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Defining key concepts of EU gender equality law

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Introduction

Outline

1. Preliminary remarks on the concepts of equality, sex, and gender
2. Direct discrimination
3. Indirect discrimination
4. Harassment and sexual harassment
5. Conclusions



Concepts of equality, sex and gender

Spectrum of equality concepts

Formal equality: treating likes alike

Substantive equality: de facto equality

- equality of opportunity
- Equality of results
- Special measures
- Asymmetric

EU gender equality law reflects a large part of this spectrum, see e.g.: C-136/95, *Thibault* (1998): ‘the result pursued by the Directive is substantive, not formal, equality.’ (par. 26).

Broad overview scope of EU gender equality law

Negative obligations (prohibition to discriminate)

- Equal Pay
- Employment relations / professional education
- Social benefits and social insurances related to paid work
- Goods and services

Positive obligations

- Positive action
- Protecting pregnancy and maternity
- Work life balance
- Combating gender based violence

(used to be mostly policy apart from Victim's Rights Directive 2012/29, now EU supposed to ratify Istanbul Convention.)

Note: no clear division between negative and positive obligations!





Sex vs. Gender?

- Both terms are used in EU law and by the CJEU, but there are no EU definitions.

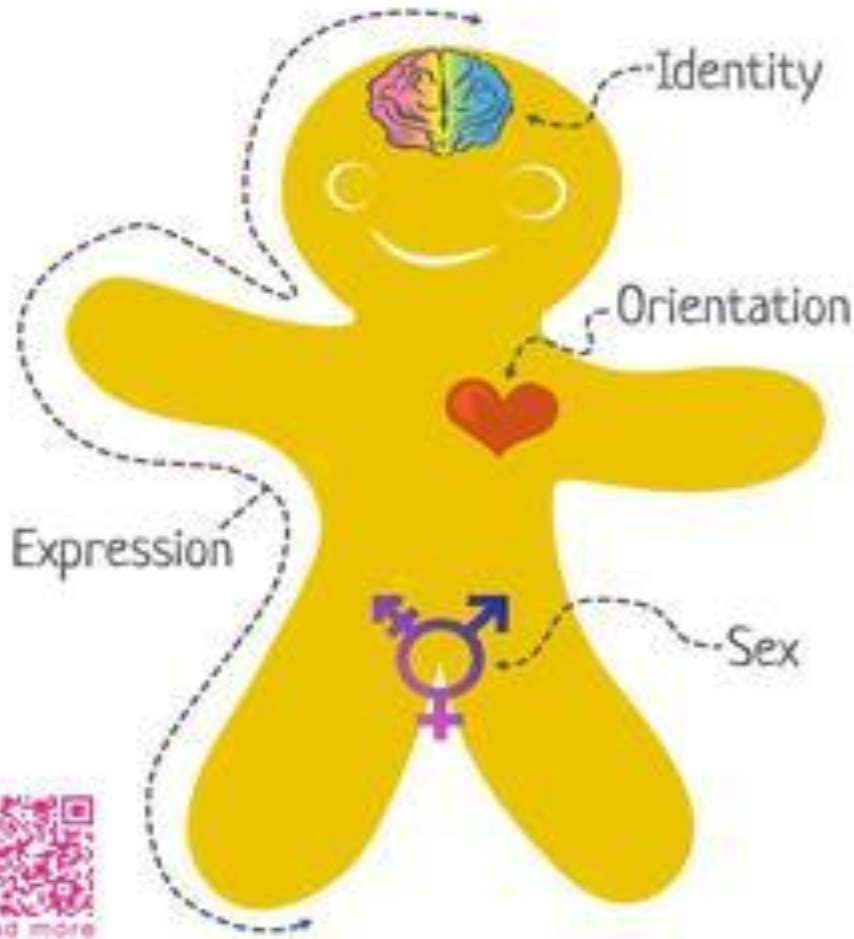
- Definitions CEDAW Committee:

“**sex**” here refers to **biological differences** between men and women
“**gender**” refers to **socially constructed** identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the **distribution of power** and rights favouring men and disadvantaging women.

CEDAW, General Recommendation No. 28, par. 5

The Genderbread Person

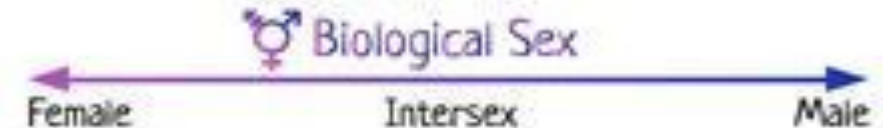
by www.ItsPronouncedMetrosexual.com



Gender identity is how you, in your head, think about yourself. It's the chemistry that composes you (e.g., hormonal levels) and how you interpret what that means.



Gender expression is how you demonstrate your gender (based on traditional gender roles) through the ways you act, dress, behave, and interact.



Biological sex refers to the objectively measurable organs, hormones, and chromosomes. Female = vagina, ovaries, XX chromosomes; male = penis, testes, XY chromosomes; intersex = a combination of the two.



