The EU Legal Framework on Equality

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1. Terminology and theoretical background

2. EU legal framework: Primary and secondary EU law

3. The bigger normative picture: ECHR, UN instruments, ILO Conventions

4. ANNEX: Gender pay gap and under-representation of women
TERMINOLOGY AND THEORETICAL BACKGROUND
Caveats and terminological clarifications

- “Gender” and “sex” used interchangeably, although “gender” (broader term) is often preferred.

- **Equality** as the underlying concept.
  - Emphasis on gender (for our purposes), but common conceptual premises across grounds.

- **Equality of treatment** as the norm / general principle.
  - Must be ensured across grounds and across areas of policy / activity.
  - Gender equality = equality of treatment on grounds of gender

- **Discrimination** – right not to be discriminated against as the individual (justiciable) right – non-discrimination as a general principle.

- Why look at international legal instruments?
  - Normative framework on equality of treatment / non-discrimination is multi-layered.
  - Gender / sex discrimination prohibited under virtually every Human Rights treaty.
Conceptions of equality: Taxonomy

**Formal equality**
- “Treating likes alike” – same treatment
- Levelling up / down permissible
- Primacy of the individual / state neutrality
- Negative obligations

**Equality of opportunities**
- “Levelling the playing field”
- Ensuring equal access (to jobs, decision-making bodies, public office etc) in principle
- Prevalence of individual merit

**Substantive equality**
- Link with distributive justice
- Accommodation of differences
- Positive equality obligations
Theoretical background: Key points

**Symmetrical** (equality as treating the same) v. **asymmetrical** (equality as treating differently) conceptions of equality.

Equality of opportunities as the term / conception of choice in the EU normative framework.

Gradual shift in EU law towards a (more) substantive paradigm of equality (e.g. legitimacy of positive action) but limits of legitimacy → no equality of outcome / results.

Equal treatment (comparison) v. special treatment (no comparison, e.g. pregnancy).
EU LEGAL FRAMEWORK ON GENDER EQUALITY
Nature of gender equality in EU Law

- **Founding value** of the Union – Art. 2 TEU
- **Aim** of the Union – Art. 3(3) TEU
- Ubiquitous **obligation** – gender mainstreaming
  - Art. 8 TFEU: “The Union in all its activities shall aim to eliminate inequalities, and to promote equality, between men and women.”
  - Art 10 TFEU: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex…”
  - Art. 9 TEU: “In all its activities, the Union shall observe the principle of the equality of its citizens…”
- **General principle** of EU Law – Defrenne No 3
- **Right** – Art. 23 EU CFR (gender equality)
History of gender equality in EU law [I]

Gradual expansion from a single equal pay provision

- Art. 119 EEC (now Art. 157 TFEU) not implemented until 1970s – decision to adopt new Directive on equal pay; Defrenne litigation before the CJEU (direct effect of Art. 119 EEC).
- Non-linear expansion (e.g. several important Dir and CJEU rulings in the 1970s, relatively little in the early 1980s).

Pivotal role of the CJEU

- Defrenne No 2 → economic and social aim of Art. 157 (ex Art. 119)
- Defrenne No 3 → equal treatment / non-discrimination as a general principle of EU law
- P v S and Cornwall County Council (C-13/94, 1996) → “sex” broadly construed (transsexuality, gender reassignment)
- Deutsche Telekom (C-50/96, 2000) → equal pay as an expression of a fundamental human right
- Badeck (C-158/97, 2000) → positive action (tie-break quotas) permissible
- Test-Achats (C-236/09, 2011) → gender neutral insurance premiums
History of gender equality in EU law [II]

**EU Charter of Fundamental Rights (EUCFR)**

- Proclaimed in Nice – not legally binding (until Lisbon) [more on the EUCFR later]

**Treaty of Amsterdam**

- Essential task of the Community (ex Art. 2 EC).
- Obligation to eliminate gender inequalities in all activities [ex Art. 3(2)].
- More protected grounds post-Amsterdam (only nationality and gender protected until then).
- Art. 13 EC (now Art. 19 TFEU) considerably increased EU competence – provided legal basis for Dir 2000/43, Dir 2000/78 and Dir 2004/113.
- New para 4, ex Art. 119 → positive action permissible in principle.

