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Yüksek Lisans Tezi

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**ONAY SAYFASI**

Enstitümüz AB Hukuku Anabilim Dalı Yüksek Lisans öğrencisi Esra HOŞGÖR'ün "***WOMEN RIGHTS AND EU:GENDER DISCRIMINATION IN THE FIELDS OF PAYMENT EC DIRECTIVES AND ECJ DECISIONS AND THE CURRENT DEVELOPMENTS IN TURKEY***" konulu tez çalışması **23 Mart 2010** tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği/ ~~oyçokluğu~~ ile başarılı bulunmuştur.

Onaylayan:

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|---|---|---|
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.....tarih ve ..... Sayılı Enstitü Yönetim Kurulu kararı ile onaylanmıştır.

# ÖZET

Ayrımclık Türk ve Avrupa Birliği hukuk sistemleri için kritik sorunlardan biridir. AB ayrımcılığı yasaklamak ve eşit ödeme ilkesini sağlamak için çeşitili hukuki düzenlemeler yapmıştır. Bugünün dünyasında kadın ve erkek arasındaki ücret farkları kayda değer bir mesele haline gelmiştir. Bu yüzden bu çalışmadaki amacım ayrımclık ve eşit ödeme prensibine dikkat çekmektir. AB Antlaşması madde 141 erkek ve kadın işçiler için eşit işe eşit ücret ilkesini getirmiştir. Ve AB' de bu konularda çeşitili tüzük ve yönergeler çıkarılmıştır. Adalet Divanı kararlarıda bu konularda büyük etki yaratmıştır. Türk hukukunda İş Kanunu madde 5 bu konu ile alakalıdır. Türkiye Türk hukuk sistemi ile AB hukuku sistemini uyumlaştırma amacı ile bu alanda bazı kanuni değişiklikler yoluna gitmiştir. Bu çalışma Türkiye ve AB'nde ayrımcılık yasağı ve eşit ödeme ilkesini şekillendirmek için faydalı olmak üzere hazırlanıp bitirilmiştir.

# ABSTRACT

Discrimination has been a critical problem in European Union and Turkey legal systems. EU took measures to combat discrimination and provide equal pay principle. In today's world pay differences between men and women become a significant issue. So in this work my aim was to take attention to discrimination and equal pay principle. Article 141 of EC Treaty has been a provision providing equal pay principle for men and women for equal work or work of equal value. And there have been several Regulations and Directives related to these issues. European Court of Justice's case law has a major effect on these subjects. In Turkish law Labor Act Article 5 deals with this issue. And Turkey has made some changes in these fields in order to harmonize Turkish legal system to EU legal system. This work has been devised and settled so that it would be utile for shaping anti discrimination law and equal pay principle in EU and Turkey.

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# ABBREVIATIONS

**AG** : Advocate General
**CEDAW** : The Convention on the Elimination of All Forms of Discrimination Against Women
**CFI** : Court of First Instance
**EC** : European Community
**ECHR** : European Convention on Human Rights
**ECtHR** : European Court of Human Rights
**ECJ** : European Court of Justice
**ECR** : European Court Reports
**EEC** : European Economic Community
**EU** : European Union
**ICCPR** : International Covenant on Civil and Political Rights
**ICESCR** : International Covenant on Economic, Social and Cultural Rights
**ILO** : International Labor Organization
**OJ** : Official Journal of the European Communities
**Para.** : Paragraph
**TEU** : Treaty on European Union
**TFEU** : Treaty on the Functioning of the EU and Commerce
**UDHR** : Universal Declaration of Human Rights

# INTRODUCTION

Discrimination is identified differently in ECHR and EU primary and secondary legislations. Liberal equality claims that individuals should be judged according to their personal qualities. This doctrine is infringed when individuals are subjected to damage on the basis only of their status, their group membership or unrelated physical characteristics. Distinctions on such grounds are discriminative and are outlawed. In contrast, not every distinction is discriminatory. The argument in here is to limit laws which are sensitive enough to outlaw discriminatory distinctions, while permitting positive difference.

The prohibition of discrimination in EC law didn't firstly integrated indirect discrimination. In the beginning EC law first prohibited only direct discrimination which is discrimination caused by express reliance on grounds prohibited by law as the basis for disadvantageous treatment. Later by the case law of ECJ the legal concept of indirect discrimination was created.

In EC law there are various legislative measures prohibiting discrimination. And EC Treaty Article 141 brings out the equal pay principle.

In ECHR and ILO we can see the signs of anti discrimination measures too. There are several ECtHR case examples on this issue.

Anti discrimination rights are always rationalized or explained by equality. So in this work first chapter begins with definition of discrimination and equality. And makes a look at the EU's view of equality. Later defines the grounds which discrimination is prohibited. And lastly defines reverse discrimination.

As above mentioned in EU law anti discrimination has been the context of several legislative measures. In second chapter of the work there's a list of sources of EU anti discrimination law starting from EC Treaty. Discrimination can be direct or indirect but sometimes it is difficult to distinguish indirect discrimination from direct discrimination. As a result of this in the continuing of the second chapter the distinction

between direct and indirect discrimination has been made in the light of ECJ decisions. Anti discrimination principle has its own exceptions so on going of the second chapter list of exceptions is given. And lastly a lookup at EU's Draft Constitution on these issues has been made.

In the third chapter of the work equal pay principle has been mentioned with the light of EC legislations and ECJ decisions.

Last chapter of the study examines the Turkish legal system for anti discrimination measures. The reason of exploring Turkish law anti discrimination measures is Turkey is now a candidate state for EU membership. To examine Turkish law in the field of discrimination is necessary in accordance with this reality.

The objective of this study to underline the anti discrimination and equal pay principle and identify the problems in this area.

# CHAPTER I. DISCRIMINATION

Discrimination can basically be defined as inequitable treatment of a person or group on the basis of prejudice. To treat one particular group of people less favorably than others just because of their race, color, nationality, ethnic or national origin. It can be behavior endorsing a certain group or it can be negative behavior directed against a certain group.

Law is involved with discrimination only when it is intolerable. As indicated by Feldman discrimination becomes ethically unacceptable once it takes the form of treating a person less favorably than others on account of a consideration which is morally irrelevant[1].

Legal systems attempt to categorize subjects which are morally inappropriate in specific frameworks. Subjects who fall outside the control of an individual are commonly speaking morally irrelevant bases on which to disfavor people in fields such as the workplace and education[2].

A legal system which forbids discrimination has to be aware of the several different ways in which discrimination reveals itself. Anti discrimination measures intend to prohibit discrimination and to endorse equality[3]. Anti discrimination rights protect people from being deprived of certain benefits just because of their race, sex etc. They grant certain grounds on which distinction must not be made by certain persons while dealing with certain people in regard of certain benefits or burdens.

Even though extensive legal protection, discrimination continues to exist and further efforts are needed to ensure that the right no to be discriminated against is implemented effectively in an enlarged European Union. Campaigns launched in 2003 to increase awareness of the right to equal treatment and non discrimination in all

[1] Feldman, Civil Liberties and Human Rights in England and Wales , 2nd Edition Oxford , 2000 , p.135-9.

[2] Evelyn Ellis, EU Anti Discrimination Law, Oxford, 2005, p.2.

[3] Elisa Holmes, "Anti Discrimination Rights Without Equality", The Modern Law Review,Volume:68,No:2 2005, P.7.

Member States, the year 2007 has been designated as the European Year of Equal Opportunities for All. The aim of the year was to inform people of their rights, to celebrate diversity and to support equal opportunities for everyone in the European Union.

Discrimination is widespread, according to a large prohibition of Europeans. In particular, discrimination on the basis of ethnic origin, disability and sexual orientation is considered by citizens to be widespread. European Union citizens recognize the disadvantages faced on the basis of disability, sexual orientation, gender and ethnic origin. According to Survey requested by the Directorate General for Employment, Social Affairs and Equal Opportunities discrimination on the basis of gender is perceived by an average of % 40 of the European Union population[4].

## 1. DISCRIMINATION AND EQUALITY

Besides to difficulties surrounding the classification and definition of discrimination it is not enough to concentrate on the negative concept of non-discrimination. The ethical basis of anti discrimination is a fundamental human right to be treated in the same way as other human beings. The goal would be to create substantive equality.

Equality is the main value in society but equality may diverge with other basic social values. There are different ways which the concept of equality can be expressed[5].

### 1.1. Concepts of Equality

Even if we can consent on whether two individuals are relevantly similar, we may still have doubts as to whether they should always be treated alike[6]. Equal

[4] Flash Eurobarometer, Discrimination in the European Union, The Gallup Organization, 2008.

[5] Evelyn Ellis, op.cit , p.3.

[6] Sandra Fredman, Discrimination Law, Oxford University Press, 2002, p.1-5.

treatment can actually bring about inequalities. Equality can be expressed in different ways depending on which underlying conception is chosen.

Difference implies inequality and inequality is synonymous with inadequacy. Anti discrimination measures mean to prohibit discrimination and to promote equality. The term equality can be used in a number of different ways. Formal equality, substantive equality and pluralism.

### *1.1.1 Formal Equality*

Formal equality is centered on the idea that every person has a right to be treated in equal way to another person in the same state. In this concept equality lies in uniformity. It attracts to people's feelings of fairness and justice. This is an Aristotelian view. According to Fredman the power of this concept of equality develops from the especially elementary notion, that fairness needs consistent treatment[7].

Equality in formal equality concept creates four set of problems. First problem is the threshold question of when two individuals are relatively alike. Not every distinction is discriminatory. Second problem is equality as formal is just a virtual principle. It compels simply that two similarly sited individuals be treated alike. The significance of this is there has been no difference in principle among treating two such people equally, badly, and treating them equally well. Third problem is the require to find a comparator. Contradictory treatment can only be established by finding a similarly sited person of the opposite race or sex who has been treated more favorably than the appellant. The fourth and last problem is its treatment of difference only "likes" qualify for equal treatment; there is no requirement that people be treated appropriately according to their difference[8]. Seeing that formal equality is extremely individualist.

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[7] Ibid p.1-5.

[8] O.M Arnadottir, Equality and Non Discrimination under The European Convention on Human Rights, 2003, p.33-40..

### *1.1.2 Substantive Equality*

Substantive equality intends to balance for the social disadvantages suffered by certain groups. The center is on the relevant reality of people's lives. This type of equality concept is directly in conflict with the concept of formal equality. The cause of this is it might involve unequal treatment. Substantive equality bases on difference[9]. As a result to create equality persons must be treated differently according to their needs. Equality laws should be sensitive to the practical results of equal treatment.

Formal equality may possibly be seen symmetrical in the other hand substantive equality is asymmetrical. Substantive equality is asymmetrical since it allows unequal treatment with the aim of fixing social disadvantages and reaches the aim of equality in fact[10].

In the notion of substantive equality two types can be characterized which are *equality of opportunity* and *equality of results*. To achieve equality of opportunity anti discrimination measures have to equalize the starting point for every one in order that every one can complete on the same level. To achieve equality of results anti discrimination measures have to equalize the outcome or result.

*Equality of Opportunity*- This type of equality provides everyone the same opportunities. However this type of equality can contain unequal treatment and unequal finishing points. The reason of this is equality of opportunity is not involved with the end result. It intends to make the starting point equal for all. In accordance with this equality type equal treatment beside a background of post and structural discrimination can be responsible for disadvantage once individual's gets equality of opportunity the problem of institutional discrimination has been overwhelmed and fairness stresses that they be treated on the base of their individual equalities[11].

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[9] I. Bacik, "Combating Discrimination: The Affirmative Action Approach , in R. Byrene and W. Duncan , Developments In Discrimination Law in Ireland and Europe", Irish Centre for European Law, 1997.

[10] Erica Howard , "The Euroepan Year of Equal Oppurnities For All : Is the EU Moving Away From A Formal Idea of Equality?", European Law Journal vol:14 no:2 , 2007, p.4-7.

[11] Sandra Fredman, "Equality: A New Generation", Industrial Law Journal, Vol:30, No:2, p.145-168, 2001.

This type of equality discards policies which intend to correct imbalances in the work for force by quotas or targets whose aim is one of equality of outcome.

According to B. William there are two equal opportunity types which are *a procedural* and a *substantive sense* of equal opportunities[12]. On a procedural view equality of opportunity needs the removal of barriers to the advancement of women or minorities. However this doesn't assure that this will head to greater substantive fairness in the result. On a substantive sense of equality of opportunity needs measures to be taken to ensure that persons from all sections of society have a legitimately equal chance of gratifying the criteria for access to a particular social good.

Equality of opportunities has been criticized for not being concerned in the outcome. as a result equalizing the start line doesn't lead to more equal society.

*Equality of Results*- This type of equality takes into account existing inequalities and disadvantages initiated by post discrimination and intend to resolve these by equalizing the outcome or result[13].

This type of equality seeks to create a fairer allocation of goods and resources in society and looks to achieve a further representative participation of all groups in public life. Michael Connolly[14] expresses this equality type as a notion which pays at least some regard to the distribution of outcomes between various different groups.

Equality of results is mainly concerned by attaining a fairer distribution of benefits, although formal equality is based on a notion of procedural fairness stemming from consistent treatment. Nevertheless there are problems with this type of equality too. First problem is it seems to apply against the principle of equality and non discrimination and against people's feelings of fairness and justice, as it allows

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[12] B. Williams, "The Idea of Equality in S. Guttenplan, J. Hornsby and C. Janaway", Reading Philosophy Selected Texts with a method For Beginners, Blackwell ,2003, p.72-75.

[13] Hugh Collins "Discrimination, Equality and Social Inclusion", The Modern Law Review Limited, Vol: 66, No: 1, 2003, p.16-43.

[14] Michael Connolly LLB., Townshend - Smith on Discrimianiton Law: Text, Cases and Materials, Cavendish Publishing 2004, p.379-81.

preferred treatment of people belonging to certain groups. A second problem is its aims of redistribution of wealth are entwined with the release of poverty. Third problem is the result coming with redistribution depends on the way the model is used. And the last problem is there are disadvantages linked to the setting of quotas.

### *1.1.3 Pluralist Approach to Equality*

The goal of this type of equality is to construct a society where differences and variety between groups and individuals are considered an advantage to be distinguished and where everyone is treated with the same respect[15]. There is an approval of distinctive cultures and identities and people would be considered in harmony with their own requirements and aspirations. Consistent with this type of equality anti discrimination measures would intend to construct an atmosphere of normal tolerance between people of different groups. A method to do this is to prohibit discrimination and another method is putting down a obligation to mainstream equality and respect for diversity.

## 1.2 EU‘s Concept of Equality

It is not always likely to draw a clear dividing line among the different concepts of equality. EU legislation against discrimination aims at creating formal equality and restrains some uncertain and restricted step towards a more substantive concept of equality.

The EU policy of mainstreaming can be seen in EC Treaty Article 3(2) in which lays down gender mainstreaming:

*“In all activities referred to in this Article, the Community shall aim to eliminate inequalities and promote equality, between men and women”*

[15] Erica Howard, op. cit, p173.

A mainstreaming obligation has parts of both substantive equality and pluralism. Apart from the legislation there have been few precise policy instruments intending to found substantive or pluralist concepts of equality[16]. The term "equal opportunities" has been used regularly in relation to EU anti discrimination policies.

Procedures that have been suggested by the Commission are the endorsement of mainstreaming of non discrimination and equal opportunities for all in related EU policies[17]. The Commission recognizes that enlargement has expanded the EU' s variety in terms of culture, language and ethnicity and one of the significant challenge is the need to develop a rational and effective attitude to the social and work market integration of ethnic minorities[18].

## 2. THE GROUNDS ON WHICH DISCRIMINATION HAS BEEN FORBIDDEN

There are principles which lead the judges in achieving decisions as to whether a particular group should be protected. The question of how a group is defined is a difficult one.

With powers given by the Treaty of Amsterdam a directive is adopted in which "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin"[19]. And a second directive which expands the principle of equal treatment to prevent discrimination on grounds of age, disability, religion and sexual orientation is adopted[20].

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[16] Erica Howard, op.cit, p.178.

[17] Mark Bell, "Equality and EU Institution", Industrial Law Journal, Volume: 33, p.242-260, 2004.

[18] Mark Bell and Lisa Waddington, "Reflecting on Inequalities in European Equality Law", European Law Review, Vol: 28, No: 3 p.349-369, 2003.

[19] Council Directive 2000/43/ EC of June 29 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ LI 180/22.

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

The list is extended by ECHR by the Human Rights Act 1998 which come into effect in 2000. According to this enjoyment of Convention rights must be protected without discrimination on any grounds such as sex, race, religion, color, language, national or social origin , political or other opinion, association with a notional minority, property, birth or other status[21].

In the current state of law there is only limited list of grounds on which EU law prohibits discrimination which are: Nationality, Sex, Part time and Temporary Employment, Social or Ethnic Origin, Religion or Belief, Disability, Age and Sexual Orientation.

**2.1 Nationality**

EU law prohibits discrimination against persons on the ground of their possessing the nationality of one of the Member States. EC Treaty Article 12 outlaw discrimination in general terms and empowers the Council to adopt rules designed for this purpose[22].

**2.2 Sex**

Gender discrimination is prohibited under Article 14 of ECHR and Protocol 12.

Article 14 of ECHR- *" The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".*

The prohibition of gender discrimination isn't a distinct principle in the ECHR but it is a case of the general principle of non discrimination. Under ECHR law principle of prohibition of gender discrimination is a second class assurance. But

[21] Ovey Clare and Robin Whyte, The European Convention on Human Rights, 3rd Edition, Oxford, 2002.

[22] Evelyn Ellis, op. cit, p.20-21.

ECtHR case law developed a comprehensive system on prohibition of gender discrimination. The first case example of ECHR Article 14 was in 1985[23]. In this case applicants Mrs. Abdulaziz, Mrs. Balkandali and Mrs. Cabales are lawfully and permanently settled in UK. In accordance with the immigration rules in force at that time Mr. Abdulaziz, Mr. Balkandali and Mr. Cabales were refused permission to remain with or join them in UK as their husbands. So applicants acclaimed that they had been victims of discrimination on the grounds of sex and race. ECtHR decided the case against UK in the framework of immigration restrictions[24].

*"As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the Member States of the Council of Europe[25]"*

In EU law discrimination on grounds of sex was prohibited for economic reasons from the establishment of the Common Market in 1957. At the time when TEC was drafted there were two opposite views about relationship between social policy and the establishment and functioning of the Common Market. According to French view the harmonization of the social cost of production was essential in order to make sure that business contest on a fair and equal basis once the barriers to the free movement of persons and capital were removed. According to Germany view the harmonization of indirect or social costs would inevitably follow from the creation of a Common Market[26].

The French delegation succeeded in convincing the others to accept two specific provisions. These two provisions would protect French industry from social dumping. Today these Articles are Article 141 on equal pay for men and women, and Article 142 which provides that Member States will endeavor to maintain the existing equivalence between paid holiday schemes[27].

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[23] Abdulaziz, Cabales and Balkandali v UK A94 (1985) , 1985 7 EHRR 471.

[24] D.J Harris, M. O'Boyle and C. Warbrick, Law of the European Convention on Human Rights, Butterworths, 1995.

[25] Ibid. para.78.

[26] Hammond Suddards, Sex and Race Discrimination, Legal Essentials, 1999.

So a principle emerged which was accepted by both EU and ECJ: the equal treatment of men and women.

Equality of opportunity between sexes takes place in the EU social policy. Five Action Programmes have been organized through the periods 1982-5, 1986-90, 1996-2000 and 2001-05. These Action Programmes intend to implement the equality legislation on a practical level. In 1982 "Advisory Committee on Equal Opportunities for Women and Men" was established. This Committee aims to assist the Commission to create and implement policy on the advancement of women's employment and equal opportunities and to assemble for the exchange of information between interested organizations in this area. The Amsterdam Treaty gave a intense importance to equality of opportunity irrespective of sex.

The Parliament has obsessed an influential standing Committee on women' rights and granted the motivation for Community action in this field.

The principle of equal treatment of men and women granted direct effect by the ECJ in the Defrenne II case[28]. This case was about the different retirement ages imposed by the Belgian airline Sabena on air stewardesses and male cabin stewards. When Mrs. Defrenne's employment contract was automatically terminated upon her reaching the age forty she complained of unequal treatment on grounds of sex.