Sexual orientation is who you are physically, spiritually, and emotionally attracted to, based on their sex/gender in relation to your own.



read more



Direct discrimination

Direct discrimination - definition

- Definitions grew out of ECJ case law
- Now definition in secondary law:
 - Art 2(1)(a) Directive 2006/54/EC (Recast)
 - Art 2(a) Directive 2004/113/EC (Goods & Services)
 - Art 3(A) Directive 2010/41/EU (Self-Employment)

“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. Less favourable treatment
2. On grounds of sex
3. Comparability

Direct discrimination - less favourable treatment

The less favourable treatment should fall within the material scope of EU gender equality law. For example, access to employment, including promotion and training; employment conditions, including pay; social security; access to goods and services.



Direct discrimination - on grounds of sex

Examples of important CJEU rulings:

- **Pregnancy** or **maternity** leave discrimination = sex discrimination. No comparison required. (e.g. Case C177-88 *Dekker*)
- Discrimination related **breastfeeding** = sex discrimination (e.g. Case-531/15 *Otero Ramos* (2017))
- Discrimination arising from **gender reassignment** = sex discrimination (e.g. C-13/14 *P v S* (1996); C-451/16 *MB v Secretary of State* (2018))



Direct discrimination - comparability

- **Problems** arise: Situations / persons are rarely exactly the same; it depends on the perspective of the judge whether they are declared to be so or not.
- The phrase 'is, has been or would be treated' expands the possibilities for comparison: **comparator can be past, current or hypothetical**.



Direct discrimination – comparability continued

- 'the requirement relating to the comparability of situations does not require those situations to be identical, but **only similar**' (C-451/16 *MB v Secretary of State* (2018), par. 41 and case law cited there)
- The comparability of situations must be **assessed not in a global and abstract manner, but in a specific and concrete manner** having regard to all the elements which characterise them, in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue, as well as, where appropriate, in the light of the principles and objectives pertaining to the field to which that national legislation relates (*MB v Secretary of State* , par. 42)



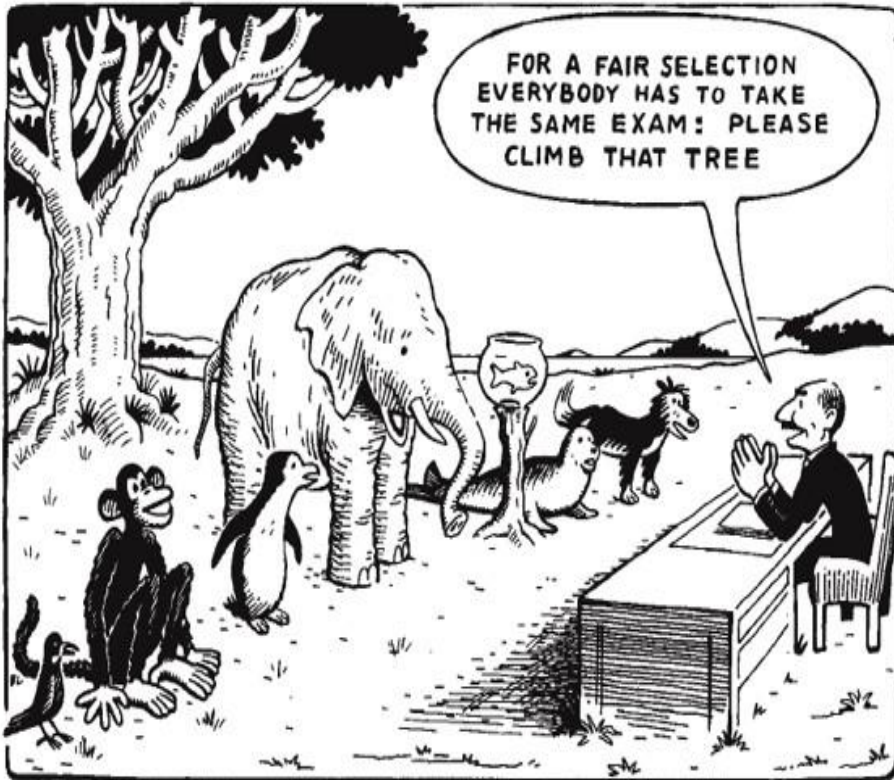
Justifications for direct discrimination?