**Treaty of Lisbon**

- Confirms the post-Amsterdam position and the central importance of gender equality for the Union.
Normative basis of EU gender equality law: Art 157 TFEU

Art. 157(1)
- Equal pay for equal work or work of equal value.

Art. 157(2)
- Meaning of pay.
- Meaning of pay without discrimination based on sex.

Art. 157(3)
- EU Council and EP can act (through OLP) to adopt measures to ensure equal opportunities and equal treatment of men and women in employment and occupation.

Art. 157(4)
- Positive action permissible under the principle of equal treatment.
EU gender equality Directives: Mechanics of EU law-making

- Area of shared competence – Art. 3(3) TEU
  - Principles of subsidiarity and proportionality must be complied with.

- Unanimity v. Qualified Majority Voting (QMV) in adoption of secondary legislation
  - Art. 19 TFEU → unanimity
  - Art. 157 TFEU → QMV

- Art. 157 is both vertically and horizontally directly effective (Defrenne No 2)
EU gender equality Directives: Overview

- Dir 2006/54 – Recast Equal Treatment Directive [employment]
  Modernised and simplified existing provisions and repealed seven previous instruments including:
  - Dir 75/11 – equal pay
  - Dir 76/207 – gender equality in employment (as amended by Dir 2002/73)
  - Dir 86/378 – gender equality in occupational social security schemes (as amended by Dir 96/97)
  - Dir 97/80 – burden of proof
- Dir 79/7 – gender equality in statutory social security
- Dir 2010/41 – gender equality for self-employed persons (repealing Dir 86/613)
- Dir 92/85 – Pregnant Workers Directive
- Dir 2010/18 – Parental Leave Directive (repealing Dir 96/34)
- Dir 2004/113 – gender equality in access to goods and services
EU gender equality Directives: Scope

- Personal scope → EU citizens (?) but otherwise “somewhat complex and scattered” [Kountouris and Freedland, “The Personal Scope of the EU Sex Equality Directives”, European Network of Legal Experts in the Field of Gender Equality, 2012]

- Vertical (Van Duyn, 1974) but no horizontal direct effect (Marshall, 1986), although recent case-law suggests some relaxation of the doctrine (e.g. Mangold, 2005; Kucukdeveci, 2008)

- Equality / Non-Discrimination Directives generally aligned (to a large extent) in terms of basic content:
  
  - Protection from direct / indirect discrimination, harassment, victimisation.
  
  - Permit / require asymmetrical treatment (e.g. reasonable adjustments, positive action) under certain conditions.
  
  - Reversal of burden of proof applies to all discrimination cases.
Gender equality in the EU Charter: Preliminary points

- “[S]ame legal value as the Treaties” but does not extend Union competences – Art. 6(1) TEU and Art. 51 EUCFR

- Binds MS only when they act in the scope of EU law – Art. 51 EUCFR

- Rights corresponding to the ECHR will have the same meaning and scope but EU law may provide “more extensive protection” – Art. 52(3) EUCFR

- Gender discrimination (or discrimination on any other protected grounds) can be justified under the same general conditions of justification laid down by the ECHR / ECtHR.

- Meaning of rights – positive obligations stemming from Art. 14 ECHR (Thlimmenos v. Greece)?
Gender equality in the EU Charter: Basic provisions

Article 23 – Equality between women and men

• “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.”