ECJ 's decision in this case explains two fundamental elements of the Court's reasoning in relation to the principle of equal pay for men and women. First one is, ECJ refer to equal pay as apart of the social objective of the Community. Second one is, Article 141 mustn't be interpreted narrowly or restrictively, its meaning and effects must be understood in the light of its aim.

The principle of equality between men and women was recognized as a general principle of EU law and as a fundamental right of EU law by the Defrenne III case[29].

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[27] Samantha Besson, "Gender Discrimination Under EU and ECHR Law: Never Shall The Twain Meet?" , Human Rights Law Review 8:4, 2008, Oxford University Press, p.12.

[28] Case 43/75, Gabrille Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena, (1976), ECR 455.

[29] Case 149/77, Gabrille Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena, 1978 ECR 1365.

Equality between men and women signifies one of the EU's goal which are explained in EC Treaty Article 2 and 3[30].

Definition of sex can be considered as a biological issue and the only problem to apply the principle of sex equality would concern its scope. ECJ concentrated on gender as well as sex. But according to ECJ non discrimination on ground of sex extends in two important ways.

First way is the principle of sex discrimination being clarified by the ECJ as affording automatic protection against discrimination based on pregnancy. In Dekker v Stichting Vormingscentrum Voor Jonge Volwassen Plus case[31] Mrs. Dekker in June 1981 applied for the post of instructor at the training centre for young adults run by the Voor Jonge Volwassen. On June 1981she informed the Committee which is dealing with the applicants that she is three months pregnant. The Committee nonetheless put her name forward to the board of management of Voor Jonge Volwassen as the most proper candidate for the job. By letter of 10 July 1981 Voor Jonge Volwassen informed Mrs. Dekker that she wouldn't be appointed. ECJ in its decision granted that the Equal Treatment Directive prohibit an employer to reject to employ a pregnant woman who was otherwise proper for the job which she had been offered. Being pregnant was the important reason for her non employment. Since this is a condition which can apply only to members of the female sex the meaning of this is that the employer's action constituted direct discrimination on the ground of sex.

In Handels – OG Kontorfunktionaeremes Forbound, Denmark v Dansk Arbejdsgiverforening case[32] Mrs. Birthe Vibeke Hertz was a part time cashier and saleswoman and her employer was Aldi Marked K/S. Mrs. Hertz was appointed by Aldi Marked on 15 July 1982. She gave birth to a child in June 1983. After a complicated pregnancy she was on a sick leave. On the expiry of her maternity leave which was in

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[30] Theresa Wobbe, "From Protecting to Promoting: Evolving EU Sex Equality norms in an Organizational Field", European Law Journal , Vol:9, No:1, 2003, p.88-108

[31] Case 177/88, Dekker v Stichting Vormingscentrum Voor Jonge Volwassen Plus, ECR I-3941 (1991) 20 ILJ 152.

[32] Case 179/88 Handels – OG Kontorfunktionaeremes Forbound, Denmark v Dansk Arbejdsgiverforening, (1990) ECRI-3979.

accordance with Danish law ran for 24 weeks after birth she get back to work in 1983. She had no problems since June 1984. Between June 1984-85 she was on a sick leave for again 100 working days. And it was a common ground between Mrs. Hertz and Aldi Marked that Mrs. Hertz's illness was a result of her pregnancy. By June 27 1985 Aldi Marked informed Mrs. Hertz that it was terminating her contract with the statutory four months notice. ECJ's decision in here was principle of sex discrimination holds good through the relevant period of maternity leave[33].

Another case example is Webb v EMO case[34]. In this case EMO Air Cargo in 1987 employed 16 persons. In June 1987 one of important worker Mrs. Stewart learned that she was pregnant EMO decided not to wait to the leave of maternity and put a replacement and Mrs. Stewart would train this person during the next 6 months before her leave. Mrs. Webb recruited.

Mrs. Webb didn't know she was pregnant when her contract started. In July 1987 Mrs. Webb informed her employer that she might me pregnant. On July 30 Mrs. Webb was dismissed. ECJ in this case again made a clear distinction between pregnancy and illness. Treatment based on pregnancy is ipso facto treatment based on sex.

Second way is the principle of sex equality has been held to apply to discrimination based upon gender reassignment. In P. v S and Cornwall County Council case[35] P. the applicant used to work as a manger in an educational establishment operated by Cornwall County Council. In April 1992 P. informed the director S. about the intention to go gender reassignment.

At September 1992 P. go to surgical operations and was given three months notice which is ending at 31 December 1992. The final operation being made before the dismissal of P. took place and after that P. had the notice. In its decision ECJ granted

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[33] J. Gerards, Intensity of Judicial Review in Equal Treatment Cases, Vol: 51, No: 2, NILR, 2004, p.135-183.

[34] Case C 32/93, Webb v EMO, (1994) ECR I-3567.

[35] Case C 13/94, P. v S and Cornwall County Council , (1996) ECR I-2143.

that Equal Treatment Directive[36] prohibited the discharge of an employee where the true reason for the discharge had been found by the referring Court to be the employee's proposal to undertake gender reassignment.

Another case example is KB v National Health Service Pensions Agency case[37]. In this case K.B is a woman who has been working for National Health Service for twenty years as a nurse. K.B. had a relationship with R. who has been born as a woman and had a gender reassignment to become a man but couldn't able to amend his birth certificate to reflect this change officially. K.B. and R. get married in an adapted church ceremony approved by a Bishop of the Church of England.

The National Health Service Pensions Agency K.B. that as K.B and R. are not married officially if K.B dies before R. , R. would not be able to receive a widower's pension. In its decision ECJ granted that a decision to restrict benefits to married couples excluding all unmarried couples, did not get into sex discrimination since it applied to both sexes. However ECJ in this situation found an inequality of treatment but this inequality relate to the capacity to marry. ECJ found such behavior as a breach of ECHR Article 8 and 12.

*"Legislation, such as that at issue in the main proceedings which in breach of the ECHR , prevents a couple …… from fulfilling the marriage requirement ……, in principle, incompatible with the requirements of Article 141."*[38]

ECJ stated that it's for the Member States to determine the conditions under which they give legal recognition to gender reassignment. So national court would decide whether Article 141 could be used by K.B. and R.

ECJ's broad interpretation of the concept of "sex" may expand the Equal Treatment Directive on the ground of homosexuality.

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[36] Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, OJ LI 80/22.

[37] Case C 117/01, KB. v National Health Service Pensions Agency, (2004) 1 CMLR 28.

[38] Case C 117/01, KB. v National Health Service Pensions Agency, (2004) 1 CMLR 28, para.34.

A case example for this is GRANT v South – West Trains Ltd case[39]. The case was about travel dispensation given by an employer in respect of the common law opposite sex spouse of an employee but refused to give it to lesbian employee whom was living with female partner. However ECJ didn't extend the equal treatment principle in Article 141 to discrimination on the ground of homosexuality[40].

### 2.3 Part Time and Temporary Employment

These two justifications on which discrimination is outlawed had been developed from the law on sex discrimination. Discrimination on the grounds of part time and temporary working is provided illegal by the Directive on Part Time Work[41] and the Directive on Fixed Term Work[42]. So with regulation male part time and temporary workers have legal protection against discrimination.

### 2.4 Racial or Ethnic Origin

In 1997 the European Monitoring Centre on Racism and Xenophobia was created[43]. In 2000 Race Directive[44] implementing the principle of "Equal Treatment" between persons irrespective of racial or ethnic origin was adopted by EU.

The General Policy Recommendation on National Legislation to Combat Racism and Racial Discrimination[45] was adopted in 2002 by the European Commission against Racism and Intolerance, a body of the Council of Europe.

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[39] Case C 249/96, GRANT v South – West Trains Ltd, (1998) ECR I-621.

[40] P.A. Riach and Rich J. Field, "Field Experiments of Discrimination in the Market Place", The Economic Journal, Vol: 112, 2007, p.480-518.

[41] Directive 97/81 EC of 15 December 1997 concerning the Framework Agreement on part time work cocluded by UNICE, CEEP and the ETUC, OJ (1998) L 14/9.

[42] Diretive 99/70 EC of 28 June 1999 concerning the framework agreemnt on fixed term work cocluded by ETUC, UNICE and CEEP, OJ (1999) L 175/43.

[43] Regulation 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia, OJ (1997) L151/1.

[44] Council Directive 2000/43/ EC of June 29 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ LI 180/22.

In Race Directive there is no definition of the terms "racial or ethnic origin". Member States are free to define racism in their national law. Racial Directive seems to be predicated on the basis that the human race itself consists of different racial groups.

The term "xenophobia" indicates sinister fear or dislike of foreigners. So this can be told that directive targeted at discrimination against racial groups whose origin is outside the EU[46].

The term "ethnicity" means the distinctive characteristics of different racial groups or people. Religion must play a part in defining ethnicity.

Race Directive applies to the nationals of third countries but it does not include differences of treatment based on nationality.

Color wasn't mentioned in the Race Directive. But color could play a indirect role in establishing ethnicity.

If we look at British case law we can see some examples on this issue. British law is advanced on racial discrimination over the other Member States of the EU. It could be a guide to ECJ for definition of racial or ethnic origin.

The most important case is Mandla v Dowell Case[47]. In this case a Sikh boy wouldn't allow getting in his school in the reason of refusing to cut of his hair and removing his turban. In this case Lord Fraser in House of Lords set out two essential and five relevant characteristics of an ethnic group[48].

Essential characteristics are:

- A long shared history.

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[45] European Commission Against Racism and Intolerance (ECRI), ECRI General Policy Recommendation No 7 on National Regulation to Combat Racism and Racial Discrimination, Strasbourg, 17 February 2003.

[46] Erica Howard, "Anti Race Discrimination Measures In Europe: An Attack on Two Fronts", European Law Journal, Vol:11 No:4, July,2005,p.470-472.

[47] Mandla v Dowell Lee Case (1983) 2 AC 548 (HL).

[48] Evelyn Ellis, op. cit, p.30-32.

- A cultural tradition of its own.

Relevant characteristics are:

- A common sense of geographical origin.
- A common language.
- A common literature.
- A common religion.
- Being a minority.

House of Lords in this case decided that Sikhs constitute an ethnic group with applying the above given characteristics.

But with applying these characteristics Rastafarians do not constitute an ethnic group because they don't have a long shared history. Muslims too can't constitute an ethnic group because they don't have a common sense of geographical origin they include people of many different nationalities and colors. However in CRE v Dutton case gypsies was identified as an ethnic group by House of Lords because of having a long time shared history and common geographical origin[49].

### 2.5 Religion or Belief

Race Directive doesn't give the definition of religion or belief. Race Directive's meaning for words of religion or belief includes both religious beliefs and

[49] Ibid. , p. 30-32

other philosophical beliefs on important issues[50]. However ECJ has to determine the typical facets of religious practice[51].

In ECHR Article 9:

*" Everyone has the right to freedom of thought, conscience and religion, this right includes freedom to change his religion or belief and freedom either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."*

ECtHR concept of religion is relevant to ECJ's interpretation. ECtHR infer Article 9 of ECHR not only to major world religions but extending it to radical religions and to non religion beliefs[52].

According to European Commission on Human Rights religion is a movement which be referred to popularly as cults.

Religious discrimination has been on the agenda by arising in Islamophobia particularly after 9/11[53].

The division between religious discrimination and race discrimination can be sometimes confusing. Some aspects of religious discrimination are covered by race relations legislation.

### 2.6 Disability

There's not a definition provided for the term "disability" in the Framework Directive[54]. And yet there is not a universal definition of disability. Various notions of

[50] Unison Bargaining Support Factsheet , Religious Discrimnaiton , April 2006.

[51] Jeremy Gunn, "The Complexity of Religion in International Law", Harvard Human Rights Journal , Vol:16, 2003, p.189-215.

[52] C. Evans, Freedom of Religion under The European Convention on Human Rights, Oxford, 2001.

[53] Rachel A. D. Bloul, "Anti Discrimination Law, Islamophobia an Ethnicization of Muslim Identities In Europe and Australia", Journal of Muslim Minority Affairs, Vol:28 No:1, April 2008.

[54] Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

disability are endowed with national laws of the Member States. Some national laws protect against discrimination both person with disability and persons who are not disabled though are in certain relation to a person with disability.

The definition can not be limited to physical or pathological conditions. The definition can be clarified as including the functional effect of the disability and its effect on a person's ability to relate to the environment.

If we look at United Kingdom's domestic law Disability Discrimination Act 1995 defines the term disability as: A physical or a mental impairment which has a substantial and long term adverse effect on the ability to carry out normal day to day activities[55].

If we look at ECJ case law there are 2 judgments about the definition of the term "disability". First case is Sonia Chacon Navas v Eurest Colectividades SA case[56] in which ECJ answered the question whether the term sickness is in the scope of protection provide by the Framework Directive. According to Court, the concept of disability is different from the concept of sickness[57].

*"Although the concept of disability within the meaning of Directive 200/78 must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life, the concept of disability and sickness cannot simply be treated as being the same[58]"*

Second case is S. Coleman v Attridge Law and Steve Law case[59] in which ECJ deals with the question whether the Directive only protects from direct discrimination ,

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[55] Evelyn Ellis, op. cit, p.35.

[56] Case C13/05 Sonia Chacon Navas v Eurest Colectividades SA

[57] Jane Kamedova, "Prohibition of Discrimination On The Grounds of Disability in The EC Law", Brno, Dny prava, Vol: 1, 2008, p.653-661.

[58] Case C 13/ 05 Sonia Chacon Navas v Eurest Colectividades SA, para.43-47.

[59] Case C-303/06 S. , Coleman v Attridge Law and Steve Law.

the person whom is disabled or whether the prohibition of direct discrimination apply to a person who is not himself disabled but being discriminated by the reason of the disability of his child. According to Court, Framework Directive doesn't only limited to people who themselves have a disability within the meaning of the Directive.

"*Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. The principle of equal treatment enshrined in that directive in the area of employment and occupation applies not to a particular category of person but by reference to the grounds mentioned in Article 1.*

*Where an employer treats an employee who is not himself disabled less favorably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favorable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a) of Directive 2000/78.*[60]"

**2.7 Age**

The Framework Directive didn't also define the term "age". It can be said that the Directive intends to protect all age groups not only older people. But the Preamble of the Framework Directive refers to elderly people and Recital 8 expresses of supporting older worker.

In American Law according to Age Discrimination in Employment ACT 1977 only workers who are 40 and over are being protected[61].

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[60] Case C-303/06 S. , Coleman v Attridge Law and Steve Law, para.38, 50, 56.

[61] Aileen McColgan, Discrimination Law: Text, Cases and Materials, Second Edition, 2005, p.10-14.

## 2.8 Sexual Orientation

Discrimination on grounds of sexual orientation is a vicious denial of dignity and equality because it strikes out against the sexual intimacy at the very core of an individual's identity. This involves both equality right and right to privacy and family life.

Sexual orientation has been defined as a sexual orientation towards (i) persons of same sex, (ii) persons of the opposite sex or (iii) persons of the same sex and of the opposite sex[62].

Sexual orientation discrimination is mostly applied to homosexuals. However, the prohibition in the Framework Directive also extends to discrimination against heterosexuals and bisexual people.

# 3. REVERSE DISCRIMINATION

The definition of reverse discrimination is, individual members of the disadvantaged group be actively preferred over others in the allocation of jobs, promotion, and other similar benefits. The legitimacy of reverse discrimination is problematic. Its acceptability depends on which conception of equality is utilized[63].

According to formal equality the arguments presented by opponents of reverse discrimination appear to be indisputable. Three characteristics of formal equality make it predictable for reverse discrimination to form an illegitimate breach .First one is formal equality presumes that justice is an theoretical, universal concept and can't vary to reflect different patterns of benefit and disadvantage in a particular society. Second one is premising of formal equality which makes reverse discrimination internally

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[62] Mark Bell, "A Patchwork of Protection: The New Anti Discrimination Law Framework", The Modern Law Review, Limited, Vol: 67, No: 3, 2004, p.465-77.

[63] Alina Tryfonidou, Reverse Discrimination in EC Law, Series European Monographs,2009.

conflicting is its individualism. Third one is formal equality requires equality before the law.

According to substantive equality, the substantive approach to reverse discrimination rejects an abstract view of justice and as an alternative claims that justice is merely significant in its interaction with society. A substantive view of equality would consider the state as having a duty to act positively to correct the results of such discrimination. Reverse discrimination could be entirely legitimate if a substantive view of equality is accepted.

According to equal opportunities, this approach rejects reverse discrimination if it aims to achieve equality of outcome by treating individuals just on the basis of their sex or color.

In EC law according to Equal Treatment Directive[64] Article 2(4):

*"Shall be without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities which affect women's opportunities"*

The Equal Treatment Directive Article 2(4) has been modernized by Article 141 (4) of the EC Treaty:

"*With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*"

[64] Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

If we look at ECJ case law. There are three case examples. First one is Kalanke case[65]. In this case, a limited form of reverse discrimination was struck down by the Court. ECJ sited community law within the equal opportunities model. The Court recognized that formal equality could perpetuate disadvantage.

Second case is Marschall case[66] in which ECJ stated that Article 2(4) of the Directive permitted a rule which gave priority to the promotion of female candidates where they were fewer women than men in the relevant post and both genders candidates were equally qualified. The Court attempted to combine a substantive notion of equality with obligation to the primacy of the individual.

The third and last case example is Badeck case[67]. The case was about a far reaching and sophisticated scheme which remedy the under representation of women in public. There were two problems in this case that has been fixed by the Court. First problem is the primacy of the individual, second problem is the difference between equality of opportunity and equality of results. The Court put out a two part formula in this case which would make a measure giving priority to women in under represented sectors of public service compatible with community law. First one is if the candidates are the subject of an objective assessment which takes into account the specific personal situations of all candidates; second one is if it does not automatically and unconditionally give priority to women when women and men are equally qualified. With this formula the Court found the scheme compatible with the Directive[68].

[65] Case C-450/93 , Kalanke v Freie Hansestadt Biemen, (1995) ECR I-3051 IRLR 660.

[66] Case C 409/05 Marschall v Land Nordhein Westfalen, (1997), ECR I-6363.

[67] Case C- 158/97 Georg Badeck and Others v Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen , (2000), ECR-289.

[68] Dagmar Schiek, "A New Framework on Equal Treatment of Persons in EC Law? Directives 2000/43/EC, 2000/78/EC and 2002/EC Changing Directive 76/207/EEC in Context", European Law Journal, Vol: 8, 2002, p.290-314.

# CHAPTER II. EU AND ANTI DISCRIMINATION LAW

The European Community was called the European Economic Community till the Treaty of European Union in 1993. The European Economic Community (EEC) term is appropriate nonetheless the Community was concerned with economic matters at the beginning.

Plans for European integration in the period after Second World War led to the establishment of the European Coal and Steel Community which was founded by France, Germany, Italy and Benelux in 1951. There was an aim through the Member States which is to move forward the economic integration. Coal and Steel Community was a first step for a more economic and political integration. The result of this is the creation of two more communities in 1957 with the Treaty of Rome which are the European Atomic Energy Community and the European Economic Community[69].

The key aim was to create a common market. Single European Act in 1986 defined the term common market as an area where there would be free movement of goods, persons, services and capital. There were social issues too but they were less important than the goal of common market[70].

Revisions were made on the founding Treaties with Single European Act (1986), the Treaty on European Union (Maastricht Treaty 1992), Treaty of Amsterdam (1997) and Treaty of Nice (2004). With these revisions they have included additional areas of policy within the EU which one of them is social policy.

Discrimination on grounds of nationality was forbidden from the starting of EC law. Discrimination on grounds of sex had a progressive development from limited base. Founding Treaty established the principle of equal pay for men and women. In 1970's secondary legislation included equal treatment in workplace. In 1999 with the Treaty of Amsterdam the scope of legislation against discrimination expanded.

[69] Malcolm Sargeant, Discriminaiton Law, Pearson Longman, 2004, p.12-13.

[70] Mark Bell, Anti Discrimination Law and the European Union, Oxford Press, 2002.

EC Treaty Article 13 led the Community power for legislating to combat discrimination based on sex, racial or ethnic origin, age or disability.

