The Shifting Boundaries of Equality: From «Sex» to «Gender» in EU Law

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Abstract: *The essay traces the evolution of EU anti-discrimination law from a binary notion of «sex» to a broader understanding of «gender». While the Treaties largely retain the language of equality between women and men, the ECJ increasingly treats disadvantage as stemming from socially assigned roles and expectations, not biology alone. This reading is strengthened by international standards and case law (ECHR, CEDAW, the Istanbul Convention and ILO Convention No. 190, together with ECtHR) showing convergence towards a socially constructed and more inclusive concept of «gender» in EU law.*

Keywords: Gender – Sex – EU Law – ECJ Case Law – Non-discrimination – International Human Rights – Gender Identity

1. Introduction and Methodology

Since its inception, the European Union (EU) has embraced equality as one of its guiding principles. Article 119 of the Treaty of Rome enshrined the principle of equal treatment between men and women. This principle has inspired and provided a robust legal basis

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for developing a substantial and coherent body of norms against all forms of discrimination. This normative evolution has been driven by the case law of the European Court of Justice (ECJ), as well as by the reciprocal influence and dialogue between EU law and international law at regional and global levels. Legal scholarship has also played a fundamental role in raising public awareness of the complexity of discrimination and the need for a comprehensive approach to tackling it. In this respect, the concepts that first emerged in academic discourse had a significant impact on the more specific categories of primary and secondary EU legislation when they were incorporated into case law.[1]

Historically, the concept of «sex», understood in a strictly biological and binary sense, has been the central normative category through which inequalities between men and women have been identified and addressed. However, the boundaries of this concept have had to expand and change in the face of social roles, stereotypes and forms of discrimination for which a strictly binary conception has proved inadequate. This evolution has led to the emergence of a new concept: «gender». The semantic field of «gender» is broader and more complex, encompassing not only elements related to biological sex, but also socially constructed roles and individual identity. When used by the courts, this concept offers a versatile tool that can provide broader and more comprehensive protection.[2]

Yet, this change creates a lexical asymmetry between case law and doctrine, both of which increasingly refer to gender equality, and legislation, which remains primarily based on sex. This asymmetry leads to recurring interpretative issues, particularly regarding the potential for EU law to adopt a broader concept of equality that extends beyond biological differences, while remaining anchored to the competences conferred by the Treaties.

This study examines how EU law on gender equality has evolved, shifting from a biological to a social conception. From early decisions on equal pay to more recent ones on parental leave, work-life balance, and access to employment-related benefits, EU law has progressively addressed patterns of disadvantage linked to gender roles in the labour market. The absence of the term «gender» from the Treaties is an important starting point in this regard, but not legally decisive. Instead, equality has been defined through legislative implementation and judicial interpretation.

At primary law level, equality is integrated into a complex and detailed legal framework. Article 19 of the Treaty on the Functioning of the European Union (TFEU) provides a horizontal legal basis for combating discrimination within the limits of EU competences, while Articles 8 and 10 TFEU require that considerations of equality and non-discrimina-

[1] Lenaerts et al., *EU Constitutional Law*, Oxford University Press, 2022; Craig, De Búrca, *Equal Treatment and Non-Discrimination: On the Grounds of Sex, Race, Disability, Religion or Belief and Age*, in Craig, De Búrca (eds.), *EU Law: Text, Cases, and Materials*, Oxford University Press, 2024; Barnard, *EU Employment Law*, Oxford University Press, 2012.

[2] From a terminological perspective, where the paper is not addressing the evolution of the relevant concepts and where the discussion is not tied to the terms' specific legal usage, the author adopts «gender equality» as the default expression, in preference to «sex equality».

tion permeate EU policies through integration obligations. In the labour context, Article 157 TFEU is the cornerstone of equality between women and men, mandating equal pay for male and female workers and empowering the EU legislator to adopt positive action measures. This is complemented by Articles 153(1)(i) and (2) TFEU, which allow the EU to support and supplement Member State initiatives in the area of equal opportunities in the labour market. The Charter of Fundamental Rights of the European Union (CFR) further strengthens the Union's rights-based equality mandate by enshrining formal equality (Article 20), prohibiting discrimination (Article 21), and promoting gender equality (Article 23). Together, these elements form an advanced normative framework, which, however, lacks positive definitions of relevant terminology such as «equality» and «sex». This has allowed the ECJ to provide substance to these categories by redefining them and shifting from a biological conception of «sex» to a social conception of «gender» through progressive and teleological development.[3]

