https://doi.org 10.59821/18294219-2024.2-nbks01

Norbert Bernsdorff
Doctor of Law, Honorary Professor at Philipps-University Marburg, Faculty of Law, National key expert at the European Union Agency for Fundamental Rights (in Vienna), Retired Judge of the Federal Social Court (Third Instance Court on Social Affairs of Germany),
Member of the Editorial Board of the Scientific-Practical Journal "Legality" of the RA Prosecutor`s Office

Bettina Kukat-Sedler
Doctor of Law, Editor of the Journal for Inclusive Didactics and the Journal „Frauenförderung and Gender Mainstreaming", Head of the Institute „Genderperspektiven für die European Studies", Staff Member of the International Institute for Gender Equality

EQUALITY REQUIREMENTS IN THE EUROPEAN JUDICIAL AREA - SPECIAL FOCUS: GENDER DISCRIMINATION[1]

Abstract

The following article shows that the principles of equality and non-discrimination have gradually become established in the legal order of the European Union, namely as part of a development process. The European Court of Justice has played a decisive role in ensuring the effective protection of these principles.

Initially, these principles were only recognised in relation to employment and social security until, as their scope and field of application gradually expanded, they were finally made explicit in the Charter of Fundamental Rights of the European Union.

Above all, the gender mainstreaming approach should be applied in all phases of the process of making political decisions. Gender mainstreaming complements the traditional equality of women.

However, the prohibition of gender discrimination can come into conflict with other rights and interests, meaning that restrictions to this prohibition may be justified.

Keywords: principle of equality; non-discrimination; gender discrimination; gender, disability and age; Gender mainstreaming; ECJ; ECJ case law; European judicial area; Charter of Fundamental Rights; prohibition of discrimination.

[1] The article was presented on 07.10.2024 and was reviewed on 31.10.2024.

1.Introduction

A long time ago, the Frankfurter Allgemeine Zeitung (FAZ) criticised a judgement by the European Court of Justice in Luxembourg (ECJ) in which the ECJ had banned different tariffs in private insurance for men and women, and a week later demanded: "Courts should no longer incapacitate legislators". Criticism of the ECJ's equality jurisprudence was nothing new, and five years after the *"Mangold" case*[2], the ECJ was once again "pilloried"; the Court was accused of having "disregarded the legislative power in the member states with remarkable recklessness".

2. Stages of the Prohibition of Discrimination - Community and Union Law

The idea of equality, which is one of the core tasks of the European Community/Union, has always been anchored in its legal system. In accordance with its objective, which was originally (solely) aimed at establishing a single market without restrictions[3], the Treaty establishing the European Economic Community (EEC Treaty)[4] did not initially contain a general principle of equality or a general prohibition of discrimination. The aim of the Community's earlier endeavours to protect against discrimination was a level playing field in the internal market, rather than social protection, which was also initially understood by the ECJ only as an annex to the internal market concept.[5] Therefore, the focus was initially on the prohibition of discrimination on the basis of nationality as a strictly functional principle of equality geared towards market integration, which was systematically assigned to the fundamental freedoms[6] (Art. 7 para. 1 EEC Treaty, then Art. 6 of the Treaty establishing the European Community <ECT>, later Art. 12 EC Treaty, now Art. 18 para. 1 TFEU). In contrast to the prohibition of discrimination on grounds of nationality, the prohibition of discrimination on grounds of sex did not apply generally in the development stage of the EEC Treaty, but only to labour law.[7] Article 119 of the EEC Treaty (then Article 141 of the EC Treaty, now Article 157 of the Treaty on the Functioning of the European Union <AEUV>), which provided for equal treatment of men and women with regard to pay, was also initially intended to ensure only liberal equality of competition[8]; i.e. the primary aim was to prevent the employment of women from leading to distortions of competition.[9]

---

[2] ECJ, judgement of 22 November 2005, case C-144/04 (Mangold), ECLI:EU:C:2005:709.

[3] Cf. ECJ, judgement of 9 February 1982, Case C-270/80 (Polydor Limited and RSO Records Inc.), ECR 1982, p. 329.

[4] From 25 March 1957, BGBl II p. 766.

[5] Hermann Reichold, Aktuelle Rechtsprechung des EuGH zum Europäischen Arbeitsrecht, Juristenzeitung (JZ) 2006, p. 549.

[6] Stefan Huster, Gleichheit im Mehrebenensystem, Europarecht (EuR) 2010, p. 325 (332).

[7] For the guidelines issued in this regard, see Manfred Husmann, Die Richtlinie 79/7 im Lichte der Rechtsprechung des Europäischen Gerichtshofs, Rentenversicherung (RV) aktuell 2010, p. 100.

[8] Hermann Reichold, loc. cit., p. 549.

[9] Ulrich Becker, Sozialrecht in der europäischen Integration - eine Zwischenbilanz, Zeitschrift für die sozialrechtliche Praxis (ZFSH/SGB) 2007, p. 134.

