Rethinking EU Equality Law – Towards a More Coherent and Sustainable Regime

Exploring the Alternatives

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Summary

The EU equality law framework is often critiqued for its lack of internal and external coherence, which are a legacy of its gradual and piecemeal development. The, at times, poor articulation of EU equality law with other areas of social and economic policy necessary to meeting equality objectives is similarly critiqued, but less often invoked in equality law debates despite the fact that it is essential for the practical achievement of substantive equality. Taking such a broader notion of equality law as a starting point, we suggest new possibilities of developing an equality-related legal and policy framework at the EU level that is more congruent, better articulated, and, hence, more likely to facilitate equality goals. Drawing on our research, we focus on three specific examples – 1) explicit protection for gender identity discrimination, 2) accommodation of religious practice at the workplace, and 3) relationship between working time, work-family reconciliation and gender equality – to illustrate how such overall coherence can be achieved within EU equality law and policy.

I Introduction

The development of equality legislation at the European Union (EU) level is one of the major achievements of the European integration project, and its role in driving advances in equality law and policy in many EU member states is undeniable. Yet, the currently enacted EU equality law framework is not without shortcomings. Its variegated character and lack of coherence are often cited as particularly problematic, both from a normative perspective as well as for equality law’s future development.

The internal incoherence of this framework is exemplified by the existence of a ‘hierarchy of rights’, wherein protections for certain grounds on the basis of which discrimination is prohibited are more robust than for others. Gaps in the material scope of the equality directives (e.g. the
fact that discrimination in the access to goods and services is only covered for racial and sex
discrimination) undermine substantive protection against discrimination, and some gaps in
coverage render some potential non-discrimination grounds (e.g. gender identity) almost
entirely out of the scope of formal protection.

Crucially, the misalignment between the EU equality legal framework and international
approaches to equality also contributes to external incoherence. EU equality law lags behind
some recent developments in international equality law conventions and recommendations,
and, in some instances, it may not be fully in line with the jurisprudence of the European Court of
Human Rights (ECtHR).

Another form of incoherence stems from occasional misalignment between formal EU equality
law and other legal and policy fields that fall outside of the former's jurisdictional boundaries but
which are essential to achieving equality objectives in practice (e.g. working-time regulation).
While less often invoked in equality law debates, this broader systemic incoherence also poses a
significant problem from the perspective of substantive equality.

Rather than being normatively based, the inconsistencies resulting from the patchy nature of the
EU equality law stem from the piecemeal manner in which it developed over time. This
development, in turn, has depended on a range of structural and political factors, which have
shaped the EU's legal competences and institutional architecture, including the pool of actors
capable of influencing decisions on particular legal and policy developments. Similarly, historical
particularities and contingencies of policymaking, rather than purely normative grounds, have
contributed to the manner in which the EU equality law framework articulates, at times uneasily
and incompletely, with other EU legal and policy fields that do not necessarily fall within equality
law 'proper', yet which are essential to achieving equality objectives.

Addressing these various forms of incoherence is essential to developing and improving the EU
equality framework. In this research-based policy paper, we suggest that embracing a broader
notion of equality law – one, which is attentive to both internal and external coherence, and the
dynamic interactions between equality law and related policy fields – opens possibilities for
developing an equality-related framework at the EU level that is more congruent and better
articulated (Figure 1).
We illustrate how more overall coherence can be achieved within EU equality law and policy by drawing together our previous individual research. Specifically, we focus on three examples: 1) explicit protection of gender identity discrimination, 2) accommodation of religious practice at the workplace, and 3) the relationship between working time, work-family reconciliation and gender equality. While the first two refer more explicitly to the internal and external cohesion of equality law, the last embraces a wider, systemic conception of equality law in the EU context that is attentive also to policy fields that are consequential for equality.

Following specific policy proposals we make in relation to each of the above noted examples, we argue that thinking of equality law in a way that is attuned to both its internal and external dimensions, and its nesting in a wider policy context, is necessary if we are to facilitate equality goals in practice. We conclude with broader recommendations for future development of EU equality law. Namely, we argue that while human dignity and substantive equality should be the key principles guiding the revision and amendment of the current equality law and policy framework in the coming years, such a framework is necessary also to uphold and enable the
achievement of a range of interrelated policy objectives, including the long-term sustainability of the European integration project.

