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# The new challenges of equal employment in the European Union

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## Abstract

The challenges of equal employment in the European Union have been existing for more than half a century. The study's purpose is to reveal the contradictions of labour law in the EU in the field of equality. It contains the actual problems of equal treatment. The legal system of the EU has very effective elements but at the same time a homogenous but flexible system of legal principles should be worked out. The paper suggests that anti-discrimination as a basic right should be taken into more consideration.

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## 1. Introduction

In the legal system of the European Union equality as basic principle has been existing from the foundation of the Union: it is such a basic law principle as democracy, due process of law or the theory of proportionality. At the same time from the beginning it is used in several meaning and from the point of the topic of this article it has specific meaning and it's of great importance. This paper will explain the meaning of equality in labour law.

## 2. For the defense of the employees' rights

The European Union as an economic community demands that its citizens should take job, work, choose a career on equal conditions. It will serve if we think of one of the four basic freedoms that is the free movement of workers, since it cannot be enforced without ensuring equal possibilities, namely equal opportunities in labour market and equal employment conditions for each of the employees and groups of employees.

At the same time EU and Member States are obliged to guarantee the employees' rights as best as possible and one of the most important rights in this field is the prohibition of illegal differentiation between employees, i.e. the prohibition of discrimination.

First of all the employees have the right to be treated equally with those being in a comparable or similar situation. This must cover their behavior throughout the labour market process and the entire length of their labour law situation, namely from the commencement to the termination of the legal relationship. Though even before the commencement of a legal relationship – typically during a certain job advertisement and interview – the Member States with their regulation and practice must assure such situations that the employees' right to equality would not

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be violated. And during the employment relationship the equality typically should be fulfilled in the following fields: wage system, working hours, assuring the working conditions, professional advancement, efficient legal remedy, the modification or the termination of the legal relationship. Otherwise in the European Union this problem on political, legal, economic and social fields is on the agenda „forever” and in continuous changing.

### **3. The eternal fight between “good and evil”**

The process during which the European Union tries to fulfill equality between the employees with the help of both the legislator and the judiciary is rather complicated. In the background there is the complexity of the problem since to establish such a system of regulation and application method which would be appropriate and successful in every situation in life is very difficult. To be exact it is impossible. From this statement we can draw two conclusions: on the one hand we must face the problem that this question is limited from legal aspect, because the prohibition of discrimination is a basic human demand what must be fulfilled by each state – as the Union itself - independently from time and space. The solution cannot be restricted to certain regulations, norms, but the equality must be approached from wider aspect. The task of the law would be to establish appropriate regulations to situations in life which are important on the basis of social processes. To be exact, situations which are important from the point of the citizens, in our case, the employees.

On the other hand it must be considered that if equal rights are ensured properly it is not enough to rely on the sources of itemized law. That is even if the Union – and of course the Member States - tries to make regulations fully it is impossible. Let's think of the fact that an employee in a certain situation in life can be hurt by violation of law in a great number of ways and it is not sure that this violation hurts the employees' right to equal treatment at the same time. Or on the contrary we can state that in those situations when an employee does not get a proper wage for the done work some questions of equality necessarily emerge. But instead of solving this important problem the Union cannot relax and wait for the cases involving the employees „to be solved by themselves”. In this context I review the main elements of the regulation in the following.

#### *3.1. The ideas in the Basic Treaties*

On analyzing the regulation on labour equality the examination of the Basic Treaties is indispensable. It is necessary since in the regulation itself the provisions and principles of the Lisbon Treaty are essential. The system of norms is a fixed background of the solution since the Union legislators think that the Union citizens would be left without basic guarantee if the Basic Treaties themselves – as the most important Union documents – would not contain certain concrete regulations.

As early as in 1957 the Treaty of Rome contained such basic provisions that – although modified and amended several times – still define the Treaties' provisions regarding equality up to the present. At this point I would like to emphasize that in 1997 good progress was made as a consequence of the emerged practical problems, the new directives, other legal materials and the practice of the Court of Justice of the European Union when the Treaty of Amsterdam threw a new light upon the requirement of the equal treatment, namely the obligation on ensuring equality. And the Treaty of Lisbon - though in a changed structure - declares the basic right to equality in a similar way. I add e.g. that in the basic principles of the European Union it is mentioned that the Union is built on the anti-discrimination society between women and men. Nevertheless the question of gender equality is of great importance within the system of labour and social law.

Basically there is a difference between general principles securing equality and the so called „branch-specific” norms regarding specific fields (e.g. employment). The separation is of great importance at defining the level of defense since on guaranteeing specific rights the traceability to the Basic Treaties is very important. From our point of view one of the best examples of „branch-specific” rules is Article 157 of the Treaty on the Functioning of the European Union which declares the principle of „equal pay for equal work” as well as the general prohibition of employment discrimination.

### 3.2. *To follow the direction of directives*

In the legal system of European Union directives belong to the most important legal sources and at the same time they are the most important means of legal harmonization. It is very honourable that several of them deal with equal employment, labour law employment and labour market equality, and in the following I would like to mention the most important ones.