From the start community discrimination law intends to achieve the economic aim rather than ensuring fundamental social rights. ECJ recognized the human rights dimension of equal treatment to men and women.

Community's anti discrimination policy has two goals which are to ensure the functioning of the internal market and creating an inclusive society.

According to Mark Bell there are two different community models. First one is the market integration model which justifies intervention in social matters only if it is necessary to prevent unfair competition. Second one is social citizenship model which sees a wider role for community in which ensuring of fundamental social rights[71].

## 1. SOURCES OF EU ANTI DISCRIMINATION LAW

Since EU is seen as a federation, it must be able to create its own law and impose these laws effectively in its own system.

There is a vast range of legislation covering discrimination coming from various sources. Legislations specifically cover race, religion or belief, sex, sexual orientation and disability[72].

Anti discrimination norms exist at a number of levels which can be mentioned as international level, EC level and national level. Some Member States have relied on ratified instruments of international law to provide legal protection for individuals[73].

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[71] Mark Bell , Anti Discrimiantion Law and the European Union, op. cit, p.191.

[72] Michael Connolly, Townshend –Smith on Discrimination Law: Text Cases and Materials, op.cit, p.379-85.

[73] Malcolm Sargeant, op.cit, p.1-5.

EU anti discrimination law has its own characteristics. It is limited than domestic law since it reflects the specific objectives of the European Community. EU dimension of discrimination law applies only to situations which fall within the scope of European Community[74].

### 1.1 The EC Treaty

Main source of EU law is the founding Treaties. Through the three founding Treaties the only Treaty making explicit reference to equality is the Treaty establishing the European Community (TEC). TEC contains provisions which are significant in this ground[75].

There are two types of provisions:

i. Provisions which themselves give substantive right.

ii. Provisions which grant enabling authority on the institutions of the EU to make secondary legislation.

We can give some examples for the first type of provisions. The provision that shows the importance of the Union's prohibition on discrimination which is Article 2 of the EC Treaty is an example for this type provisions. With this Article equality between men and women is indicated within the list of tasks:

*"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic*

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[74] Mark Bell, Anti Discrimiantion Law and the European Union, p.145-149.

[75] Michael Connolly, Discrimiantion Law, Sweet& Maxwell, 2006.

*performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."*

According to Article 3(2) of EC Treaty:

*"In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women."*

With Article 141 the principle pay for equal work was established. Article 141 protects the equality of opportunity.

For the second type of provisions, which provides the legal authorization for secondary legislation, we can see Article 249 as a good example for this. The Article 249 of EC Treaty makes clear the need for specific authorization for particular measures of secondary legislation. Article 249 enables the European Parliament, the Council and the Commission to make secondary legislation in order to carry out their task. Though this is limited. It is limited with the provisions of EC Treaty. So European Parliament, the Council and the Commission can make secondary legislation only when a provision of EC Treaty authorizes them.

With amendments made by Amsterdam Treaty on Article 141, now Article 141 grants a secondary law making power[76].

According to Article 141(3):

*"The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value."*

[76] Gavin Barrett, "Shall I Compare Thee to...? On Article 141 and Lawrence", Indusrtail Law Journal, Vol:35, No:1, 2006, p.93-101.

The meaning of this Article is important. It allows measures to be taken without limitation of any form of legislative instrument. It includes both equal pay and other aspects of equal treatment[77].

According to Article 13 (1):

"*Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

Article 13 is in the Part One of the TEC which is named as "principles". Therefore ECJ can emphasize the constitutional, importance of the instruments adopted in relevant to Article13[78]. This provision couldn't be used if there is another more specific enabling authority exists. So under this condition, Article 141(3) seems to be the appropriate provisions for legislation dealing with sex discrimination. However still Article 13 can be used both on sex and on the other grounds which discrimination is outlawed[79].

Amsterdam Treaty enables provisions directly dealing with sex equality. But before Amsterdam Treaty's creation for the enactment of secondary legislation in sex equality area, more general provisions been utilized. Article 94 and 308 are more common ones.

According to Article 94 Council can act unanimously on a Commission proposal and after consulting the European Parliament and the Economic and Social Committee to make directives. This is called "harmonization legislation".

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[77] Evelyn Ellis, op. cit, p.12-17.

[78] L. Flynn, "The Implication of Article 13 EC after Amsterdam Will Some Forms of Discrimination be More Equal Than Others?", Common Market Law Review, Vol:36, Issue:6, 2007, p.1127-1152.

[79] Michael Connolly, Townshend –Smith on Discrimination Law: Text Cases and Materials, op.cit, p.107-109.

According to Article 308:

*"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".*

Article 308's scope is wider.

Another example of harmonization legislation is under Article 137. According to Article 137 the Community will support and complement the activities of the Member States in mentioned fields such as[80]:

- Improvement in particular of the working environment to protect workers health and safety.
- Working conditions.
- Social security.
- Equality between men and women with regard to labor market opportunities and treatment at work.

The Council in the above mentioned Articles is authorized to adopt directives. But the Council is also permitted to adopt measures. This is mentioned in Article 137(2) (a). Although this must be in accordance with Article 251. According to Article 251 the Council can adopt measures after consulting the Economic and Social Committee and the Committee of the Regions. However there is an exception of this rule, in order to take action inter alia in the fields of social security and social protection, the Council has to act unanimously on a proposal from the Commission, after consulting the

[80] Isabelle Chopin, "Possible Harmonization of Anti Discrimination Legislation in the European Union: European and non Governmental Proposals", European Journal of Migration and Law, Vol: 2, Kluwer Law International, 2000, p.413-430.

European Parliament , the Economic and Social Committee and the Committee of the Regions[81].

## 1.2 Secondary Legislation

There are three types of secondary law within the EC which are regulations, directives and decisions. Those three secondary legislation elements have to state the reason on which they are based. And they must refer to any proposals or opinions which the Treaty required them to do so.

All regulations and almost all directives required to be published in the Official Journal of the EU. According to Article 254 EC regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251 must be published in the Official Journal[82].

### *1.2.1. Regulations*

Regulations have general application so they create binding legal obligations for every person within the EU. They create general law and can effect the legal position of any legal person within the Community. According to Article 249 EC Treaty regulations are binding in their entirety and directly applicable in all Member States. The ECJ also accepted this interpretation.

A regulation example in the field of discrimination can be "EU Regulation on the Rights of Disabled Persons and Persons with Reduced Mobility When Traveling by Air"[83]. With this regulation airlines and travel companies can't refuse to accept bookings from passengers who are disabled.

[81] Paul Craig and Grainne De Burca, EU Law: Text, Cases and Materials, 4th Edition, Oxford, 2008.

[82] Takis Tridimas, The General Principles of EU Law, 2nd Edition, Oxford, 2006.

[83] Regulaiton 1107/206 EC ,OJ C- 24, 31.1.2006,p.12.

### *1.2.2. Directives*

According to Article 249 directives are addressed to States. A directive is binding on each Member State which it is addressed but it leaves to national authorities the choice of form and methods.

Directives don't take effect within the legal systems of the Member States as they are formed. They require the Member States to legislate to achieve a particular end-legislation. They needed to be translated into the national law. Directives contain a time limit in which transition must be completed.

Directives that have been enacted in the field of discrimination have three broad themes which are sex equality, non discrimination on the ground of race and non discrimination on the remaining grounds set out in Article13.

The Equal Pay Directive[84] and Equal Treatment Directive[85] supplement Article 141 of EC Treaty and prohibit sex discrimination[86].

The Race Directive[87] implements the principle of equal treatment irrespective of racial or ethnic origin.

Framework Directive[88] reduces discrimination on the grounds of religion or belief, disability, age or sexual orientation.

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[84] Directive 75/117 /EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ (1975) L45/19.

[85] 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 ,OJ (1976) L 39/40.

[86] Christopher McCrudden, "Thinking About the Discrimination Directives", European Anti Discrimination Law Review, Vol: 1, 2005.

[87] Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

[88] Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

Equal Treatment Directive was prompted by the Council's Resolution of 21 January 1974 concerning a social action programme. Equal Treatment Directive have been held by ECJ to confer right directly on individuals[89].

If we look at Article 1 of Equal Treatment Directive, Race Directive and Framework Directive we see the directives aim of means.

Equal Treatment Directive Article1:

*"The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men an women as regards access to employment, including promotion, and to vocational training and as regards working conditions and , on the conditions referred to in paragraph 2, social security. This principle in hereinafter referred to as "the principle of equal treatment" "*

Race Directive Article 1:

*"The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment"*

Framework Directive Article1:

*"The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view of putting into effect in the Member States the principle of equal treatment"*

So we can say that Equal Treatment Directive doesn't directly refer to discrimination. It puts in the effect of the principle of equal treatment. However Race Directive and Framework Directive refer both to discrimination and the principle of equal treatment.

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[89] Dagmar Schiek, op.cit, p.295-312.

Equal Treatment Directive and the Framework Directive are limited in their application to the workplace.

There's a hierarchy between the norms of anti discrimination law in which racial discrimination is at the top and age discrimination at the bottom[90].

Equal Treatment Directive, The Framework Directive and Race Directive aim to protect human beings. Although Race Directive intend to protect legal bodies.

If we look at Article 2(1) of three Directives, we can see that they are incapable of taking direct effect.

The coverage of the Race Directive is different from Equal Treatment Directive and Framework Directive, it expand beyond the workplace.

The Pregnancy Directive[91] aims to introduce measures to support improvements in the safety and health at work for pregnant workers and workers who have recently given birth or are breastfeeding. With this Directive the position of pregnant women who gave birth are equated to sick workers position.

The Pregnancy Directive forbids any decrease in the standards of protection already existing in the Member States. Member States must make sure that women are not forced to perform night work during both pregnancy and for a period following the childbirth.

Women on fourteen-week leave are guaranteed their contractual employment rights. In Boyle v EOC[92] case ECJ stated that the accrual of annual leaves is contractual

[90] Sandra Fredman, "Double Trouble: Multiple Discrimination and EU Law", European Law Anti Discrimination Law Review 2, 2005, p.13-18.

[91] 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, OJ (1992) L348/1.

[92] Case C-411/96, Boyle v EOC, (1998) ECRI-6401.

employment right. The Court in Merino Gomez v Continental Industrias del Caucho[93] case decided that the right to annual leave is protected contractual right.

On the fourteen week leave women are entitled to a payment or allowance which is equal to sick day in the Member States concerned.

Pregnant workers must allowed to time off without loss of pay in order to attend ante natal examinations where such examinations have to take place during work hours.

The Directive on Parental Leave[94] gives a right to parental leave for at least three months to all workers on the birth or adoption of a child. Member States have to protect workers against dismissal on the ground of taking parental leave.

In the Directive on Part Time Work[95], part time workers are defined as employees whose normal hours of works are less than the normal hours of work of a comparable full time worker. This Directive protects both male and female workers.

In the Directive on Fixed-Term Employees[96] is protecting as it mentioned in its name "fixed-term workers". A fixed term worker is a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions.

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[93] Case C-342/01, Merino Gomez v Continental Industrias del Caucho.

[94] Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ (1996) L145/4.

[95] Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ (1986) L359/56.

[96] Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ (1999) L175/43.

The Directive on Equal Treatment of the Self Employed[97] protects the self employed workers. Directive in its Article 2 defines the term "self employed".

*"A self employed worker is all persons pursuing a gainful activity for their own account under the conditions laid down by national law including formers and embers of the liberal professions."*

### *1.2.3. Decisions*

According to Article 249 a decision is addressed to a particular legal person or group of such persons. This can include individual people, corporations and Member States. The decision binds the person whom it is addressed. Decisions aren't capable of producing legal obligations[98].

## 1.3 Decisions of ECJ and CFI

ECJ's decisions play a crucial role in interpreting EU law in the area of equality and non discrimination. Some of the important phrases have been defined by ECJ. This situation has been took place in the Draft Constitution. Draft Constitution Article IV 438 (4) dedicates that the case law of ECJ and CFI is to remain the source of interpretation of EU law. ECJ plays an important role in anti discrimination law with preliminary ruling procedure despite CFI[99].

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[97] Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ (1986) L359/56.

[98] Paul Craig and Grainne de Burca, op.cit, p.82-83.

[99] Ibid., p.104-107.

## 1.4 Indirect Sources

Some internationally agreed legislations aim to protect fundamental human rights. Most important of them is ECHR. Other ones are European Social Charter and Community Social Charter. These are indirect sources of EU law and anti discrimination law in EU.

### *1.4.1. European Convention on Human Rights (ECHR)*

Several provisions in the ECHR protect the rights to equality and non discrimination. ECHR's scope of discrimination law is wider than EU's anti discrimination law[100].

Some provision examples that can be given are Article 8 which guarantee respect for family and private law, Article 12 the right to marry or Article 9 the protection of freedom of thought and religion. These provisions are substantive[101].

However Article 14 ECHR is important and different from articles that are giving substantive rights:

*"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

Article 14 doesn't give a definition to the term "discrimination". But the list of grounds on which discrimination is prohibited is somehow outmoded. When comparing it with Framework Directive this could be seen barely. It doesn't contain disability, age and sexual orientation discrimination.

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[100] Prof. O. De. Schutter, European Commission, Employment and Social Affairs The Prohibiiton of Discrmiantion Under European Human Rights Law, 2005,p.11-13.

[101] Michael James, Privacy and Human Rights, Dartmouth, 1994.

The ECtHR way to deal with whether there is discrimination or not is: Firstly ECtHR looks if there is a difference of treatment between two people in a situation. Then looks if that difference is listed in Article 14 ECHR. If it is listed in Article 14 then ECtHR proceed to examine the case.

### *1.4.2. The European Social Charter*

The European Social Charter takes account of fundamental social changes and includes some rights. It's different from ECHR. It can't be appealed before judicial authorities. This is not a self executive Treaty. It is setting standards to be achieved by its Member States. It's not known as well as ECHR Part I of European Social Charter give a list of 31 rights in the fields of employment and social welfare[102].

### *1.4.3. The Community Social Charter*

The Community Social Charter was signed in 1989 by 12 Member States except UK. It's a ceremonial declaration. It doesn't have a binding force. It had an action programme which contains proposals for legislation[103].

### *1.4.4. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*

The Convention on the Elimination of all Forms of Discrimination Against Women is an international convention adopted in 1979 by the United Nations General Assembly. It came into force on 3 September 1981. According to CEDAW discrimination is any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or

[102] Prof. O. De. Schutter, op.cit, p.27-30.

[103] E. Ellis, op.cit, p.327-328.

exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field[104].

The goals of the CEDAW Convention are much broader than European sex equality law. It has threefold purpose. It obliges the adoption of appropriate and effective measures at three different levels which are: to implement complete equality in law and in public administration, to improve the de facto position of women and to combat the dominant gender stereotypes and gender ideology.

Three decades have passed since CEDAW was adopted by over %90 of the Member States of the United Nations, yet the EU still has not ratified the Convention and EU Member States have not implemented it[105].

For a few years, the EC has been invoking the CEDAW in preambles of secondary non-discrimination legislation. Once this happened first it was not in the field of sex equality but rather in the Race Directive[106], based on the Commission's proposal. Soon afterwards, it also appeared on the preamble of the General Framework Directive[107] though this time not based on the Commission's proposals.

Nevertheless, the references to CEDAW in EC non-discrimination legislation are no more than merely formal invocations of the human rights background of the relevant measures. There is as of up till now no statement of core, that is, on the question whether the content of the law is in line with CEDAW. On that level, CEDAW needs to be taken much more seriously by the Community institutions.

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[104] Rikki Holtmaat, "The Possible Impact of other International Instruments to Combat Discrimination against Women (the case of the CEDAW Convention)", 2004, p.3.

[105] Ibid, p.3-6.

[106] Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

[107] Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

In the Court's case law, CEDAW is hardly ever mentioned. There is just one such reference, namely in the Levy case[108] of 1993, were CEDAW was referred to by the Commission in the context of night-work. The Court simply states that fact without engaging in any substantive discussion of the Convention's provision.

CEDAW is a key convention, an instrument to drive national and international law and policy. The EU must commit itself to CEDAW by ratifying and implementing the Convention without any reservation.

### *1.4.5. Other International Law Sources*

Various United Nations human rights instruments define the meaning and the content of the principles of anti discrimination and equality. The Charter of the United Nations prohibits discrimination on the basis of race, sex, language or religion.

The Universal Declaration of Human Rights (UDHR) adopted in 1948 enlarged the list to include color, sex, political or other opinion, national or social origins and other status.

According to Universal Declaration of Human Rights all human beings are born free and equal in dignity and rights. It points out that all are equal before the law and are entitled without any discrimination to equal protection of the law and that higher education shall be equally accessible to all on the basis of merit[109].

The International Bill of Human Rights which consists of UDHR, The International Covenant on Economic, Social and Cultural Rights (ICESCR) and The International Covenant on Civil and Political Rights (ICCPR) guarantees freedom from discrimination to all Members of the human family.

[108] Case 158/91, Levy, (1993), ECR I-4287.

[109] United Nations Expert Group Meeting on Managing Diversity in the Civil Service, United Nations Headquarters , NY, 3-4 May 2001.

Signatories to the ICESCR recognize further the equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence. It is clear: Individuals are to be judged solely on competence and experience, without preferences granted on the basis of race, gender or ethnic origin.

The International Convention on the Elimination of All Forms of Racial Discrimination permits temporary discrimination in favor of disadvantaged groups.

The EU actively co-operates with the United Nations (UN) in tackling racism and discrimination and supports the mandate of the UN Special Rapporteur on contemporary forms of racism, xenophobia and related intolerance.

## 2. LEGAL CONCEPT OF DISCRIMINATION

The prohibition of discrimination is an achievement in EU law. Since discrimination is prohibited there had been distinctions made between different forms of discrimination. The most important distinction is direct and indirect discrimination distinction[110].

EC Treaty in Articles 12, 13(1), 39(2), and 141(2) prohibit discrimination against specified groups of people. And EC Treaty Article 141(3) refers to principle of equal opportunities and equal treatment. ECJ with secondary legislation (The Equal Treatment Directive) aims to put into effect the principle of equal treatment.

The distinction between indirect and indirect discrimination has been developed by ECJ since 1960's[111].

Direct discrimination occurs where; on one of the protected grounds, one person is treated less favorably than another person. The prohibition aims to protect the

[110] Elisa Holmes, op. cit, p.185-187.

[111] Christa Tobler, Indirect Discrimination: A Case Study Into Development of the Legal Concept of Indirect Discrimination Under EC Law, Hart Publishing, 2005, p.55-57.

principle of formal equality. On the other hand indirect discrimination occurs where, some requirement is demanded, some practice is applied, or some other action is taken which produces an unfavorable effect for a protected class of persons. The rule against indirect discrimination tries to grant equality of opportunity.

### 2.1 Direct Discrimination

Direct discrimination is based upon a prohibited ground. The concept of direct discrimination usually covers cases that depend on a ground which is related in a dissoluble way to a outlawed discriminatory ground.

The term direct discrimination didn't originally appeared in wording of EC law. ECJ's interpreting of the concept of direct discrimination can be gathered from the method in which it has distinguished it with indirect discrimination[112].

The concept of direct discrimination at EC level was firstly developed by ECJ. Article 141 of EC Treaty amends that Member States must ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. Article 141 seems to outlaw all distinctions not only sex related distinctions. On the other hand ECJ, in its interpretation of Article 141 stated that there must be no distinction made on the basis of sex. So this indicates that other distinctions over pay will be allowed.

ECJ's important decision in this concept is Defrenne v Sabena[113] case in which ECJ defined direct and indirect discrimination:

*"A distinction must be drawn within the whole area of application of Article 119 ( now Article 141) between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the Article in question and secondly, indirect and disguised discrimination which*

[112]Ibid , p.55-57.

[113] Case 43/75, Gabrille Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena, (1976), ECR 455.

*can only be identified by reference to more explicit implementing provisions of a community or national character."*

The explanation for direct and indirect discrimination in here was a little complex. Direct discrimination is called overt behavior. On the other hand indirect discrimination is called disguised[114].

The distinction that has been made between indirect and indirect discrimination by ECJ doesn't match with the distinction of the Member States.

In Defrenne case the Court tries to make distinction merely among discrimination which can be identified without the need for further explanatory legislation and that which can not.

Case examples for this distinction made by ECJ are Burton v British Railways Board[115] case and Macarthys Ltd. v Smith[116] case.

