



ERA Seminar – EU Gender Equality Law
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Introduction to EU Equality Law:

Dr. Nuria E. Ramos Martín
University of Amsterdam



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Issues to address

- Trends on gender equality
- Main legal instruments fighting discrimination at supranational level
Overview & Scope
- Differences between various grounds of discrimination
- How is the international/EU legislation implemented at national level?

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EIGE – Gender Equality Index - Gender Policy Brief

Upward convergence in gender equality: How close is the Union of equality?

- Upward divergence in gender equality on company boards
- The gender gap in FTE employment decreased slightly at EU level.
- Following the outbreak of COVID-19, gender equality appears to be at a crossroad.
- Take gender differences into consideration in crafting responses to the COVID-19 pandemic

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EIGE data – Gender Equality index

- In 2019, progress on increasing women's labour market participation is disappointing: the gender employment gap has stagnated at 12 percentage points since 2014.
- Persistence of a gender pay gap, with women's gross hourly earnings 14.1% below those of men, on average, in 2019.

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Introduction.

■ General Concepts and provisions

- Equality as a general principle of EU law (Cordero Alonso C-81/05; Mangold C-144/04; Danks Industri C-441/14)
- Equality as a value/aim - corollary duty of States?
- Right to equality – absence of discrimination on several grounds: sex, age, disability, religion, belief, sexual orientation and race/ethnicity. (Different scopes)



Overview: International and EU equality law legislation

- International level - CoE, UN, ILO
- EU level
 - Treaties (TEU, TFEU, Charter of fundamental rights of the EU)
 - Secondary Law – Directives:
 - Directive 2000/43 (race and ethnicity);
 - Directive 2000/78 (Framework);
 - Gender Directives 2006/54/EC (recast), 79/07/EEC (social security), 92/85/ECC (maternity), 2004/113/EC (goods & services), and 2010/41/EC (self-employment).



International level

- UN - ICCPR 1966 - International Covenant on Civil and Political Rights & ICESCR 1966 - International Covenant on Economic, Social and Cultural Rights
- CEDAW 1979 - The Convention on the Elimination of All Forms of Discrimination against Women
- UN Convention on the Rights of Persons with Disabilities 2006
- ILO Conventions
 - Equal Remuneration Convention, 1951 (No. 100)
 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

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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.

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From **economic reasoning** (preventing social dumping) to a **social aim**: protection of a fundamental right – Schröder, C-50/96 Main objective.

Landmarks on EU equality law:

- Treaty of Rome: gender equality (Article 119 TEEC) & prohibition on discrimination based on nationality.
- Defrenne cases
- Directives 75/117 EEC (equal pay), 76/207/EEC (employment & occupation), 79/7/EEC (social security).
- Directive 96/34/EC parental leave (currently WLB Directive 2019/1158)
- Directive 97/80/EC (burden of proof)
- Treaty of Amsterdam (1997): competence to prohibit discrimination on other grounds.
- Directives 2000/43 (on race) 2000/78 (Framework), 2006/54 (Recast Directive - gender equality).
- Equality for flexible workers (Directive 97/81/EC and 1999/70)
- Treaty of Lisbon - Charter of Fundamental Rights of the EU (Same value as the Treaties)



New Developments in EU law

- The European Pillar of Social Rights initiative – One of the three main categories:
 - Equal opportunities and access to the labour market;
 - Principles 2 & 9
- New work-life balance Directive 2019/1158 - challenges faced by working parents and careers/De-genderisation policies - reforming Directive 2010/18 - parental leave, paternity leave, flexible working arrangements
- Proposal Directive – pay transparency



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 – for measures combatting discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation)

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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. (...)
3. The European Parliament and the Council,(...), 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.

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Charter of Fundamental Rights of the EU (Chapter III - Equality):

- Article 20 Equality before the law
- Everyone is equal before the law.
- **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.

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Charter of Fundamental Rights of the EU:

- 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.'

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Charter of FFRR of EU

- Article 26

Integration of persons with disabilities

- The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

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Article 21 EU Charter of FFRR

Horizontal direct effect in the CJEU case law

- Mangold C-144/04 and Küçükdeveci v Swedex GmbH & Co KG C-555/07 case law of the CJEU, the horizontal direct effect of EU general principles and of provisions of the Charter of Fundamental Rights became a debated issue.
- Küçükdeveci - the Court confirmed that the Charter have the same legal value as the Treaties, including the horizontal effect;
- Directives that concretise a general principle of EU law can de facto have horizontal direct effect;

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Article 21 EU Charter of FFRR

- Direct age discrimination cases: David Hütter v Technische Universität Graz C-88/08 and Schmitzer v Bundesministerin für Inneres C-530/13 - article 21 CFFRR and article 6 of Directive 2000/78 - principle of proportionality:
- A justification for difference of treatment must be “objective” Conditions: legitimate social policy aim and the means to achieve such legitimate aim must be “appropriate and necessary”.