Article 20 – Equality before the law

• “Everyone is equal before the law.”
• General principle of EU law [Racke (1984); EARL (1997); Karlsson (2000)]

Article 21 – Non-discrimination

• “Any discrimination based on any ground such as sex […] shall be prohibited.”
• “[…] any discrimination on grounds of nationality shall be prohibited.”
THE BIGGER PICTURE: INTERNATIONAL NORMATIVE FRAMEWORK ON GENDER EQUALITY
Gender equality in the ECHR system [I]: Legal framework

- **Art 14 ECHR → Prohibition of discrimination**
  - Not a general / self-standing equality clause – can only be used in conjunction with other rights (“in the enjoyment of”).
  - Indicative (“such as…”) and open-ended (“…or other status”) list of protected grounds.
  - **Objective justification →** legitimate aim + proportionality
  - “Very weighty reasons” needed to justify gender discrimination (Abdulaziz, Cabales and Balkandali v. UK, 1985)

- **Protocol 12 ECHR → Free-standing right to non-discrimination**
  - “[F]ull and effective equality” may require positive action (permissible not compulsory) – Preamble
Gender equality in the ECHR system [II]: Selected case-law

- **Abdulaziz, Cabales and Balkandali v. UK** (1985)
  - Narrow margin of appreciation, as gender equality is “major goal” of the CoE and “very weighty reasons” must be put forward to justify difference in treatment on grounds of gender. (para 78)
  - Formal equality → gender discrimination can be rectified through levelling down (as was the case).

- **Thlimmenos v Greece** (2000)
  - “The right not to be discriminated against […] is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.” (para 44)
  - Positive obligation to treat different situations differently – shift to substantive equality?

- **Konstantin Markin v. Russia** (2012)
  - Refusal of parental leave to military servicemen (when such leave is available to servicewomen) amounts to gender discrimination.
  - Gender stereotypes cannot be used to justify different treatment.
Key UN instruments on gender equality

- **Article 1(3) UN Charter:** “…promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion…”

- **Article 3 ICCPR and Art. 3 ICESCR:** “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”

- **Convention on the Elimination of Discrimination Against Women (CEDAW)**
  - “International bill of rights for women”.
  - Defines what constitutes discrimination against women and sets an agenda for national action to end such discrimination.
  - Adopted by the UN in 1979 – came into force on 3 September 1981.
Key ILO instruments on gender equality

ILO facts and figures:
- ILO member States: 187
- ILO instruments adopted: 399
- Conventions: 189
- Protocols: 6
- Recommendations: 204

Resolution concerning Gender Equality at the Heart of Decent Work (June 2009)
Resolution concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection (June 2004)
Governing Body’s March 2005 Decision on Gender Mainstreaming in Technical Cooperation
Equal Remuneration Convention (No. 100) – fundamental convention
Discrimination (Employment and Occupation) Convention (No. 111) – fundamental convention
Workers with Family Responsibilities Convention (No. 156)
Maternity Protection Convention (No. 183)
ANNEX: GENDER PAY GAP AND UNDER-REPRESENTATION OF WOMEN
GENDER PAY GAP: EU-28 (2014) [II]

- For the economy as a whole, in 2014, women's gross hourly earnings were on average 16.1% below those of men in the European Union (EU-28) and 16.5% in the euro area (EA-18).

- Across Member States, the gender pay gap varied by 25.4 percentage points, ranging from 2.9% in Slovenia to 28.3% in Estonia.
Gender Balance in Decision-making Bodies

[I]: National Institutions

Central Banks

- Men: 78%
- Women: 22%

Quoted Companies

- Men: 80%
- Women: 20%

Supreme Courts (national)

- Men: 63%
- Women: 37%
Gender Balance in Decision-making Bodies [II]: European Institutions

European Courts

- Men: 73%
- Women: 27%

European Financial Institutions

- Men: 92%
- Women: 8%

European Institutions (Council, Commission, EP)

- Level 1
  - Men: 85%
  - Women: 15%
- Level 2
  - Men: 69%
  - Women: 31%
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