II Exploring the Alternatives

1. Recognition of Gender Identity as a Non-discrimination Ground

Since the ECJ ruling in \( P v S \) (Case C-13/94) in 1996, 'sex' discrimination has been interpreted as including \textit{gender reassignment discrimination}. More recently, Recital 3 of the Recast Directive (2005/54/EC) established that 'the principle of equal treatment for men and women […] also applies to discrimination arising from the gender reassignment of a person'. However, EU law does not prohibit discrimination on the basis of gender identity. This entails three problems.

1. Only few Member States have expressly prohibited gender reassignment discrimination in employment. The lack of an express prohibition of gender identity discrimination may have some bearing on the fact that 41\% of respondents to an EU survey were not aware of laws prohibiting gender identity discrimination in employment, whereas the rate was lower for sexual orientation discrimination, which is explicitly outlawed at the EU level. It may also partly explain why, among LGTB people, transgender people are the ones who suffer higher levels of discrimination, both in access to employment (30\%) and in employment (23\%).

2. The interpretative solution derived from \( P v S \) is not entirely satisfactory because gender reassignment is only one particular aspect of gender identity and gender expression. The term ‘trans’ is generally used to refer to people whose gender identity and/or gender expression differs from the sex assigned to them at birth, which includes people who live in their desired gender on a continuous basis without undergoing gender reassignment medical treatment and/or surgery, as well as people who occasionally cross-dress. Furthermore, many trans people do not understand gender in binary terms: they may see themselves as ‘more than male and more than female’, or as neither male nor female.

3. The real scope of the CJEU interpretation in \( P v S \) and subsequent cases is unclear. Does it only apply to gender reassignment or can it also apply more broadly to gender identity discrimination? Within the academic literature there is disagreement (see background article). The best way to address this uncertainty and to achieve external coherence with the growing international accord is to expressly prohibit gender identity discrimination in legislation.

To address these problems, the prohibition to discrimination on gender identity grounds needs to be incorporated by way of binding legislation. This would improve \textit{internal coherence} (avoid a hierarchy of discrimination rights) and \textit{external coherence} (international conventions and recommendations). Two legal basis could be considered:

1. The first alternative would be article 19 TFEU, where the term ‘sex’ could be stretched to include ‘gender identity’. This would be based on the fact that the origin of
discriminatory conduct against trans people is always based on the fact that their preferred gender identity differs from the sex that they were physically given at birth. Indeed, the CJEU stated in P v S that gender reassignment discrimination ‘is based, essentially if not exclusively, on the sex of the person concerned’.7

2. The second alternative would be article 352 TFEU.8 This provision was already used in the past to enact sex equality legislation (e.g. Directive 76/207/EEC) when there was not a specific legal basis, and it could arguably be used again in this context.

**Policy Recommendations**


2. Amend all the equality directives to clarify that any reference to sex discrimination includes gender identity discrimination (alternative option).

2. Accommodation of Religious Practice

EU equality law contains several provisions that require the accommodation of working environments to certain workers’ circumstances. The more widely known accommodation requirement concerns the duty to take appropriate measures to enable disabled persons to have access and full participation in employment, provided this does not impose a ‘disproportionate burden on the employer’ (Directive 2000/78/EC, article 5). However, this is not the only example. There is also an EU law duty to accommodate working conditions for women who are pregnant or breastfeeding, if the normal working conditions would entail risks for their health and safety (Directive 92/85/EEC, article 5(1)). Workers returning from parental leave have also the right to request changes to their working hours and/or patterns (Directive 2010/18/EU, clause 6(1)). The recent Commission proposal for a new Work-Life Balance Directive also includes a ‘right to request flexible working arrangements for caring purposes’ (COM/2017/0253 final, article 9). This highlights that a duty to accommodate working environments to workers’ circumstances can be relevant in many different contexts. In fact, in some jurisdictions, it also applies to gender, national origin, age (Canada) and religion (US, Canada). For reasons of space, this case study only focuses on the accommodation of religious practices at the workplace, but many normative considerations are applicable to other relevant grounds.

Extending the duty to accommodate diversity at the workplace beyond its current boundaries would improve the internal coherence of EU equality law because a duty to consider workplace adjustments would apply more evenly across relevant discrimination grounds. In the particular case of religious discrimination, it would also improve external coherence because ECtHR case law on indirect religious discrimination in private employment suggests that employers should endeavor to accommodate manifestations of religious beliefs, where possible, unless there are objective and reasonable justifications not to do so (Thlimmenos v Greece, App. No. 42393/98; Eweida v UK, App. No. 48420/10).
To achieve this, one possibility would be extending the duty of reasonable accommodation to religion or belief (and other relevant grounds) through legislative action. However, some Member States, like France, may consider that this could undermine the constitutional principle of ‘secularism’. In a context of rising Islamophobia, taking legislative action may also be particularly controversial and even politically unachievable. Therefore, a more realistic option could be interpreting the concept of indirect discrimination as including an obligation to reasonably accommodate the needs of employees of certain religious faiths, unless the employer’s neutrality requirements pursue a legitimate aim and are proportionate.