This first phase of the development also includes what was derided as the "postage paragraph" [10]. Section 611a of the old version of the German Civil Code (BGB)[11], which, in implementing a directive based on Article 119 of the EEC Treaty[12], initially simply "lacked bite". The worst punishment for a company that discriminated against a woman when awarding a job in violation of equality was that it had to reimburse her for the postage and envelope for the application: a loss that any company could probably easily cope with[13]. A breath of fresh air in the cautious ruling practice of the labour courts was only brought about by a case decided by the ECJ in 1984, which was brought about by a referral from the Hamm Labour Court. The plaintiffs in the original proceedings, Colson and Kamann, had invoked Section 611a of the German Civil Code (BGB) due to rejection of their application to a prison and were successful with their claim on the merits. The ECJ countered the compensation of only DM 7.20 awarded by the Labour Court by stating that the damages must not only adequately compensate for the loss suffered by the discriminated job applicants, but must also have a deterrent effect against further discrimination[14].

However, protection against discrimination in Community law was only really accelerated with the EC Treaty[15], which was accompanied by a considerable extension of the prohibition of discrimination. While the Treaty of Maastricht[16] still did not contain any changes to the prohibitions of discrimination, which had previously only been granted in certain areas, the Treaty of Amsterdam[17] laid the foundation for the comprehensive promotion of equality between men and women - in the sense of gender mainstreaming - at the level of primary law. The newly inserted Art. 3 para. 2 TEC (now Art. 8 TFEU) stipulated that the Community should endeavour to eliminate inequalities and promote equality between men and women in its activities referred to in Art. 3 para. 1 TEC. The promotion with a cross-cutting clause, which covered all Community/Union policy areas such as transport policy, competition policy, environmental policy, development policy or energy policy, aimed to accelerate the development of gender equality and achieve sustainability in this regard[18]. By declaring equality bet-

[10] Christian Rolfs, Aktuelle Rechtsprechung und Praxisfragen zur Benachteiligung wegen des Geschlechts, Neue Juristische Wochenschrift (NJW) 2009, p. 3329; the term goes back to Manfred Zuleeg, Gleicher Zugang von Männern und Frauen zu beruflicher Tätigkeit, Recht der Arbeit (RdA) 1984, p. 325.

[11] Inserted by the Act on Equal Treatment of Men and Women in the Workplace and on the Preservation of Entitlements in the Event of a Transfer of Undertakings of 13 August 1980, Federal Law Gazette I p. 1308.

[12] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ("Equal Treatment Directive"), OJ L 39, 14 February 1976, p. 40.

[13] The "Portoparagraph" - Deutschlandfunk, PISAplus from 28 August 2010.

[14] ECJ, judgement of 10 April 1984, Case C-14/83 (Colson and Kamann), ECR 1984, p. 1891.

[15] Treaty establishing the European Community as amended by the Treaties of Maastricht, Amsterdam and Nice.

[16] From 7 February 1992, entered into force on 1 November 1993.

[17] From 2 October 1997, entered into force on 1 May 1999.

[18] Renate Pirstner-Ebner, Neue Gemeinschaftsrechtsentwicklungen im Bereich des Gender-Mainstreaming, European Journal of Economic Law (EuZW) 2004, p. 205.

ween men and women to be a Community task and, in conjunction with Art. 3 para. 2 TEC, establishing a positive obligation on the part of the Community that was of equal importance to other Community tasks and objectives, Art. 2 TEC made the gender equality policy especially weighty[19].

The likewise newly inserted Art. 13 TEC (now Art. 19 TFEU) has further extended the protection against discrimination through a comprehensive prohibition of discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. However, in order for Article 13(1) of the EC Treaty to become effective, the respective prohibition of discrimination had to be specified in concrete terms by means of Council directives or measures[20]. Article 13 TEC was also the authorising basis for the newly added secondary law measures of the Community legislator, which were later accompanied by a reorientation of subjective public rights in Union law[21].

The Community legislator "entered" this "new territory" with Council Directive 2000/43 of 29 June 2000, implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin ("Racial Equality Directive")[22], the scope of which, unlike the gender directives of the first stage[23], was extended beyond the area of gender equality to all areas of life such as access to and supply of goods and provision of services available to the public, including access to housing. Directive 2002/73 of the European Parliament and of the Council of 23 September 2002[24] merely amended Council Directive 76/207 EEC of 9 February 1976 ("Equal Treatment Directive")[25] and, like the latter, was therefore limited to labour law. Council Directive 2000/78 of 27 November 2000, establishing a framework for equal treatment in employment and occupation ("Framework Directive")[26], prohibited discrimination in this area on the grounds of religion or belief, disability, age or sexual orientation. Council Directive 2004/113 EC of 13 December 2004[27] took gender equality out of the Racial Equality Directive and therefore concerned the same matters in this area and also applied to private law relationships[28].