In Burton v British Railways Board case Mr. Burton was an employee of British Railways Board. The Board made an offer of voluntary reducancy to some of its employees. Mr. Burton applied in 1977 for voluntary reducancy. But his application was rejected because of his age. Mr. Burton was 58 but this reducancy was given to male employees which are 60 and over. However for female workers this age was 58. Mr. Burton therefore claimed that he was treated less favorably then female workers in his age. ECJ decided that there's no discrimination against sex in this case because determination of a minimum pensionable age for social security purposes which isn't same for men as for women doesn't amount to discrimination prohibited by Community law.

In Macarthys Ltd. v Smith case Mrs. Wendy Smith was an employee of Macarthys Ltd. for a week salary of 50 pounds for a week. However her processor a

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[114] Sandra Fredman, Discrimination Law, op. cit, p.92-94.

[115] Case 19/81 Burton v British Railways Board, (1980), ECR 555.

[116] Case 129/79 Macarthys Ltd. v Smith, (1980), ECR 1275.

man received a salary of 60 pounds for a week. She claimed for discrimination. ECJ stated that Article 119 of EEC Treaty (141 now) applies directly to all forms of direct and overt discrimination on which may be identified solely with the aid of the criteria of equal work and equal pay. So ECJ repeated his formula in Defrenne case.

ECJ changed its approach in Worringham v Lloyds Bank Ltd.[117] case. In this case Susan Worringham and Margaret Humphreys were employees of Lloyds Bank. And they claimed of discrimination because Lloyds Bank was not paying the same salary to female workers under 25 as to male employees. ECJ in this case didn't use the wordings "direct and overt" "indirect and disguised" instead said that direct discrimination could be both overt and covert[118].

Direct discrimination is based on the concept of equality of consistency. It is clear that one person is treated less favorably than another of the opposite sex or race. According to European Commission equality shouldn't be made the occasion for a disimprovement of working conditions for one sex.

In Smith v Advel[119] case male workers claimed that they were treated less favorably than female because the pension age for male is 65 but for female it is 60. ECJ decided that equality had been breached. But the Court stated that breach could be remedied by rising female's pension age to 65 too. So equality was gained but the position of women get worse.

The definition of direct discrimination show that a comparison is at the center of the legal formula. ECJ in Schullard v Knowles[120] case said that a woman could compare her pay with a man doing the same work that wasn't employed by the same employer but worked in the same service.

[117] Case 69/80 Worringham v Lloyds Bank Ltd, (1981), ECR 767.

[118] J. Gerards, op.cit, p.135-1183.

[119] Case C 408/92 Smith v Advel, (1994), IRLR 602.

[120] Schullard v Knowles (1996) IRLR 344.

But there are important situations where there is simply no appropriate comparator. Such as in the situation of pregnancy discrimination. In Webb v EMO[121] case the Court considers an ill man as the appropriate comparator to pregnancy since the effects of illness on the capacity to work is similar.

ECJ lately changed its notion about this situation. ECJ stated that discrimination on grounds of pregnancy contravenes the equal treatment principle because only women can be treated badly for this reason[122].

However move away from comparator in pregnancy wasn't over. According to ECJ in the situation of pregnancy related illness which continues after the birth, a woman will only be able to prove a breach of the equality principle if she can show that she was treated less favorably than an ill man[123].

Again in disability discrimination there's a difficulty of finding an appropriate comparator. So ECJ moved away from comparative approach.

Direct discrimination treats equality as an end in itself not as a means to a different end. Direct discrimination is symmetrical because discrimination is treated as wrongful whether it is directed against a member of a group which is disadvantaged or one which is relatively privileged.

New generation EC non discrimination Directives gives definition of direct discrimination which is the Equal Treatment Directive, the Race Directive and the Framework Directive[124].

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[121] Webb v EMO (1992) 2 All ER43.

[122] Case C177/88 Dekker, (1990), ECR I 394.

[123] Case C 179/88 Hertz, (1990) ECR I-3979.

[124] Dagmar Schiek, op.cit, p.290-314.

Equal Treatment Directive Article 2(2)[125]:

*"Direct discrimination; where one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation."*

Race Directive Article 2(2) (a)[126]:

*"Direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin."*

Framework Directive Article 2(2) (a)[127]:

*"Direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on any grounds referred to in Article 1"*

## 2.2 Indirect Discrimination

The purpose of the concept of indirect discrimination is indefinite. The principle tries to reach beyond equal treatment to equality of results. But its aim isn't the achievement of equality of results[128].

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[125] 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 ,OJ (1976) L 39/40.

[126] Council Directive 2000/43/ EC of June 29 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ LI 180/22.

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

[128] Christa Tobler, op. cit, p.57-59.

The concept of indirect discrimination is intended to deal with neutral differentiation with a disproportionate impact or effect upon a group that is protected by an explicit prohibition of discrimination.

Recently, the concept of indirect discrimination has a firm place both in international human rights law and EC law. According to ECtHR the prohibition of discrimination includes measures that are not discriminatory at appearance but are discriminatory in fact and effect[129].

International human rights treaties go further than omission discrimination by obliging the Member States to take on in supporting equality and in changing their societies. This obligation is important in the context of indirect discrimination because it's often results with structural problems. When applying prohibitions of indirect discrimination under EC law, the EU Member States should keep their international legal obligations in mind too[130].

Indirect discrimination is worse treatment of a person or a group of persons that in substance is based on a prohibited discrimination ground. Indirect discrimination is indirectly based on the prohibited ground.

### *2.2.1. Indirect Discrimination under The European Convention on Human Rights*

Discrimination under ECHR can consist in the different treatment of persons in comparable situations, as well as, in the same treatment of persons in non-comparable situations. ECHR don't include a definition of the concept of discrimination but includes a prohibition of discrimination.

The attitude of ECHR to indirect discrimination was hesitant. Although in recent case law, ECtHR explicitly referred to indirect discrimination.

[129] Samantha Besson, op.cit, p.647-682.

[130] Maria Green Cowles, James Caporaso and Thomas Risse, Europeanization and Domestic Change Transforming Europe, Cornell University, 2001.

A case example for this is Hoogendisk v The Netherlands[131] case. The context of this case is a disability allowance under Dutch law which was approved only if the earnings of the applicant or of a family member who were oblige to contribute to the applicant's maintenance remained below a certain level. ECtHR in this case decided that indirect sex discrimination based on the fact that the second condition resulted in more women than men losing the benefit

ECtHR is less confident than ECJ about importing a concept of indirect discrimination into the open-ended equality guarantee in Article14 of ECHR.

In Abdulaziz case[132] ECtHR took a narrow formal view of discrimination. According to ECtHR Article 14 of ECHR only prohibited regulations which expressly differentiated on grounds of race or ethnic origin. So ECtHR stated that UK's domestic law was not unlawful.

### *2.2.2. Indirect Discrimination under EC Law*

The concept of indirect discrimination wasn't an original invention of European Community. The concept of indirect discrimination shaped in Griggs v Duke Power[133] case in U.S.A. The case was about racial discrimination. In the case the employer instated literacy tests for all applicants. The same test applied for all candidates but the engage effects of discrimination against blacks in the education system meant that an inconsistent number of blacks failed to achieve the required standard. The ware force is almost wholly consisting of whites. U.S Supreme Court thus expanded the principle of equality. According to Supreme Court equal treatment was discriminatory if the result was the fewer blacks could comply, unless the requirement

[131] Hoogendisk v The Netherlands, 6 January 2005, 40 EHRR SE22.

[132] Abdulaziz, Labales, No42, (1985) 7 EHRR 47I.

[133] Griggs v Duke Power Co., 401 US 424(1971).

was necessary for the proper execution of the job in hand. This concept lately accepted by first British Law then EC law[134].

When submitting the prohibition of indirect discrimination, national authorities and courts will have to hold in three step analyses which are related to the scope of the law, the nature of the measure and objective justification. So these three questions must be asked and answered by the courts:

- Does the case get in the sphere of non-discrimination law which is operated in the Member State?

- Can the victim prove that there is an indirect discrimination on a specific ground?

- Can the perpetrator prove that there is objective justification that will prevent finding indirect discrimination?

Notion of indirect discrimination under EC law is dual. First ECJ developed this notion with the mean of enhancing the effectiveness of the prohibition of discrimination. According to ECJ the insertion of indirect discrimination is essential to guarantee the effective working of one of the fundamental principles of the Community. In the case where the list of types of discrimination is limited, the concept of indirect discrimination becomes a vital instrument for bringing a case concerning a ground for differentiation that is not prohibited within the application field of EC law.

Second the notion of indirect discrimination is seen as a tool to make visible and challenge the underlying causes of discrimination. For example in Jenkins v Kinsgate Ltd.[135] Case. In this case Mrs. Jenkins is a part time employee in women's clothing manufacturer. And she claimed that she was getting an hourly rate of pay lower than paid to one of her male colleagues employed full time on the same work. ECJ in this case recognized the difficulties of female workers to engage in full timework. In the situation where worse treatment of part time workers disparately affects on women, the

[134] Christa Tobler, op.cit, p.57-59.

[135] Case C 96/80 Jenkins v Kinsgate Ltd, (1981) ECR 911.

notion of indirect sex discrimination exposes the unequal division within the family between men and women of house and care work.

Indirect discrimination occurs when an unjustified unfavorable effect is moderated for a confined group of persons by an actually class neutral action. In here there is a problem which is whether such adverse impact must actually occur or whether it was sufficient for it simply to be expected. This comes in front of ECJ in O'Flynn v Adjudication Officer[136] case. This case was about nationality discrimination. Mr. O'Flynn asked for a funeral payment from Adjudication Officer. But his application was rejected because according to Regulation a funeral payment is made only if the funeral takes place in the UK. Mr. O'Flynn is an Irish national resident in UK. His son died in UK, religious ceremony took place in UK but buried in Ireland. In this case the Court was content with proof of merely contingent harm.

*"Unless objectively justified and proportionate to its aim, a provision of national law must be regarded as, indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers[137]"*

However in sex discrimination cases ECJ didn't follow this way. In above mentioned Jenkins v Kingsgate[138] case the Court point out the importance of being able to prove actual adverse impact.

The Employment Appeal Tribunal wanted to know from ECJ whether the Treaty forbade paying part-time workers less than full time workers, when the category of part timers is predominantly composed of women. ECJ in this case stated that[139]:

*"The purpose of Article 119 is to ensure the application of the principle of equal pay for men and women for the same work….. that a difference in pay between full time workers and part time workers doesn't not amount to discrimination prohibited*

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[136] Case C 237/94 O'Flynn v Adjudication Officer, (1996) ECR I-2617.

[137] Ibid. para.20.

[138] Case 96/80 Jenkins v Kingsgate, (1981) ECR 911.

[139] Case 96/80 Jenkins v Kingsgate, (1981) ECR 911.

*by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the level of pay of part time workers on the ground that the group of workers is composed exclusively or predominantly women."*

Disadvantageous treatment of part time workers compared to full time workers has been treated as "prima facie" indirectly discriminatory by ECJ on the basis that many more women then men are obliged by their domestic responsibilities to opt for part time work.

Sometimes it is hard to detect when there is disadvantageous treatment for part timers. In Elsner Lakeberg v Land Nordhein Westfalen[140] case, a part time teacher complained of indirect discrimination like her full time colleagues. She was paid over time only if she worked more than three extra hours per month. According to AG. Jacobs the critical issue was whether the overall pay of full timers was higher than part timers for the same number of hours worked. AG. Jacobs concluded that there was prima facie indirect discrimination on related to facts. ECJ get to the same result but on different basis which is the burden to be discharged before qualifying for overtime was greater for part timers than full timers.

ECJ took a different treatment on the part time work force if it is potentially indirectly discriminatory in Kochelmann v Bankhaus Hermann Lampe KG[141] case. Ms. Kochelmann was an employee of Bankhaus Hermann Lampe KG and she was dismissed on economic grounds. According to German redundancy legislation employer must look at the individual circumstances of employees and decide to whom the loss of employment would cause the least harm and full timers and part timers couldn't be compared for this aim. The Court in this case took a different approach and decided that this situation was potentially indirectly discriminatory. The reason of this is, the number of workers employed full time in Germany was higher than the number of part time

[140] Case C 285/02 Elsner Lakeberg v Land Nordhein Westfalen.

[141] Case C-322/98 Bankhaus Hermann Lampe KG, (2000), ECRI-7505.

workers, so in the situation of cutting jobs part time workers are in disadvantage because they have lesser chance of finding another comparable job[142].

The definition of indirect discrimination was firstly formalized for sex discrimination by the Burden of Proof Directive Article 2 (2)[143]:

*"For the purpose of the principle of equal treatment referred in parag.1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of the one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex"*

Later Race and Framework Directive adopted a test for indirect discrimination which is base on continent harm.

Race Directive Article 2(2) (b):

*"Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."*

Equal Treatment Directive Article 2(2) defines indirect discrimination as: practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

The using of the words "provision, criterion or practice" in the definitions above means that the legal concept of indirect discrimination relates to measures in the broadest meaning of the word. The concept is described by two basic elements first one relating tot the nature of the prohibited measure and second one is the legitimacy of any justification.

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[142] E. Ellis, op.cit, p.91-98.

[143] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex , OJ L 014 , 20/01/1998.

This can be formalized like this[144]:

- Indirect nature of discrimination.

i. The existence of a formally neutral measure.

ii. A disparate impact resulting from the measure in the sense of an expressly prohibited ground.

- Absence of objective justification.

i. Reliance on a legitimate aim which is independent of the prohibited criterion.

ii. Proportionality of the measure that is suitable and necessary

The wording of the Directives show that the standard of proportionality required by EC law is high, it's not sufficient that a measure is merely convenient or desirable. It must be appropriate and suitable for reaching the aim in question. ECJ frequently leaves it to the Member States national courts to judge proportionality.

In indirect discrimination cases, the requirement of comparability of situations might be challenging. It's critical to establishment of indirect discrimination that the complainant is able to identify a group of persons with whom to make a comparison so that it can be asserted that the comparators receive more advantageous treatment. The selection of the comparator group is a key issue.

In Österreichischer Gewerkschatsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich[145] case, which was concerning periods of absence from work being taken into account for the purpose of calculating redundancy payments. ECJ

[144] Christa Tobler, op. cit, p.211.

[145] Case C-220/02 Österreichischer Gewerkschatsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich, (2004), ECRI-5907.

in this case compared absence from work due to voluntary parental leave to absence from work due to military civil service and decided that they are not comparable.

Another case example is Gruber v Sillhoutte International Schmied GmbH & Co KG.[146] case. In this case Mrs. Gruber terminated her contract of employment in the reason of obtaining childcare. According to Austrian legislation employee could have a termination payment in the condition of an employment relationship lasting for three years and termination must be for "important reasons". In the list of important reasons childcare wasn't listed. But legislation gave this termination payment for childcare if employment was for at least five years and half. Mrs. Gruber claimed that this situation constitute indirect discrimination. ECJ looked out if maternity could get in accordance with important reasons. The Court stated that maternity isn't an important reason because all the important reasons listed in the legislation were related to working conditions in the responsibility or to the conduct of the employer, representation of the continuing work impossible.

ECJ's case law allocate for comparability to be taken into account, in order to prevent the danger of undermining the effectiveness of the prohibition of indirect discrimination. National authorities and courts which are to decide an indirect discrimination must be careful about comparability. First of all the comparison must always be between the groups of people relevant in the framework of the type of discrimination at issue. Secondly national courts and authorities must be careful not to assume non comparability very easily[147].

### *2.2.3. Relationship Between Indirect and Direct Discrimination*

Direct and indirect discrimination are logical counterparts. To distinguish them is important.

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[146] Case C-249/97 Gruber v Sillhoutte International Schmied GmbH & Co KG., (1999), ECR I-5925.

[147] J. Gerards, op.cit, p.135-183.

Direct discrimination is described as less favorable treatment of a person as compared to another on the grounds of a prohibited type of discrimination. For example, people of color are refused to get in to a night club while other people are accepted.

On the contrary indirect discrimination, involves cases in which, an apparently neutral provision, criterion or practice would put persons protected by the relevant provision at a particular disadvantage compared with other persons. The group of disadvantaged doesn't completely but mainly consist of persons that are protected by the discrimination ground in the question. They are simply unreasonably represented in the disadvantaged group. The example of part time work in the context of sex discrimination can be given.

The ECJ's approach to indirect discrimination can be seen in two recent cases. First one is Vasiliki Nikoloudi v Organismas Tilepikoinonion Eellados AE[148] case. This case was about collective agreement on the promotion of temporary staff to permanent staff. Temporary staff which had worked full time at least for two years is eligible to become permanent staff. In this case female temporary staff that have been employed part time as a cleaner, and full time for a little less than two years but couldn't get promotion. The Court looked at General Staff Regulation which provides that only women could be taken on as part time cleaners. ECJ found that the exclusion of a possibility of appointment as an established member of staff by reference, apparently neutral as to the workers sex, to a category of workers which under national rules the force of law is composed exclusively of women constitutes direct discrimination on grounds of sex. The Court focused on the effect of the measure in question and on substance rather than from[149].

Second case is Tadao Maruko v Versorgungsanstalt der deutschen Bühnen[150] case. This case is concerning Germany where same sex couples can't marry but only register their partnership. Mr. Maruko was refused for a widower's pension. The person allowed to a widower's pension had to be a woman who was married to a man. This

[148] Case C 196/02 Vasiliki Nikoloudi v Organismas Tilepikoinonion Eellados AE, (2005), ECR I-1789.

[149] Ibid., p.135-183.

[150] Case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, (2008).

reduces male partners in two ways. First they are not woman; secondly they weren't able to marry their same sex partners. ECJ in this case again, found direct discrimination not indirect discrimination because surviving spouses and surviving life partners are in comparable situations.

So as a solution direct discrimination now includes cases where reliance on a formally neutral criterion in fact affects one group only, be it by nature or on the basis of a rule that has the force of law. In contrast indirect discrimination relates to cases where an apparently neutral criterion has an effect that is less for reaching[151].

## 3. EXCEPTIONS TO ANTI DISCRIMINATION PRINCIPLE IN EC LAW BROUGHT BY DIRECTIVES

The Race Directive, the Equal Treatment Directive and the Framework Directive contain exceptions to principle of anti discrimination. Especially Framework Directive contains some additional exceptions than others[152]. The list of permissible exceptions is limited to ones expressly mentioned in these three Directives.

### 3.1 Genuine and Determining Occupational Requirement

This exception took it place all three Directives. This exception operates in very limited circumstances.

According to Race Directive[153] Article 4:

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[151] Kees Waaldijk , Christa Tobler, "Case Note on Maruko", Common Market Law Review, Vol:46, 2009, p.723-46.

[152] Mark Bell, "A Patchwork of Protection: The New Anti Discrimination Law Framework", p.473-475.

[153] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L.180.

*"Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provide that the objective is legitimate and the requirement is proportionate"*

This exception tolerates positive discrimination. This exception provides a justification for providing more favorable treatment for a member of a protected class than for other people on the ground of that class. The example that can be given is a man to model man clothes[154].

This exception doesn't apply to whole classes of jobs but instead each case must be examined individually.

In Johnston v Chief Constable of the RUC[155] case at UK police officers don't carry out fire arms except for special operations and non distinction is made between men and women. Then Chief Constable decided that men should carry d-fire arms in regular course of duties. And later Chief Constable decided that general police operations involving carrying of fire arms should no longer assigned to women. Since that decision no women in full time reserve has been offered contract or had her contract renewed. Mrs. Johnston was a member of full time reserve from 1976 to 1980. In 1980 Chief Constable refuses to renew her contract. So Mrs. Johnston applied for unlawful discrimination which is prohibited by the Sex Discrimination Order. ECJ stated that Chief Constable couldn't justify his refusal to provide women police with fire arms training by relying on the part of the Directive which referred to the exception to occupational activities whose nature require male workers. And the Court decided that policewomen are more liable to be assassinated than policemen but didn't give explanation to this decision. But ECJ pointed out to proportionality and decide that the

[154] E. Ellis, op.cit, p.272277.

[155] Case 222/84 Johnston v Chief Constable of the RUC, (1986), ECR 1651.

refusal to renew Mrs. Johnston‘s contract could not be avoided by allocating to women duties which can be performed without fire arms.