In the 1970s, the ECJ already recognised in Prais (Case 130/75) that the accommodation of religious beliefs was ‘desirable’. The recent CJEU judgment in Achbita (Case C-157/15) seems to point in that direction in that it implies that the EU concept of indirect discrimination requires ‘taking into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary’. However, the CJEU only discussed the need to balance interests at stake in passing, and it remarked that the accommodation of manifestations of religious beliefs should not impose ‘additional burdens’ on the employer and it should take into account the employer’s ‘inherent constraints’. Therefore, this ruling has some limitations: 1) it does not provide detailed guidelines on how to balance the ‘interests’ at stake; 2) it does not make the distinction between public and private employers, an aspect which tends to be relevant in the ECtHR case law; 3) it seems to put more emphasis on the interests of the employer than on those of the employee.

**Policy Recommendations**

1. Promote at better understanding of the EU concept of ‘indirect discrimination’ and how it can be used at national level to accommodate relevant employee rights at the workplace.
2. Encourage discussion at EU and national level on how to develop balanced approaches to the accommodation of religious diversity at the workplace.
3. At the next occasion, the CJEU should provide more detailed guidelines on how to balance employer/employee rights and interests in these cases.

3. Working Time, Work-Family Reconciliation and Gender Equality

There is widespread agreement that ‘family friendly’ policies that recognize gendered dynamics and patterns of care provision, yet which facilitate the possibility of more equal sharing of unpaid care work between men and women, tend to support work-life balance and women’s employment in the most egalitarian manner. While the biological (sex) difference necessitates special accommodation of pregnancy, there is no reason for other ‘family friendly’ instruments or rights to be directed at women only. Instead, work-family reconciliation policies should encourage and enable redistribution of unpaid care work between parents or partners by, for example, extending rights to care leaves and to remuneration while on leave also to men.

This sort of approach has been for some time championed at the EU level, and is integral to the

As the ‘New Start’ initiative reflects, leave rights are only one component of what is required for a family friendly workplace, and the initiative emphasizes a ‘comprehensive’ approach that encompasses a range of ‘mutually reinforcing measures’, both legislative and non-legislative, including, *inter alia*, flexible work arrangements, child care and long-term care, and tax measures.

In so far as the day-to-day balancing of work and family duties is concerned, working hours and patterns or access to care services are far more significant than leave policies. In so far as time, flexibility in arranging work tends to be emphasized as crucial for work-family reconciliation. However, regulation of standard work hours, including their limitation, is also essential in this context. Long or excessive work hours can interfere with more active assumption of responsibility for the provision of care. Thus, it is in the context of full-time work that changes or modifications are also needed if the goal of encouraging men to shoulder a more equal share of care work and that of enabling women’s access to a broader range of jobs (including full time) are to succeed.

The ‘New Start’ initiative and the newly proposed Directive on work-life balance tackle work hours by extending the right to flexible working arrangements, including reduced working hours, to all working parents of children up to 12 and carers with dependent relatives (COM/2017/0253 final, Art. 9). This is an important innovation. However, this approach remains partial, because it does not encompass standard work hours directly and comprehensively. To do so, the ‘New Start’ initiative would have to refer also to the Directive concerning certain aspects of the organization of working time (2003/88/EC), which is the key EU instrument that governs regulation of work hours by setting minimum standards for maximum hours of work and mandatory periods of rest. While the latter is a health and safety instrument, it has obvious implications for work-family reconciliation and equality because it regulates those patterns of work that are still deemed to be ‘male’ patterns, since men are statistically more likely to engage in full-time work or work in excess of what are considered ‘normal’ work hours.

