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The legal framework on gender equality

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outline

1. overview legal instruments, both EU & other
2. some major differences EU / other IL options
3. discuss EU legislation
 1. origin
 2. Charter, treaties, directives
 3. system: closed & open + legal exceptions
 4. some differences with other IL approaches

but first: why sex-equality law at all?

to clarify: sex & gender

- mostly understood as:
 - **sex** referring to biological difference
 - male & female
 - **gender** referring to socially constructed roles (expected behaviour of men & women etc.)
 - masculine & feminine
- however, in practice often used as synonyms, encompassing both aspects

sex or gender?

on 'Trans & intersex equality rights in Europe' see:
M. van den Brink & P. Dunne, Nov. 2018,
https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=638586



1) overview



general instruments

- UN + regional human rights treaties + non-discrimination & equality norms, esp.
 - UN: Int. Covenant on CP Rights (ICCPR) & Int. Covenant on ESC Rights (ICESCR)
 - CoE: Eur. Convention on Human Rights (ECHR) & Eur. Social Charter (ESC)
- non-legal: e.g. UPR, shadow reports, special rapp.

specific instruments

- on sex / women's equality & other issues: CEDAW convention; Istanbul convention on violence; other (e.g. on nationality)
- on employment & gender issues:
 - ILO conventions, esp no. 100, 111, 156 & 183



International Labour Organization

2) major differences EU law / other IL

- **EU law:**
 - EU treaties and EU regulations are directly applicable: once adopted by MS: no need to 'translate' into national law
 - EU directives are not directly applicable. Directives in essence tell member states to do something therefore, when passed they need a piece of legislation to make them into national law.
 - most sex-equality law: in directives: directives binding as to the result: states need to implement, and can choose their own ways & means
 - monitoring by European Commission (art. 17 TEU) and domestic & EU Courts
- **other international and regional law:**
 - treaty ratification binds states, but applicability depending on domestic framework (monist / dualist systems)
 - various monitoring tools, e.g. reporting procedures, individual and collective complaints, domestic compliance mechanisms

2) in case of non-compliance

- major difference EU law / other instruments:
 - EU law: often via domestic court questions for a *preliminary ruling*
 - CoE, UN: individual complaints procedures *after* exhaustion of domestic remedies
 - exceptions:
 - collective complaints procedure European Social Charter
 - complaints procedure ILO (employers, trade unions, art. 24 ILO Constitution) (also inter-state complaints possible, art. 26)

2) other issues to take into account in complaints procedures

- UN and other treaties:
 - ratification of treaty and complaints procedure required
 - outcome ('views') not legally binding
 - CEDAW: arguably only to complaints regarding *women's* rights violations
 - to keep in mind: ICCPR art. 26: not restricted to rights included in treaty (as art. 14 ECHR), but general non-discrimination norm

2) European (CoE) conventions

- European Convention on Human Rights:
 - admissibility strictly tested
 - about 95% submissions inadmissible
 - judgments: legally binding; follow-up by Committee of Ministers
- European Social Charter:
 - system for collective complaints
 - no need to exhaust domestic remedies
 - no victim requirement
 - conclusions (decisions): not binding; follow-up by Committee of Ministers

what has the EU got to do with
sex equality?

3) the EU & sex-equality

- equal pay in the original treaty (art. 119, now art. 157 TFEU)
 - gap at the time:
 - France 10%, Germany 29%, Netherlands 31%
- from unfair competition in an internal market to social policy & employment rights
- 1999: Treaty of A'dam:
 - sex equality: core task of EU
 - (cf art. 3(3) TEU)

3) overview of legal instruments

- primary & secondary legislation:
 - primary: Charter & treaties:
 - TEU: Treaty on European Union
 - TFEU: Treaty on the Functioning of the EU
 - Charter (see art. 6 TEU)
 - secondary: directives
 - directives are binding as to the result (i.e. states are free to decide on the best way to implement directives) (art. 288 TFEU)

3) Legal instruments: TEU & TFEU

- Treaty on European Union (TEU)
 - treaty provides: basic structure & provisions
 - art. 2 TEU: **sex equality = common value**: thus, a yardstick for new candidates EU membership
 - art. 3(3) TEU: "The Union shall **promote ... equality between women and men ...**"

3) Legal instruments: TEU & TFEU

- Treaty on the Functioning of the EU (TFEU): more detailed provisions
 - art. 157
 - (1-2): **equal pay**
 - (3): promotion of **equal opportunities** and treatment
 - (4): **positive action** measures
 - art. 8: "In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women."
(*gender mainstreaming provision*)
 - art. 10: "In defining and implementing its policies and activities, the Union shall **aim to combat discrimination** based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."
 - art. 19: "...within the limits of the powers conferred by them upon the Union, the Council... may take appropriate action to **combat discrimination** based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