The ECJ has played a pivotal role in shaping equality legislation. While early case law focused primarily on equal pay, subsequent judgements have broadened the scope of protection to include indirect discrimination, structural disadvantage, and barriers related to caregiving responsibilities. In this context, the Court has progressively interpreted «sex» as not being limited to biological differences. In the cases of *P v. S and Cornwall County Council*, as well as in *Richards*, discrimination relating to gender reassignment was incorporated into the prohibition of sex discrimination. This indicates that the legal concept of «sex» in EU law is not confined to a rigidly binary framework. Judgments such as *Roca Álvarez* and *Maistrellis* demonstrate a shift towards substantive equality, addressing social roles and gender stereotypes directly. However, at the same time, the case law reveals internal tensions, particularly in areas relating to pregnancy and maternity, where the Court has occasionally relied on reasoning that has been criticised for potentially reinforcing traditional gender roles. This uneven evolution is not accidental but reflects a gradual shift in the concept of equality from a formal to a more substantive paradigm within EU law.

Furthermore, the development of EU anti-discrimination legislation needs to be considered alongside developments in international and European human rights legislation, as both are increasingly influencing the interpretation of equality and non-discrimination. International human rights treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Istanbul Convention, and ILO Convention No. 190, along with their respective interpretative bodies, have defined gender-based discrimination as encompassing the socially constructed roles and power relations affecting women's participation in economic life. These developments provide a normative framework that aligns with the internal evolution of EU law.[4]

[3] Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU*, Oxford university press, 2018.

[4] Fredman, *Substantive Equality Revisited*, in *IJCL*, 2016, 14, 3, 712-738.

The central research question is to what extent the EU law incorporates elements commonly associated with «gender», such as stereotypes and socially constructed roles, into the concept of equality.
Methodologically, the study employs a doctrinal approach, combining a systematic and teleological interpretation of EU primary law with an in-depth examination of the relevant ECJ case law relating to gender equality. This analysis is supplemented with selective references to the case law of the European Court of Human Rights (ECtHR), as well as regional and international human rights instruments, where they shed light on the evolving concept of gender equality.
The structure of the contribution reflects this approach. Section 2 maps the legal framework of the EU primary law, Section 3 reconstructs the Court's case law evolution, Section 4 situates the EU *acquis* within broader patterns of interpretative convergence, and Section 5 draws conclusions regarding the concept and operation of equality in EU law.

2. «Sex», «Gender» and «Equality» in EU Primary Law

The architecture of the EU is founded on a dual commitment to economic integration and the protection of fundamental human rights. Within this framework, the legal status of «sex» and «gender» as grounds for non-discrimination occupies a central position. Although the Treaties predominantly use the binary terminology of «men and women» and «sex», the elevation of the CFR to the status of primary law has introduced a more rights-based dimension to the Union's equality mandate. A rigorous examination of these sources reveals that the Union's primary law provides a thorough, albeit evolving, foundation for gender equality that goes beyond a mere biological or literal interpretation.

2.1. Horizontal Equality Objectives

Article 2 of the Treaty on European Union (TEU) states that equality is one of the Union's core values, alongside human dignity, democracy, the rule of law and respect for human rights. The text specifies that these values are common to the Member States within a societal model in which «pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail».[5] This explicit reference confirms the status of gender equality as a general principle of EU law and signals that it is to be understood in a manner attentive to the structural and social dimensions of inequality, rather than as a purely formal or strictly biological notion.[6]

[5] European Commission, *A Union of Equality: Gender Equality Strategy 2020–2025*, COM(2020) 152 final, 2020, available online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152; Rossi, Casolari (eds.), *The Principle of Equality in EU Law*, Springer, 2017, available online: https://doi.org/10.1007/978-3-319-66137-7.

[6] Lenaerts et al., *EU Employment Law*, cit.; Barnard, *EU Employment Law*, cit.; Von Bogdandy, *Founding Principles of EU Law: A*

This legal commitment is reflected in Article 3(3) TEU, which lists among the Union's objectives the promotion of «equality between women and men». Importantly, this objective is framed in the context of the Union's internal market and social policies, reflecting the historical linkage between economic integration and social progress in EU law. The Article establishes equality between women and men not only as a value to be respected, but as an objective to be actively pursued through Union action. Thus, gender equality is transformed from a negative obligation of non-interference into a positive obligation for legislative and policy intervention.[7]

Taken together, Articles 2 and 3 TEU provide an interpretative framework for the application of more specific Treaty provisions on equality and non-discrimination, particularly those contained in the TFEU. While they do not themselves confer legislative competence, they guide the interpretation and use of the Union's equality-related legal basis.

