ACHIEVEMENTS AND TRENDS IN EU GENDER EQUALITY LAW

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This paper gives a brief outline of what the author considers the most important trends in EU gender equality law and their significance for the gender equality law in EU Member States.¹

1. From an Economically Inspired Labour Law Standard to a Fundamental Right

As is well known, gender discrimination law started in the EU with a provision on equal pay for men and women, for work of equal value. There were anticompetitive motives behind the Article (old Article 119 of the EEC Treaty, now article 141 of the EC Treaty). The provision was inserted in a rather ‘weak’ Chapter on social policy. Initially, the provision was not taken very seriously either by the Commission and the Member States, or the employers and the employees.

This has changed drastically after the decision of the ECJ in Case 43/75 (Defrenne II), when the Court found that this provision had direct effect (see also infra, Section 2). As from 1976, gender equality law has been further expanded through a number of directives.²

In the ECJ case law, equal pay and later also equal treatment developed from an economically inspired labour law standard to a fundamental right. First, the ECJ stated that Article 119, as it then was, pursues both an economic and a social aim. The social objective quickly gained importance, however, and the economic aim became secondary. Finally, the ECJ found that

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² The outline is partly based on the author’s experience and work as coordinator of the European Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women. The Network's Bulletin and some of its reports are published at: http://europa.eu.int/comm/employment_social/gender_equality/index_en.html
² Cf. the following Directives: Directive 75/117 (equal pay), Directive 76/207 (equal treatment of men and women at work; as amended by Directive 2002/73), Directive 79/7 (equal treatment for men and women in statutory schemes of social security), Directive 86/378 (equal treatment for men and women in occupational social security, as amended by Directive 96/97), Directive 97/80 (burden of proof, as amended by Directive 98/52) and Directive 2004/113 (equal treatment between men and women in the access to and supply of goods and services). See further also Directive 92/85 (safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding) and Directive 96/34 (parental leave).
Article 141 EC constitutes the expression of a fundamental right (see, for instance, Case C-50/96, *Schröder*).

This is an important finding because the qualification as a fundamental right has a number of consequences. In this context the following can be mentioned:

- a fundamental right standard should provide protection in a wide variety of situations, and thus to a wide range of persons;
- a fundamental right standard merits special protection in case of competing interests;
- a fundamental right standard must be taken duly into account by the EC and national legislator and executive.

These points are also mirrored in the ECJ case law.

For instance, *Schröder* (Case C-50/96) and a few other cases concerned, *inter alia*, a conflict of non-discrimination on grounds of sex on the one hand and economic interests of employers on the other. The economic interest lay, in particular, in avoiding anticompetitive disadvantages, the initial rationale behind Article 141. The ECJ found that the economic aim pursued by Article 141 - elimination of distortions - is secondary to the social aim of that provision, which constitutes the expression of a fundamental right.

In *Rinke* (Case C-25/02), the main issue was the compatibility of Directive 93/16 (on free movement of doctors and the recognition of their diplomas) with Directive 76/207 (equal treatment directive). Should this conflict be resolved according to the *lex posterior* rule? The ECJ held that the elimination of discrimination on grounds of sex forms part of fundamental rights, and respect for these rights is a condition of the legality of Community acts. The conflict had to be resolved by reviewing the “doctors directive” in the light of the prohibition of discrimination on grounds of sex.

Another development illustrates the evolution of gender-discrimination into a more embracing principle, which goes beyond the economic origins. Gender equality issues in the Community began in the employment context, essentially as a question of labour and social law. There is, however, a timid move from the narrow area of non-discrimination in the workplace towards issues like reconciliation of work and family life (see also infra). In *Hill and Stapleton* (Case C-243/95) the ECJ held that Community policy in the area of equal treatment aims at the reconciliation of work and family life. It considered that the protection of women and men at the workplace and in family life is a principle that, in the legal orders of the Member States, is commonly considered as a "natural corollary" of the equality between men and women. In this respect, it must be noted that Article 13 EC, which was inserted into the EC Treaty in 1997, also enables the Council to take action beyond the fields covered by Articles 137 or 141 EC (labour market, employment and occupation), thus in any field of Community competence.³

Finally, the fundamental rights character of gender discrimination was confirmed by the Charter on Fundamental Rights of the European Union. The Chapter on equality contains a

³ Thus the recent Directive 2004/113 (equal treatment between men and women in the access to and supply of goods and services) is indeed aiming at fighting sex discrimination in matters other than employment and occupation.
general prohibition of discrimination, including discrimination on grounds of sex (Article 21), and provides for equality between men and women, which “must be ensured in all areas” (Article 23). In the Constitutional Treaty, equality between women and men features among the Union values (Article I-2).

