

# Gender Equality in International and European Law

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# Plan

1. Concepts
2. International law
3. The European Union

# 1. Concepts

1. Same/different *vs* equal/unequal
2. Sameness: sex *vs* gender
3. Conceptions of equality
4. Translations into law
5. Legal and political applications

# 1.1. Same/different vs equal/unequal

*The key opposites are the pair: sameness and difference.*

*We are the same or different, we are not equal or different  
(...)*

*Equality is a function of the principle of political reflection, the difference between the sexes is a function of the principle of epistemological exploration.*

*Geneviève FRAISSE*

## 1.2. Sameness: sex vs gender

*Sex refers to the biological differences between male and female: the visible differences in genitalia, the related difference in procreative function. 'Gender', however, is a matter of culture: it refers to the social classification of 'masculine' and 'feminine'.*

*By 'gender', we mean a social and cultural construct of sexual difference. We also talk of 'socially constructed sex' or 'social relations of sexuality'. (OAKLEY)*

# 1.3. Concepts of equality

(Rawls – Theory of Justice)

***Formal equality** (or assimilationist equality or equal treatment) means that people within the same objective situation are treated equally without distinction, in this case depending on their sex. It requires everyone to have at least the same legal right to access any advantageous social position. In this conception, establishing similar social conditions is not posited as an objective.*

*Rights reserved for men are extended to women who adopt ‘masculine’ standards of behaviour, but without challenging the inegalitarian nature of how the law itself is structured.*

***Equality of fair opportunity**, or liberal equality, implies that in all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. In this conception, free market arrangements must be framed within political and legal institutions which regulate economic and social trends.*

*Fair equality of opportunity aims at substantive equality or equality of outcome.*

***Equality of outcome** or democratic equality emphasises actual equality in the distribution of income, wealth and positions.*

# 1.4. Translations into law

## *DIRECT SEX DISCRIMINATION:*

*(= breach of formal equality)*

*A person is treated less favourably than another on grounds of sex.*

## *INDIRECT SEX DISCRIMINATION:*

*(= breach of equality of opportunity and/or outcome)*

*An apparently neutral provision, criterion or practice affects a greater proportion of persons belonging to one sex, unless the different treatment can be justified objectively.*

## *SEGREGATION:*

*(breach of equality of opportunity and/or outcome)*

*Concentration women or men in different types and at different levels of employment*

- where women are confined to a restricted range of occupations (horizontal segregation)*
- or to lower levels of responsibility (vertical segregation).*

# 1.5. Legal and political applications

1) *Consensus: the assimilationist interpretation of inequality is insufficient or inadequate.*

*EXAMPLES : 1970s – EU Equality Directives / Art. 157 (3) TFEU*

2) *Critique differs depending on epistemic perspectives on the difference between the sexes:*

- *Differentialist or essentialist critiques:*

- *Epistemic assumption: sex precedes gender*
- *Normative consequence: equality of outcome has to be ensured*
- *Corrective measures: parity, granting of specific rights => incompatible with the assimilationist perspective*

**=> Positive action:**

*Specific measures targeting a particular group with a view to eliminating and preventing or compensating disadvantages resulting from existing attitudes, behaviour or structures*

*EXAMPLES: ILO and UN policies in the 1980s*

- *Universalist critiques:*

- *Epistemic assumption: gender precedes sex (sex is just a socially constructed marker of division and hierarchy)*
- *Normative consequence: sex must be emancipated from gender by means of real equality of opportunity*
- *Corrective measures: integrated approach with a view to restoring a formal equality that is truly gender-neutral (unlike the assimilationist perspective)*

**=>Gender mainstreaming:**

*Systematic integration into all policy fields of conditions, priorities and needs specific to women and men with a view to achieving equality. The aim is no longer to limit efforts to promote equality by implementing specific measures for women, but to mobilise all policies and actions, whatever the field, with the explicit aim of equality.*

- COM (96) 67 final

*EXAMPLES: 1991, Commission's Equal Opportunities Action Programme; Beijing Platform in 1995, Treaty of Amsterdam*

## 2. International Law

1. Institutions and instruments of international law related to equality
2. International Covenant on Civil and Political Rights -> CEDAW (HL)
3. Commission on the Status of Women  
-> Beijing Platform for Action (SL)