The TFEU gives concrete expression to the Union's equality mandate through a set of horizontal clauses and competence-conferring provisions. Central among these are Articles 8 and 10 TFEU, both introduced or strengthened by the Treaty of Lisbon, which establish transversal obligations applicable across all areas of Union action.

Article 8 TFEU provides that «in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women». This provision enshrines the principle of gender mainstreaming as a binding requirement of EU primary law. The horizontal nature of this principle is legally significant in that it requires equality considerations to be integrated into the formulation, implementation and evaluation of all Union policies, rather than confining equality between women and men to specific policy fields. The language of «eliminating inequalities» and «promoting equality» indicates a proactive and transformative approach, oriented towards substantive outcomes rather than formal neutrality.[8]

Article 10 TFEU supplements this framework by obliging the Union, when defining and implementing its policies and activities, to strive to combat discrimination based on a closed list of grounds, including sex. While Article 8 TFEU focuses specifically on «equality between men and women», Article 10 TFEU situates gender discrimination within a broader anti-discrimination framework. The combined effect of these provisions is to establish gender equality as both a specific and a general concern of EU governance.

The distinction between Articles 8 and 10 TFEU is not merely semantic. Article 8 TFEU embodies a group-based, outcome-oriented conception of equality, whereas Article 10 TFEU

Theoretical and Doctrinal Sketch, in *ELJ*, 2010, 16, 2, 95-111 available online: https://doi.org/10.1111/j.1468-0386.2009.00500.

[7] Rossi, Casolari (eds.), *The Principle of Equality*..., cit.; Barnard, *EU Employment Law*, cit.; Von Bogdandy, *Founding Principles of EU Law*…, cit.

[8] Pollack, Hafner-Burton, *Mainstreaming Gender in the European Union*, in *JEPP*, 2000, 7, 3, 432-456, available online: https://doi.org/10.1080/13501760050086116; Council of Europe, *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices*, EG-S-MS (98) 2, 1998; Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU*, Oxford University Press, 2018.

reflects an individual-rights-based approach to non-discrimination. Together, they illustrate the dual nature of EU equality law, which simultaneously addresses structural disadvantage affecting social groups and individual instances of unequal treatment.[9]

2.2. Legal Basis and Legislative Action

In addition to horizontal objectives, the TFEU provides a specific legal basis that enables the EU to adopt legislation in the areas of gender equality and non-discrimination.[10] Article 19(1) TFEU empowers the Council, acting unanimously and with the consent of the European Parliament, to take appropriate action to combat discrimination based on «sex», among other grounds. Although Article 19 TFEU is characterised by its procedural constraints, notably the requirement of unanimity, it nonetheless constitutes a cornerstone of the Union's anti-discrimination competence.[11]

Importantly, Article 19 does not define the concept of «sex». This deliberate openness reflects a broader characteristic of EU primary law, which frequently employs abstract and open-textured concepts whose meaning is shaped through legislative elaboration and judicial interpretation. Consequently, arguments seeking to confine the scope of Article 19 TFEU to a strictly biological notion of sex lack textual and systematic support within the Treaties themselves.

In the specific domain of employment and occupation, Article 157 TFEU occupies a pivotal role.[12] Originally introduced as an equal pay provision in the Treaty of Rome, Article 157 has undergone significant functional expansion. Article 157(1) enshrines the principle of equal pay for male and female workers for equal work or work of equal value. Meanwhile, Article 157(3) empowers the Union to adopt measures that ensure the application of the principle of equal opportunities and equal treatment in matters of employment and occupation.