2. Enforcement of Gender Equality

Gender equality law has played a pivotal - in many respects pioneer - role in the field of enforcement of Community law in general and in particular for the protection of rights, which individuals derive from that law.

First, there are indeed the principles of direct effect, consistent interpretation and State liability, which operate whenever EU gender equality law is not correctly and timely implemented and applied in national law.

Second, there is a dynamic combination of case law and provisions in the various directives on judicial protection and enforcement of EU gender equality law.4

In the case of Marguerite Johnston the ECJ identified for the first time the principle of effective judicial protection. The Court objected to an evidential rule in the Northern Ireland Sex Discrimination Act, which deprived the national court of the power to decide a point arising in relation to the equal treatment directive. The Court of Justice found that the requirement of effective judicial control, stipulated by an article of the directive, reflects a general principle of law which underlies the constitutional traditions common to the Member States and which is also laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR).

In other terms: access to the judicial process must be guaranteed.

Next the ECJ also defined -step by step, in equal treatment but also in other cases- what the meaning must be of an effective judicial protection.

In the Danfoss case, for instance, this requirement leads to a reversal of the burden of proof; in the meantime there is quite some case law (sometimes rather technical) on evidence in gender equality cases, which is partly codified in a Directive.

In general, the shift in the burden of proof in discrimination cases is considered in many countries as a positive development, sometimes resulting in more favourable rules of evidence, when compared to other areas of (labour) law. Yet, adducing evidence of discrimination continues to pose considerable problems, despite the shift in the burden of proof. In particular, the gathering of evidence still remains a difficult issue, as the necessary data are often not readily available. In some Member States efforts are made to introduce legislation on collecting employment-related statistical data by the employers.

4 E.g. Directives 75/117 (Articles 2 and 6) and 76/207 (Article 6).
In *Verholen* the Court indicated that effective judicial protection could lead to a “locus standi” for a person who has no “locus standi” under national law. Procedural rules fixing a temporal limitation on recovery of arrears of remuneration or damages that can be claimed can also be challenged. In specific circumstances they may be found to be incompatible with the principle of effective judicial protection (*Levez*).

The right to effective judicial protection evolved into a right of a fundamental nature. Closely related to effective judicial protection is the problem of sanctions for breaches of gender equality law.

The first case (*Von Colson*) concerned a refusal to consider the candidature of a job applicant on grounds of sex. According to German law she could only get the reimbursement of the expenses incurred in connection with the application (stamps and paper). The Court found in this case that, although the equal treatment directive does not require any specific form of sanction for unlawful discrimination, the sanction must nevertheless be adequate in relation to the damage sustained, it must be effective and it must have a deterrent effect on the employer.

Several cases followed after *Von Colson*: *Marshall II* and *Draehmpaehl* (an a priori upper limit in respect of damages for dismissal may not be imposed); *Dekker* (liability on the part of the person guilty of discrimination may not be conditional upon proof of fault. Any breach of the prohibition of discrimination must, in itself, be sufficient to render the employer fully liable).

The effects of these cases reached indeed beyond the Member States concerned. Austria and Sweden, for instance, had to change their legislation and abolish the limitations on compensation.

Within the Member States, the sanctions that can be imposed can be administrative, criminal, civil, disciplinary or any combination of these. In practice, it would seem that often the problem was not so much the non-existence of effective sanctions and remedies, but rather the unwillingness of judges to grant such remedies or impose such sanctions. In this respect, the real issue with compensation is rather the problem of the non-existence of a basic floor. The courts have usually broad discretion on deciding on the type or level of remedy to be afforded in an individual case. In part, their decision seems to depend on the question of how seriously gender discrimination is taken, both by the courts and by society.

Directive 2002/73, which amends Directive 76/207 and which was required to be implemented by October 5th, 2005, introduces new provisions for the enforcement of equality law. The new Article 6 incorporates certain aspects of the ECJ case law.

E.g.: protection against discrimination that continues even after the employment relationship has ended, is made explicit; Member States must introduce measures to ensure real and effective compensation or reparation, in a way which is dissuasive and proportionate to the damage suffered; the fixing of a prior upper limit is in principle prohibited.
A new and important feature for legal protection is also the possibility for associations, organisations or other legal associations to engage either on behalf or in support of complainants in any administrative or judicial procedures for the enforcement of the Directive (new Article 6(3)). In this respect, much may still be gained. In many countries gender equality litigation is very limited. Moreover, individual litigation is by its very nature limited in effects. In order to have court proceedings generating broader effects than the individual case, much depends on whether, for instance, a class action-type case can be brought and whether certain orders may be asked (e.g. to change a hiring policy etc.). It seems that in many countries this is exactly the weak point.

