EU Gender Equality Law: Definition of key concepts

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EU gender equality law: origins & evolution

• Origins: avoiding market distortions (France)

• Today: gender equality as core fundamental right
  ➢ Primary law
  ➢ Secondary law
  ➢ Policy

• International law: ILO, ECHR, CEDAW...
Gender equality: what’s in a name?

- Sex vs. Gender
- Scope of protection *rationae personae*?
- C-13/14 *P v S* (1996): gender identity
- C-249/96 *Grant v South-West Trains* (1998): but not sexual orientation

Equality: conceptual distinctions

1. **Formal**: “treat like cases as like”
   (Aristotle, *Nicomachean Ethics*)
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2. **Substantive**: “unlike cases should be treated in an unlike manner” (Aristotle, *Politics*)
Equality: conceptual distinctions

1. **Formal**: “treat like cases as like” (Aristotle, *Nicomachean Ethics*)

2. **Substantive**: “unlike cases should be treated in an unlike manner” (Aristotle, *Politics*)

3. **Transformative**: “real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns” (CEDAW)
Transformative equality: affirmative action, anti-stereotyping

EU gender equality law: the framework

• TFEU Art. 157: Equal pay & Charter Art. 23
• Directive 79/7/EEC: social security
• Directive 92/85/EEC: pregnancy and breastfeeding
• Directive 2006/54/EC (Recast): employment, access to employment, promotion, working conditions, vocational training
• Directive 2004/113/EC: access to and supply of goods and services
• Directive 2010/41/EC: self-employment
Direct discrimination

• Art 2(1)(a) Dir. 2006/54/EC
• Art 2(1)(a) Dir. 2004/113/EC

“where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”

1. Differential treatment
2. On grounds of sex
3. Comparability

Direct discrimination: justification?

General prohibition

Exceptions:
1. **Genuine and determining occupational requirement:** Article 14(2) Recast Directive
2. **Positive action:** Art. 3 Recast directive; Art. 157(4) TFEU; Art. 6 Gender Goods and Services Directive
3. Special provisions concerning the protection of women, particularly as regards pregnancy and maternity: Article 28(1) Recast Directive and Pregnancy Directive
Direct discrimination: examples

- Pregnancy: C-177/88 Dekker & C-32/93 Webb
- Sex or indissociable from sex: C-79/99 Schnorbus (2000)
- GDOR: C-273/97 Sirdar
- No GDOR: C-285/98 Kreil

Indirect discrimination

- C-170/84 Bilka-Kaufhaus
- Art 2(1)(b) Dir. 2006/54/EC
- Art ? Dir. 2004/113/EC

“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”…

1. Apparent neutrality
2. Particular disadvantage
3. Comparison
Indirect discrimination: implementation and justification

…“unless that provision, criterion or practice is objectively justified by a **legitimate aim** and the **means** of achieving that aim are **appropriate** and **necessary**”

- Objective justification test
- Legitimacy & proportionality
- Shift of the burden of proof to defendant

Indirect discrimination: examples

- C-409/16 *Kalliri*: height requirement
- C-167/97 *Seymour*: relation between aim and measures
- What about ‘covert’ direct discrimination?
  E.g. C-157/15 *Achbita*?
Harassment

- Art. 2(1)(c) and (d) Dir. 2006/54/EC & Art. 2(c) and (d) Dir. 2004/113/EC

- ‘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**’

  1. Dignity
  2. Environment

  = Cumulative conditions

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Sexual harassment

- Art. 2(1)(d) Dir. 2006/54/EC & Art. 2(d) Dir. 2004/113/EC

- ‘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**’

  1. Sexual nature
  2. Dignity
  3. Environment

  = cumulative conditions
Other EU gender equality law concepts

• Positive action

• Protection from victimisation
  C-404/18 Hakelbracht (2019)

• Discrimination by association
  C-303/06 Coleman (2018)

• Multiple discrimination
  C-443/15 Parris (2016)

• Instruction to discriminate
  Art 2(2)(b) Dir 2006/54/EC

• Gender mainstreaming...

Conclusions

• Some well-established concepts
• Some other concepts are more blurry: need for interpretation
• Role of the CJEU in flagging new types of discrimination

• Looking ahead:
  • Intersectional and multiple discrimination?
  • Anti-stereotyping?
  • Transformative equality?
Questions?

Thank you!
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