### 3.2 The Special Occupational Exception for Religious Bodies

Aim of this exception is protecting the right of religious bodies to maintain their beliefs where those beliefs would otherwise run counter to the instrument[156].

This exception took place in the Framework Directive[157] Article 4(2):

*“Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement , having regard to the organizations ethos. This difference of treatment shall be implemented taking account of Member States constitutional provisions and principles, as well as the general principle of community law, and should not justify discrimination on another ground.”*

The Framework Directive Article 4(2)’s aim is maintain the right of religious organizations to employ staff of their own religious belief to key positions.

The word “ethos” means external demonstration of adherence to a particular religion[158].

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[156] Ibid. , p.283-285.

[157] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, L 303/16 OJ L 180 .

[158] Jeremy Gunn, op.cit, p.189-215.

### 3.3 Provisions Protecting Women

The Equal Treatment Directive[159] contains a detailed provision about protecting women.

The Equal treatment Directive Article 2(7):

*"This Directive shall be without prejudice to provisions concerning the protection of women particularly as regards pregnancy and maternity.*

*A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favorable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence."*

A case example for this can be Hoffmann v Barmer Ersatzkasse[160] case in which a father claimed for unlawfully discrimination to mothers. In German law mothers get an optional period of paid leave from employment between the ending of the maternity leave eight weeks after childbirth and the child reaching the age of six months. Father claimed that this right should be given to fathers too. But ECJ rejected his claim.

The Equal Treatment Directive Article 2(7) can be used to rationalize special treatment for women in employment in relation to pregnancy and maternity leave and it can be used to justify the protection of women against biological risks which are specific to their sex[161].

[159] Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, L 303.

[160] Case 184/83 Hoffmann v Barmer Ersatzkasse,(1984), ECR 3047.

[161] E. Ellis, op.cit, p.285-289.

### 3.4 Differences of Treatment Based On Nationality

Race Directive[162] Article 3(2) put out this exception:

*"This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States and to any treatment which arises from the legal status of the third country nationals and stateless persons concerned."*

The reason of this provision is to prevent third country nationals from circumventing the limitation of EC Treaty Article 12.

### 3.5 Measures Necessary for Public Security, Public Order, The Prevention Of Criminal Offences, The Protection of Health and the Protection of the Rights and Freedoms of Others

The Framework Directive[163] Article 2(5) put out this exception:

*"This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others."*

With this exception Framework Directive tries to protect Member States form harmful cults, pedophiles and people with dangerous physical and mental illness[164].

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[162] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L.180.

[163] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, L 303/16 OJ L 180.

[164] Mark Bell, "A Patchwork of Protection: The New Anti Discrimination Law Framework", op.cit, p.473-475.

### 3.6 Payments Made by State Schemes

This exception took place in Framework Directive Article 3(3). The payments in the scope of this provision are payments of any kind made by State schemes or similar, including State social security or social protection schemes[165].

### 3.7 The Armed Forces

This exception took place in the Framework Directive Article 3(4). According to this Article discrimination on the grounds of disability and age shall not apply to the armed forces[166].

### 3.8 Reasonable Accommodation for the Disabled

This exception took place in the Framework Directive Article 5:

*"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures , where needed in particular case, to enable a person with a disability to have access to participate in, or advance in employment , or to undergo training , unless such measures would impose a disproportionate burden on the employer. This burden shall not disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."*

[165] E. Ellis, op.cit, p.291-292.

[166] Ibid. p.292.

Employers will take proper actions to assist disabled employees but these measures must be proportionate. Appropriateness of the employer's measures would be measured by their effectiveness[167].

### 3.9 Justification On Grounds Of Age

The Framework Directive Article 6 establishes this exception:

*"Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labor market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary*

*Such differences may include, among others:*

*(a) the setting up special conditions on access to employment and vocational training , employment and occupation including dismissal and remuneration conditions , for young people, old workers and persons with caring responsibilities in order to promote their vocational integration or assure their protection;*

*(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;*

*(c) the fixing of minimum age for recruitment which is based on the training requirements of the past in question or the need for a reasonable period of employment before retirement"*

[167] Jane Komedova, op.cit, p.653-661.

The breadth of this provision is to be noted. It explicitly sacrifices the principle of non discrimination to commercial interests[168]. This Article also removes occupational pensions from the reach of the Directive's provisions on age discrimination.

### 3.10 The Exceptions for Northern Ireland

This exception took place in Article 15 of the Framework Directive. This provision only took place in Framework Directive not in Race Directive or Equal Treatment Directive because being a membership of Catholic or Protestant community in Ireland isn't an issue of religion[169].

According to Article 15 of the Framework Directive:

*"1. In order to tackle the under- representation of one of the major religious communities in the police service of Northern Ireland , differences in treatment regarding recruitment into that service , including its support staff, shall not constitute discrimination in so far as those differences in treatment are expressly authorized by national legislation.*

*2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major communities there, the provision on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorized by national legislation."*

The intention of this Article appears to be except from the Framework Directive two particularly sensitive issues in Northern Ireland which are the pattern reforms to the police service, which demand an equal number of Catholic and Protestant

[168] E. Ellis, op.cit, p.295-296.

[169] Elisa Holmes, op. cit, p.296-297.

recruits to the service, and the long standing religious segregation of the teaching profession[170].

## 4. THE DRAFT CONSTITUTION AND ANTI DISCRIMINATION MEASURES

The EC Treaty is going to be replaced by the Treaty Establishing a Constitution for Europe which has been agreed by European Council in June 2004 but not being ratified by all Member States yet.

Draft Constitution contains significant number of provisions dealing with discrimination. In Article I – 2 non discrimination and equality between women and men are listed among the values of the EU. As a result of this, this principle becomes precise criteria for membership and breach of it can cause in postponement of membership rights[171].

In Article I – 3 the objectives of EU have been mentioned which are combating discrimination and promoting equality between women and men, solidarity between generations and protection of the rights of the child.

In Article I – 4 non discrimination on grounds of nationality is specially mentioned. Article I-44 gives a duty to EU which is to observe the principle of the equality of citizens.

Part III puts out detailed legal provisions which are now known as in EC Treaty Articles 13, 39 and 141. In Part III Articles 8, 18 and 108 took place of these articles.

Article III – 2 is a reproduction of EC Treaty Article 3 (2).

[170] E. Ellis, op.cit, p.291-292.

[171] Aileen McColgan, op .cit, p.228-231.

EC Treaty Article 3(2):

*"In all the activities referred to in this part, the Union shall aim to eliminate inequalities, and to promote equality, between men and women."*

In Draft Constitution Article III – 2:

*"In defining and implementing the policies and activities referred to in this part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."*

Part II of the Draft Constitution incorporates the charter of fundamental rights. The Charter of Fundamental Rights put out civil, political, economic and social rights for European citizens and other residents in the EU[172].

According to Article II – 20 everyone is equal before the law.

Draft Constitution Article II – 21:

*"Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, priority, disability, age or sexual orientation shall be prohibited."*

Draft Constitution Article II 21 (2):

*"Within the scope of application of the constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited."*

According to Article II – 22 the Unions shall respect cultural, religious and linguistic diversity[173].

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[172] Guida Schwellnus, "Reasons for Consitutionalization: Non Discrimination, Minority Rights and Social Rights In the Convention On The EU Charter of Fundamental Rights", Journal of European Public Policy, 13:8, 2006.

[173] Ibid.

Draft Constitution Article II – 23:

*"Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under represented sex."*

Article II – 24 and 25 recognize the rights of children and elderly people.

Draft Constitution Article II – 26:

*"The Union recognizes and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the Community"*

According to Mark Bell there is a distinction made between rights which are enforceable and principles which are not enforceable but gives rise to direct claims for positive action by the EU institutions or Member State authorities. Article II – 25 and 26 can be concluded as a principle. The European Commissions network of legal experts on the application of community law on equal treatment between women and men, in its observations on the Draft Constitution expressed its concern over this issue[174]. Formal equality concept is overtaking domination in the equality provisions of the Draft Constitution.

## 5. THE TREATY OF LISBON

The Treaty of Lisbon was signed on 13 December 2007. It is intended to enter into force on 1 January 2009. It is intended to reform the functioning of the European Union following the two wave's enlargement which have taken place since 2004 and which have increased the number of EU Member States from 15 to 27.

[174] Mark Bell, "Equality and the EU Institution", Industrial Law Journal, 2004, p.242-250.

The Lisbon Treaty was drafted as a replacement for the Constitutional Treaty which was rejected by French and Dutch voters in 2005.

The Lisbon Treaty is divided into two parts: The Treaty on European Union (TEU) and The Treaty on the Functioning of the European Union (TFEU). The Treaty of Lisbon amends the Treaty on European Union (TEU) (essentially the Treaty of Maastricht) and the Treaty establishing the European Community (TEC) (essentially the Treaty of Rome), which is renamed the Treaty on the Functioning of the European Union as mentioned above. Both treaties have the same legal rank.

TEU sets out general provisions governing the EU. TFEU sets out the specific objectives of the EU's various policies.

Even if the new Treaty is no longer overtly a constitutional treaty, it manages to preserve most of the important achievements of the Treaty establishing a Constitution of Europe which was signed in 2004 but never being ratified[175].

According to Article 16e of TFEU, in the area of anti discrimination measures Parliament gains the right of consent.

TFEU's part 2 is titled as non discrimination and citizenship of the Union.

According to Article 18 of the TFEU within the scope of the application of the Treaties and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

New horizontal clauses ensure that, in the definition and implementation of its policies, the Union will take into account the social dimension of the single market, sustainable development and combating discrimination[176].

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[175] Andrew Duff, True Guide to the Treaty of Lisbon, 2007, p.3-5.

[176] Article 2 of TEU "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

According to Article 19 of the TFEU without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation[177].

Within Lisbon Treaty, Charter of Fundamental Rights becomes binding and has the same legal value as the Treaties but its text will not appear in the Treaties.

[177] Ibid. p.6-7.

## CHAPTER III. EQUAL PAY

The Treaty of Amsterdam has made the removal of gender inequality and the endorsement of gender equality both a central community aim and a Member State obligation. With this active approach to gender equality gets its place in adapted Article 141 on pay discrimination[178].

Article 141 (4) is still the only EC Treaty provision which clearly refers to positive action.

Article 141 EC Treaty:

*"1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.*

*2. For the purpose of this article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.*

*Equal pay without discrimination based on sex means:*

*(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;*

*(b) that pay for work at time rates shall be the same for the same job.*

*3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.*

*4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from*

[178] Gavin Barrett, op.cit, p.93-101.

*maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."*

In Article 141 (4) the reference to "ensuring full equality in practice" dedicates simply a substantive equality model rather than formal equality. Equal opportunity is granted as essential to the achievement of full equality in practice. The words "specific advantages" point to new direct opportunities for positive action. These words "specific advantages" have been used by ECJ firstly in case about the Equal Treatment Directive Article 2 (4)[179].

EC Treaty Article 141 (4) combines a compensatory and a practical approach beyond the Equal Treatment Directive's emphasis on removing existing inequalities.

Article 141 rules equal pay where men and women perform equal work. The clearest case where equal work is performed is where two people perform identical jobs for the same employer in a single establishment.

Article 141 is important in 2 aspects. First one is it puts obligations on Member States to ensure that its terms are complied with it. Second one is it is capable of granting directly enforceable rights on individuals

## 1. PRINCIPLE OF EQUAL PAY

Equal Pay Principle is developed by the Equal Pay Directive[180] Article 1:

*"The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for*

[179] Heather Joshi, Gerry Makepeace and Peter Dolton, "More or Less Unequal? Evidence on the Pay of Men and Women from the British Birth Cohart Studies", Gender, Work and Organization, Vol: 14, No: 1, 2006, p.37-55.

[180] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 045 , 19/02/1975.

*work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.*

*In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex."*

European Community law has been immensely significant in the field of equal pay.

The principle is there should be no discrimination with regard to pay in all the areas of EU anti discrimination law.

Before Article 141 the definition of worker is given in Maria Martinez Sala v Freistaat Bayern[181] case. Mrs. Martinez Sala is a Spanish national who lived in Germany since 1968. She had various jobs through 1976 to 1986. She had a residence permit which expired at 18 April 1995 and issue to Mrs. Martinez Sala on 19 April 1994. In January 1994, it the time when she had no residence permit, Mrs. Martinez Sala applied to Freistaat Bayern for child raising allowance.

Freistaat Bayern rejected application in the reason of absence of residence permit. Mrs. Martinez Sala appealed to Social Court but her case was dismissed because of not possessing a residence permit. Then Mrs. Martinez Sala applied to Bayeriches Landessozialgericht which referred to ECJ for preliminary ruling on some issues. One of the issues is whether Mrs. Martinez Sala is a worker within the meaning of the EEC Regulation Article 7(2). The respond of ECJ was:

"*There is no single definition of worker in Community law: It varies according to the area in which the definition is to be applied. For instance, the definition of worker used in the context of Article 48 of the Treaty and Regulation no 1612/68 doesn't necessarily coincide with the definition applied in relation to Article 51 of the Treaty and Regulation no 1408/71. In the context of Article 48 of the Treaty and Regulation no 1612/68, a person who, for a certain period of time , performs services*

[181] Case C-85/96 Maria Martinez Sala v Freistaat Bayern, (1998), ECRI-2691.

*for and under the direction of another person in return for which he receives remuneration must be considered to be a worker"*

After Article 141 ECJ gives the definition of the term "worker" in Allonby v Accrington and Rossendale College[182] case. In this case Ms. Allonby was employed by the Accrington and Rossendale College as a part time lecturer in office technology. She employed from 1990 to 1996 with one year contracts. In 1996 legislation changes came in which required part time lecturers to be accorded equal or equivalent benefits to full time lecturers. In that time there are 341 part time lecturers in the Accrington and Rossendale College. So they decided to reduce its overheads.

So as a result Ms. Allonby's employment terminated at 29 August 1996 and Accrington and Rossendale College offered her re engagement through ELS. ELS is an agency which is holding a database of available lecturers. Ms. Allonby had to register in ELS if she wanted to to continue tı to works as part time lecturer. Her pay becomes a proportion of the fee agreed between ELS and Accrington and Rossendale College. In that time, Accrington and Rossendale College had more male full time salaried lecturers than women. So Ms. Allonby claimed for indirect sex discrimination by reason of the dismissal.

In this case one of the questions referred to ECJ is whether Ms. Allonby can claim access to TSS on the basis of Article 141[183]. According to ECJ there is no single definition of worker and it can vary according to the area under consideration:

*"A person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration……..*[184]*"*

[182] Case C- 256/01 Allonby v Accrington and Rossendale College, (2004).

[183] E. Ellis, op.cit, p.120-125.

[184] Case C- 256/01 Allonby v Accrington and Rossendale College, (2004), para. 67.

*"Provided that: a person is a worker within the meaning of Article 141 (1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that Article.*[185]*"*

With the definition of pay in Article 141, ECJ developed the concept for the purposes of sex equality. ECJ's case law will inform Race Directive and Framework Directive about the meaning of the pay in the fields they are.

Article 141 in EC Treaty is under Title VIII which is titled as "Social Policy, Education, Vocational Training and Youth". Article 141 is a usual type of provision. Article 141 both represents a social idea and a mechanism[186] with which indirectly synchronize social policy and state a complete legal obligation.

Article 141 wording is based on International Labor Organization (ILO) Convention Article 2(1) which is:

*"Each Member State shall, by means appropriate to the methods in question for determining rates for remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal treatment for men and women workers for work of equal value"*

## 2. THE MEANING OF PAY UNDER ARTICLE 141

In Defrenne v Sabena[187] Case ECJ stated that original Article 119 (now 141) aimed to eliminate competitive inequities between the Member States and to guarantee social progress. ECJ refer to equal pay principle as a part of the Community's foundations. The view of ECJ in this case formed the view of ECJ about Article 141.

If we look at the wording of the Article 141 (2) all benefits provided for employees by employers can be seen as pay.

[185] Case C- 256/01 Allonby v Accrington and Rossendale College, (2004), Para 70.

[186] Malcolm Sergeant, op. cit, p.108-11.

[187] Case 43/75, Gabrille Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena, (1976), ECR 455.

Article 141 must cover compensatory payments made by an employer to an employee. A case example of this is Garland v British Rail[188] case. British Rail is a subsidiary of the British Railways Board. Mrs. Garland was an employer in here and she can't use travel facilities for her spouses and dependant children after her retirement. But male workers could use this facility even if they retire. Mrs. Garland appealed in the reason of discrimination between female and male workers about this compensatory payment consisting of travel facilities.

ECJ stated that providing special travel facilities for former male employees to enjoy after their retirement but not doing the same to former female employees is discrimination in the means of Article 119 (now 141). So the Court widens the meaning of pay to concessionary rail fares provided for employees and ex-employees.

Pay covers over time pay, special bonus payments made by employers and termination payments.

In Stadt Lengrich v Helmig[189] case ECJ stated that overtime supplements constitute pay for the aim of Article 119.

In Krüger v Kreiskrankenhaus Ebersberg[190] case Mrs. Krüger was full time employed by Kreiskrankenhaus Ebersberg as a nurse. After the birth of her child on 24 April 1995 she obtained child care leave from June 1995 to 23 April 1998. She had been working to Kreiskrankenhaus Ebersberg in minor employment since 20 September 1995. She asked Kreiskrankenhaus Ebersberg the payment of the special annual allowance for the year 1995. This payment was a bonus that has been paid at Christmas. But she was refused in the reason of she was in minor employment condition. And there seems to be indirect discrimination against women because over %90 of persons who are in minor employment condition are women. Mrs. Krüger applied to Arbeitsgericht which referred to ECJ.

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[188] Case 12/81 Garland v British Rail, (1982), ECR 359.

[189] Cases C-399, 409 & 425/92, C- 34/50 & 78/93 Stadt Lengrich v Helmig, ( 1994), ECR I- 5727.

[190] Case C-281/97 Krüger v Kreiskrankenhaus Ebersberg, (1999), ECR I- 5127.

The Court in this case stated that an annual Christmas bonus can constitute "pay"[191] and in that condition there is an indirect discrimination based on sex[192].

In Gruber v Sillhoutte International Schmied Gmbh & Co KG[193] case, Mrs. Gruber have two children and took two years parental leave both for the first and the second child. On November 1995 she terminated her contract in order to take care of her children. Sillhoutte International Schmied Gmbh & Co KG made a payment but this was not the full termination payment. Mrs. Gruber claimed indirect discrimination on the ground that national provisions constitute indirect discrimination against women.

ECJ in this case didn't find indirect discrimination when comparing the workers resigns of an important reason and maternity leave. But the Court stated that termination payment as a pay mentioned in Article 119 (141).

Article 141 refers to consideration which the worker receives in respect of his employment payment. Payment must arise out of the workers employment but not to payment for the work actually done[194].

A case example of this is Sabbatini v European Parliament[195] case. The case was about expatriation allowances which were paid to people who live in foreign country in order to work for Community. Two Community employees applied to this payment but they were rejected by the Community institutions. They claim that the refusing of this payment consist of breaching Article 141. So the problem was allowances are pay or not? According to Commission it is not a payment for work done but it is a compensation for having to live away from home in order to work.

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[191] Another case examples for special bonus payment made by employers is Case 58/81 Commission v Luxembourg (1982), ECR 2175 and Case C- 333/97 Lewen v Denda, (1999), ECR I-7243.

[192] E. Ellis, op.cit, p.125-133.

[193] Case C- 249/97 Gruber v Sillhoutte International Schmied Gmbh & Co KG, (1999), ECR I- 5295.

[194] Paul Craig and Grainne de Burca, op.cit, p.875-877.

[195] Case 32/71 Sabbatini v European Parliament, ( 1972), ECR 345.

The Court looked in a different basis at this case but A.G submitted that expatriation allowances fell within the notion of pay because they were linked with employees work.

According to ECJ payments made by an employer to an employee who is absent from work can be pay[196]. So maternity benefit pay is "pay" in accordance with Article 141 because it is based on the employment relationship. So if a woman doesn't get a pay rise awarded to her colleagues during the period of her maternity pay can claim sex discrimination.