Court proceedings brought or at least supported by institutional litigants (trade unions and women’s interest groups) may help here, as these are also able to engage in strategic litigation and enforce compliance with the principle of equal treatment from which broad categories of workers may benefit. In some countries, the labour inspectorates play an important role in this respect. An important instrument is also the power - if any! - of equality bodies or NGOs to bring action of judicial review of national legislation. In any case, there is a necessity of having collective enforcement mechanisms instead of focusing mainly on individual enforcement. This is particularly important if one takes into account the very fact that, in general, many of the alleged victims of discrimination do not have either the courage or the means to start court proceedings.

The very low rate of litigation is a great concern from another perspective also. Its result is that lawyers and judges do not have much opportunity to familiarize themselves with gender equality (since the level of knowledge of (community) gender equality law is quite a problem in many Member States anyway).

Obviously, a matter of quite some relevance to the question of enforcement of equality rights is the existence and the powers of equality bodies. In a number of countries, equality bodies have ‘judicially-related purposes’ such as the power to hear complaints, to provide assistance to victims of discrimination, to conduct inquiries and to refer cases to the court, to propose solution to collective disputes. Yet, the role of equality bodies is the topic of another contribution to this conference.

3. Equal Pay

Equal pay is a vital item in the EU gender equality law, last but not least - as was already observed above - because it is where that equality law started.

Very significant was in this context the very broad interpretation of the concept of pay by the ECJ, also including occupational pensions. The qualification of occupational pensions as pay and, therefore to provide equal treatment in that area was a genuine revolution for a number of Member States. Moreover, it had also triggered the EU interference in statutory

3 See further also title III of the proposal for a directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast version) COM (2004) 279, which contains provisions on remedies and enforcement. The new enforcement provisions would have horizontal application. They would cover matters relating to access to employment, vocational training, promotion, working conditions and pay, including occupational social security schemes.
schemes of social security and the efforts to introduce the prohibition of discrimination in these as well. Partly this was a success, *inter alia* since it helped to challenge the stereotype of the (male) breadwinner in many of these schemes. For another part, the directives on social security - both occupational and statutory - contain many exceptions, which continue to pose problems. A notorious one is, for example, the differences in pension age.

Equal pay provisions of EU gender equality law proved to be effective, in particular when applied in the context of individual litigation and it helped to address a whole range of vital issues, such as: pay of part-time workers, how to make the comparison and how to deal with work of higher value, the issue of proof and objective justification for defences in pay inequalities, the transparency and objectivity in pay systems.

On the other hand, according to ECJ case law the comparison for the purposes of equal pay in an individual case may only relate to situations where the alleged discrimination finds it origin in one single source, e.g. the employer or the same collective agreement. A comparison across sectors and undertakings is not permitted. However, there is an urgent need for mechanisms that may help to bridge the existing pay gap between male and female employment, without having regard to individual cases only. In this sense, equal pay for equal work and for work of equal value remains one of the great concerns in the area of gender equality. The pay gap between men and women does not really narrow down - to the contrary, in certain respects it seems to widen again. Yet, it would seem that the existing provisions of EU gender equality law are not sufficient to tackle the more structural forms of unequal treatment.

It is often forgotten that Article 141 EC goes beyond individual litigation. It specifies that Member States have an obligation to take measures to ensure equal pay between men and women. This also implies that additional measures must be taken. The concept of work of equal value, for instance, requires that there must be appropriate tools for establishing the value of the work performed.

In the Member States, various measures are taken and strategies are being developed in this respect: reassessment of job evaluation schemes, monitoring pay practices in the workplaces, plans of action for equal pay, examination of collective agreements, cross-companies and sector comparisons and analyses, efforts to tackle gender segregation of the labour market, obligations to include equality in the collective bargaining process on the subject of remuneration etc.

The topic of equal pay (in a broad sense) is of growing political importance at the EU level. It would seem that the EU equal pay legislation is up to a ‘modernisation’ and, in addition to that, measures are necessary which go beyond equality law, strictly speaking.

4. **The Development of the Concept of Equality and Non-Discrimination**

The final topic to be discussed briefly here is the development of the concept of equality and non-discrimination: from a rather formal concept to a much more substantive notion. This development has (had) considerable impact on the equality law of various Member States.
The first step concerns the move from direct to indirect discrimination. Although there is nothing about it in the Treaty, already quite early - in 1981 - the ECJ started to develop the concept of indirect discrimination on grounds of sex, by pointing out that the use of criteria other than sex may lead to the same result and that the use of these criteria is prohibited unless there exists an objective justification (Jenkins). In 1997 the legislature stepped in. Indirect sex discrimination was codified in the Burden of Proof Directive; a few years later it was again redefined in Directive 2002/73 (amending the equal treatment Directive 76/207).  