Of particular relevance is Article 157(4) TFEU, which explicitly authorises positive action measures aimed at ensuring «full equality in practice between men and women in working life». The reference to equality «in practice» is legally and conceptually decisive: it signals that the Treaties recognise the existence of persistent, socially embedded inequalities that cannot be remedied through formal equal treatment alone. By permitting specific advan-

[9] Muir et al., *The Horizontal Equality Clauses (Arts 8–10 TFEU) and Their Contribution to the Course of EU Equality Law: Still an Empty Vessel?*, in *EP*, 2023, 7, 1381-1403 available online: https://doi.org/10.15166/2499-8249/621; Timmer, *Editorial: Mainstreaming Equality in EU Law and Beyond*, *Utrecht Law Review*, 2023, 19, 3, 1-7, available online: https://doi.org/10.36633/ulr.997; Alessi, *Le azioni positive*, in Barbera, Guariso (eds.), *La tutela antidiscriminatoria. Fonti, strumenti, interpreti*, Giappichelli, 2019.

[10] Rossi, Casolari (eds.), *The Principle of Equality in EU Law*, cit., 45-47.

[11] Craig, De Búrca, *Equal Treatment and Non-Discrimination*…, cit.

[12] Tria, *La parità di trattamento nelle condizioni di lavoro e il divieto di discriminazione nella giurisprudenza della Corte di giustizia UE*, in Cosio et al. (eds.), *Il diritto del lavoro dell'Unione europea*, Giuffrè, 2022, 425-458.

tages for the underrepresented sex, Article 157(4) TFEU endorses a substantive notion of equality based on social reality rather than biological classification.[13]
Article 153(1)(i) and (2) TFEU further reinforce this framework by enabling Union action in the field of equality between women and men regarding labour market opportunities and treatment at work. Although subject to limitations designed to respect national competences, Article 153 TFEU confirms that gender equality is a legitimate and enduring objective of EU social policy.

2.3. The Charter of Fundamental Rights

The entry into force of the Lisbon Treaty marked an important step in the development of EU equality law by conferring binding legal force on the CFR. Under Article 6(1) TEU, the CFR has «the same legal value as the Treaties» and forms part of EU primary law. However, its impact should be assessed with caution. The CFR does not constitute an autonomous source of new competences, nor does it alter the hierarchical primacy of the Treaties within the Union's legal framework. Rather, it consolidates and systematises principles and rights that had already been developed through secondary legislation and, above all, through the case law of the ECJ.[14]
In the field of equality and non-discrimination, the CFR largely reflects a pre-existing *acquis*. The principle of equality before the law (Article 20 CFR) has long been recognised as a general principle of EU law under the Treaties. Similarly, the prohibition of discrimination set out in Article 21(1) CFR is based on earlier Treaty provisions and well-established case law, such as *Stauder* (Case 29/69), *Internationale Handelsgesellschaft* (Case 11/70), and *Hauer* (Case 44/79). Rather than fundamentally redefining these principles, the CFR provides them with a clearer rights-based formulation and a more visible «constitutional» status. Thus, its main contribution lies in the realm of interpretation and justification.[15]
Article 21(1) CFR prohibits discrimination on «any ground such as sex», among others. The use of the expression «such as» is legally significant, as it confirms the non-exhaustive nature of the list of prohibited grounds and distinguishes the CFR from the closed lists contained in certain Treaty provisions, most notably Article 19 TFEU. This choice of wording does not expand the Union's legislative powers. However, it provides a broader interpretative

[13] Timmer, *Editorial: Mainstreaming Equality in EU Law and Beyond*, op. cit.; Alessi, *Le azioni positive*, cit.; Equinet, *Positive Action Measures: The Experience of Equality Bodies*, 2014, 13.

[14] Daniele et al., *Diritto dell'Unione europea: sistema istituzionale, ordinamento, tutela giurisdizionale, competenze*, Giuffrè, 2024, 205-240.

[15] Daniele et al., op. cit., 232-240; Militello, *Principio di uguaglianza e di non discriminazione tra Costituzione italiana e Carta dei diritti fondamentali dell'Unione europea (artt. 3 Cost.; artt. 20–21 Carta di Nizza)*, in *Biblioteca "20 Maggio"*, 2020, 1, 141-153; Rossi, *Il rapporto fra Trattato di Lisbona e Carta dei diritti fondamentali dell'UE*, in Bronzini et al. (eds.), *Le scommesse dell'Europa: diritti, istituzioni, politiche*, Ediesse, 2009; Borelli, *Efficacia e ambito di applicazione dei principi di non discriminazione. La sentenza Bartsch*, in Bronzini et al. (eds.), *Le scommesse dell'Europa: diritti, istituzioni, politiche*, Ediesse, 2009.

