objective.
- The Treaty of Rome: sex equality (Article 119 TEEC) & prohibition on discrimination based on nationality.
- Social Action Programmes in the 1970s
- Directives 75/117 EEC (equal pay), 76/207/EEC (employment & occupation), 79/7/EEC (social security).
- Stagnation in the 1980s.
- Directives 96/34/EC (family and working life) and 97/80/EC (burden of proof).
- Treaty of Amsterdam (1997): competence to prohibit discrimination on other grounds.
- Charter of Fundamental Rights of the EU
- Directives 2000/43 (on race) 2000/78 (Framework), 2006/54 (Recast Directive 2006/54 (sex equality)).
### EU Legal Framework – Treaty provisions

- **Article 3 TEU** (The EU shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men…)
- **Article 8 Treaty on the Functioning of the EU, TFEU** In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.
- **Article 19 TFEU** (Treaty basis – Combating discrimination – on sex among other grounds-

### Charter of Fundamental Rights of the EU:

- Same value as the Treaties
- **Article 23 - Charter:**
  - ‘Equality between women and men must be ensured in all areas, including employment, work and pay.
  - The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.’
Main Treaty provision - Article 157 TFEU:

- 1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
- 2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
- Equal pay without discrimination based on sex means:
  - (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
  - (b) that pay for work at time rates shall be the same for the same job.
- 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.
- 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Directives – equal treatment for men & women

- 2006/54/EC, in employment & occupation (recast)
- 79/07/EEC, in social security matters
- 92/85/ECC, safety and health at work of pregnant workers
- 2004/113/EC, in access to goods and services
- 2010/41/EC, in self-employment
A closer look at Directive (recast) 2006/54/EC

- Art. 1 purpose.
- Art. 2 definitions - concept of discrimination.
- Art. 3 positive action.
- Art. 4 remuneration
- Art. 5 occupational social security.
- Art. 6 personal scope equal pay provisions (employees, civil servants & self-employed)
- Arts. 7-8 material scope equal pay
- Art. 9 examples of pay discrimination
- Arts. 10-11 implementation as regard self-employed
- Art. 12-13 limitations of retroactive effect & flexible pensionable ages
- Art. 14 access to employment & working conditions
- Art. 15-16 return from maternity leave, paternity and adoption leave
- Articles 17-9 remedies and enforcement.
- Articles 20-22 promotion of equal treatment
- Articles 23-30 general horizontal provisions (compliance, prohibition of victimisation, gender mainstreaming…)

Exceptions to equal treatment rule:

- Characteristic related to sex – genuine and determining occupational requirement (Article 14.2 Recast Directive):
- restricted interpretation, periodical evaluation of the professions concerned;
- ECJ case law: Kreil C-285/98 (against principle of equal treatment to exclude women from the armed forces) and Sirdar C-273/97 (allowed exclusion from special military units).
Exceptions to equal treatment rule:

- **Protective legislation for women**: pregnancy and maternity.
- Allowing national provisions guaranteeing women specific rights on account of pregnancy and maternity (i.e., maternity leave).
- ECJ case law: Legitimacy of protecting a woman’s biological condition during and after pregnancy and second, of protecting the special relationship between a woman and her child. *(Hofmann, Case 184/83)*
- **Roca Alvarez, C-104/09**, access of men to ‘breastfeeding leave’- men and women same status of parents. *(Commission v. Greece, Case C-559/07)*: men and women same quality as parents and comparable role on children’s education.

Exceptions to equal treatment rule:

- **Positive action** measures ensuring full equality in practice between men and women (Art. 3 Recast Directive); Strict requirements & compliance with proportionality principle.
- **Case C-450/93 Kalanke**: National rules giving an ‘automatic priority’ on a promotion to women are not allowed.
- **Case C-409/95 Marschall**: If the candidatures are subject to an ‘objective assessment’ which will take into account all criteria specific to the individual candidates (‘saving clause’) the affirmative action measure complies with EU law.
- **Case C-158/97 Badeck**: a rigid quota for women in the access to training, invitation to an interview and membership of the employees’ representative bodies and/or administrative and supervisory bodies is accepted, as long as it is not leading to an ‘absolute rigidity’.
- **Case C-407/98, Abrahamsson**, the appointment of a female worker who has sufficient qualifications for a post instead of a male candidate who is better qualified is precluded by EU law (Breach of proportionality principle).
Concept of Equality:

Formal versus substantive equality.
- Formal equality: the Aristotelian way of looking at things. Like should be treated alike.
- Substantive equality: (a) equality of opportunity and (b) equality of results.
  - Several related concepts: affirmative action, preferential treatment, positive action
  - Broad range of proactive measures: Equal opportunities policies quotas and targets (i.e. preferential treatment in job applications)

Equality Concepts:

- **Formal equality** (Aristotelian): ‘Equal should be treated equal and unequal in an unequal way.’ Individual complaints led model – reactive

- **Protection against discrimination:**
  A. Direct discrimination (objective & non-justifiable)
  B. Indirect discrimination (collective & objectively justifiable/proportionality test)

- **Substantive/‘de facto’ equality:** assure equal opportunities and objective equality in the results.

- **Proactive model:** Promotion of disadvantage groups - Women
Approach to this issue:

- **Main Question:** Is the result pursued by EU law substantive or formal equality?
  
  C-136/95, Thibault; C-158/97, Badeck; Case C-407/98, Abrahamsson; C-342/01, Merino Gómez

- The positive dimension of equality can be observed, even when restrictively shaped, in the EU legislation and in the CJEU’s case law interpreting it.
  
  Cases C-450/93 Kalanke; C-409/95 Marschall; C-158/97 Badeck; C-407/98, Abrahamsson

Implementation at national level

- **International Law** – obligations depending on ratification by the States – ILO no sanctions

- **EU Law** – compliance/coercive power

- Member states implement EU secondary law differently.

- Directives provide minimum requirements/No complete harmonization.

- Non regression principle.

- Interactive-multilevel process.

- Strong impact of the ECJ case law (preliminary rulings/infringement procedures)
Application of EU gender equality law at Member State level

- Direct effect of primary law
  - art. 157 TFUE (since Defrenne II 43/75 -article 119 TEEC-)
  - Fundamental right & general EU law principle (since Defrenne III, 149/77)
- Direct vertical effect of Directives (State v. citizens)
- Indirect effect of Directives
  - Proper implementation
  - Indirect horizontal effect.
  - Interpretation in conformity with EU law
  - Liability for damages of member states.

Conclusions

- Enhanced coherence in the definition of discrimination (for gender and other grounds).
- Recognition of the substantive model of equality
- Increasing importance of the social fundamental rights perspective.
- Low interaction between the international – EU levels / High interaction EU – national levels
- Hierarchy in the protection offered by EU law against the different grounds of discrimination. (Gender equality law at the top – Direct discrimination based on sex can never be justified –Wide range of Directives – “Star of EU social law.”
- Shortcomings in the implementation at national level. Problems with enforcement of EU equality law at Member States level - See report Burri & Prechal, 2010
Simone de Beauvoir

“In almost any country, the legal status is identical for every human. But even when rights abstractly recognized this equality, manners and habits still discriminate women”.