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The Current and Future Direction of European Equality Law

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The Origins of EU Equality Law: Gender as the 'Rootstock'

- Article 157 TFEU (ex Art 141 TEC/Art 119 EEC) gave expression to the principle of 'equal pay for work for equal value', originally derived from the ILO Constitution as set out in Art 427 of the Treaty of Versallies and affirmed in Art 23(2) UDHR – note the international roots of the principle.
- *Defrenne v Sabena* [1976] ECR 455 – ECJ concludes the equal pay principle is directly applicable, elevating the status of the principle & by extension making itself both the supreme judicial authority on the topic and the 'spearhead of legal innovation'.
- EU competence in the field of gender equality expands - Equal Pay Directive 75/117/EC, Equal Treatment Directive 76/207/EC, Pregnant Workers Directive 92/85/EEC etc.
- Purposive, 'spearhead' approach of ECJ key to its development, which is largely non-controversial: individual rights claims chime with collective national/EU ambitions to generate 'output legitimacy'.

The Expanded Scope of EU Equality Law: Amsterdam and Beyond

- Art 13 TEU (now Art 19 TFEU), inserted by the Treaty of Amsterdam in 1999, extended EU competency to cover the new non-discrimination grounds of age, disability, race and ethnicity, religion or belief, and sexual orientation, along with gender.
- This provided the legal basis for the Race Equality Directive 2000/43/EC and the Framework Equality Directive 2000/78/EC, not to mention the upgraded and extended Gender Equality Directives 2004/113/EC and Directive 2006/54/EC.
- Simultaneously, 'equal treatment' (understood to require non-discrimination on the basis of suspect grounds) was recognised to be a general principle of EU law in *Mangold v Helm* [2005] ECR I-9981 and affirmed as a fundamental right in Art 21 CFR – becoming effectively 'constitutionalised' as illustrated by CJEU judgments such as *Test-Achats* [2011] ECR I-773.

The Fragmentation of EU Equality Law? Uniformity Gives Way to Variation

- The pre-existing gender equality approach was initially carried over and applied across all the Art 19 grounds, most notably in the 2000s jurisprudence of the CJEU – see e.g. *Mangold, Maruko* [2008] ECR I-1757.
- However, initial uniformity has given way to 'variation' (glass half full) and /or 'fragmentation' (glass half empty) – both within the case-law of the CJEU and also at the level of primary legislation.
- Also, political consensus at both national and EU levels has frayed, especially in respect of the race, religion and SO grounds – even as the EU institutions push forward with new equality initiatives, and attempts are made to extend the reach of EU equality law into new terrain.

CJEU Case-law Variation: Scope and Substance

- Initial application of the well-established 'purposive' approach to interpreting Art 157 & the gender equality directives – including a wide reading of scope, and a rigorous & demanding application of GOR and objective justification tests – has given way at times to a more varied, ground-specific approach.
- See for example the narrow reading of the scope of the race/ethnicity ground adopted in C-668/15, *Jyske Finans,* 6 April 2017, and that of the age ground in Case C-49/18, *Vindel v Ministerio de Justicia*, 7 Feb 2019. (For the potential seriousness of *Jyske* F*inans*, see Atrey (2018) 55(2) *Common Market Law Review* 625.)
- See also the looser application of the objective justification test applied in the 'headscarf cases' of *Achbita* and *Bougnaoui*, while also noting the relative tightening of this test in more recent case-law (*WABE*). Contrast with the approach taken to the situation of domestic workers in the recent gender equality case of Case C-389/20,*TGSS*, 24 Feb 2022.

Variation in Primary Legislation: Reflecting Political Dissensus?

- Since 2000, concern has existed about EU equality law recognising a 'hierarchy of grounds' – exemplified by the narrower scope of protection offered to the age, disability, religion and SO grounds by 2000/78/EEC.
- This concern can be overstated: some hierarchy is inevitable. But it is clear by now that EU equality law continues to advance more in respect of some grounds than others. The welcome strengthening of protection against sex discrimination provided by e.g. the recently adopted Pay Transparency Directive 2023/970 can be contrasted with stagnation in respect of other grounds, as evidenced e.g. by the non-progression of Directive Proposal (COM(2008)462).
- Note too the partial EU ratification pattern of international human rights instruments – UNCRPD and the Istanbul Convention, but not others. Political dissensus is obviously a big factor here, reflecting wider tensions. (Similar issues can arguably be seen in the ECHR jurisprudence.)

Concluding Thoughts: A 'Brave New World'?

- The past of EU equality law was focused, purposive, expansionary, relatively uniform, and driven by court-initiated process of 'constitutionalisation'.
- The present is fragmentated, variable and uneven – with legislative and case-law still playing an expansive role at times, but with the overall picture being much more variegated. It is also clear that legitimacy concerns are growing ever greater – and this is not just confined to the 'usual suspects' of Poland and Hungary, as evidenced by e.g. the *Ajos* case in Denmark.
- Predicting the future is a fool's errand. However, I suspect issues of legitimacy will remain pressing; variegation will increase; and primary legislation will become the primary vehicle for achieving innovation & expansion, rather than judicial *fiat*.