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Case C-223/19 - YS v NK – Article 21 Charter of FFRR

“The scope of the Charter is defined in Article 51(1) thereof, providing that, with regard to action by the Member States, the provisions of the Charter are addressed to those States only when they are implementing EU law.”

“The fundamental rights guaranteed by the Charter are applicable in all situations governed by EU law and that they must, therefore, be complied with inter alia where national legislation falls within the scope of EU law.”

Regarding, more specifically, discrimination on grounds of age, it is apparent from the case-law of the Court that, where they adopt measures which fall within the scope of Directive 2000/78, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age (inter alia), Member States must respect the directive (Felber, C 529/13)

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Article 21 EU Charter of FFRR

- Netherlands / Administrative High Court / CRVB:2020:1920
- The Court holds that Article 51 of the Charter states that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the **principle of subsidiarity** and to the Member States **only** when they are **implementing Union law**. In this case, no provision of Union law is applicable, so the provisions of the Charter, including Article 21, do not apply.
- The applicant is not entitled to a full old age pension.

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A closer look at Directive 2006/54/EC (recast - gender)

- Art. 2 definitions - concept of discrimination (direct, indirect, 'harassment based on sex' and 'sexual harassment')
- Art. 3 positive action.
- Art. 4-5 remuneration/occupational social security.
- Art. 6 personal scope equal pay (employees, civil servants & self-employed)
- Arts. 7-14 material scope equal pay, acces to employment & working conditions
- Articles 17- 19 remedies and enforcement.
- Articles 23-30 general horizontal provisions (compliance, prohibition of victimisation, gender mainstreaming...)

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Race - Directive 2000/43 – Overview of main Provisions

Art. 2 concept of discrimination (Direct, Indirect, Harassment)

Art. 3 scope (employment, self-employment, occupation, vocational training, social protection, including social security and healthcare; education; access to and supply of goods and services, including housing.)

Art. 4 occupational requirements

Art. 5: positive action.

Art. 7-16: remedies and enforcement – sanctions & implementation

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Other Anti-discrimination Directives: -Framework Directive 2000/78 – Overview of main Provisions

Art. 2 concept of discrimination (Direct/ Indirect/Harassment)

Art. 3 scope (employment & occupation)

Art. 4 occupational requirements

Art. 5: disability -“reasonable accommodation”.

Art. 6: age - different ways of dealing with justifications

Art. 7: positive action

Art. 9-14 + 17: remedies, sanctions and enforcement

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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).
- CJEU 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 and comparable role on children's education. (equality on parental leave)

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Exceptions to equal treatment rule:

- **Characteristic related to sex, race, age, disability, religion... – genuine and determining occupational requirement** (Art. 14.2 Recast Directive, arts. 4 Directives 2000/43 & 2000/78):
- 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).

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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-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**).
- **Positive action** measures in favour of racial minorities & other minorities or vulnerable groups (persons with disabilities) – Art. 5 Directive 2000/43 & Art. 7 Directive 2000/78

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Equality Concepts: Formal v. Substantive

- **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 (non-justifiable)
 - B. Indirect discrimination (objectively justifiable/proportionality test)
- **Substantive/'de facto' equality**: assure equal opportunities and objective equality in the results.
- Proactive model: Promotion of disadvantage/underrepresented groups – Women, minorities, persons with disabilities – Positive action/affirmative action measures (quota, targets...).

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Substantive equality in EU Law

■ Main Question:

Is the result pursued by EU law substantive or formal equality?

C-136/95, *Thibault*;

C-158/97, *Badeck*;

C-342/01, *Merino Gómez*

■ Substantive dimension of equality can be observed, even when restrictively shaped, in EU legislation and case law.

■ Cases C-450/93 *Kalanke* & C-407/98, *Abrahamsson*

■ Proposal on female quota in corporate boards



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.

■ Interactive-multilevel process.

■ Strong impact of the CJEU case law (preliminary rulings/infringement procedures)

■ Principle of effectiveness of EU Law



Application of EU 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 effect Charter of FFRR
- 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.

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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 rights perspective.
- 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 & compliance of EU equality law at Member States level.

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Is EU law and policy providing **substantive** gender equality?

“Deeds
not words”

Women’s Social and
Political Union-WSPU
Suffragettes’ motto

EIGE – data:

Trends to
Upward
Convergence
but still gender gaps



- THANKS FOR YOUR ATTENTION
- QUESTIONS? REMARKS?