In principle: direct sex discrimination cannot be justified

Exception (to be interpreted strictly): **Genuine and determining occupational requirement:** Art. 14(2) Recast Directive

*"Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a **genuine and determining occupational requirement**, provided that the objective is legitimate and the requirement is proportionate."*

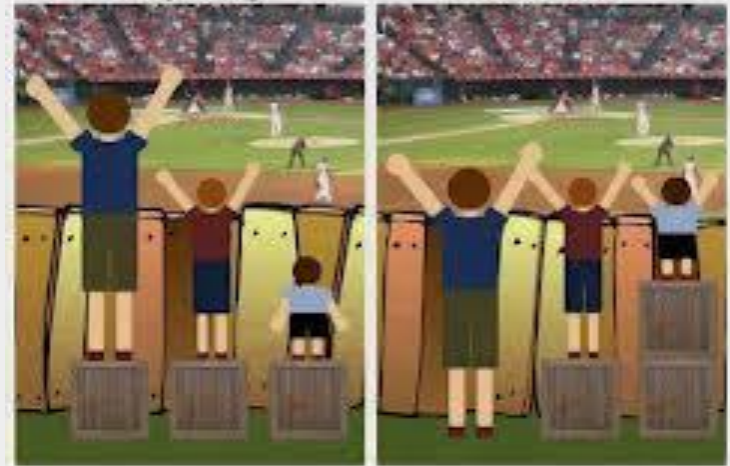
- GDOR: C-273/97 *Sirdar* (1999)
- NO GDOR: C-285/98 *Kreil* (2000)



Equality doesn't mean Justice

Equality

Justice



Indirect discrimination



Indirect discrimination - definition

Art 2(1)(b) Dir. 2006/54/EC

Art 2(b) 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, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'

➤ Focus in on impact/effect in practice

1. Apparent neutrality
2. Particular disadvantage
3. Comparison
4. (Absence of) Objective Justification



Indirect discrimination – apparent neutrality

Examples of cases:

C-170/84 *Bilka* (1986):

-> Bilka's policy was to exclude **part-time** employees from an occupational pension scheme. This affected far more female than male employees.

Note: there is now a specific Directive 97/81, which prohibits direct discrimination on the grounds of part-time work.

->C-409/16 *Kalliri* (2017): for entry into police force there was a **height requirement** of at least 1.70m. CJEU ruled that this is indirect discrimination based on sex, as far less women than men will be able to access employment with police.



Indirect discrimination – particular disadvantage

- It is for the applicant to **prove prima facie case of indirect discrimination**. This can be very difficult due to lack of statistics or other reasons; more on burden of proof later today.
- The definition of direct discrimination speaks of '**less favorable treatment**', whereas the definition of indirect discrimination mentions '**particular disadvantage**': the CJEU has held that there is **no substantial difference** between these two terms (C-83/14, *CHEZ* (2015), concerning Directive 2000/43/EC on race/ethnicity).) No heavier degree of seriousness is required for indirect discrimination (*CHEZ*, par. 98-102).



Indirect discrimination – comparisons

- Generally, a **group** of persons should be put at a disadvantage (definition mentions 'persons of one sex at a particular disadvantage compared with persons of the other sex').
- Approach to comparators similar as with direct discrimination; again difficulties to identify comparator group.



Indirect discrimination – objective justification test

- '*...unless that provision, criterion or practice is objectively justified by a **legitimate aim** and the **means of achieving that aim are appropriate and necessary***'
- **To be interpreted strictly**
- Objective reasons should be unrelated to any discrimination on grounds of sex (e.g. C-167/97, *Seymour-Smith* (1999))
- budgetary considerations cannot justify a difference in treatment (C-187/00, *Kutz-Bauer* (2003), par 59-60)
- Measure should not go beyond what is necessary to achieve aim (e.g. *Kalliri* par. 37)
- Supported by evidence, mere generalisations are not sufficient (*Seymour*, par. 76)



(Sexual) Harassment

Harassment - definition

- Art 2(1)(c) Directive 2006/54/EC (Recast)
- Art 2 (c) Directive 2004/113/EC (Goods & Services)
- Art 3(c) Directive 2010/41/EU (Self-Employment)

'harassment': ...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



Sexual harassment - definition

- Art 2(1)(d) Directive 2006/54/EC (Recast)
- Art 2 (d) Directive 2004/113/EC (Goods & Services)
- Art 3 (d) Directive 2010/41/EU (Self-Employment)

'sexual harassment': ... 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



(Sexual) Harassment

- No comparator required
- Harassment and sexual harassment cannot be justified!
- Not much case law from the CJEU yet, but more developments at national level (also due to more societal debate and recognition).

Conclusions



- Important role of CJEU in defining concepts
- Some concepts remain difficult to interpret
- Distinction between direct and indirect not always easy to distinguish

Looking forward: how to include a substantive equality approach?

- Positive action
- Multiple/intersectional discrimination (e.g. Directive 2000/43 recital 14 - Directive 2000/78 recital 3; C-415/10 *Meister* (2012); C-443/15 *Parris* (2016)).



Thank you!

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Suggestions for further reading

Susanne Burri, *EU gender equality law – update 2018* (European Commission and EELN 2019): <https://www.equalitylaw.eu/downloads/4767-eu-gender-equality-law-update-2018-pdf-444-kb>

Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (OUP; 2nd ed., 2012).

Handbook on European Discrimination Law (2018):
https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf

Alexandra Timmer en Linda Senden (2019), *A Comparative Analysis of Gender Equality in Europe 2018* (<https://www.equalitylaw.eu/downloads/4829-a-comparative-analysis-of-gender-equality-law-in-europe-2018-pdf-807-kb>)