The introduction of indirect discrimination was, in fact, a revolutionary novelty. For the majority of Member States - old and new, with the UK as an exception - indirect discrimination was an entirely new concept. It continues to pose problems in the application and observance of the law, both at national and EU level (cf. the recent cases Elsner, Nikoloudi and Rinke).

An important merit of the concept of indirect discrimination is that, by focusing on the effects of the rules applied or the effect of a certain behaviour and by taking into account the social, cultural, economic or other de facto realities, its introduction marks an important shift from a formal conception of equality to a substantive understanding of equality. This is also a novelty for many Member States.

In Thibault, for instance, the ECJ observed that the aim pursued by Directive 76/207 was substantive and not formal equality. Similarly it held that “the aim of Article 2(4) of that Directive is to achieve substantive rather than formal equality by reducing de facto inequalities which may arise in society” (Abrahamsson, Briheche).

Substantive understanding of equality also goes beyond the limited negative concept of discrimination, the “prohibition of”. This prohibition obviously has its limits even if construed broadly and encompassing such notion as indirect discrimination. Equality in fact involves not only eliminating discrimination but also actively taking steps to promote greater equality. In other terms, it requires positive and proactive measures. Cf. Articles 2 and 3(2) of the EC Treaty. Since the additions inserted by the Amsterdam Treaty, they impose the objective of promoting equality between men and women in the Community. It is also argued that a proactive approach required by a substantive understanding of equality and as reflected in Articles 2 and 3 EC Treaty should involve positive action policies and measures.

The clearest example of coping with the differences between men and women is perhaps the Pregnant Workers Directive, which in fact recognizes the need to accommodate pregnancy and breastfeeding, by providing, inter alia, for maternity leave, adjustment of working conditions and time off for antenatal checks; in that way these measures seek to ensure equal opportunities for female workers. Issues of pregnancy/maternity and parental leave as well as pay or allowances during these leaves are regularly submitted to the ECJ for adjudication. This despite the fact that, in general, the national rules concerning the protection of pregnancy and maternity often go beyond what EU gender law requires.

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6 The latter was deemed necessary because of Directive 2000/43 (race directive) and Directive 2000/78 (general equal treatment framework directive). These two directives contain a new definition of indirect discrimination and it was believed that, for reasons of consistency, the definition in the field of sex discrimination should be the same. The recent definitions square, in turn, with the concept of indirect discrimination as defined by the ECJ in the area of discrimination of grounds of nationality.
This brings me to the rather diffuse and sometimes hotly debated concept of “positive action”. Positive action is not defined at EU level and may take very different forms. It may include measures aiming at improving vocational training and guidance of women, ethnic minorities or disabled persons. Another type of positive action that has been introduced as such into Community law is accommodation.

The most controversial form of positive action is preferential treatment for the disadvantaged group. This type of positive action takes the form of quotas or targets and relates to recruitment, promotion and sometimes also to dismissal. Under EU law there is no explicit obligation to positive action, the provisions are framed as a faculty.

According to some, in the EC legislation positive measures - Article 2(4) of Directive 76/207 and Article 141(4) EC - reflect too much a nature of “exception” to the ban on discrimination rather than a justified form of differentiated treatment, as a means to achieve real equality; within certain limits, obviously. In Sweden, Austria and to some extent Germany, positive action is an area where Community gender equality law can be said to have had a negative impact on national gender equality policy instead of enhancing it. However, in general, it can also be said that there is very limited recourse to positive action measures in the Member States and those that do exist, even appear to fall short of what is allowed under the current EU framework.

The ECJ case law on preferential treatment evolved from a very strict interpretation of these provisions (Kalanke) to a slightly more liberal one: in the cases that followed Kalanke, the ECJ seemed to have softened its position (Marschall, Badeck, Lommers).

Briefly put, measures that give automatic and unconditional preference to one sex are not justified under EU law. In the case of recruitment and promotion, targets and/or quotas can only be accepted if each and every candidate is the subject of an objective assessment, which takes account of the specific personal situations of all candidates. Indeed, this presupposes very transparent processes.

Finally, an issue high on the agenda in several Member States and the EU and a matter of quite some concern is the issue of reconciliation of family and professional life. Obviously, strictly speaking this is a matter beyond equal treatment law but it is intrinsically linked to equal opportunities. More recently interest for this topic has been prompted by demographic problems, which make an increase of the participation of women in employment a crucial issue and, at the same time, also often aim at boosting the birth rate.7

The measures reported from various Member States concern, for instance, changes to the legislation on part-time work and various forms of (parental) leaves, the funding of child care and improving the availability and quality of child care facilities, the reintegration of workers, who return from parental leave at the workplace, the introduction of flexible work arrangements in order to facilitate the reconciliation of work and family responsibilities etc. At EU level, the Commission recently announced a number of initiatives. It would seem that EU gender equality law and policy may join in with these measures.

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