When in the middle of the 1970s it has come unambiguous that the reticent regulation of the Treaty of Rome and the case law of the Court of Justice of the European Union on shaky ground of that time will not be sufficient to solve the emerged problems, the Directive 75/117/EEC which is of great importance even today was set up. This directive is essentially destined to eliminate the pay discrimination between women and men and at the same time efforts were taken to widen the demands of equality between employees. So the directive defines what should be considered equal or of equal value, to be exact on what basis can this be judged correctly. It deals with all the elements of the guaranteeing regulations referring to the legal relation, and also with the right to the effective legal remedy.

The direct continuation of this directive is the 76/207/EEC Directive which deals with equal employment in general. Though the definition of the concept of rightful discrimination, respectively the obligation of granting privilege is a new element. On the base of the first such concepts are mentioned with which help it can be judged if the measures, decision or order of a certain Member State or employer are justified or not (e.g. women employees are not applied willingly for an extremely encumbering physical job). And the second defines the later crystallized and today continuously changing system of principles on which basis the persons and/or groups who/which on the basis of personal or other characteristics start from disadvantage can be the subject of more positive judgement than those who are in an advantageous situation. This way the person or group in a disadvantageous situation can be set to equal level, regarding their opportunities to the equal situation. Concerning women maternity leave is a good example of this method.

It is also worthy to mention the Directive 2000/78/EC that increases the severity of rules giving new conceptions in the circle of justifying the discrimination. Furthermore it deals with the questions of discrimination regarding specific groups: women, old people, employees with atypical working condition, etc., and it also mentions the relationship between equality in general sense and equality to be fulfilled in employment.

Finally we cannot leave out of consideration the Directive 2006/54/EC either which offering a special dogmatic solution summing up the earlier directives and putting them into a homogeneous structure. This way the structure is more logic and clearer since on the basis of this the employees can gather information about their rights and it also makes judicature easier. However it may be criticized because to the changing challenges of a changing world it does not offer new solutions.

### 3.3. *The guard of the Union legal order – The practical judgment of the Court of Justice of the European Union*

As I have referred above the guarantee of equality for employees is not a problem which could be solved easily within the limits of itemized law. So the Court of Justice of the European Union receives a preferential role: it has dealt - and is dealing with – labour law discrimination cases. In case law it has to explain, change the rules, concepts, principles. Most of the cases get before the headquarter of the Court in Luxembourg by the initiation of employees because of the violation of equality and because of the inappropriate ensuring of free movement of labour. I also add that this last circle of problems has close connection with requirement of equal treatment, too.

The Court has double task, on one side it has to create a specific, suitable solution for the unsettled question but from the other side it has to make abstraction to the greatest measure, because the Court can make a homogenous and at the same time flexible protective system by adequate consequent decisions. It is important not only for the Member States, jurisdiction and employers (see: what is within and what is beyond the limits of law), but also a good mean for the employees to enforce their right to legal remedy.

The Court improves the system of equality rights by interpreting such outstanding concepts and principles as measure of comparability, the widening of the principle „equal pay for equal work” to „equal pay for equal or

accepted as equal value work”, the concept of indirect discrimination, by the application of the test of measure, the system of conditions, or by keeping the granting privilege within reasonable frames. However it is not rare that in the judgments’ of the Court concerning two similar topic and content not even real connection cannot be observed, but it is also a repeating phenomenon that the Court gives contradictory judgments’ in similar cases.

Good examples of the above mentioned statement are discrimination cases between female and male employees but there are many examples of age discrimination cases, too. There is a typical example of the first when the contradiction concerning women employees can be observed as a consequence of the directive 76/207/EEC what I mentioned earlier. The Court has not made an unambiguous decision in the question whether what the limit of the obligation of women employees’ grant privilege during a certain employment is, since the Court often declares as a basic law of equality that rather women – even of lower education - than men should be appointed to such positions where women employees are proved underrepresented. But it can be thought a very extreme standpoint, so recent years the Court makes decisions in such cases on wider deliberation of evidence. From among the age discrimination cases it is worthy to mention such cases when older employees get into such a disadvantageous situation that she/he is not accepted to a certain position. Namely when a Member State declares exclusively that e.g. a person over 60 is not allowed to work as pilot it definitely qualifies discrimination, namely this decision is not sufficiently justified, objective or apportioned. Why is a person of 59 more adaptable than a 60 year-old one? At the Mangold-case the Court declared that eligibility must not depend on age, we cannot live with the presumption that an employee over 60 is incompetent to carry out her/his duties. On the other hand in the Wolf-case the Court justified the type of discrimination declared in the German law when the decision was that Mr. Wolf was not allowed to work as fireman any longer. Though in this case the Court accepted the justification of the Member State that to restrict becoming a fireman over 40 is necessary and justified in a suitable manner with special regard to the person’s physical state. The irony of fate is that between the two cases hardly one year passed.

So I state that the Court’s task is not easy when within the frames of prohibition the discrimination the „good and evil” must be conciliated. But without developing law and originating summons we could not speak about anti-discrimination law in the field of labour law.