---

[19] Renate Pirstner-Ebner, loc. cit., p. 206.

[20] Cf. Martin Rungaldier, Aktuelle Tendenzen in der europäischen Rechtsentwicklung, insbesondere hinsichtlich des Alters und der Arbeitszeit, RdA 2009, Sonderbeilage Heft 5, p. 40.

[21] Thorsten Kingreen, Grundrechtsverbund oder Grundrechtsunion - Zur Entwicklung der subjektiv-öffentlichen Rechte im europäischen Unionsrecht, EuR 2010, p. 338, 339.

[22] OJ 2000 No L 180, p. 22.

[23] Council Directive 75/117/EEC of 10 February 1975 ("Equal Pay Directive"), Council Directive 76/207/EEC of 9 February 1976 ("Equal Treatment Directive") and Council Directive 79/7 EEC of 19 December 1978 ("Directive on statutory security schemes").

[24] OJ No L 269, 5 October 2002, p. 15.

[25] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[26] OJ 2000 No. L 303, p. 16.

[27] OJ 2004 No. L 373, p. 37.

[28] Thorsten Kingreen, loc. cit., p. 339.

The final stage in the development of equality rights in Europe is crowned by the Charter of Fundamental Rights of the European Union (CFR), which became legally binding when the Treaty of Lisbon came into force on 1 December 2009. Unlike the Constitutional Treaty, the CFR has not been incorporated into the treaties. Instead, the Union has expressly recognised the rights, freedoms and fundamental rights laid down in the Charter of Fundamental Rights by reference in Article 6(1) of the Treaty on European Union (TEU) and has designated the Charter as the primary source of fundamental rights. Furthermore, the CFR's status as primary law is determined by its equal status with the treaties. In seven titles, the CFR contains a comprehensive catalogue of rights, freedoms and principles that not only go beyond the guarantees recognised as general principles of Community/Union law, but also exceed the rights to freedom and equality in the German Basic Law in terms of content. What is new above all is the equal inclusion of social rights in Title IV of the Charter, which is entitled "Solidarity"[29]. In addition, so-called modern or innovative fundamental rights, which take up more recent social and technical developments such as data protection, consumer protection or biomedicine, are different from the German Basic Law. Finally, Title III on equality, which contains many specific prohibitions of discrimination in addition to a general principle of equality, takes up a great deal of space.

3. Areas of Protection of the Prohibition of Discrimination - ECJ Case Law

3.1. Discrimination on the Basis of Gender

3.1.1. Cases of "Defrenne I-III" - In the "Defrenne" decisions from the 1970s, the ECJ made fundamental statements on the equal treatment of men and women with regard to the pay of male and female employees. The decisions were based on legal disputes between a (former) stewardess and her employer, the Belgian Sabena Public Limited Company, in which she was pursuing compensation claims for wage discrimination against her male colleagues who performed the same work as "pursers"[30]. The reason for a referral to the ECJ at this time was not only the lower pay of the stewardesses for the same work. According to a provision of the Belgian Arrete royal of 3 November 1969, stewardesses were also excluded from the special regulation on retirement pensions for civil aviation personnel. The ECJ did not agree with the plaintiff, who saw this as a violation of the principle of equality enshrined in Article 119 of the EEC Treaty because the pension entitlement was part of the "remuneration" defined in Article 119(2) of the EEC Treaty as remuneration owed indirectly by the employer. The ECJ excluded social security systems or benefits directly regulated by law, in particular old-age pension schemes, from the definition of remuneration in Art. 119 of the

[29] Eckhart Pache/Franziska Rösch, Europäischer Grundrechtsschutz nach Lissabon - Die Rolle der EMRK und der Grundrechtecharta in der EU, EuZW 2008, p. 519 (520).

[30] ECJ, judgement of 8 April 1976, Case C-43/75 (Defrenne II), ECR 1976, p. 455; ECJ, judgement of 15 June 1978, Case C-149/77 (Defrenne III), ECR 1978, p. 1365.

EEC Treaty[31]. According to the ECJ, the principle of equal pay enshrined therein, which is a specific expression of the general principle of equality, is one of the foundations of the Community. Although Art. 119 of the EEC Treaty expressly only addressed the Member States, in the opinion of the ECJ, it also granted employees their own rights which, in the event of discrimination, applied not only to public authorities, but also directly to legal relationships between private individuals[32], i.e. it had a horizontal effect.

In the *"Lawrence and Others"* decision[33], the ECJ restricted the principle that equal pay must be granted for equal work or work of equal value, regardless of whether it is performed by a man or a woman. The reason for the decision was the difference in payment for canteen and cleaning services in school facilities. Following the (contractual) transfer of services to a private company, the ECJ had to decide whether the lower remuneration of women constituted discrimination on grounds of sex if equivalent activities were carried out by different employers. It found that Art. 141 para. 1 EC Treaty does not contain any reference to the fact that the work must be carried out for one and the same employer. In the opinion of the ECJ, however, the criteria already established in the *"Defrenne II"* case, according to which a single source responsible for the unequal treatment, such as a collective agreement, is sufficient, were not fulfilled. The provision therefore only covered gender-related differences in the same sector or within the same group; large-scale compensation for labour market-related gender discrimination was therefore ruled out[34].

