EU Equality Law in the Future
Seminar on ‘Current Reflections on EU Gender Equality Law’
September 20-21, 2010, Trier

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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

  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

  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
II. Inner dimension – achievements and problems

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  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 on 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