## 2.1. International organisations and male/female equality

### 1) International level

#### - United Nations (New York, Geneva)

#### Universal Declaration of Human Rights + specialised treaties

- by subject ([Covenant on Civil and Political Rights/ Covenant on Economic/Social/Cultural Rights](#))
- by specific category of discrimination (women, children etc – security provisions in these instruments)

#### - Specialised agencies

- by subject (ILO - [Convention 111/156](#) - / WHO etc)
- or population (HCR etc)

### 2) Regional level: Council of Europe

# What are fundamental human rights?

- Inherent rights of ALL human beings
- Rights independent of nationality, place of residence, sex, national or ethnic origin, colour, language or any other status (non-exhaustive list)

=>Corresponding duty of governments to act in certain ways or to refrain from certain acts

⇒ Non-discrimination =

- overarching principal of universal fundamental rights
- reflected in all major treaties and conventions relating to human rights
- complemented by the principle of equality (Art. 1 Universal Declaration of Human Rights)

# Fundamental international instruments (United Nations)

## The “matrix”: Universal Declaration of Human Rights - 1948

⇒ Two “derived” covenants” - 1966:

- International covenant on civil and political rights (ICCPR)
- International covenant on economic, social and cultural rights (ICESCR)

# Other international instruments (UN)

- International convention on the elimination of all forms of *racial* discrimination (ICERD) - 1965
- Convention on the elimination of all forms of discrimination against *women* (CEDAW) - 1979
- Convention against *torture* and other cruel, inhuman or degrading treatment or punishment (CAT) - 1984
- Convention on the rights of the *child* (CRC) - 1989
- International convention on the protection of the right of all *migrant workers* and members of their families (ICRMW) - 1990

# Common features

- Monitored by a reporting procedure for all instruments once they are signed (no sanctions against states)
- Ratification (and sometimes ratification of additional protocols) required for broader monitoring and/or individual complaints
- Direct vertical (but not horizontal) effect

# 1 Treaty => 1 supervising body

- ICERD => CERD
- ICCPR => CCPR/HRC (PROT)
- ICESCR=>CESCR
- CEDAW=>CEDAW
- CAT=>CAT
- CRC=>CRC
- ICRMW=>CMW

# Role of the “Treaty Committees”

- Monitor the implementation by States Parties of rights provided by the Treaties (periodical reports) – from the moment of signature
- Decide on complaints addressed to these States Parties

## 2.2. CEDAW - 1979

⇒ Duty for all States Parties to prohibit all forms of discrimination against women

⇒ Duty to respect and implement women's rights to equality and equal opportunities

Entry into force: 3 September 1981

About 175 States Parties

# CEDAW: Substantive Aspects

- Broad definition of discrimination (including violence – Committee):

*“any distinction, exclusion or restriction made on the basis of sex in the political, economic, social, cultural, civil or any other field”*

- Encouragement for positive action (Art. 4)
- About 25 Committee recommendations clarifying the scope of the convention on specific issues

e.g.: violence against women (19); equal marital rights (21); participation in political public life (23); women and health (24); positive action (25)

# CEDAW: Substantive Aspects

- 3 major themes:
  - women's civil rights and legal status
  - procreation
  - impact of cultural factors on the situation of women

**NB: States Parties may record reservations!**

- **Broad material scope**
  - political and public life, education, employment & occupation, health care, social security, equality before the law (Convention)
  - reproductive and sexual rights, personal freedom, freedom of expression, family role etc (UN Conferences)

# CEDAW: Procedural Aspects

## A. General review

- Committee of 23 independent experts chosen by States Parties to CEDAW
- Periodic reports (importance of open process)

## B. Judicial review

Additional Protocol, entered into force on 22

December 2000 (for those States which ratified):

- Communications (complaints) from individuals and associations => conclusions (decisions) “*erga omnes*”
- Inquiry procedure for serious and systematic breaches

=> check whether the State has ratified.

# How to make use of CEDAW

- Remain an active participant in drawing up and submitting reports to the UN
- Demand corresponding national action and legislation
- Take part in permanent critical questioning of the international bodies
- Take up the legal options exercising the right to submit an individual complaint (?)