A case example for this is Joan Gillespie and Others v Northern Health and Social Services Boards[197] case. The Court in this case stated that the definition of pay contains all consideration which workers receive directly and indirectly from their employers in respect of their employment. The benefit paid by an employer under legislation or collective agreements to a woman on maternity leave fall within the definition of pay.

In the condition that the payment is notional only and never actually passes into the hands of the employee doesn't prevent it from falling within the scope of Article 141.

A case example for this is Warringham v Lloyds Bank Ltd.[198] Case. In this case Lloyds Bank Ltd had separate pension schemes for male and female employees. The schemes for male employees were contributory but for female employees the scheme became contributory if they were over 25. Two women employee claimed about breach of Article 141.

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[196] We can give two case examples for this situation Case 360/90 Arbeitenwohlfahrt der Stadt Berlin v Bötel, (1992), ECR I- 3589 and CaseC-278/93 Freers v Deutsche Bendespost, (1996), ECR I- 1165.

[197] Case C- 342/93 Joan Gillespie and Others v Northern Health and Social Services Boards, (1996), ECR I-475.

[198] Case 69/80 Warringham v Lloyds Bank Ltd., (1981), ECR 767.

The Court decided that there is a breach of Article 141. According to ECJ it doesn't matter whether the schemes were instantly paid by the employer and paid into the pension fund.

## 2.1 Pensions

According to Article 141 in order to be "pay" the consideration must come directly or indirectly from the employer. But this puts out the problem if pension benefits get in the scope of Article 141[199].

This issue came in front of ECJ firstly in Burton v British Railways Board[200] case. The problem in this case is whether the provision of early retirement pensions under a voluntary redundancy scheme contravenes EU law. The main problem in here is women can become eligible to this payment at age 55 while men at 60. The Court stated that the condition of access to the voluntary redundancy scheme is discriminatory.

Another case about pensions is Bilka- Kaufhaus v Weber von Hartz[201] case. Mr. Weber was an employer of Bilka- Kaufhaus as a sales assistant from 1961 to 1976. After working full time at October 1972 she chooses to work part time. Her employment ended at 1974. And Bilka- Kaufhaus refused to pay her an occupational pension in the reason of she had not worked full time for the minimum period of 15 years. The Court decided that pension provided by Bilka- Kaufhaus is a payment according to Article 141.

*"Benefits paid to employees under the scheme therefore constitute consideration received by the worker from the employer in the respect of his employment, as referred to it in the second paragraph of Article 119."*

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[199] E. Ellis, op.cit, p.133-143.

[200] Case 19/81 Burton v British Railways Board, ( 1982), ECR 555.

[201] Case 170/84 Bilka- Kaufhaus v Weber von Hartz, (1986), ECR 1607.

Payments made under a supplementary scheme fall within the scope of Article 141 in the essence of two requirements which are:

- The scheme must be supported by the employer and must be contractual in origin rather than setup by statue. In Jorgensen v Foreningen of Speciallaeger[202] case ECJ decided that the payment which a doctor receives for goodwill on selling her practice when she retires isn't equivalent to a pension. According to the Court the transfer of practice isn't related to the age of the transferor and may happen any time. And it is the person taking over the practice who pays the purchase price.

- ECJ differentiate social security payments and pay. A case example for this is Defrenne v Belgium[203] case. Ms.Defrenne was an air hostess in Sabena Airlines. She had to retire at the age of 40 like her other female colleagues. Then she discovered that she has been discriminated in relation to pension arrangements. According to Belgium law she could not claim pension until she is 60. But she had to retire at age 40. She applied to Belgian court which referred to ECJ for preliminary ruling. The Belgian court asked whether a retirement pension granted under a social security scheme, which is financed by workers and employers contributions, as well as State grants constitute pay under Article 141. ECJ stated that both general and special state pension schemes are excluded from Article 141.

The Barber v Guardian Royal Exchange Assurance Group[204] case is important because in this case ECJ put contracted out pensions within the scope of Article 141. Mr. Barber is an employee in Guardian Royal Exchange Assurance Group. Mr. Barber was a member of the pension fund established by the Guardian Royal Exchange Assurance Group. This fund is a non contributory scheme. Under Guardian Royal Exchange Assurance Group's pension scheme the pensionable age for men is 62 and for

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[202] Case C-226/98 Jorgensen v Foreningen of Speciallaeger, (2000), ECR I-2447.

[203] Case 80/70 Defrenne v Belgium, (1971), ECR 445 (First Defrenne Case).

[204] Case C-262/88 The Barber v Guardian Royal Exchange Assurance Group, (1990), ECR I-1889.

women 57. Mr. Barber was made redundant at 1980 when he gets the age 52. He couldn't get his retirement pension. Mr. Barber claimed for discrimination because a woman in his age could get her retirement pension.

ECJ decided that a pension paid under a contracted out scheme constitutes consideration paid by the employer to the worker in respect of his employment and falls within the scope of Article 119 (141). So the result of this case is both supplementary and contracted out occupational pension schemes were subject to the principle of equality as between the sexes[205].

ECJ analyzed the relationship between State social security schemes and occupational pension schemes in Beune[206] case. In this case ECJ stated that it gave importance to the condition of whether the scheme is a result of a formal agreement:

*"It follows from all the foregoing considerations that a civil service pension scheme of the type at issue in the main proceedings, which essentially relates to the employment of the person concerned, forms part of the pay received by that person and comes within the scope of Article 119."*

On the other hand with this decision it's not clear to decide whether a payment is made by reason of employment relationship.

Article 141 has direct effect since Defrenne II[207] case but how would this rule be applied in the scope of Article 141 in relation to pensions. In Barber[208] case ECJ took a restrictive stance on this issue:

*"The direct effect of the Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before*

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[205] Ibid., p.133-143.

[206] Case C – 7/93 Bestuur van Algemen Burgerlijk Pensionenfonds v Beune, (1994), ECR I – 4471.

[207] Case 43/75, Gabrille Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena, (1976), ECR 455.

[208] Case C-262/88 The Barber v Guardian Royal Exchange Assurance Group, (1990), ECR I-1889.

*that date initiated legal proceedings or raised an equivalent claim under the applicable national law*[209]*"*

The financial implications of the Barber case were so important for the pension industry that the Member States took the unprecedented step of legislating directly on the matter. The EC Treaty annexed the "Barber Protocol" which provides:

"*For the purpose of Article 119 of the Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law"*

In Ten Oever v Stichting Bedrijfspensionenfonds voor het Glazenwassers-en Schoomaakbedrijf[210] case ECJ pointed out to this issue again. This case was about granting of a widower's pension. Mr. Ten Oever's wife was a member of an occupational pension scheme funded by employers and employees until her death at 13 October 1988. At that time the scheme provided for a survivor's pension was only for widows only. In January 1 1989 it extended to widowers. After the death of his wife Mr. Ten Oever applied for the widower's pension. But his apply was rejected in the reason that it wasn't provided to widowers at that time when Mrs. Ten Oever deceased. Mr. Ten Oever based on the Barber decision of ECJ and claimed that the pension was a pay under Article 119 and there is discrimination between men and women.

ECJ decided that *"a survivor's pension paid by an occupational pension scheme the rules of which were not laid down directly by law but were the result of an agreement between both sides of the industry concerned…… to declare the scheme compulsory for the whole of the industry concerned and which is funded wholly by the employees and employers in the industry concerned, to the exclusion of any financial contribution from the public purse constitutes a pay".*

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[209] Ibid.

[210] Case C-109/91 Oever v Stichting Bedrijfspensionenfonds voor het Glazenwassers-en Schoomaakbedrijf, (1993), ECR I-4879.

Nonetheless ECJ stated that the Barber judgment for limiting its effects in time, it must be made clear that equality of treatment in the matter of occupational pensions may be claimed only in relation to benefits payable in respect of periods of employment subsequent to May 17 1990. So in this case Mr. Ten Oever's wife deceased in 13 October 1988 he can't claim for widower's pension because of this.

The result of this is pension providers must calculate the proportions of each pension which are attributable to service before and after 17 May 1990.

In Defreyn v Sabena SA.[211] case, the question of what sort of payments fall within the definition of benefits under occupational social security scheme for the aim of the Barber Protocol raised. Mrs. Defreyn became an employee of Sabena on 27 June 1960. She became redundant in 1987. The problem was the additional redundancy payments made pursuant to a collective agreement which is sex discriminatory, they were paid by the individual's last employers to workers receiving unemployment benefit.

ECJ decided that an occupational scheme such like in this case, which provides protection against the risk of unemployment by providing workers employed by an undertaking, which is Sabena in this case, with benefits intended to supplement the unemployment benefit provided under a statutory social security scheme fell within the scope of Barber Protocol. But Mrs. Defreyn couldn't claim the protection of Article 119 (now 141) since her employment relationship ended before 1990.

According to ECJ the of time limitation contained in Barber Protocol applies only to claims for pension payment, not to claims in relation to the right to join a pension scheme[212].

The right to join a scheme on non discriminatory terms had been established in Bilka Kaufhaus Gmb H v Weber Von Hartz[213] case. Mrs. Weber was an employee in Bilka Kaufhaus Gmb H as a sales assistant from 1961 to 1976. She chose to work part

[211] Case C-166/99 Defreyn v Sabena SA, (2000) ECR I- 6155.

[212] E. Ellis, op.cit, p.136-137.

[213] Case C- 128/93 Bilka Kaufhaus Gmb H v Weber Von Hartz, (1994), ECR I-4583.

time from 1 October 1972 until her employment come to an end. Bilka Kaufhaus Gmb H refused to pay her an occupational pension in the reason of, she didn't work full time for minimum period of 15 years.

According to ECJ the direct effect of Article 119 (now 141) can be relied upon in order retroactively to claim equal treatment in relation to the rights to join an occupational pension scheme and this may be done as from 8 April 1986, the date of the Defrenne judgment in which, the Court held for the first time that Article 119 has direct effect. The limitation of the effects in time of the Barber judgment does not apply to the right to join an occupational pension scheme.

ECJ also stated in Vroege v NCIV Instituut voor Volkshuisvesting BV[214] case, that the Barber Protocol didn't apply to claims in relation to the right to join a pension scheme. Mrs. Vroege worked part time at NCIV Instituut voor Volkshuisvesting BV since 1 May 1975. NCIV Instituut voor Volkshuisvesting BV's pension scheme rules provided that only men and unmarried women employed for an indeterminate period and working at least % 25 of normal working hours can join the scheme.

Mrs. Vroege never worked more than %80 of the full day; she was not allowed to pay contributions into the scheme and was unable to acquire pension rights. Later new pension scheme rules come in to force which provides that employees of both sexes who have reached 25 years of age and work at least %25 of normal working hours can join the scheme and also women who were not members before 1 January 1991 can purchase additional years of membership provided, however the had to reach age 50 on 30 December 1990

.Mrs. Vroege didn't reach age 50 at 31 December 1990 and can't rely on this provision. She claimed for discrimination which is incompatible with Article 141. The Court decided that the limitation of the effects in time of the judgment in Barber case concerns only those kinds of discrimination, which employers and pension schemes could logically have deem to be allowable owing to the transitional derogations for

[214] Case C – 57/93 Vroege v NCIV Instituut voor Volkshuisvesting BV, (1994), ECR I-4541.

,which Community law provided and which were capable of being applied to occupational pensions.

ECJ while extending Barber Protocol to all benefits payable under occupational social security schemes and incorporating it into the Treaty, Protocol no.2 essentially adopted the same interpretation of the Barber case[215], as did in the Ten Oever case[216]. However ECJ didn't deal with the conditions of membership of such occupational schemes.

In Magorrian and Cunningham v Eastern Health and Social Service Board[217] case, the question of what is meant by access to a pension scheme raised. In this case Mrs. Magorrian and Mrs. Cunningham were nurses in a mental health sector. They worked full time for a period of time and when their family responsibilities increased they started to work part time. The difference of full and part time work was very small. Both of them affiliated to the Superannuation Scheme. Since 1973, this scheme was open to part time workers too. Mrs. Magorrian retired in 18 October 1992 at age 59. Mrs. Cunningham retired in April 1994 at the age 56. But they couldn't get the pensions for their part time work since the scheme was open to part time workers only if they worked specific number of hours. They applied to national court which referred to ECJ.

ECJ found the application discriminatory. The Court decided that the national limitation period provided the enforcement of community rights impossible in practice.

A worker can claim to join an occupational pension scheme, which is undermined in practice but this doesn't permit the worker to escape paying contributions in relation to the period in question[218].

[215] Case C-262/88 The Barber v Guardian Royal Exchange Assurance Group, (1990), ECR I-1889.

[216] Case C-109/91 Oever v Stichting Bedrijfspensionenfonds voor het Glazenwassers-en Schoomaakbedrijf, (1993), ECR I-4879.

[217] Case C-244/96 Magorrian and Cunningham v Eastern Health and Social Service Board, (1997), ECR I-7153.

[218] Paul Craig and Grainne de Burca, op.cit, p.879-881.

In DEI v Evrenopoulos[219] case the wording in Barber Protocol "workers or those claiming under them" came in to as a question. Mr. Evrenopoulos's wife worked for DEI. On her death Evrenopoulos applied for a survivor's pension to DEI. His application was rejected in the reason of he is not fulfilling the requirements. Mr. Evrenopoulos claimed for the breach of Article 141 but he did his application to the wrong place. Greek Administrative Court addressed him to lodge his objection to Insurance Board in 1991. And then the case went to ECJ for a preliminary ruling.

ECJ stated that the judicial proceedings between the plaintiff and the defendant began with the original action of 12 June 1989 and begun before the essential date of the ruling Barber Protocol.

Other problems have occurred in the field of transitional arrangements, when pension schemes changed their rules to lay down the same pension age for men and women. A case example of this is Smith v Avdel Systems Ltd.[220]. Applicants are Mrs. Smith and four other women who have been working in Avdel Systems Ltd. Applicants are members of the Avdel Pension and Life Assurance Plan Occupational Pension Scheme which have been rune by their employer. In this scheme until 30 June 1991 the retirement age for women are 60 and for men 65. In 1 July 1991 age was set to 65 for both sexes.

According to ECJ until equalizing measures are adopted by a pension scheme, the only way in which there is fulfillment with Article 141, is to give to persons in the disadvantaged class the advantages of those in the favored class. After the time when the fund rules changed Article 141 didn't prevent measures producing equality by reducing the advantage of the persons formerly favored so that from this date beyond it was permitted to have a common pension age of 65. The period before 17 May 1990 wasn't effected by Article 141 since Barber Protocol come out. So EU law didn't validate the retroactive reduction of the advantages which women at that time enjoyed.

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[219] Case C-147/95 Dimosia Epicheirisi Ilectrismou (DEI) v Evthimios Evrenopoulos.

[220] Case C- 408/92 Smith v Avdel Systems Ltd, (1994), ECR I-4435.

Another important case in this field is of occupational pensions is Coloroll Pension Trustees Ltd. v Russell[221] case. Coloroll Pension Trustees Ltd. Holds and handle the assets of the schemes created by the various companies in the Coloroll Group for their employees with the aim of providing them with pensions and other benefits promised by the employer. The Coloroll pension scheme is final salary scheme which is provided to employees when they reach normal retirement age which is 65 for men and 60 for women.

Article 119 (now 141) can be relied upon against the trustees of an occupational pension scheme since the effectiveness of the Article 1119 would be reduced and the legal protection required to guarantee real equality would be damaged, if an employee or an employee's dependants could rely on that provision only as against the employer. The pension beneficiary can continue against the employer in the case of default by the pension fund. So in this case survivor's rights are directly effective. And the temporal limitation in Barber case applies to survivor's pension too.

The Coloroll case established that Article 141 doesn't apply to additional benefits consequent on additional voluntary contributions made by the employee.

Another case example is Birds Eye Walls Ltd. v Roberts's[222] case. This case was about the legality of bridging pension in UK. The mean of the bridging pension is to equalize the financial package received by male and female employees retiring early. But to get this pension scheme smaller sum were paid to women aged between 60 and 65 than to men of the same age because of the women's earlier right to a state pension. Mrs. Roberts claimed that there is a breach of Article 141.

However ECJ didn't get to that result. The Court decides that bridging pensions constitutes a pay. So ECJ looked out at comparison, if there is a discrimination or not. And decide that there is no discrimination in the means of Article 119 (now 141).

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[221] Case C-200/91 Coloroll Pension Trustees Ltd. v Russell.

[222] Case C-132/92 Birds Eye Walls Ltd. v Roberts, (1993), ECR I-5579.

ECJ's case law on the meaning of pay according to Article 141 can be used in the fields of Race Directive and the Framework Directive. But in Framework Directive there is an exception about occupational pensions which is:

*"The fixing of occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those Schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex"*

### 2.2 The Occupational Social Security Directive

Several types of pension schemes have been legislated by the Council with The Occupational Social Security Directive[223]. The purpose of this Directive is to apply the principle of equal treatment in occupational social security schemes.

The Directive in Article 2(1) gives the definition of occupational social security scheme:

*"Occupational social security schemes' means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity or occupational sector or group of such sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional."*

The Bilka – Kaufhaus[224] and Barber[225] cases type of supplementary pension schemes and substitute pension scheme is in the content of this Directive[226].

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[223] Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ (1986) L225/40.

[224] Case 170/84 Bilka- Kaufhaus v Weber von Hartz, (1986), ECR 1607.

[225] Case C-262/88 The Barber v Guardian Royal Exchange Assurance Group, (1990), ECR I-1889.

The Directive in Article 2 (2) tells the places where it can't be applied:

*"This Directive does not apply to:*

*(a) individual contracts,*

*(b) schemes having only one member,*

*(c) in the case of salaried workers, insurance schemes offered to participants individually to guarantee them:*

*- either additional benefits, or*

*- a choice of date on which the normal benefits will start, or a choice between several benefits."*

So The Directive does not apply to:

- individual contracts for self-employed workers;
- schemes for self-employed workers having only one member;
- insurance contracts for employees not involving the employer;
- the optional provisions of occupational schemes offered individually to participants;
- occupational schemes financed by contributions paid by workers on a voluntary basis.

The Directive include the treatment of members the working population, which can be listed as: self-employed workers, workers whose activity is interrupted (by illness, maternity, accident or involuntary unemployment), persons seeking employment, and retired and disabled workers and their beneficiaries[227].

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[226] Ibid., p.881-884.

The Directive in Article 4 mentions the situations where it provides protection:

"*This Directive shall apply to:*

*(a) occupational schemes which provide protection against the following risks:*

*- sickness,*

*- invalidity,*

*- old age, including early retirement,*

*- industrial accidents and occupational diseases,*

*- unemployment;*

*(b) occupational schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits are accorded to employed persons and thus constitute a consideration paid by the employer to the worker by reason of the latter's employment."*

So The Directive applies to occupational schemes providing protection against the risks of sickness, invalidity, old age, industrial accidents, occupational diseases and unemployment, including occupational schemes which provide for other social benefits, such as survivor's benefit and family allowances if intended for employed persons[228].

According to the Directive there must be no discrimination on the basis of either directly or indirectly.

Special protective provisions for women relating to maternity permitted.

Directive in Article 6(1) gives a list which contains sex discrimination circumstances:

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[227] E. Ellis, op.cit, p.143-145.

[228] Ibid., p.145-151.

"*Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family for:*

*(a) determining the persons who may participate in an occupational scheme;*

*(b) fixing the compulsory or optional nature of participation in an occupational scheme;*

*(c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;*

*(d) laying down different rules, except as provided for in subparagraphs (h) and (i), for the reimbursement of contributions where a worker leaves a scheme without having fulfilled the conditions guaranteeing him a deferred right to long-term benefits;*

*(e) setting different conditions for the granting of benefits of restricting such benefits to workers of one or other of the sexes;*

*(f) fixing different retirement ages;*

*(g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;*

*(h) setting different levels of benefit, except insofar as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of benefits designated as contribution-defined; (i) setting different levels of worker contribution;*

*setting different levels of employer contribution in the case of benefits designated as contribution-defined, except with a view to making the amount of those benefits more nearly equal;*

*(j) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in subparagraphs (h) and (i), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme."*

The Directive allows the use of gender specific actuarial calculations in some situations[229].

