

Academy of European Law – ERA

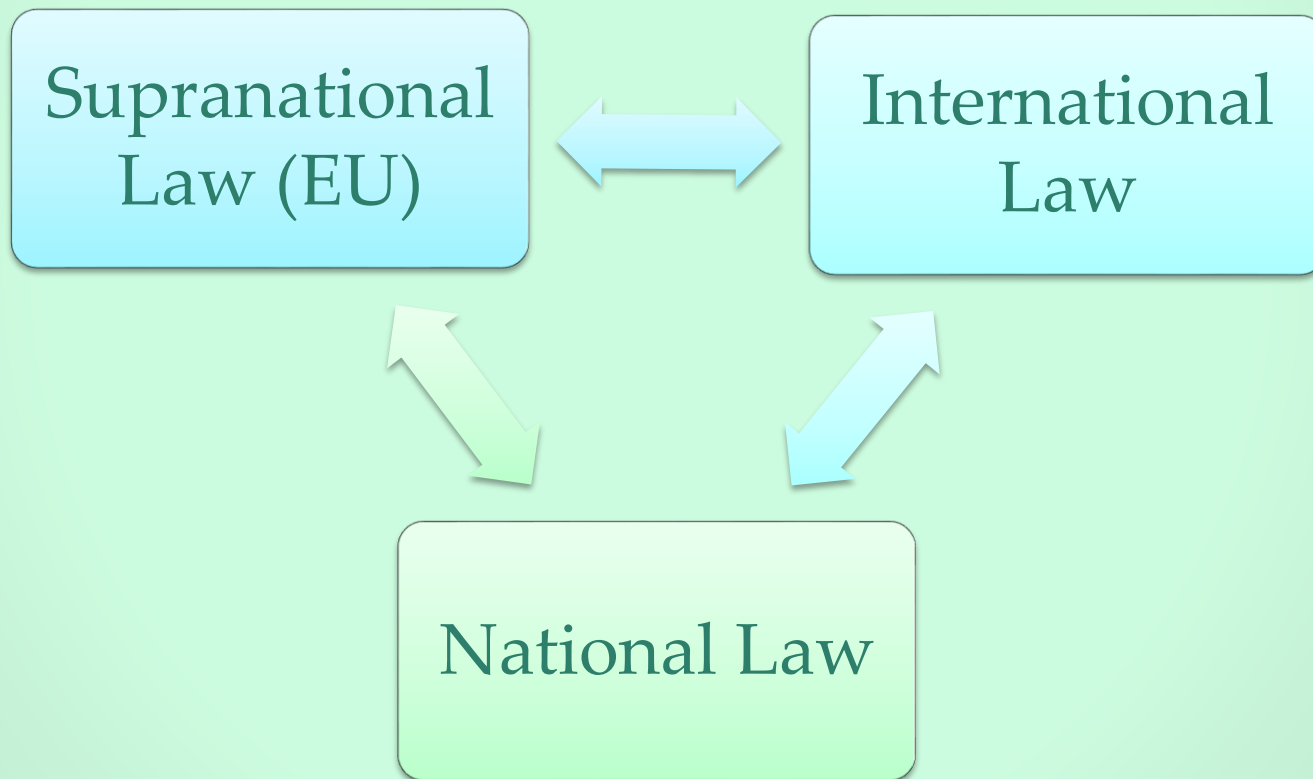
Definition of key concepts:
direct / indirect discrimination
harassment / sexual harassment