## 2.3. Beijing Platform for Action 1995

1946: Commission on the Status of Women  
(UN)

Annual meetings

+ periodic UN Conferences:

Nairobi (1985)

Beijing (1995) -> Platform

New York (2000) – Beijing +5

New York (2005) – Beijing + 10

# Annual CSW Meetings

- Every year (late February/early March), meetings in New York lasting 2 weeks
- Attended by national delegations (Belgium: Cabinet, ministers, administration, NGOs + PR)
- Evaluation of progress, identification of challenges
- High-level round-table + conclusions on priority theme
- Adoption of draft resolutions submitted by States Parties

# BEIJING

- Soft law process: *GENDER MAINSTREAMING*
  - 1 declaration – “*commit ourselves as governments to implement the PA ensuring that a gender perspective is reflected in all our policies and programmes*”
    - ⇒ 12 priority areas + strategic objectives
    - ⇒ Funding to back projects
- 5-year conferences: evaluation of progress (CEDAW and Beijing) + Declarations
- Annual sessions of the Commission: thematic resolutions
  - Strategic role of the EU (enlargement problem!)

# BEIJING

The 12 areas:

Poverty, education, health, violence, armed conflicts, economy, decision-making, institutional mechanisms, fundamental rights of women, media, environment, girls

# Summary of international law

- HL (CEDAW)
- SL (GM ->Beijing)
- Action + (CEDAW)
- Funding
- INSTRAW (research and technical support)

# 3. The European Union

3.1. Brief history

3.2. Legal foundations

3.3. Discriminatory acts and situations

3.4. Effectiveness

3.5. Gender mainstreaming

# 3.1 Brief history

1957 : Article 119 TR – economic motivation

1976 : ECJ - Defrenne 2: economic AND social (pay) ECJ 8 April 1976: Defrenne c/ Sabena:

-Direct horizontal and vertical effect

-Broad interpretation of the term 'pay'

⇒ **Legislative arsenal** 13 directives (equal pay -> access to goods and services)

⇒ **Funding measures**

⇒ **Specific measures**

1998: GM: Amsterdam

## 3.2 Legal foundations

### The Treaties:

Art. 2 and 3 EU Treaty: missions

Art. 8 (GM) and 10 (HL) TFEU (former Art. 2 and 3 Amsterdam)

Art. 19 TFEU (former Article 13 Amsterdam)

Art. 153 TFEU (former Art. 137 Amsterdam)

Art. 157 TFEU (former Art. 141 Amsterdam)

=> Basis for the adoption of secondary law

=> Basis for the adoption of financial programmes

=> Guides the actions of the institutions (GM)

=> Interpretative guidance ECJ

=> Under certain conditions, direct H/V effect

# Secondary law

Art. 119/141/157: 7 directives (2006: recasting)

6 more directives adopted on other Treaty foundations

-> ! Directives

-> Principally employment (except goods and services)

- [Directive 2006/54/EC](#) of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)
- [Directive 2004/113/EC](#) of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services
- [Directive 2002/73/EC](#) of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (repealed)
- [Council Directive 98/52/EC](#) of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland (repealed)
- [Council Directive 97/80/EC](#) of 15 December 1997 on the burden of proof in cases of discrimination based on sex (repealed)
- [Council Directive 97/75/EC](#) of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC
- [Council Directive 96/97/EC](#) of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes (repealed)

- [Council Directive 96/34/EC](#) of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (**under revision**)
- [Council Directive 92/85/EEC](#) of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (**under revision**)
- [Council Directive 86/613/EEC](#) of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood
- [Council Directive 86/378/EEC](#) of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (**repealed**)
- [Council Directive 79/7/EEC](#) of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security
- [Council Directive 76/207/EEC](#) of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (**repealed**)
- [Council Directive 75/117/EEC](#) of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (**repealed**)

# Directive [2006/54/EC](#) (recast)

[Official Journal L 204 of 26 July 2006]

1. Repeals and replaces 7 directives on 15 August 2009:
  - Directive [75/117/EEC](#) on equal pay;
  - Directive [76/207/EEC](#) (amended by Directive [2002/73/EC](#)) on equal treatment with regard to [access to employment, vocational training and promotion, and working conditions](#);
  - Directive [86/378/EC](#) (amended by Directive [96/97/EC](#)) on [occupational social security schemes](#);
  - Directive [97/80/EC](#) (amended by Directive [98/52/EC](#)) on the [burden of proof in cases of discrimination based on sex](#).
2. Unifies the principal overarching concepts

# Secondary law

Equal pay (2006)

Equal treatment (2 directives) (2006)

Social security

Occupational social security schemes (2006)

Self-employment

Pregnant workers

Parental leave

Burden of evidence (2006)