The relationship between standard work hours and work-family reconciliation has been acknowledged in the CJEU jurisprudence (e.g. *SIMA* (Case C-303/98) and *Jaeger* (Case C-151/02) cases), and the relationship of both with gender equality has been previously debated in the context of negotiations surrounding the Working Time Directive’s (WTD) unsuccessful revision attempts (from 2004 to 2010). Unfortunately, this concern appears to now have been left aside. While the latter Directive’s contested past is an obvious culprit, a truly comprehensive and equality-oriented approach to work-family reconciliation is not possible without encompassing standard working time. For the same reason, objectives of work-family reconciliation and gender equality ought to be cross-referenced within the context of standard work-hours’ regulation, whether through their direct acknowledgment in the instrument’s preamble or expansion of the Art. 13 ‘adaptability’ principle.

A *joined-up approach* such as this, would not only promote more overall coherence across legal and policy fields, it would also better facilitate the practical achievement of work-life balance in a way that is consistent with substantive equality goals.

Human dignity and substantive equality are some of the most essential foundational values and objectives of EU equality law (broadly understood). For this reason, they should be mainstreamed into all new EU legislative and policy initiatives, and they should also be considered in revising existing legislation and policies. This is essential to ensure that the inconsistencies that we have identified are effectively addressed, and that instrumental objectives do not continue to create internal and systemic incoherencies in the future.

Following the Lisbon Treaty, mainstreaming of anti-discrimination objectives is now envisaged in article 10 TFEU. However, in practice, economic and political considerations often override this principle. To achieve more coherence at the three levels considered in this paper, more weight must be placed on mainstreaming the value of human dignity and the realization of substantive equality, as well as the EU's and its member states' international commitments.

Mainstreaming is necessary not only in the negotiation and adoption of legislation, but also in its implementation and interpretation. The inherent constraint of EU legislative and policymaking processes (e.g. requirements of unanimity or qualified majority in the Council) stem from the fact that they rely on political compromises, which can often result in less ambitious laws or in legislative instruments that fit ‘awkwardly’ within their policy area or within the whole EU legal system. Member states and (EU and national) courts also have a crucial role to play in implementing and interpreting equality-related legislation in a way that preserves the underlying objectives of human dignity and substantive equality, and is aligned with international commitments.

A first step forward in this direction would be adopting the Horizontal Directive Proposal (COM(2008)0426), which has been in negotiations for almost ten years. However, this new Directive could create new inconsistencies as regards the areas where national equality bodies should have powers to operate. As is stands, this new Directive would require that equality bodies...
have powers as regards discrimination in access to goods and services, but this is currently not required for the same protected grounds in the field of employment. In the area of work-life balance, the recently proposed Directive (COM/2017/0253 final), part of the ‘New Start’ initiative, is a significant step towards a comprehensive approach that encompasses a range of relevant policy and regulation fields. As such, it could become a blueprint for future legislative action that promotes more coherence. Yet, even this Directive continues to preserve inconsistencies, as it fails to address, or cross reference, a key area of working-time regulation that is of obvious relevance for balancing of work and family obligations in a way that also advances gender equality goals, even it is enacted on different legal grounds.

These token inconsistencies and the others that this paper has identified, may indicate that there is need to review the whole coherence of EU equality law at internal, systemic and external levels. In the aftermath of the launch of the European Pillar of Social Rights, and when almost 20 years of the entry into force of former article 13 EC have passed, it may be a good moment to engage in such a comprehensive review.

About the Authors

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Dr. Zbyszewska held Research Fellowships at the University of Warwick (2013-2016) and the Lund University Faculty of Law in Sweden (2015). Her doctoral thesis was awarded the University Association for Contemporary European Studies (UACES) Best Thesis prize in 2013, and she has received funding from the ESRC, Socio-Legal Studies Association, the Social Sciences and Humanities Research Council of Canada (SSHRC) and the Interuniversity Centre on Work and Globalization (CRIMT). Her PhD in Law and Society is from the University of Victoria Faculty of Law in Canada.

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Dr Benedi Lahuerta holds a PhD from the University of Leicester (2015) and an LLM in EU Law from the College of Europe (2008), where she also worked as an academic assistant at the Legal Studies Department. During her doctoral studies, Sara was a trainee at the European Commission (DG Justice) and she has collaborated with local and European NGOs dealing with equality, migrants and women's rights. She has received funding from the ESRC and the Society of Legal Scholars.

Key Reading


Zbyszewska, A. 2016. ‘Reshaping EU Working-Time Regulation: Towards a More Sustainable Regime’ European Labour Law Journal 3 (Special Issue: Future Directions of EU Labour Law, Jeremias Prassl (ed.)).

Further Reading


Benedi Lahuerta, S. 2013. ‘Untangling the application of the EU equality directives at national level: a bottom-up approach’, CELLS Online Paper Series.

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