24. Apr. 2017

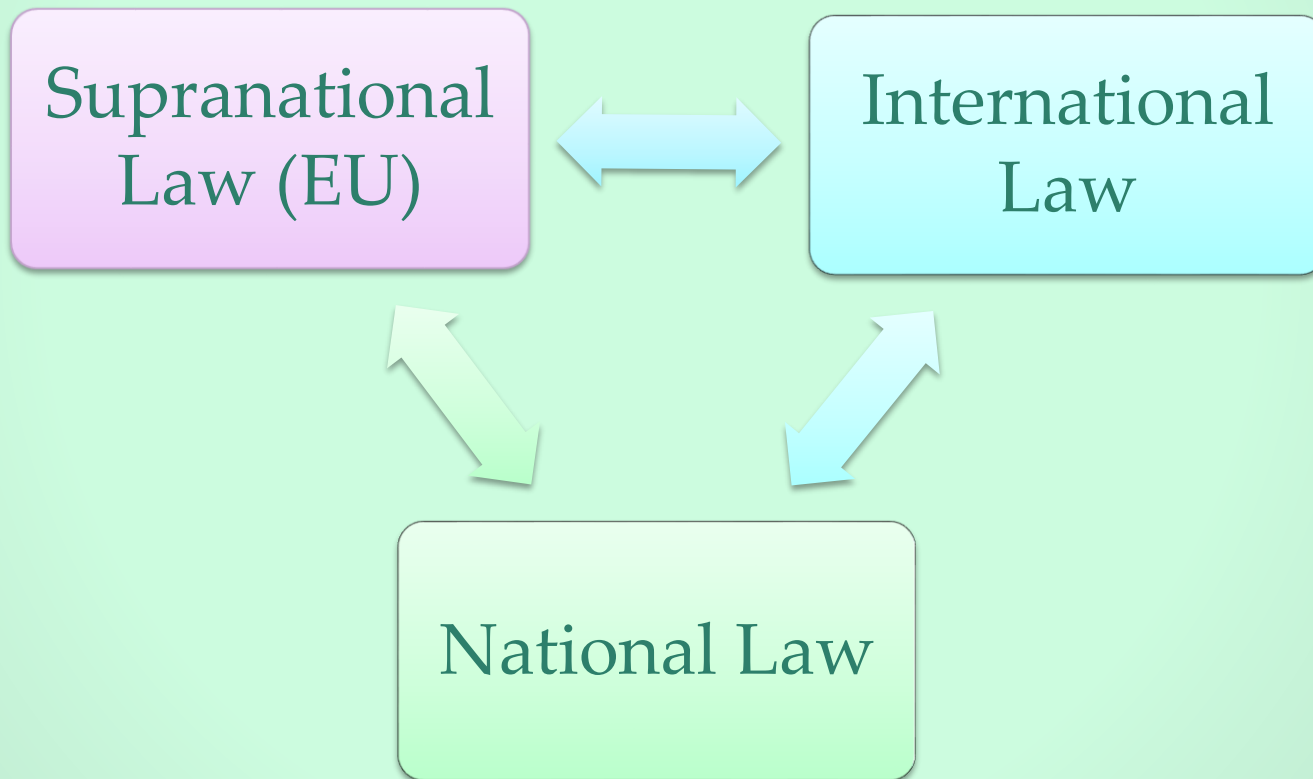
Prof. Dr. Sarah Elsuni



Anti-discrimination law within multi-level governance



Anti-discrimination law within multi-level governance



Anti-discrimination law

Primary Legislation

- **Treaty on European Union (TEU)**

- Art. 2: Union is founded on the values of non-discrimination & equality between women and men
- Art. 3 para 3: EU shall combat discrimination and promote equality between women and men



Anti-discrimination law

Primary Legislation

- **Treaty on European Union (TEU)**
- **Charter of fundamental rights of the EU (EU-Charter)**
 - Art. 21: Prohibition of discrimination
 - Art. 23: Equality between men and women

Anti-discrimination law

Primary Legislation

- **Treaty on European Union (TEU)**
- **Charter of fundamental rights of the EU (EU-Charter)**
- **Treaty on the functioning of the EU (TFEU)**
 - Art. 8
 - Art. 10
 - ...
 - Art. 157 (ex 141/119): Equal pay for men and women
 - Art. 19



Secondary Legislation

Anti-discrimination law

Secondary Legislation



Directives

- **2006/54/EC** 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
 - „grounds of sex“
 - Art 4, 5 & 14: Prohibitions of discrimination

Anti-discrimination law

Secondary Legislation



Directives

- **2006/54/EC** 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
 - „grounds of sex“
 - Art 4, 5 & 14: Prohibitions of discrimination
- **2000/78/EC** of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation
 - “religion or belief, disability, age or sexual orientation”

Anti-discrimination law

Concept of direct discrimination



Legal definition:

Where one person is **treated less favourably** on **grounds of sex than another is, has been or would be** treated in a **comparable situation**.