Access to goods and services

# 3.3 Discriminatory Acts and Situations

(Dir. 2006/54 Art. 2)

- a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;  
e.g. woman dismissed or not appointed because she is pregnant
- b) "indirect discrimination": where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;  
e.g. an employer only appoints workers taller than 170 cm
- c) "harassment": where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
- d) "sexual harassment": where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

## Discrimination includes:

- a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;
- b) instruction to discriminate against persons on grounds of sex;
- c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

## Positive action:

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

# The prohibition of discrimination is

## 1) applied across the 3 targeted areas:

- pay
  - e.g. criteria applied to job classification systems
- occupational schemes
  - e.g. obligation to contribute and calculation of contributions
- access to employment, working conditions, training, etc.
  - e.g.: recruitment conditions

## 2) complemented by specific provisions on

- maternity leave,
- paternity leave
- adoption leave

# 3.4 Effectiveness/Efficacy

## General restraints:

- 1) **References for a preliminary ruling**
- 2) **Infringement procedures launched by the Commission following failure to transpose by the deadline**

### 1. Proceedings for failure to notify:

The Member State is informed that it has failed to meet its obligation to notify national measures transposing the directive concerned. It is given an initial period of two months to notify the reasons for this delay.

### 2. Non-compliance proceedings:

The Member State is informed by the European Commission that the national provisions adopted do not comply with the directive concerned. It is given a reasonable period set by the European Commission to bring its legislation into line with EU rules.

Failure to resolve => ECJ and possible fines

# SPECIFIC RESTRAINTS (2006/54)

## 1. Remedies

- even after the relationship has ended
- open to bodies with a legitimate interest

## 2. Burden of proof

If the person considering themselves wronged establishes facts from which it may be presumed that there has been direct or indirect discrimination,  
⇒ respondent must prove that there has been no breach of the principle of equal treatment.

*This principle applies to maternity /parental leave directive.*

### **3. Penalties**

- injury must result in *effective* reparation or compensation that is *dissuasive* and *proportionate* to the damage suffered.
- compensation or reparation *may not be restricted by the fixing of a prior upper limit*
  - UNLESS the only damage suffered is the refusal to consider a job application.

### **4. Assistance for victims**

MS designates one or more bodies to provide *independent* assistance to victims of discrimination in pursuing their complaints

### **5. Protection from victimisation**

### **6. Prevention (in particular harassment)**

### **7. Standstill**

# Effectiveness/Efficacy?

- Fighting discrimination ≠ equality
- Transposition/ non-transposition
- *Acquis communautaire* (important but insufficient)
- Role of the European Court of Justice (spectacular advances/annoying stagnation)
- Recasting and codification of 7 equality directives (2006)
- Independent assistance for victims by sex equality bodies (2002/73)
- Need for all players to participate: administration (transposition), civil society, judiciary etc.

## 3.5 Gender Mainstreaming

= Continuous evaluation of the impact policies have on the lives and status of women and men with a view to promoting equality between the sexes

- 1990: Commission starts thinking about it (action programmes)
- 1995 (Beijing): improved approach
- 1998: Art. 3 Amsterdam
- Art. 8 and 10 TFEU
- + certain provisions in 2006/54

## 2001-2005: framework strategy

- 5 priority objectives (economic life, decision-making, social life, civil life, changing roles and stereotypes)
- 2 strategic objectives (third countries and enlargement)

## 2006-2010: A road map for the future

- Priority fields of action (economic independence, reconciliation, participation, violence, stereotypes, external policy)
- Governance (indicators)

# TOOLS

- Evaluation methods
  - Gender Institute
  - analogous national institutes – Dir. 2006/54
- Statistical apparatus and indicators
- Support groups
  - advisory – civil society and administration
  - high-level group – politics
- Funding to support projects
- Specific measures (dual track approach) –  
+ only developed in HL (>< UN)
  - e.g. self-employed women, gender and sciences,  
domestic violence

# Fields of application

ESSENTIALLY, ANY... but above all:

- MOC
- SEE
- Development cooperation
- Structural Fund (and also specific funds)
- ...

Black holes: “hard” zones

- external trade,
- competition,
- external policy etc.

# Future challenges

- Enlargement
- Gender Institute
- Can equality between men and women be resolved within diversity? (questioning the “two-track” approach, e.g.: progress)
- Potential for integrating a broader, less formal vision of equality into hard law