The ECJ reaffirmed its fundamental statements on equal pay in the *"Cadman"* case[35], which concerned the criterion of seniority (anciennity) as a factor determining pay, the application of which resulted in pay inequalities between male and female employees.

3.1.2.Case of "Dekker" - The consistent (implementation of) the advancement of women can also be demonstrated by the ECJ's case law on equal treatment for pregnant women. The subject of the *"Dekker"* decision[36] was the refusal of an employer to conclude an employment contract with a female applicant who had been deemed to be suitable by a selection committee. The employer based its refusal on the fact that the applicant was pregnant when she submitted her application, which would lead to financial disadvantages for the employer if the applicant were hired due to her absence linked to pregnancy. As the refusal to hire was not directly linked to gender, the ECJ had to decide whether this behaviour could constitute direct discrimination based on gender at all. The ECJ considered it decisive whether the reason for the refusal could

[31] ECJ, judgement of 25 May 1971, Case C-80/70 (Defrenne I), ECR 1971, p. 445.
[32] ECJ, judgement of 8 April 1976, Case C-43/75 (Defrenne II), loc. cit.
[33] ECJ, judgement of 17 September 2002, Case C-320/00 (Lawrence and others), ECR 2002, p. I-7325.
[34] Hermann Reichold, loc. cit., p. 549 (550).
[35] ECJ, judgement of 3 October 2006, Case C-17/05 (Cadman), ECLI:EU:C:2006:633.
[36] ECJ, judgement of 8 November 1990, Case C-177/88 (Dekker), ECR 1990, p. I-3941.

apply indiscriminately to both sexes or (by its nature) exclusively to one of the two sexes. Pregnancy can therefore be considered as a factor leading to discrimination, even if only women have applied for the job.

Even before Directive 92/85[37] came into force, the ECJ had also granted pregnant women protection against dismissal and ruled that, on the basis of the principle of non-discrimination and in particular Art. 2 para. 1 and Art. 5 para. 1 of Directive 76/207 , a woman must be granted protection against dismissal not only during maternity leave, but also throughout her pregnancy. The Court stated that dismissal during the relevant periods could (by its very nature) only affect women and should therefore be regarded as direct discrimination on the grounds of sex[38].

3.1.3.Case of "Kleist" - In the *"Kleist"* case[39] , the plaintiff, employed by a pension insurance institution as a senior doctor, defended herself against her dismissal upon reaching the age of 60. The dismissal was based on the pension insurance institution's decision to dismiss all employees who fulfilled the requirements for retirement in accordance with the relevant regulations[40]. The ECJ first stated that the application of the principle of equal treatment with regard to the conditions of dismissal in accordance with Art. 3 para. 1 lit. c) of Directive 76/207 precludes both direct and indirect discrimination on the grounds of sex. The ECJ also includes such an age limit for the mandatory departure of employees under the term "dismissal" in this provision, if this departure entails the granting of retirement pension. In principle, the ECJ considers a dismissal policy that is linked to the entitlement to old-age pension to be discriminatory if women achieve this entitlement at an earlier age (five years) than men. Consistently, it also affirms direct discrimination prohibited by the Directive in the event that a national regulation allows an employer to make such dismissals in order to promote access to employment for younger people.

3.2. Discrimination on the Basis of Disability

In the *"Chacon Navas"* case[41], for the first time, the ECJ dealt with the prohibition of discrimination on the grounds of disability covered by Directive 2000/78[42]. In the main proceedings, the plaintiff challenged the termination of her employment relati-

[37] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28 November 1992, p. 1.

[38] ECJ, judgements of 8 November 1990, Case C-179/88 (Handels- og Kontorfunktionaerernes Forbund), ECR 1990, p. I-3979, and of 30 June 1998, Case C-394/96 (Brown), ECR 1998, p I-4185.

[39] ECJ, judgement of 18 November 2010, Case C-356/09 (Kleist), ECLI:EU:C:2010:703.

[40] Service Regulations B for doctors and dentists working for the Austrian social insurance institutions.

[41] ECJ, judgement of 11 July 2006, Case C-13/05 (Chacon Navas), ECLI:EU:C:2006:456.