Art. 2 para 1 (a) Directive 2006/54/EC

Anti-discrimination law



Concept of direct discrimination

ECJ |

- Dekker (C-177/88): **refused employment pregnancy**

“... that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. ...

Such discrimination **cannot be justified** on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.”

Anti-discrimination law

Concept of direct discrimination



ECJ |

- Dekker (C-177/88): **refused employment pregnancy**
- Ornano (C-335/15): **maternal leave**

„According to the Court’s settled case-law, however, discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations. ...

However, women taking maternity leave provided for by national legislation are in a **special position** which requires them to be afforded special protection, but which is **not comparable** either to that of a man or to that of a woman actually at work.”

Anti-discrimination law



Concept of direct discrimination

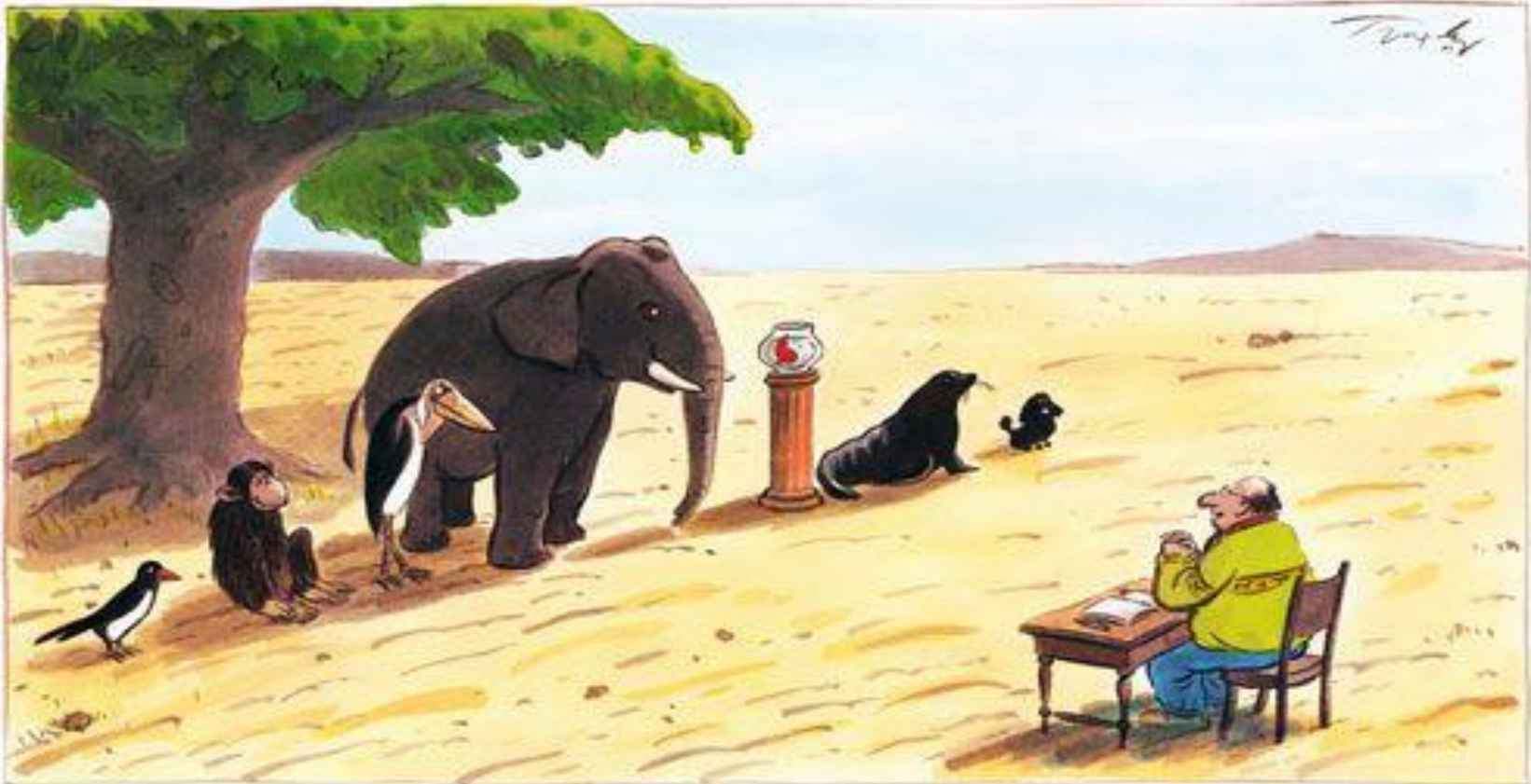
ECJ |

- Dekker (C-177/88): **refused employment pregnancy**
- Ornano (C-335/15): **maternal leave**
- Feryn (C-54/07): **discrimination by statement**

Public declaration to „not recruit employees of a certain ethnic or racial origin“, which is “likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination”.

Anti-discrimination law

by: Hans Traxler



„Zum Sinne einer gerechten Anwesenheit lautet die Prüfungsaufgabe für Sie alle gleich: Klettern Sie auf dem Baum!“

Anti-discrimination law

Concept of indirect discrimination



ECJ: part-time work

- Bilka (170/84): **exclusion of part-time work from retirement benefit**

“...found that a much lower proportion of women than of men work full time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty where ... that measure could not be explained by factors which exclude any discrimination on grounds of sex.”

→ substantial approach to equality

“if the undertaking is able to show that its pay practice may be explained by **objectively justified factors unrelated to any discrimination on grounds of sex there is no breach** of article 119...”

Anti-discrimination law

Concept of indirect discrimination



ECJ: part-time work

- Bilka (170/84): **exclusion of part-time work from retirement benefit**
- Wippel (C-313/02): **absence of agreement as to hours of work and organisation of working time.**

“... it is settled case-law that national provisions discriminate indirectly against women where, although worded in **neutral terms**, they **work to the disadvantage of a much higher percentage of women than men**, unless that difference in treatment is **justified by objective factors unrelated to any discrimination on grounds of sex.**”

Anti-discrimination law

Concept of indirect discrimination