framework for assessing equality and non-discrimination claims within the scope of EU law, including in areas governed by secondary legislation and subject to judicial review.
Within the CFR, Article 23 occupies a distinctive position. It provides that «equality between women and men must be ensured in all areas, including employment, work and pay» and expressly permits positive action measures in favour of the under-represented sex. In this respect, the CFR goes beyond a purely declaratory approach. Unlike other CFR provisions that recognise rights without imposing a corresponding obligation to secure concrete outcomes,[16] Article 23 formulates a clear commitment to action. Its wording closely mirrors Article 157(4) TFEU and reinforces the substantive equality logic that has long characterised EU gender equality law, particularly in the field of employment and occupation.
Therefore, the importance of Article 23 lies less in the creation of new rights than in the strengthening of the Union's obligation to act. By recognising the need to «ensure» equality between women and men, the CFR supports an interpretation of EU law that considers corrective and proactive measures to be legitimate tools for addressing structural disadvantage. In this sense, the CFR formalises a progressive approach that has already emerged through legislative practice and ECJ case law, rather than introducing a new conceptual shift.
The role of the CFR in EU equality law must also be understood considering its interpretative provisions. Article 52(3) stipulates that rights corresponding to those guaranteed by the European Convention on Human Rights be given the same meaning and scope. This clause establishes a formal link between the EU legal order and the ECHR system, promoting coherence rather than innovation. In practical terms, it confirms that the interpretation of CFR rights relating to equality, non-discrimination, and private life cannot be detached from the evolving standards developed by the ECtHR.
When considered as a whole, these elements indicate that the CFR performs a supportive and reinforcing function in the evolution of EU equality law. The CFR neither replaces the Treaties nor diminishes the ECJ's central role in shaping gender equality and non-discrimination law. The added value of the Charter lies in enhancing the visibility and coherence of equality norms and strengthening the Union's legal obligation to pursue substantive equality.

3. The Evolution of Gender Equality in the Case Law of the European Court of Justice

The development of gender equality in EU law has been driven more by the ECJ's gradual establishment of equality through case law than by successive Treaty revisions.[17] As Scior-

[16] Pioggia, *Diritto sanitario e dei servizi sociali*, Giappichelli, 2024, 14.

[17] Craig, De Búrca, *Equal Treatment and Non-Discrimination*…, cit.; Fredman, *Discrimination Law*, Oxford University Press, 2022; Lenaerts et al., op. cit.; Ellis, Watson, *EU Anti-Discrimination Law*, Oxford University Press, 2013; Burri, Prechal, *EU Gender Equality Law. Update 2013. Report*, European Union, 2013; Barnard, *EU Employment Law*, cit.; Bell, *Anti-Discrimination*

tino observes,[18] the original Treaties anchored non-discrimination in a narrow, sector-specific clause (*i.e.*, the prohibition of sex discrimination in pay). However, the Court progressively interpreted these provisions as manifestations of a broader fundamental principle of equality and non-discrimination within the Union legal order. This section traces the Court's case law trajectory, from its initial «constitutionalisation» of equal pay, to its more substantial interpretation of equality encompassing indirect discrimination and affirmative action.[19] Ultimately, there has been a gradual shift from a biologically based concept of sex to a contextual focus on gender-based disadvantage, stereotypes and socially constructed roles.[20]

3.1. Equal Pay and the «Constitutionalisation» of Sex Equality

EU gender equality case law originates from the principle of equal pay, which was first set out in Article 119 of the EEC Treaty (now Article 157 TFEU). In pivotal early case law, the ECJ emphasised that this provision could not be interpreted purely in economic terms. In *Defrenne (No.2)*, the ECJ held that the equal pay rule «forms part of the social objectives of the Community, which is … to ensure social progress and seek the constant improvement of the living and working conditions of their peoples» and that Article 119 «is mandatory in nature» and not merely programmatic, as a matter of fact: «the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals».[21] This articulation underscored that gender equality was not a secondary or optional concern, but an integral element of the EEC's social dimension.

Although the judicial considerations in *Defrenne (No. 2)* remained framed around the binary categories of male and female workers, this decision paved the way for equality to be viewed as a fundamental principle rather than a purely market-related rule.[22]

In its early phase, the ECJ's approach to equality was characterised by formalism. Discrimination was defined as unequal treatment of men and women in comparable situations, and legal analysis centred on identifying whether differences in treatment could be at-

Law and the European Union, Oxford University Press, 2002.