Article 9 contains exceptions for pensionable age and survivors benefits which are restricted with self employed:

"*Member States may defer compulsory application of the principle of equal treatment with regard to:*

*(a) Determination of pensionable age for the purposes of granting old-age or retirement pensions, and the possible implications for other benefits:*

*- Either until the date on which such equality is achieved in statutory schemes,*

*- Or, at the latest, until such equality is required by a directive.*

*(b) Survivors' pensions until a directive require the principle of equal treatment in statutory social security schemes in that regard;*

*(c) The application of the first subparagraph of Article 6 (1) (i) to take account of the different actuarial calculation factors, at the latest until the expiry of a thirteen-year period as from the notification of this Directive."*

According to Article 9(a) where men and women may claim a flexible pension age under the same conditions this shall not be considered to be incompatible with the Directive.

[229] Paul Craig and Grainne de Burca, op.cit, p.881-890.

## 2.3 Other Payments Made by Employer to Employees

Article 141 can be extended to a variety of payments made as a result of statutory obligations cost on employers.

ECJ figure outs ,which are integrated in the calculation of the gross salary payable to the employee and which directly affect the calculation of other advantages linked to the salary, form part of the worker's pay[230] .

According to ECJ, all forms of redundancy payments are within the scope of Article 141.

In Seymour – Smith and Laura Perez v Regina v Secretary of State for Employment[231] case, Ms. Seymour-Smith started work as a secretary with Christo & Co. on 1 February 1990, and was dismissed on 1 May 1991. On 26 July 1991 she complained to the Industrial Tribunal that she had been unfairly dismissed by her former employers. Ms Perez commenced employment with Matthew Stone Restoration Limited on 19 February 1990 and was dismissed on 25 May 1991. On 19 June 1991 she made a complaint of unfair dismissal by her former employers to the Industrial Tribunal. On 20 June 1991 she was informed by the Central Office of Industrial Tribunals that they would not register her complaint as she had not been employed for more than two years. However, on 12 August 1991, she complained again to the Industrial Tribunal, reiterating that she had been unfairly dismissed. On 15 August 1991 they applied to the High Court of Justice for leave to move for judicial review of the disputed rule on the ground that it was contrary to Directive 76/207. The High Court dismissed the application for judicial review. The applicants appealed against that decision to the Court of Appeal. The Court of Appeal asked whether an award of compensation for breach of the right not to be unfairly dismissed under national legislation constitute "pay" within the meaning of Article 119 of the EC Treaty.

[230] E. Ellis, op.cit, p.151-154.

[231] Case C- 167/97 Seymour – Smith and Laura Perez v Regina v Secretary of State for Employment, (1999), ECR I-623.

ECJ decided that compensation given pursuant to a judicial decision for breach of the right not to be unlawfully dismissed constitutes pay within the meaning of Article 119 of the Treaty. Such compensation is designed in particular to give the employee what he would have earned if the employer had not unlawfully terminated the employment relationship. It falls within the definition of pay for the purposes of Article 119 of the Treaty. So the Court decided that compensation is a pay and is within the scope of Article 141.

An important case in this filed is Rinner- Küehn v FWW Spezial – Gebaudereinigung Gmb. H[232] case. Mrs. Rinner Küehn is an employee of FWW as an office cleaner. FWW refused to pay her salary during her absence for reasons of illness. ECJ decided that the employer's payments under this situation form pay according to Article 141. So the continued payment of salary to a worker in the event of illness falls within the definition of pay.

In Commission v Belgium[233] case there is a scheme which established special payments for elderly workers on redundancy. Being appropriate for this payment depend on eligibility for unemployment benefit. Women weren't allowed to unemployment payment after the age of 60. But men could get this payment. The payments were made by the workers last employer. ECJ stated that the additional payment at issue must be considered to constitute pay within the meaning of Article 141.

A payment can be pay within the meaning of Article 141 even if it is not supported to any degree at all by the employer. A case example of this is Gillespie[234] case. In this case ECJ based its decision on the payments foundation in the employment relationship.

Article 141 (1) and (2) refers especially to term "pay". Pay can broaden too many other forms of consideration arranged by the employer to the employee in esteem

[232] Case 171/88 Rinner- Küehn v FWW Spezial – Gebaudereinigung Gmb. H, (1989), ECR 2743.

[233] Case C 173/91 Commission v Belgium, (1993), ECR I- 673.

[234] Case C – 342/93 Joan Gillespie and Others v Northern Health and Social Services Boards, (1996), ECR I-475.

of the employment. So we can put for example holiday entitlements, access to canteen facilities in the file s of pay. These were given as remuneration for the job done.

If we look out how far the term "pay" goes in ECJ case law, we can see Barber v Guardian Royal Exchange Assurance Group[235] case. The Court in this case took a perspective approach to how pay levels are to be compared. ECJ apply a global type of consideration to the pay received by each sex.

ECJ used this approach in Brunnhofer v Bank der Österreichischen Postparkasse AG[236] case. The case was about difference between the remuneration paid by the Bank der Österreichischen Postparkasse AG to Ms. Brunnhofer and that paid to male workers. The Court in this case decides that the essential elements of the pay package must be compared. If it is found that they are in imbalanced value, then there would be a infringe of equal pay principle.

## 3. THE MEANING OF EQUAL WORK

According to Article 141 each Member State shall ensure that the principle of equal pay applies for male and female workers for equal work or work of equal value is applied[237].

So there two conditions first one is equal pay for equal work and the second one is work of equal value.

### 3.1 Equal Pay for Equal Work

Article 141 rules equal pay where men and women perform equal work. This applies to pay discrimination in the terms of Race Directive and the Framework Directive.

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[235] Case C- 262/88 Barber v Guardian Royal Exchange Assurance Group,(1990), ECR I-1889.

[236] Case C- 381/99 Brunnhofer v Bank der Österreichischen Postparkasse AG, (2001), ECR I- 4961.

[237] Paul Craig and Grainne de Burca, op.cit, p881.

The clearest case where equal work is performed is where two people perform identical jobs for the same employer in a single establishment.

In here the question whether Article 141 extended to the performance of identical jobs for the same employer in different establishments or the performance of identical jobs for different employers arise. The answer to both of these questions must be yes. The important issue is what is being valued when two jobs are classified as equal work.

There are two different approaches to this. First one is to examine the value of the jobs in terms of their content and the demands they place on workers. Second one is to determine the value of the jobs to the employer by means of measuring. Generally the first approach is preferred[238].

ECJ in Macarthys Ltd. v Smith[239] case made it clear that its approach is the first one. The Court stated that the vital test lies in establishing whether there is a difference in treatment between a man and woman performing equal work.

*"The scope of that concept…. is entirely qualitative in character in that it is exclusively concerned with the nature of the services in question."*

So it doesn't matter where of for whom equal work is performed. If the nature of the services is identical then it must be equal.ECJ may have to deem that Article 141 widen to comparisons with colleagues in other establishments belonging to the same employer and even with comparators working for different employers.

The comparison issue came in front of ECJ at Commission v Denmark[240] case. The Court didn't answer this question in this case. But AG comment that Article 141 extend to comparison outside the workers immediate workplace.

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[238] E. Ellis, op.cit, p.158-162.

[239] Case 129/79 Macarthys Ltd. v Smith, (1980), ECR 1275.

[240] Case 143/83 Commission v Denmark, (1985), ECR 427.

ECJ in a case concerning Equal Pay Directive gave an answer to comparison issue. It was Commission v UK[241] case. In this case the Court suggests that the issue requires comparison outside the employer's establishment. According to ECJ Directive needs that a worker has to be allowed to claim before an appropriate authority that his work has the same value as other work. So what ECJ meant in this decision is Article 141 can need compassions with pay of the employees outside the claimant's immediate working place.

In another case Lawrence v Regent Office Core Ltd.[242] another question came in front of ECJ. The question is whether a group of women workers could compare their pay with that of men working for a different employer in situations of jobs were of equal value. The Court in this case stated that in this kind of a situation in ,which differences identified in the pay conditions of workers of different sex performing equal work or work of equal value, can't be qualified to a single source doesn't come within the scope of Article 141 . So situation doesn't fall in the scope of Article 141.

ECJ repeated this formulation in Allonby v Accrington and Rossendale College[243] case. The Court in this case didn't find the condition of Mrs. Allonby comparable with male lecturers which are directly employed buy the college. Since Mrs. Allonby was employed by contractor which is ELS.

In the condition of two jobs of equal value then another question rises whether their unequal remuneration is grounded on discrimination. The law assumes that discrimination exists then the employer has the chance to defend the claim by proving that the unequal pay has different reason.

A case example for this can be Angesttenbetriebsrat der Weiner Gebeitskrankenkasse v Wiener Gebeitskrahnkenkasse[244] case. In this case

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[241] Case 61/81 Commission v UK, (1982), ECR 2601.

[242] Case C 320/00 Lawrence v Regent Office Core Ltd, (2002), ECR I- 7325.

[243] Case C256/01 Allonby v Accrington and Rossendale College, (2004).

[244] Case C-309/97 Angesttenbetriebsrat der Weiner Gebeitskrankenkasse v Wiener Gebeitskrahnkenkasse, (1999), ECR I- 2865.

psychotherapy services were provided by both doctors and psychologist. The second group which are constitute of psychologists are consisting of women and they complained of being less paid than doctors. National court asked ECJ whether the different qualifications of two groups meant that their work couldn't be considered equal. The Court stated that different qualifications may mean that what seem to be identical jobs are not in reality the same. So the term same work doesn't apply where the same activities are performed over a considerable length of time by persons the basis of whose qualification to exercise their profession is different.

In the condition that two employees are classified in the same job category under a collective agreement is not enough to demonstrate that they are doing equal work.

According to ECJ equal work must be understood on the basis of objective criteria, not subjective matters.

The concept of equal work in jobs held simultaneously come in front of ECJ in Macarthys Ltd. v Smith[245] case. In this case the Macarthys Ltd. employed a man as a manager until 1975 and paid him f 60 per week. After four months later Macarthys Ltd. employed a woman for the same job but paid her f50 per week. The Court decided that this case gets is the filed of Article 141. ECJ didn't make a reference to four months of time between two periods of employment. If other things are equal than comparison can be made.

### 3.2 Work of Equal Value

ECJ even before the amendment of Article 141 by Amsterdam Treaty accepted that the expression "equal work" includes the conditions where two jobs were of equal value.

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[245] Case C- 129/79 Macarthys Ltd. v Smith, (1980), ECR 1275.

In Defrenne v Sabena[246] case the Court wasn't in this view and it went into secondary legislation of the Community.

But in Jenkins v Kingsgate Ltd.[247] case ECJ pointed out Equal Pay Directive, which expresses equal pay for work to which equal value.

But a change in ECJ's approach occurred in Murphy v Bord Telecom Eireann[248] case. Ms. Murphy is an employer of Bord Telecom. She maintained telephones. Ms. Murphy claimed to have been paid of the same rate as male colleague which was employed as stores laborer. The Irish High Court referred to ECJ for preliminary ruling and asked if the Community law principle of equal pay for equal work extend to a claim for equal pay on the basis of work of equal value. ECJ decided that this case gets in the scope of Article 141.

The real problem in equal value is to know whether the substantial equality is all that necessary by Article 141 or whether there must be absolute mathematical equality.

## 4. DIRECT EFFECT OF EQUAL PAY PRINCIPLE

A provision of EU law is directly effective where it is enforceable by a legal person in the court of the Member States. The first case where direct effect of the equal pay principle shows is the First Defrenne[249] case.

In order to take direct effect a provision must satisfy certain criterion of precision which is: the scope of the obligation it creates must be clear and it must also be unconditional, non – discriminatory and final.

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[246] Case 43/75, Gabrille Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena, (1976), ECR 455.

[247] Case C 96/80, Jenkins v Kinsgate Ltd, (1981) ECR 911.

[248] Case 157/86 Murphy v Bord Telecom Eireann, (1988), ECR 673.

[249] Case 80/70 Defrenne v Belgium, ( 1971), ECR 445.

ECJ in the Second Defrenne[250] case agree with AG Lamothe whom in the first Defrenne case opinion was to giving direct effect to Article 141.

But when we look at Article 141 and compare it with the requirements of a provision to take direct effect we see that Article 141 couldn't assure the conditions of a provision to have direct effect. The scope of obligation is indefinite.

The concept of equal work and equal pay is unclear. Nonetheless ECJ in its decision at Second Defrenne case gave direct effect to Article 141. ECJ would come to the same conclusion about the principle of equal pay which is included in the Race Directive[251] and the Framework Directive[252].

The equal pay obligation became unconditional as far as the founding Member States were concerned as from the end of the first stage, from the beginning of 1962 January. If the Article possesses the characteristics compelled to produce direct effect then this has been so ever since it ended to be conditional at the beginning of 1962.

ECJ gave prospective direct effect to Article 141 as an exception in Amministrazione delle Finanze dello Stato v Denkavit Italiana Srl.[253] Case. Again in Grzelczyk v Cenrte Public d' Aide Sociale[254] case ECJ gave perspective effects to Article 141.

The temporal limitation which has been expressed in Barber case[255] doesn't extend to matters outside the pensions field.

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[250] Case 43/75 Gabrille Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena, (1976), ECR 455.

[251] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180.

[252] Council Directive2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16.

[253] Case 61/79 Amministrazione delle Finanze dello Stato v Denkavit Italiana Srl., (1980), ECR 1205.

[254] Case C-184/99 Grzelczyk v Cenrte Public d' Aide Sociale, (2001), ECR I- 6193.

[255] Case C-262/88 The Barber v Guardian Royal Exchange Assurance Group, (1990), ECR I-1889.

The Defrenne time limitation doesn't prevent Member States from enacting more extensive retroactive rights to equal pay within their own jurisdictions.

With Second Defrenne case equal pay principle gains horizontal direct effect. The meaning of this is it can be enforced against employers who are private persons or companies and against organs of the State.

The extent of Article 141's direct effect is limited. So there may be some conditions in which the Article compels the Member States 's to provide equal pay for equal work but there are some conditions in which the Article itself can't be directly imposed. In Second Defrenne case ECJ made a distinction which is direct and overt sex discrimination and disguised discrimination. In the condition of direct and overt discrimination Article 141 gain direct effect. But in the condition of indirect discrimination and disguised discrimination Article 141 doesn't have direct effect. ECJ in its later case law didn't use the terms "direct and overt" and "indirect and disguised".

Article 141 is directly effective, when female and male workers perform identical jobs concurrently in the same establishments where they perform such jobs at different times, when there is indirect discrimination over pay in relation to men and women performing identical jobs and when there is gender plus discrimination in relation to identical jobs.

There's another problem which is whether the Article 141 is directly effective when two jobs compared are not identical but are supposed to be of equal value. An answer is given to this question at Murphy v Nord Telecom Eireann[256] case. In this case ECJ stated that Article 141 is directly effective when the claimant can explain that she is occupied on work of higher value than that of her male comparator. The same can be applied to where the work established to be of equal value.

The power of equal pay principle has been weakened in the field of occupational pension scheme.

[256] Case 157/86 Murphy v Nord Telecom Eireann, (1988), ECR 673.

A rate of pay infringes Article 141 and automatically submitted invalid. A case example of this is Kowalska v Freie und Hansestadt Hamburg[257] case. In this case there was a discrimination occurring under the terms of a collective agreement. And the mentioned principle applied to this case.

## 5. EQUAL PAY DIRECTIVE 1975

The Equal Pay Directive[258] was accepted at 1975. This Directive is an attempt to complement the laws of the Member States in relation to the principle of equal pay. Therefore at that date principle of pay equality is an essential value to the Community.

The Equal Pay Directive was seen as granting a valuable additional means of control by the Commission over the Member States in relation to pay equality.

The need for Directive was diminished with ECJ's Defrenne v Sabena case[259] in which the Court ruled that Article 141 was directly effective.

### 5.1 Content of Equal Pay Directive

According to Article 1(1) of the Directive:

*"The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration."*

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[257] Case 33/89 Kowalska v Freie und Hansestadt Hamburg, (1990), ECR I- 2591.

[258] Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ (1975) L 45/19.

[259] Case 43/75, Gabrille Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena, (1976), ECR 455.

There are two features of substance of this provision. First one is the nature of work to be compared. Second one is the scope of the prohibition on discrimination.

When comparing the nature of work Article refers to the same work or work to which equal value is endorsed. So there is a need for an actual comparator of the opposite sex.

The term "same work" means that two people are employed to perform identical jobs. For this we must look at the nature of the tasks performed. A case example of this is Jenkins v Kingsgate Ltd. case[260]. So a full time employee and part time employee on the same process would seem to be performing the same work.

Another term is "work to which equal value is attributed". ECJ on this term focuses on job content in assessing the value of work.

The second part of Article 1(1) of the Directive is concerned with the scope of the prohibition of discrimination.

*"In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex".*

Article 1 (2) refers to removal of all discrimination. So it can be said that indirect and direct discrimination is outlawed by both Article 141 and The Equal Pay Directive. However the discrimination must be on grounds of sex. So gender must be the cause of the differential treatment of the men and women.

Again in Article 1(1) of the Directive sex discrimination is forbidden with regard to "all aspects and conditions of remuneration". This part of the Article differs it from EC Treaty Article 141. If we look at this term "aspect" in here it means that any benefit extended to employee by an employer by means of the contract of employment

[260] Case C 96/80, Jenkins v Kinsgate Ltd, (1981) ECR 911.

could be identified as pay. And the word "conditions" enables a worker to challenge the way in which or the terms on which pay is made available.

This part of the Article 1 (1) of the Directive supports the view taken in Barber case[261]. So with this, Article 141 prohibits discriminatory admission to pay and discrimination in relation to the quantum of pay received.

We can see this in the Framework Directive and Race Directive too.

In cases of sex discrimination over pay which fall outside the scope of the direct effect of Article 141, there's nothing in the Directive which supplies direct effect. In this situation, a person can rely on the "Francovich Principle[262]" in order to claim damages from the State itself for its breach of EU obligations[263].

In Article 2 of the Directive there is a refer to the pursuit of claims by judicial process.

Directive Article 2:

*"Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities."*

The meaning of this is the issue must be decided by an independent judge.

Directive Article 3:

*"Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay."*

[261] Case C-262/88 The Barber v Guardian Royal Exchange Assurance Group, (1990), ECR I-1889.

[262] The ECJ developed a general principle of state responsibility for compliance with EC law in a case in the field of employment rights: Andrea Francovich and others v Italian Republic, joined cases C-6/90 and C- 9/90, (1991), ECR I- 5357. The resulting principle of state liability is called the "Francovich principle" of state liability.

[263] Heather Joshi, op.cit. p.37-55.

According to this Article legislation which conflict with equal pay principle will be annulled by the Member States. This provision gives a duty to Member States. This duty is definite and extends to legislation which pre dated the Directive.

Directive Article 4:

"*Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.*"

The meaning of this Article is all types of discrimination on the grounds of sex are barred from collective agreements and the rest.

Directive Article 5:

"*Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal pay.*"

This Article is concerned with the victimization of those who claim a breach of the equal pay principle. This Article is wide. It mentions two groups first one is who have simply made a complaint within the undertaking; second one is who have actually launched legal proceedings. But this Article provides no protection for workers who are ill treated in some way and falls short of discharge. Article 5 could only be enforced only vertically against an employer which was an organ of the State. The reason of this is ECJ in its case law about Equal Pay Directive and Article 141 didn't mention this Article. But in the case if the Court had decided about this Article then Article 5 would be similar to Article 141 and can be enforced both vertically and horizontally since it would have direct effect[264].

[264] E. Ellis, op.cit, p.190-206.

Directive Article 7:

*"Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment."*

The Framework Directive gives one year to Member States to put in force the legislation essential to ensure compliance.

### 5.2 Equal Pay Directive and Article 141

If we look at ECJ's view about the relationship between Equal Pay Directive and Article 141. There are two different approaches of ECJ.

In its first decision at Defrenne v Sabena case[265] ECJ stated that community secondary legislation implement Article 119 from the point of view of broadening the narrow criterion of equal work so saying that Directive went further in its provisions than Article 141.

But in 1980's ECJ changed its approach in Defrenne case with Jenkins v Kingsgate Ltd. case[266]. The Court decide that Article 1 of the Equal Pay Directive which is mainly designed to assist the practical application of the principle of equal pay outlined in Article 119 ( now 141) of the Treaty in no way changes the content or scope of that principle as defined in the Treaty.