[42] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, p. 16.

onship, which had been sent to her by her employer after a long period of sick leave without giving any further reasons. At the same time, the employer had recognised the unlawfulness of her dismissal and offered the plaintiff compensation. In her lawsuit, the dismissed employee claimed that the dismissal was null and void and requested that the employer be ordered to reinstate her. Under Spanish law[43] - the case was held in Spain - "unilateral decisions by the employer that lead to direct or indirect discrimination on the grounds of age or disability are considered null and void". Against this background, the referring Spanish court had primarily asked the ECJ whether the general framework established under Directive 2000/78 guaranteed protection of a person who had been dismissed by their employer solely on the grounds of illness. Within the meaning of Directive 2000/78, the interpretation of the term "disability", which, according to the ECJ, must be carried out autonomously and uniformly, leads to the conclusion that a person dismissed by his or her employer solely on the grounds of illness is not covered by the general framework established under Directive 2000/78 to combat discrimination on the grounds of disability. The ECJ then defined the concept of disability as a limitation that does not have to be exclusively attributable to physical, mental or psychological impairments. It is then sufficient, if the disability generally constitutes a hindrance to the participation of the person concerned in employment. Therefore, the ECJ's decision is based on a social concept of disability, not a medical concept of disability[44]. It states that Article 13 of the EC Treaty does not apply to discrimination on the grounds of illness, and therefore, illness cannot constitute further ground for prohibition of discrimination within the meaning of Directive 2000/78.

3.3. Discrimination on the Grounds of Age

3.3.1. Case of "Mangold" - Subject of the *"Mangold"* decision[45] was the fixed-term agreement based on Section 14 para. 3 sentence 4 of the German Part-Time and Fixed-Term Employment Act (TzBfG)[46] in an employment contract concluded by the plaintiff Mangold with his employer in 2003. According to this provision, the limitation of an employment relationship did not require an objective reason if the employee had attained the age of 52 at the start of the employment relationship[47]. In principle, the ECJ considered the disputed provision of the TzBfG to be compatible with the provi-

[43] Article 17(1) of the Law on the Status of Employees, as amended by Law 62/2003 of 30 December 2003 introducing fiscal, administrative and social measures (BOE No. 313 of 31 December 2003, p. 46874), which transposed the Directive into Spanish law.

[44] Ninon Colneric, Antidiskriminierung - quo vadis?, Neue Zeitschrift für Arbeitsrecht (NZA), Supplement 2/2008, p. 66 (72).

[45] ECJ, judgement of 22 November 2005, case C-144/04 (Mangold), loc. cit.

[46] Act on Part-Time Work and Fixed-Term Employment Contracts and on the Amendment and Repeal of Labour Law Provisions of 21 December 2000, Federal Law Gazette I, p. 1966, amended by the First Act on Modern Services on the Labour Market of 23 December 2002, Federal Law Gazette I, p. 4607.

[47] According to the version of the regulation that came into force on 1 January 2003 (in force until 31 December 2006; thereafter: from the age of 58).

sions of Community law on the protection of employees because it served precisely to promote the employment of older workers. However, the ECJ ultimately agreed with the plaintiff, who had argued that the fixed-term agreement based on Section 14 (3) TzBfG was incompatible with Directive 2000/78. The unrestricted act of linking the provision to the attainment of 52 years of age constituted discrimination based directly on age, which was prohibited by the Framework Directive. The ECJ examined the justification of the unequal treatment on the basis of Art. 6 (1) of Directive 2000/78, which required a legitimate aim and proportionality. The employment policy objective, which it considered to be legitimate in principle, was countered by the fact that a large group of employees, defined solely on the basis of age, would run the risk of being excluded from permanent employment for a significant part of their work lives. Against this background, the ECJ held that a regulation contradicted the principle of proportionality if it used age as the sole criterion for a fixed term, without taking into account other circumstances such as the structure of the respective labour market or the personal situation of the person concerned.

3.3.2.Case of "Palacios de la Villa" - The decision in the *Palacios de la Villa case*[48], which concerned a collective agreement provision for the purpose of promoting employment; this provided for compulsory retirement upon attaining the age limit of 65 if the employee concerned had fulfilled the required qualifying period for drawing old-age pension; it is also related to the prohibition of age discrimination. In its decision, the ECJ found that even though a national provision with this content led to unequal treatment based directly on age within the meaning of the Framework Directive, this unequal treatment was justified under Art. 6 of the Directive. The ECJ considered the labour policy objective pursued by the collective agreement provision an issue, namely to promote access to employment and regulate the labour market in order to curb unemployment, to be legitimate, and the measures based on this – to be proportionate. If the national regulation does not contain more precise information, the objective can also be derived from the general context of the measure in question.