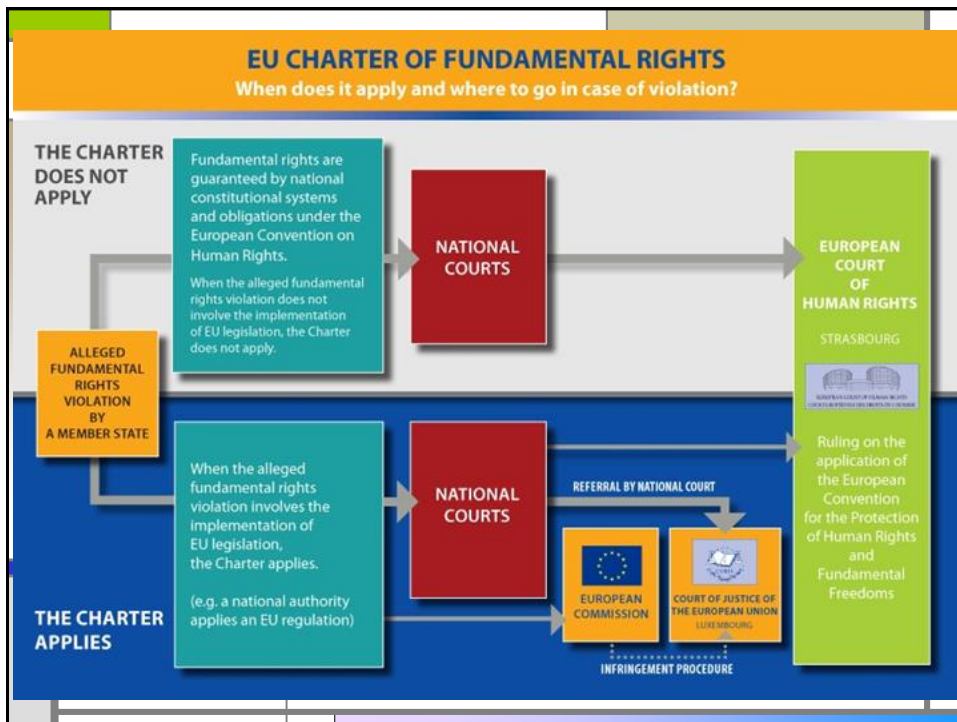
3) Legal instruments: Charter

- legal status:
 - adopted 2000 in Nice
 - legally binding since Treaty of Lisbon in 2009 (art. 6(1) TEU)
 - addresses: EU bodies + MS but the latter **only** when implementing EU law (art. 51(1) Charter)
- contents:
 - part 1: dignity
 - part 2: freedoms
 - **part 3: equality, esp. art. 23**
 - part 4: solidarity
 - part 5: citizen's rights
 - part 6: justice
 - part 7: general provisions

Scope Charter (art. 51)

“The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States **only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”

(see also art. 6(1) TEU)



3) legal instruments: directives

- sex-equality directives:
 - 'Recast directive' (2006/54): equal opportunities & equal treatment
 - 'Third directive' (79/7): statutory social security
 - 'Goods & services directive' (2004/113)
 - 'Self-employed directive' (2010/41)
- other relevant directives:
 - 'Pregnant workers directive' (92/85)
 - 'Parental leave directive' (2010/18)
- from intersectional discrimination angle also:
 - 'Race directive' (2000/43)
 - 'Framework directive' (2000/78)

on intersectional discrimination see Sandra Fredman, 2016:

'Intersectional Discrimination in EU Gender Equality and Non-Discrimination',
<https://www.equalitylaw.eu/publications>

types of discrimination

- direct discrimination
(e.g. Dekker, 1990, C-177/88)
- indirect discrimination
(e.g. Bilka Kaufhaus, 1986, 170/84)
- intersectional discrimination
(Parris, 2016, C-443/15)
- harassment (Coleman, 2008, C-303/06)
- sexual harassment (so far only EU staff cases; on procedural aspects see e.g. OZ, 2017, T-607/16)
- instruction to discriminate (no cases; relevance of demands of clients? Bougnaoui, C-188/15, 2017)
- by association (e.g. Coleman, 2008)

3) EU legal system: closed & open system of exceptions

- closed system: distinctions based directly on sex (direct discrimination) only allowed if exception provided for in directive (esp. '2nd' or 'equal treatment' directive 76/207, now included in Recast)
 - exceptions:
 - pregnancy & maternity
 - positive action incl. preferential treatment
 - genuine occupational requirement
- open system: direct discrimination may be objectively justified (objective justification test)

3) the legal system: closed system of exceptions

- closed system test:
 - distinction based directly on sex?
 - if yes: exception provided in directive?
 - if so: purpose of distinction legitimate & measure proportionate?
- ratio of the system
- NB re pregnancy: regarded as *direct* discrimination of women on ground of sex - no comparator needed
 - *Dekker v VJV* (1990, C-177/88)

3) the legal system: open system test: objective justification

- test:
 - discriminating measure / criterion / provision
 - corresponds to a real need of the undertaking (business), or serves a necessary purpose of social policy (govt)
 - is appropriate to achieve that purpose / need
 - and is necessary to attain that purpose
 - same test applies to **indirect** sex-discrimination, i.e. to assess the acceptability of an apparently neutral provision, criterion or practice that nevertheless puts persons of one sex at a disadvantage in comparison with persons of the other sex
- Landmark case CJEU: *Bilka Kaufhaus* 1986, C-170/84

3) the legal system: exception: pregnancy & maternity

- NB pregnancy regarded as direct discrimination of women on ground of sex - no comparator needed
 - *Dekker v VJV* (1990)
- art. 2(2)(c) Recast: "... discrimination includes ... any less favourable treatment of a woman related to pregnancy or maternity leave ..."
- art. 28(1): "This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity"
- but what if:

3. the legal system: exception: pregnancy & maternity

- NB pregnancy regarded as direct discrimination of women on ground of sex - no comparator needed (*Dekker v VJV* (1990))
- art. 2(2)(c) Recast: "... discrimination includes ... any less favourable treatment of a woman related to pregnancy or maternity leave ..."
- art. 28(1) Recast: "This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity"
- ECtHR in *AP, Garçon & Nicot v France*, 2017: sterilisation as a condition to change of legal gender unacceptable

3. the legal system: exception: occupational requirements

- genuine occupational requirement (art. 14(2) Recast)

3. the legal system: exception: positive action

- positive action: *Lommers 2002*
 - regards: equal starting points
- specific form of positive action:
 - preferential treatment: *Kalanke (1995)*
 - access to scarce goods (i.e. jobs, promotion etc.); very strict conditions apply

that's it - thank you
any questions?

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