



EU Equality Law in the Future

Seminar on 'Current Reflections on EU Gender Equality Law'

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Outline

I. Origin of discrimination legislation

- generally speaking
- in the EU

II. Evolution

- 'outer' dimension
- 'inner' dimension

III. The Lisbon Treaty with the EU Charter

IV. Current state of affairs and possible implications for the future

I. On the origin of discrimination legislation

- **Generally speaking**

Unacceptable differential treatment concerning a certain **group** has been identified at **societal level**

The goal is to **change** hitherto normative perceptions on belonging and exclusion and to purport social **justice** and **integration** – at individual and societal level

- **EU**

1957 – Art. 6 and 119, 'market rights'

1986, (-89), -92, -97, 2001, 2007 a social dimension

II. Evolution of Community Discrimination Law

- Bob Hepple* sketches 'equality at work' in EU in four stages:

Human rights in the new world order (1948-58)

Formal equality (1957-75)

Substantive equality (1976-99)

Comprehensive and transformative equality (2000-2004)

*The Transformation of Labour Law in Europe, eds. Hepple and Veneziani, Oxford 2010

II. Evolution of Community Discrimination Law – outer dimension

Pre-Amsterdam

- The 1957 Treaty of Rome, Art. 119

Directive 75/117/EEC on Equal Pay

Directive 76/207/EEC on Equal Treatment

Directive 79/7/EEC on Social Security

Directive 86/378/EEC on Occupational Schemes (96/97/EC)

Directive 86/613/EEC on Helping Spouses

II. Evolution of Community Discrimination Law

– outer dimension

Pre-Amsterdam

- 1986 Single Act
- 1992 Maastricht

Directive 92/85/EC on Pregnant Workers

Directive 96/34/EC on Parental Leave

Directive 97/80/EC on the Burden of Proof (98/52/EC)

II. Evolution of Community Discrimination Law

– outer dimension

Post-Amsterdam

- The 1997 Amsterdam Treaty, Arts. 2, 3(2), 13 and 141
The EU Charter of Fundamental Rights 2000
The 2001 Nice Treaty

Directive 97/81/EC on Part-time Work

Directive 99/70/EC on Fixed-term Work

Directive 2000/43/EC on Race Discrimination

Directive 2000/78/EC on a Framework for Equal Treatment

New Article 13 Directive, proposal, COM(2008) 426 final

Directive 2002/73/EC the amended Equal Treatment Directive

Directive 2004/81/EC on residence permits for victims of trafficking

Directive 2004/113/EC on sex equality and goods and services

Directive 2006/54/EC Recast

New Directive on Self-employment and helping spouses, proposal COM(2008) 636 final

Amended Pregnancy Directive, proposal COM(2008) 637 final

Institute for Gender Equality Reg. EC No 1922/2006

II. Evolution of Community Discrimination Law – inner dimension

- Any legal order is built on the principle according to which 'like shall be treated alike'
- Identified unacceptable differential treatment at societal level ...
- leads to piecemeal legislative intervention ...
- in the form of bans on discrimination at individual level based on stipulated equality (a person's sex is of no relevance) and a formal equality concept (a right to equal treatment **for the similarly situated**), ...
- in contradiction with the material or substantial equality concept behind the legal intervention in the first place (women are treated differently and are not similarly situated), thus ...
- **creating a conflict between the basic design of discrimination legislation and the overarching goal of this legislation – Equality between men and women.**

II. Evolution – inner dimension.

Normative answers to bridge the conflict

- Direct effect - [Defrenne C 43/75](#)
- Extention of the scope of the stipulation:
 - pregnancy and mothers' leave amounts to direct discrimination – [Dekker C-177/88](#), [Mayr C-506/06](#)
 - transsexuality equals sex, [P v S C-13/94](#), [Grant C-249/96](#)
 - pay [Beune C-7/93](#)
- The concept of indirect discrimination: [Jenkins C 96/80](#), [Bilka-Kaufhaus C 179/84](#), [Seymour-Smith and Laura Perez C-167/97](#)
- The reversed burden of proof: [Danfoss C-109/88](#)
- A scope for positive action:
 - [Kalanke C-450/93](#), [Marschall C-498/95](#), [Badeck C-158/97](#), [Abrahamsson C-407/98](#), [Lommers C-476/99](#), [Briheche C-319/03](#)
- (and a duty to a pro-active approach)
- Transferred discrimination, [Coleman C-303/06](#)
- Non-instrumental character of this legal field: [Allonby C-256/01](#)

II. Inner dimension – achievements and problems

- Sex equality law forms part of Community Law from the very beginning
- There is a treaty based mainstreaming approach
- The 'constitutional support' for sex equality is significantly more developed
- and requires a proactive approach
- It follows the qualified majority voting rules
- The liberal 'strait-jacket' and complaints-led model of equality law
- The non-instrumental character of equality rights due to constitutional 'market hegemony'

III. The Lisbon Treaty with the EU Charter...

- TEU: Articles 2, 3 and 6 on values, goals and fundamental rights
'The Union is founded on the values of ... equality ...common to the MS in a society in which ... non-discrimination ... and **equality between men and women** prevail" (art. 2)
'The Union's aim is to promote peace, its values and the well-being of its peoples' (art. 3.1)
The Union ... 'shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive **social market economy**, aiming at full employment and social progress ... It shall combat social exclusion and discrimination and ... promote ... **equality between women and men** ...' (art. 3.3)
- TFEU: Articles 2, 5, 7, 8, 9, 10, 19 (Art. 13 TEC), 153 (Art. 137 TEC) and 157 (Art. 141 TEC)
The Union shall ensure consistency between its policies and activities , taking all of its objectives into account' (art. 7)
'In all its activities, the Union shall aim to eliminate inequalities, and to promote, **equality, between men and women**' (art. 8)
'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on **sex**, racial or ethnic origin, religion and belief, disability, age or sexual orientation' (art. 10)

III. ...The Lisbon Treaty with the EU Charter

- EU Charter: Title III on Equality and Title IV on Solidarity

Article 21, Non-discrimination

Article 23, Equality between women and men

Article 25, The rights of the elderly

Article 26, Integration of persons with disabilities

- European Convention on Human Rights, Art. 6.3 TEU, Art. 53 EU-Charter

- Directive 2010/18/EU implementing the revised Framework Agreement on Parental Leave

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- **The non-instrumental character of equality rights due to constitutional 'market hegemony'**

Social Market Economy, social rights an economic asset

- **The liberal 'strait-jacket' and complaints-led model of equality law**

Fredman*: 'Instead of creating rights in their traditional individualised, negative, judicially enforceable, and fault-based form a new proactive model is emerging: mainstreaming, positive duties and other proactive initiatives' making 'positive duties' a responsibility for state and employers empowered to bring about institutional change

* European Law Journal , Vol. 12, No. 1, January 2006 pp. 41-60

IV. Current state of affairs and possible implications for the future

- 'Transformative' equality – individual *and* collective rights focusing opportunities
Coleman C-303/06, Feryn C-54/07
- Race Directive and proposal of new art. 13 directive:
Gender equality a secondary concern?
- New protected groups:
Risk for a 'down-hill' development?
 - risk for erosion of the concepts of direct and indirect discrimination
- Multiple discrimination