Today the Equal Pay Directive only explains the obscure aspects of Article 141. The major aim of the Directive must be to explore the ways in which it clarifies Article 141.

[265] Case 43/75 Gabrille Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena, (1976), ECR 455.

[266] Case 96/80 Jenkins v Kinsgate Ltd, (1981) ECR 911.

Article 141 is important in two aspects. First one is it puts obligations on Member States to ensure that its terms are complied with it. Second one is it is capable of granting directly enforceable rights on individuals The Equal Pay Directive can have a role on both of these aspects. It can explain clearly what duties are cast on Member States and assist the direct effect of Article 141. It has been asked several times to ECJ whether the Equal Pay Directive have direct effect or not but there's yet no answer is given to this question by the Court.

# CHAPTER IV. ANTI DISCRIMINATION AND TURKISH LAW

In this part of this work there will be a overlook at Turkish law and its anti discrimination legislations. As far as Turkey is a candidate for European Union, it's important to examine Turkish law on the basis of discrimination in comparison with EU law. Turkish Constitution of 1982 guarantees the gender equality and sets the principle of non discrimination. So the first guide in Turkish law about anti discrimination would be Turkish Constitution of 1982.

## 1. CONSTITUTIONAL LAW AND EQUALITY

Republic of Turkey is founded on the sovereignty of the nation, and is a democratic republic. Republic is a product of all citizens' equal willpower. So it depends on the equality of the nationals. In harmony with this we can think that equality principle is a natural element of being a republic[267].

Article 2 of the Turkish Constitution of 1982:

*" The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism Atatürk , and based on the fundamental tenets set forth in the Preamble"*

In this Article the Constitution didn't clearly mention the equality principle. But in the Article it used the term "fundamental tenets set forth in Preamble" and made reference to the Preamble paragraph 9. In Preamble paragraph 9 mentions that Turkish citizens have absolute respect for one another's right and freedoms, mutual love and

[267] Ergun Özbudun, Türk Anayasa Hukuku, Yetkin Yayınları 2003.

fellowship and the desire for. So these words put the equality aspect of Turkish Republic[268].

Again in Preamble paragraph 8 there's a clear hint about equality principle which is: It is the right of every Turkish citizen to lead an honorable life and to develop his or her material and spiritual assets under the aegis of national culture, civilization and the rule of law, through the exercise of the fundamental rights and freedoms set forth in this Constitution in conformity with the requirements of equality and social justice[269].

Turkish Constitution of 1982 Article 4:

*"The provisions of Article 1 of the Constitution establishing the form of the State as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed."*

If we examine this Article, it counted Article 2 in the list of irrevocable provisions, so with adding of Article 2 automatically the Preamble gets into the irrevocable provisions list since Article 2 made a clear reference to it.

Turkish Constitutional Court in its decision mentioned that Article 10 of the Constitution is an essential notion of the Turkish Republic. Article 10 of the Turkish Constitution of 1982 mentions the equality before the law[270].

There are anti discriminatory provisions in the Constitution. According to Article 10 all individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion

[268] Merih Öden, Türk Anayasa Hukukunda Eşitlik İlkesi, Yetkin Yayınları, 2003.

[269] Ibid.

[270] E. 1980/45, k.t. 1.7.1980 , AYMKD, S.18, s.253.

and or any such consideration. Men and women have equal rights. The Sate shall have the obligation to ensure that this equality exists in practice[271].

No privilege shall be granted to any individual, family, group or class.

State organs and the administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.

So according to Turkish Constitution of 1982 discrimination is prohibited on the issues mentioned in Article 10 and told that such discriminatory classifications would be against the equality principle of the Constitution.

Gender discrimination is outlawed with Article 10 of the Constitution. Any gender discriminatory legal classification and differentiation would be a breach of the Constitution.

A case example can be given in this field which is about Uniform Code of Military Justice. In this legislation there was an article which forbids women to participate in public trials. This provision was repealed in the reason of the principle that the trials must be opened to everyone. However Constitutional Court in its decision mentioned that there is no legitimate reason to discriminate women since they have the same rights as the men[272].

So in the condition of discrimination on the basis of gender made at the legislation that provision would be void in the light of equality principle.

## 2. LABOR LAW AND ANTI DISCRIMINATION

The negative approach of labor law about women's joining to work life has been tried to be eliminated by social security law. The provisions in social security law

[271] Ibid.

[272] E. 1963/143, K. 1963/167, K.t. 26/6/1963, AYMKD, S. ,1.s , 346-47 350.

have the approach that women can't stand on their feet. So social security law gave women rights in the system to help her to take care of her[273].

In Civil Servants Law there are several provisions that protect women.

Civil Servants Law[274] Article 106 stated that health care would be made to the son of the insured in case if he is fewer than 18, if he is middle education to 20, higher education to at most 25. But daughter of the insure can get the health care help unless she get married, worked or get an salary from any social security institution. So insured's sons have been discriminated in the favor of daughters[275].

Civil Servants Law made distinction between men and women in the filed of maternity health support. Men have to pay 120 days maternity insurance premium before one year of the birth. But women's would pay 90 days. It's hard to find a justification for this legislation. So this provision aims to ease the mother's condition to use this instrument. But there is a clear discriminatory approach in here in the area of maternity health support there must be a no distinction between men and women. So this legislation needed to be changed in near future[276].

Again according to Civil Servants Law men can earn retirement payment when they get in age 60 but women can get it at age 58. So this is a type of discrimination made in the favor of women again. But EU Directive 79/7 seems to be coherent with this rule. Law makers try to protect women by creating a discriminatory legislation in.

According to Civil Servants Law the requirement to earn death pension for widow the only condition is she will married again. But for widower can get this pay if he is over 55 and needs this payment. But this provision has been changed because of its discriminatory content. In 1985 this has been changed. Now the widow or widower until the time they get married again then they can get this payment.

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[273] Ali Güzel, A. Rıza Okur and Nurşen Caniklioğlu, Sosyal Güvenlik Hukuku, Beta, 2009.

[274] Sosyal Sigortalar Kanunu , Kanun No:506, RG 11766-11779, 1964, s.2827.

[275] Pir Ali Kaya, Avrupa Birliği ve Türk İş Hukuku Bağlamında Eşitlik İlkesi, Dora, 2009.

[276] Ali Güzel, Türk İş Hukukunun Avrupa Topluluğu İş Hukuku Açısından Değerlendirilmesi, İzmir, 1992, p.26-27.

According to Civil Servants Law in the condition of the death of the insured if the daughter of the insured get a payment monthly and in the while getting married she would get a payment of a years of her monthly payment in one time. This marriage help is only given to daughters not to the sons. But there is an issue in here. Sons could get their monthly payment even in the condition of marriage if he is going to the college. This is a support for girls to get married in early ages[277].

In Turkish social policy family scheme is only given to government employees. This pension scheme is given with the monthly payments. And in the condition if the wife and husband are both government employees then this pension would be paid to only men. This is a discriminatory provision. This provision has been made in the light of Civil Code of Turkish Law in which the husband was the householder. But Civil Code has changed this provision and both partners become equal in house holding. So this provision should change in the light of Civil Code[278].

Labor Act of Turkey[279] in Article 5 mentions the principle of equal treatment:

"*No discrimination based on language, race, sex, political opinion, philosophical belief, religion and sex or similar reasons is permissible in the employment relationship.*

*Unless there are essential reasons for different treatment, the employer must not make any discrimination between a full-time and a part-time employee or an employee working under a contract made for a definite period and one working under a contract made for an indefinite period.*

*Except for biological reasons or reasons related to the nature of the job, the employer must not make any discrimination, either directly or indirectly, against an employee in the conclusion, conditions, execution and termination of his employment contract due to the employee's sex or maternity.*

[277] Ali Güzel, A. Rıza Okur and Nurşen Caniklioğlu, Sosyal Güvenlik Hukuku, op. cit.

[278] Nurşen Caniklioğlu, "Sosyal Hukukta Ayrımcılık Olarak Değerlendirilebilecek Düzenlemeler ve Mağduriyetin Giderilmesi İçin Başvurulabilecek Yollar", 2004, Marmara University p.680-682.

[279] İş Kanunu, Kanun No: 4857, RG 25134, 2003.

*Different remuneration for similar jobs or for work of equal value is not permissible.*

*Application of special protective provisions due to the employee's sex shall not justify paying him a lower wage.*

*If the employer violates the above provisions in the execution or termination of the employment relationship, the employee may demand compensation up to his four months' wages plus other claims of which he has been deprived. Article 31 of the Trade Unions Act is reserved.*

*While the provisions of Article 20 are reserved, the burden of proof in regard to the violation of the above stated provisions by the employer rests on the employee.*

*However, if the employee shows a strong likelihood of such a violation, the burden of proof that the alleged violation has not materialized shall rest on the employer."*

Turkish labor law seems to accept substantive equality. And with Article 5/3 of the Labor Act of Turkey we can see that Turkish labor law has prohibited gender and pregnancy discrimination but also prohibited indirect discrimination too[280].

And in Article 96 of Labor Act of Turkey the responsibilities of the employer had been mentioned and one of them is not to discriminate over the employees[281]:

*"Employers and their representatives shall not make suggestions as a basis for replies by employees from whom information is requested by the labor inspectors responsible for supervision and inspection, nor shall they incite or compel employees in any manner whatsoever to conceal or distort the facts, or discriminate against them in any way on account of information supplied or communications or applications addressed by them to the competent authorities."*

[280] Kübra Doğan Yenisey, "İş Kanununda Eşitilik İlkesi ve Ayrımclık Yasağı, Çalışma ve Toplum", Cilt:4, Sayı:11, 2006.

[281] Can Tuncay, "Türk İş Hukukunun Avrupa Birliği İş Hukukuna Uyumu, AB Türkiye ve Endüstri İlişkileri", İstanbul, Derleyen: Alpay Hekimler, 2004.

In Turkey women have to work 87 days more than men to earn same as a men in a year[282]. Women's started "Red Purse Campaign" in order to take attention into equal pay. Red Purse Campaign has been firstly started in USA at 1988. In Turkey it's celebrated firstly at 2009.

## 3. EU LEGISLATION HARMONIZATION PROGRAM AND ANTI DISCRIMINATION

Turkey with 10 November 2008 dated Council of Ministers decision has determined the works that have to be done in order to harmonize Turkish legal system with EU[283]. This has been called "Turkey's Programme for Alignment with the Acquis"

In the second part of the Programme which is named political rights contains rights for women.

According to this Programme Turkey will within the Civil Servants Law and Labor Law enable the mother and father to share maternity leave without pay, thereby creating a parental leave.

Turkey will strengthen women's education, labor and political participation and social life so by that way women's status in community will arisen. And will continue to support women organizations too[284].

Turkey will give special training about women's right to judges, prosecutors, city halls and law enforcements. Turkey in order to increase women's labor force will expand micro credits in all provinces. These are some of the provisions in the Programme concerning women's rights and their involving in labor force.

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[282] TÜSİAD, Kadın- Erkek Eşitliğine Doğru Yürüyüş: Eğitim, Çalışma Yaşamı ve Siyaset, TÜSİAD Yayınları, İstanbul 2000.

[283] Nazan Moroğlu, "Avrupa Birliği Antlaşmalarında ve Yönergelerinde Kadın ve Erkek Eşitliği", Sicil İş Hukuku Dergisi, Cilt:1, Sayı:4, İstanbul , 2006, p.213.

[284] Kübra Yenisey Doğan, "Kadın Erkek Eşitiliği Bakımından Türk İş Hukukunun Avrupa Birliği İş Hukuku ile Olası Uyum Sorunları", İş Hukuku ve İktisat Dergisi, Cilt:6, Sayı:4, Ankara, 2004,p.4-39.

In the fields of discrimination and equal pay Turkey's current legislation seems to be compatible with EC Directives. Even in some areas Turkey gave women more rights than the EU Directives (especially in the social security area as mentioned above). In principle we can see that there's a harmonization between EU and Turkish law but there are still some challenges needed to be passed.

In EU Directives there is a special place of the rule of non discrimination in the area of engagement in a work. So these kind of arrangements needed in Turkish legal system too.

In Turkish legislation we can see the terms direct and indirect discrimination and both of them are prohibited. But a clarification is needed. Especially in terms of sexual harassment which is only mentioned in Turkish Penal Code but needed to be mentioned in Labor law too[285].

If we compare some of the Directives and Turkish legislation:

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 - This Directive and Turkish legislation in this area seems to be coherent.

Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex – This Directive and Turkish legislation is partially coherent.

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social policy – This Directive and Turkish legislation is partially coherent but Turkish legal system gave women more rights in this area than men which creates discrimination.

[285] Ibid. ,p.4-39.

The inequality between men and women in Turkey starts from education. If we look at the statistics in EU women who have college degree are % 58, women with doctoral degree are % 41. But in Turkey women who have college degree are % 34, 6 and unfortunately every one of the four women don't go to any school at all (these are 2000 statistics of TÜSİAD).

## 4. INTERNATIONAL AGREEMENTS

Turkey ratified the UN Convention for the Elimination of Any Discrimination Against Women (CEDAW) in December 1985. CEDAW demands the realization of the same rights for men and women in all fields of life with changes and revisions of law in areas that discriminate against women and the taking of necessary measures for the modification of daily activities and practices that perpetuate discrimination.

CEDAW describes discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Turkey signed CEDAW at 1985 but significant changes in women rights at Turkey started in 1990's. CEDAW is within the UN Fundamental Rights Conventions.

Turkey had also ratified ECHR at 18 May 1954 and recognized individual application at 28 January 1987 and lastly adopted ECtHR's compulsory jurisdiction at 1990[286].

And Turkey has also ratified ILO's Convention, which one of them is Equal Remuneration Convention, at 1967[287].

[286] Feyyaz Gölcüklü and Şeref Gözübüyük, Avrupa İnsan Hakları Sözleşmesi ve Uygulaması, Turhan, 2007.

[287] Tekinalp/Tekinalp, Avrupa Birliği Hukuku, Beta , 2009.

So we have to look out the effect of these agreements in Turkish law system. This will lead us to Turkish Constitution of 1982 Article 90:

*"The ratification of treaties concluded with foreign states and international organizations on behalf of the Republic of Turkey shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification.*

*Agreements regulating economic, commercial and technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the state, and provided they do not infringe upon the status of individuals or upon the property rights of Turkish citizens abroad. In such cases, these agreements must be brought to the knowledge of the Turkish Grand National Assembly within two months of their promulgation.*

*Agreements in connection with the implementation of an international treaty, and economic, commercial, technical, or administrative agreements which are concluded depending on an authorization given by law shall not require approval by the Turkish Grand National Assembly. However, agreements concluded under the provision of this paragraph and affecting the economic or commercial relations and private rights of individuals shall not be put into effect unless promulgated.*

*Agreements resulting in amendments to Turkish laws shall be subject to the provisions of the first paragraph.*

*International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Additional sentence: 7.5.2004-5170/7md.) In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provision of international agreements shall prevail."*

Article 90 of the Constitution, entitled "Ratification of International Treaties", and states that international agreements properly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional. The new amendment added a new sentence to Article 90 of the Constitution which guarantee that, in the case of contradiction between the provisions of the duly ratified international agreements on fundamental rights and freedoms and the provisions of domestic laws, the former shall prevail, and that the judiciary will as a result refer to the provisions of such international agreements directly by ignore the provisions of domestic laws[288].

Before that amendment, the question of superiority between international agreements and domestic laws was the subject discussion. Later to its adoption, the question of superiority between international agreements on fundamental rights and freedoms and domestic laws has been determined.

[288] Erdoğan Teziç, Anayasa Hukuku, Beta, 2009.

# CONCLUSION

The grounds for discrimination are politically determined. ECJ attempted to develop generalizable principles to decide when discrimination law must be extended to a unenumareted group. The framework of discrimination law depends on whether it arises from domestic law, the ECHR or EU law.

EU is moving towards a more substantive concept of equality. We can realize that ruling out discrimination and imposing equal treatment isn't enough to deal with the types of inequality experienced by same groups in society and the acknowledgment that there are structural difficulties to full participation faced by disadvantageous groups.

Before Article 13 of EC Treaty, Directives were adopted. The Commission wanted to ascertain a common minimum standard of protection against discrimination across the EU. Anti discrimination measures aimed formal equality for providing minimum standard of protection in combat against discrimination. The Directives followed by provision against indirect discrimination and for positive action. The minimum standards are developed in the Race Directive and the Framework Directive.

The idea of going beyond formal equality has started in the language used by the Commission. This idea wasn't new; it was mentioned by ECJ before. This new idea is based on the fact that in the area of gender discrimination formal equality isn't sufficient to deal with presented inequalities.

The importance on prevailing non discrimination and equal opportunities for all is promoting, as it does mean a superior focus on these issues in policy making. If the Draft Constitution isn't going to become legally binding, there will be no legal basis for the prevailing duty except in relation to gender equality.

There is a change towards a more substantive idea of equality in the ECJ. But it appears that this won't be put down in legislation at EU level. Other non legislative

measures and policies would go further towards substantive and pluralist ideas of equality and harmonize the formal equality idea in the EU legislation.

Equal treatment isn't enough to challenge the comprehensive and inherent types of inequality experienced by some groups and positive measures might be needed to compensate for this. The European Commission is seeking a more positive attitude to equality. The Commission appears to be using the language of equal opportunities and to be underlining the concept of equal opportunities for all.

Sometimes allegation of equality can't rationalize anti discrimination rights. The common solution to this can be to generate a different notion of equality.

Equal treatment reveals with anti discrimination in relation to two reasons. First reason is equal treatment is the normal rule necessary by separate principles of respect for individual dignity or equal value. This has been mentioned in ECHR Article 14 too. Second reason is the principle has affords a prevailing constitutional principle within the EU legal system. These two reasons explain the importance of equal treatment in ant discrimination laws.

Equal pay principle has failed down several times in past. The failure to provide equal pay for men and women is the most unenviable form of discrimination. In European society women's work and values is still under estimated. EU has helped to maintain a view that men and women are of equal value. The important achievements can be counted as first the addition of equal pay principle in EC Treaty, secondly ECJ' s case law and lastly mainstreaming equality principle in European Employment Strategy and the European Social Inclusion Agenda. However in general these the most noticeable progress had been in ECJ' s case law with Second Defrenne case in which Article 141 get direct effect.

At present there's still gender pay difference between female and male workers. For the employers the duty to afford equal pay for equal work has its own obstacles. According to Article 141 pay is centered on an analysis of the work which is done by employees or workers. But the employer is concerned not only in the content of the work performed but the manner in which work is performed too.

So EU law must ensure effective protection from discrimination for all persons in all areas of life. This indicates the same level of protection with no hierarchy of rights between different grounds including gender, race or ethnic origin, religion or belief, age, disability or sexual orientation.

So as a criticism it can be said that instead of various Directives a single Directive can be adopted which tackles discrimination on grounds of religion or belief, disability, age and sexual orientation. With this Directive measures to encourage equality would be included in EC legislation.

If we look at Turkish law equality principle is one of the primary essence of Republic of Turkey. In constitutional law equality problem arises not in the field of existence but in formulation it to the legislation. In 1924, 1961 and 1982 Constitution of Turkey equality principle is formulated as equality before the law. With 1961 and 1982 Constitutions the equality before the law extends with anti discrimination on the grounds mentioned in the Constitution. It can be seen that Turkish Constitution tries to explain equality principle clearly and detailed it while expanding it as other modern constitutions.

According to the The Global Gender Gap Report -2009 released by World Economic Forum, Turkey was 129$^{th}$ over 134 countries on the list. And Egypt even passed us after 2008. This document shows Turkey's equality problems clearly. And this problem can only be solved by the way of education. There is legislation prepared but our women don't know how to use them so putting up the rules isn't enough you have to teach your citizens how to recommend them.

Discrimination is a content which's context is permanently widening. Therefore the completion of its content is a discussable issue with all the changes made till today it seems to be that it would be discussed in Turkish law too. Labor Act of Turkey Article 5 mentions the equal treatment principle and in accordance with this legislation Turkish Penal Code mentions that no to obey this principle creates a burden. So Turkish law seems to be sensitive in this issue since Turkey is a candidate for EU

membership. And the international agreements signed are putting responsibility on Turkey to deal with this issue.

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