#### **4. New challenges**

As I mentioned earlier the assurance of the employees’ equality in labour-market and labour law is not a new problem in the European Union. Consequently the deficiencies and contradictions concerning these cases are not only new ones either and at the same time nowadays in the economic and social situation new problems emerge. At the top of all the legal environment is continuously changing and the practice of judgement of the Court is not perfectly homogenous.

So the so called employment segregation appears from time to time what most often puts the women employees into disadvantageous situations. This terminology has not been perfectly defined legally so I think the biggest problem is that the Court regards it only partly, in most cases on weighing the situation in human resource market. The most important thing is that some groups are squeezed to the periphery totally regarding to some specific positions. Though this phenomenon has significant social background, its main reason is the practice of inconvenient regulation of equality.

The fact that the right to human dignity as constitutional right is referred to and its appearance in the Union legal practice is a new development. Though the Court earlier also indicated that the right to equal treatment originates from the right to equal human dignity, during the application it stays uncertain. Its main reason is that the Union does not have an own charta or non-charta constitution either. In spite of this it can be deduced from the common constitutional tradition of the Member States and from other directives (it is completed by the Charter of Fundamental Rights of the European Union and the European Social Charter). So I propose that the Court during its procedure should declare its commitment on approaching basic human rights more definitely.

The justified discrimination and some elements of grant privilege are also changing. The Court tries to interpret such regulations of the Member States which are restrictions for some groups of employees (typically for women and old people) according to the changing situations of the labour market. In my opinion the Court often ignores the

distant purpose which was declared in its own employment policy of the European Union in general, namely I consider incorrect that they supervise such a Union goal which aims at discrimination free employment at the highest level possible.

I also mention the development of equality as a complex concept and policy since it has been applying in the Union law in wider and wider sense (from this point less concrete). To all of these are also added the questionable approach which was worked out by the Court on the basis of the directive 2000/78 EC, so that the Court intends to set up a special hierarchy within the system of equality rights. Its details and applicability are both questionable at present.

## 5. Conclusions – Beyond good and evil

Summing up I propose that during the total or partial revision of the Union's equality policy – with special attention to the world of employment and social security – the most efficient solution would be if one would approach the problem from a new aspect. The basic problem always remains the same: like absolute justice cannot be done during the eternal fight between good and evil, unambiguous - taken into consideration all justified needs - decisions in equality questions cannot be made. We cannot leave out of the consideration that regarding the employees we are speaking about the right of all of us, about the fact how we can succeed within the frames of our job, and how we can get to equal situations comparing with others. The solution of all these can be found only if the jurisprudence, judicature, employers, employees, the whole society, the economic players would admit that we cannot work and live honestly without the fulfillment of equality rights – otherwise we are hurt in our human nature. And this is inadmissible both from the point of the legal system of the European Union and the fundamental human rights.

## References

- Barnard, C. (2006). *EC Employment Law*. (3rd ed.). Oxford: Oxford University Press, 398.
- Bitskey, B. & Gyulavári, T. (2003). Kell-e diszkriminációs törvény? *Jogtudományi Közlöny*, 1, 1-8.
- Dworkin, R. (2006). *Is Democracy Possible Here?* Princeton: Princeton University Press, 97.
- Gyulavári, T. & Könczei, Gy. (2000). *Európai szociális jog*. Budapest: Osiris Kiadó, 134-135.
- Kalas, T. (2001). Egyes jogelvek szerepe az Európai Bíróság ítélezési gyakorlatában. *Jogtudományi Közlöny*, 7-8, 313-320.
- Schiek, D. (2002). A new framework on Equal Treatment of Persons in EC law? *European Law Journal*, 2, 290-314.
- Sólyom, L. (2001). *Az alkotmánybíráskodás kezdetei Magyarországon*. Budapest: Osiris Kiadó, 410.
- Trócsányi, L. & Badó, A. (ed.) (2005). *Nemzeti alkotmányok az Európai Unióban*. Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., 17. and the contents of the constitutions of the Member States of the European Union
- Weber, G. (1996). Az Európai Bíróság és a nemek közti hátrányos megkülönböztetés tilalma a munka világában. *Jogtudományi Közlöny*, 6, 181-184.
- Council Directive 75/117/EEC, 76/207/EEC, 2000/78/EC and Directive 2006/54/EC of the Parliament and of the Council*. Downloaded: [http://eur-lex.europa.eu/RECH\\_naturel.do](http://eur-lex.europa.eu/RECH_naturel.do), 16/04/2012.
- Consolidated versions of the *Treaty on European Union and the Treaty on the Functioning of the European Union*. Downloaded: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>, 16/04/2012.
- European Social Charter*. Downloaded: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CL=ENG>, 16/04/2012.
- Charter of Fundamental Rights of the European Union*. Downloaded: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>, 16/04/2012.
- C-229/08 *Colin Wolf v Stadt Frankfurt am Main*, C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG*, C-144/04 *Werner Mangold v Rüdiger Helm, P v S and Cornwall County Council*, C-341/08 *Dominica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*. Downloaded: [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/), 16/04/2012.