3.3.3.Case of "Kücükdeveci" - The subject of the *"Kücükdeveci" decision*[49], which concerned German law, was the calculation of an employee's notice period. Although the plaintiff, who had entered the employment relationship at the age of 18, had already been employed by the employer for ten years at the time of termination, the employer calculated the notice period on the basis of a period of employment of only three years and based this on Section 622 (1) sentence 2 BGB (old version). According to this, periods before the age of 25 were not taken into account when calculating the notice pe-

[48] ECJ, judgement of 16 October 2007, Case C-411/05 ((Palacios de la Villa), ECLI:EU:C:2007:604.
[49] ECJ, judgement of 19 January 2010, case C-555/07 (Kücükdeveci), ECLI:EU:C:2010:21.

riod. The plaintiff considered this to be discrimination on the grounds of age, which is why the provision should not be applied. In the opinion of the ECJ, the discrimination of young employees by this provision depending on when they started work, also constituted an unjustified violation of the prohibition of discrimination on the grounds of age, as specified by the Directive.

4. Once Again: Prohibition of Gender Discrimination

4.1. Art. 21 CFR - Non-Discrimination

Non-discrimination on the basis of sex is regulated in Art. 21 CFR. Art. 21 (1) CFR is closely linked to Art. 19 TFEU. The provision explicitly states that measures can be taken to combat various forms of gender discrimination[50], However, non-discrimination within the meaning of the CFR and Art. 19 TFEU, differ in terms of their scope of application. In contrast to Art. 19 TFEU, Art. 21 CFR does not state that the European Union is authorised to determine measures to combat the respective discrimination. The standard deals with discrimination on grounds of sex by the respective bodies of the European Union. Therefore, Art. 21 CFR does not affect Art. 19 TFEU in any way. At the time it was drafted, the individual grounds of non-discrimination in Art. 21 CFR were still exhaustively regulated. Today, however, a demonstrative list is assumed; the characteristics regulated in this standard are only exemplary in nature.

In the event of violation of Art. 21 CFR, there are several forms of correction: either the legislator extends the more favourable provision to the discriminated group or the discriminated persons, or it treats everyone equally and eliminates the more favourable provision[51]:

All in all, the fundamental rights standard serves as a good opportunity to defend oneself against gender discrimination. However, it does not cover so-called indirect discrimination. Here what is helpful is that the characteristics of Art. 21 CFR are not exhaustively regulated anyway so that direct discrimination based on another characteristic not listed in the catalogue can be claimed at any time. In any case, the general principle of equality in Art. 20 CFR applies to so-called indirect discrimination. What should also be kept in mind is that the fundamental rights standard does not contain an absolute prohibition, but only a relative prohibition because there is still the possibility of justifying discrimination.

[50] Heinrich Wolffgang in: Carl-Otto Lenz/Klaus-Dieter /Borchardt (eds.), EU-Verträge, Kommentar, 2nd ed., 2012, Art.21 CFR para. 1.

[51] Hans Dieter Jarass, Charter of Fundamental Rights of the European Union, Commentary, 4th edition, 2020, Art. 21 para. 5.

4.2. Art. 23 CFR - Equality between Women and Men

Art. 23 CFR is based on two provisions, Art. 3 TEU and Art. 157 TFEU. In principle, Art. 23 para. 2 CFR corresponds to Art. 157 para. 4 TFEU[52]. The aim of this provision is to "promote equality between women and men"[53]. The intention was to establish an independent provision to enshrine the equality of both genders; furthermore, the aim was to regulate so-called positive discrimination. Such positive discrimination can occur if, for example, a measure puts a woman in a better position than a man. Ultimately, Art. 23 CFR developed from this.

The provisions of the TEU and the TFEU were therefore the model or basis for Art. 23 CFR. However, Art. 3 para. 3 TEU and Art. 10 TFEU also serve to prevent gender discrimination. Furthermore, the CFR aims to prevent differentiation and achieve equality.

If Art. 23 CFR is not relevant in certain constellations, anyone affected by gender discrimination can invoke the general principle of equality in Art. 20 CFR. This provision is there to guarantee equality. Another key advantage of this provision is that Art. 20 CFR can be invoked directly before a court.

4.3. The Fundamental Rights Approach to Gender Discrimination

To sum up, there are several legal grounds in the CFR for taking action against gender discrimination. However, it depends on the context in which such gender discrimination occurs. Art. 20 CFR is rarely applied to gender discrimination because the special prohibitions of discrimination, namely non-discrimination and equality of the sexes under Art. 21 and Art. 23 CFR, are relevant here. There is no general consensus as to whether legal persons under public law are also covered by the scope of protection of Art. 20 CFR. Gender discrimination can be justified if there is an objective justification that also complies with the principle of proportionality. In the context of Art. 20 CFR, no distinction is made between so-called indirect and direct discrimination. Art. 23 CFR also contains the obligation to protect equality. However, this does not mean that the citizen has a claim against the State for a specific measure within the meaning of Art. 23 para. 2 CFR.

5. Conclusion: Anti-Discrimination in the European Judicial Area Today

The European Community/Union has pursued a systematic anti-discrimination policy in recent decades. Based on the past experiences of the Member States, measures have been taken in primary and secondary law to protect many disadvantaged groups of the population from discrimination. The four already mentioned central anti-discri-

[52] Heinrich Wolffgang in: Carl-Otto Lenz/Klaus-Dieter Borchardt (eds.), loc. cit., Art. 23 para. 1.