ECJ

- Danfoss (C-109/88): **equal pay for equal value work**

„... where it appears that the application of the criteria relating to supplements, such as **mobility, training or length of service**, systematically **works to the disadvantage** of female employees, the employer may, none the less, and if so on what conditions, **justify** its use.“

„... where an undertaking applies a system of pay which is totally **lacking in transparency**, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men “ (**burden of proof**)

Anti-discrimination law

Concept of indirect discrimination



ECJ

- Danfoss (C-109/88): **equal pay for equal value work**
- Schnorbus (C-79/99): **counterbalance of effects of military service**

Anti-discrimination law

Concept of indirect discrimination



Legal definition:

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**.

Art. 2 para 1 (b) Directive 2006/54/EC

Anti-discrimination law

Concept of sexual / harassment



Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.

Preamble (6) Directive 2006/54/EC

Anti-discrimination law

Concept of harassment



Legal definition:

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**.

Art. 2 para 1 (c) Directive 2006/54/EC

Anti-discrimination law

Concept of sexual harassment



Legal definition:

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.

Art. 2 para 1 (d) Directive 2006/54/EC

Anti-discrimination law

Concept of multiple discrimination



Multiple Discrimination in EU Law

Opportunities for legal responses to intersectional gender discrimination?

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

Susanne Burri and Dagmar Schiek

This report, therefore, uses the term 'multiple discrimination' as overarching, neutral notion for **all instances of discrimination on several of the discrimination grounds contained in Article 13 EC and in other instruments.**

The term 'multiple discrimination of women' is used to refer to any discrimination against a woman which does not only involve gender.

Anti-discrimination law

Concept of multiple discrimination



CJEU: ... religion/belief ... and sex?

- Achbita (C-157/15), Bougnaoui (C-188/15): **headscarf**

“direct or indirect discrimination?”

- apparently neutral rule prohibiting the wearing of any visible sign of political, philosophical or religious beliefs → difference of treatment indirectly based on religion or belief.
- “... such a difference of treatment does not amount to indirect discrimination if it is objectively justified ...”

“occupational requirement?”(C-188/15)

- willingness of an employer to take account of the wishes of a customer ... cannot be considered a genuine and determining occupational requirement.

Thank you!