[53] Georg Blauensteiner/Gerhard Oswald/Bernd Weinhandl in: Michael Holoubek/Georg Lienbacher (eds.), CFR Commentary, 2014, Art. 23 p.312.

mination directives, which oblige the Member States of the Union to establish and enforce legal standards to combat discrimination and apply the principle of equal treatment, should be mentioned here. The directives contain a ban on direct and indirect discrimination. This also covers simple harassment ("unwanted behaviour") which has the effect of violating the dignity of the person concerned and creating an environment characterised by intimidation, hostility, humiliation, degradation or insults[54]. The directives also require a the country's guarantee for effective legal protection.

The topic of "equality in the European judicial area" has been significantly upgraded by the Charter of Fundamental Rights. It begins in Title III with a general principle of equality (Art. 20) and then (Art. 21 and Art. 23) contains many prohibitions of discrimination that are to be regarded as special principles of equality. In addition to the grounds for non-discrimination in Art. 19 para. 1 TFEU, the Charter of Fundamental Rights also prohibits discrimination on the following grounds: social origin, genetic characteristics, language, political or other opinion, membership of a national minority, property and birth.

[54] Thus expressly Art. 2 para. 3 of Directives 2000/43 and 2000/78.

Reference list (գրականության ցանկ, список литературы)

1.N. Colneric, Antidiskriminierung – quo vadis?, NZA, ISSN 0943-7525, 2008, p. 66.
N. Colneric, Anti-discrimination – quo vadis?, NZA, ISSN 0943-7525, 2008, p. 66.
2.St. Huster, Gleichheit im Mehrebenensystem, EuR, ISSN 0531-2485, 2010, p. 325.
St. Huster, Equality in the multi-level system, EuR, ISSN 0531-2485, 2010, p. 325.
3.R. Pirstner-Ebener, Neue Gemeinschaftsrechtsentwicklungen im Bereich des Gender-Mainstreaming, EuZW, ISSN 0937-7204, 2009, p. 205.
R. Pirstner-Ebener, New developments in Community law in the field of gender mainstreaming, EuZW, ISSN 0937-7204, 2009, p. 205.
4.H. Reichold, Aktuelle Rechtsprechung des EuGH zum Europäischen Arbeitsrecht, JZ, ISSN 0022-6882, 2006, p. 549.
H. Reichold, Current case law of the ECJ on European labour law, JZ, ISSN 0022-6882, 2006, p. 549.
5.Chr. Rolfs, Aktuelle Rechtsprechung und Praxisfragen zur Benachteiligung wegen des Geschlechts, NJW, ISSN 0341-1915, 2009, p. 3329.
Chr. Rolfs, Current case law and practical issues relating to discrimination on grounds of sex, NJW, ISSN 0341-1915, 2009, p. 3329.
6.Judgement of the Court of Justice of the European Community in the Case C-43/75, Defrenne II, 8 April 1976, ECR 1976, p. 455.
7.Judgement of the Court of Justice of the European Community in the Case C-149/77, Defrenne III, 15 June 1978, ECR 1978, p. 1365.
8.Judgement of the Court of Justice of the European Community in the Case C-177/88, Dekker, 8 November 1990, ECR 1990, p. I-3941.
9. Judgement of the Court of Justice of the European Union in the Case C-144/04, Mangold, 22 November 2005, ECLI:EU:C:2005:709.
10.Judgement of the Court of Justice of the European Union in the Case C-13/05, Chacon Navas, 11 July 2006, ECLI:EU:C:2006:456.
11.Judgement of the Court of Justice of the European Union in the Case of C-411/05, Palacios de la Villa, 16 October 2007, ECLI:EU:C:2007:604.
12.Judgement of the Court of Justice of the European Union in the Case C-555/07, Kücükdeveci, 19 January 2010, ECLI:EU:C:2010:21.
13.Judgement of the Court of Justice of the European Union in the Case of C-356/09, Kleist, 18 November 2010, ECLI:EU:C:2010:703.

Նորբերթ Բերնսդորֆ
Իրավաբանական գիտությունների դոկտոր, Մարբուրգի Ֆիլիպսի անվան համալսարանի պատվավոր պրոֆեսոր, Հիմնարար իրավունքների Եվրոպական միության խարտիայի ազգային փորձագետ (Վիեննայում), Գերմանիայի դաշնային սոցիալական դատարանի նախկին դատավոր, ՀՀ դատախազության «Օրինականություն» գիտագործնական պարբերականի խմբագրական խորհրդի անդամ

Բետինա Կուկաթ-Սեդլեր
Իրավաբանական գիտությունների դոկտոր, «Inclusive Didactics» («Ներառական դիդակտիկա») և «Frauenförderung and Gender Mainstreaming» («Կանանց իրավահավասարության աջակցում և գենդերային ինտեգրում») ամսագրերի խմբագիր, «Genderperspektiven für die European Studies» («Գենդերային հեռանկարների ղորտում եվրոպական ուսումնասիրությունների») ինստիտուտի ղեկավար, Գենդերային հավասարության միջազգային ինստիտուտի աշխատակազմի անդամ

ՀԱՎԱՍԱՐՈՒԹՅԱՆ ՊԱՀԱՆՋՆԵՐԸ ԵՎՐՈՊԱԿԱՆ ԸՆԴԴԱՏՈՒԹՅԱՆ ՏԱՐԱԾՔՈՒՄ. ԱՌԱՆՑՔԱՅԻՆ ՈՒՇԱԴՐՈՒԹՅՈՒՆԸ՝ ԳԵՆԴԵՐԱՅԻՆ ԽՏՐԱԿԱՆՈՒԹՅՈՒՆ[1]

Համառոտագիր

Ներկայացված հոդվածը ցույց է տալիս, որ հավասարության և խտրականության արգելման սկզբունքները աստիճանաբար հաստատվել են Եվրոպական միության իրավական համակարգում՝ որպես զարգացման գործընթացի մաս: Արդարադատության եվրոպական դատարանը վճռորոշ դեր է խաղացել այս սկզբունքների արդյունավետ պաշտպանության ապահովման գործում:

Ի սկզբանե այս սկզբունքներն ամրագրվել են միայն աշխատանքի և սոցիալական ապահովության հետ կապված հարաբերություններում, մինչև որ աստիճանաբար ընդլայնելով դրանց շրջանակն ու կիրառման դաշտը՝ դրանք վերջնականապես ամրագրվել են Եվրոպական միության հիմնարար իրավունքների խարտիայում:

Նախ և առաջ գենդերային ինտեգրման մոտեցումը քաղաքական որոշումների կայացման գործընթացի բոլոր փուլերում պետք է լինի անկյունաքարային: Գենդերային ինտեգրումը լրացնում է կանանց ավանդական հավասարությունը:

Այնուամենայնիվ, գենդերային խտրականության արգելքը կարող է բախվել

[1] Հոդվածը ներկայացվել է 07.10.2024 թ., գրախոսվել է 31.10.2024 թ.:

այլ իրավունքների և շահերի հետ, ինչը նշանակում է, որ այս արգելքի սահմանափակումները կարող են արդարացված լինել:

Հիմնաբառեր - հավասարության սկզբունք, հակախտրականություն, գենդերային խտրականություն, գենդեր, հաշմանդամություն և տարիք, գենդերային ինտեգրում, ԱԵԴ, ԱԵԴ նախադեպային իրավունք, Եվրոպական ընդդատության տարածք, Հիմնարար իրավունքների խարտիա, խտրականության արգելք:

Норберт Бернсдорф

Доктор юридических наук, почетный профессор в Марбургском университете им. Филипса, национальный ключевой эксперт Европейской хартии основополагающих прав (в Венне), бывший судья федерального суда по социальным делам Германии, член редакционной коллегии н аучно-практического журнала «Законность» Прокуратуры РА

Беттина Кукат-Седлер

Доктор юридических наук, редактор журналов «Inclusive Didactics» («Инклюзивная дидактика») и «Frauenförderung and Gender Main streaming» («Поддержка женского равенства и гендерная интеграция»), руководитель Института «Genderperspektiven für die European Studies» («Европейские исследования гендерных перспектив»), сотрудник Международного института гендерного равенства

ТРЕБОВАНИЯ К РАВЕНСТВУ В ЕВРОПЕЙСКОМ СУДЕБНОМ ПРОСТРАНСТВЕ – ОСОБЫЙ ФОКУС: ГЕНДЕРНАЯ ДИСКРИМИНАЦИЯ[1]

Абстракт

В данной статье показано, что принципы равенства и запрета дискриминации постепенно утвердились в правовом порядке Европейского Союза, а именно как часть процесса развития. Европейский суд сыграл решающую роль в обеспечении эффективной защиты этих принципов.

Изначально эти принципы признавались только в отношении занятости и социального обеспечения, пока, по мере постепенного расширения их сферы и области применения, они, наконец, не были четко изложены в Хартии основных прав Европейского Союза.

Прежде всего, подход гендерной интеграции должен применяться на всех этапах процесса принятия политических решений. Гендерная интеграция дополняет традиционное равенство женщин.

Однако запрет гендерной дискриминации может вступать в противоречие с другими правами и интересами, что означает, что ограничения этого запрета могут быть оправданы.

Ключевые слова: принцип равенства; антидискриминация; гендерная дискриминация; гендер; инвалидность и возраст; гендерная интеграция; ЕС; прецедентное право ЕС; европейское судебное пространство; Хартия основных прав; запрет дискриминации.

---

[1] Статья была представлена 07.10.2024 и прошла рецензирование 31.10.2024.