18 Sciortino, *L'uguaglianza di genere nell'UE: categorie giuridiche e tutele*, in *Rivista AIC*, 4, 2020, 19-58.

19 Martin, *Égalité et non-discrimination dans la jurisprudence communautaire: étude critique à la lumière d'une approche comparatiste*, Bruylant, 2006, 43; Sciortino, op. cit., 22-23.

20 ECJ, 30 April 1996, Case C-13/94, *P v. S and Cornwall County Council*, EU:C:1996:170, paras. 12-21, in *CJEL*, 1996, 339, 2, with a note by Brems; Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT*, in *ELJ*, 1999, 5, 1, 63-81; Sciortino, op. cit., 31-32.

21 ECJ, 8 April 1976, Case C-43/75, *Defrenne v Sabena (No 2)*, EU:C:1976:56, paras. 10, 30, in *CMLR*, 1977, 108-118, with a note by Crisham, Tas, *Defrenne v SABENA: A Landmark Case with Untapped Potential*, in *EP*, 2021, 6, 2, 881-890; Neville Brown, *Air Hostesses and Discriminating Employers*, in *MLR*, 1984, 47, 6, 692-703; Koopmans, *Retrospectivity Reconsidered*, in *CLJ*, 1980, 39, 2, 287-303.

22 Sciortino, op. cit., 31-32.

tributed to the worker's sex. However, even within this framework of formal equality, the ECJ acknowledged that certain seemingly neutral rules could have differential impacts in practice. The emergence of case law on indirect discrimination (as seen in cases such as *Bilka-Kaufhaus*)[23] demonstrated an early awareness that inequality could stem from the structural features of employment conditions rather than from explicit distinctions based on sex.[24]

3.2. Substantive Equality and Positive Action

An essential shift accompanied the ECJ's elaboration of the doctrines of indirect discrimination and positive action. EU equality law gradually moved beyond a purely comparator-based logic to embrace a more teleological orientation concerned with achieving the objective of gender equality rather than merely policing formal symmetry.

This development is particularly evident in the evolution of Article 141(4) TEC (now Article 157(4) TFEU). Initially, positive action was framed as a derogation from the principle of equal treatment.[25] Following the Treaty of Amsterdam, however, these actions came to be seen as an essential part of the framework for achieving substantive equality, aimed at removing the practical obstacles that hinder genuine equality of opportunity.[26]

The ECJ's case law clearly illustrates this reorientation. In *Kalanke*, the Court initially adopted a restrictive stance towards positive action. In that case, the judges held that an automatic preference for women in promotion decisions could fall outside the permissible scope of gender equality law if it bypassed individual assessment and substituted quantitative criteria for merit.[27] This approach reflected a reluctance to endorse positive action that could be perceived as creating reverse discrimination.

The Court's position softened in *Marschall*, when it upheld a regime in which preferential treatment for women in promotions was permissible, provided that each candidate was as-

[23] ECJ, 13 May 1986, Case C-170/84, *Bilka-Kaufhaus*, ECLI:EU:C:1986:204; Arnull, *Sex Discrimination in Occupational Pension Schemes*, in *ELR*, 1986, 11, 365-366; Waddington, Bell, More *Equal than Others: Distinguishing European Union Equality Directives*, in *CMLR*, 2001, 38, 3, 587-611; Lane, Ingleby, *Indirect Discrimination, Justification and Proportionality: Are UK Claimants at a Disadvantage?*, in *IJL*, 2018, 47, 4, 531-552.

[24] Sciortino, op. cit., 29-32.

[25] Directive 76/207/EEC, Art. 2(4), drafted against the background of the pre-Amsterdam version of Art. 141 EC, stated that the Directive did not affect measures intended to promote equal opportunities for women and men, notably by addressing factual inequalities that hinder women's opportunities in the fields covered by Art. 1(1). In textual terms, positive action was therefore framed within a limited derogatory space vis-à-vis the principle of equal treatment and, as such, was liable to the restrictive construction typically applied to exceptions from general principles.

[26] Sciortino, op. cit., 38-39; Bell, Waddington, *Exploring the boundaries of positive action under EU law: A search for conceptual clarity*, in *CMLR*, 2011, 48, 5, 1503-1526; Caruso, *Limits of the Classic Method: Positive Action in the EU after the New Equality Directives*, in *HILJ*, 2003, 44, 331-332; O'Cinneide, *Positive Action and the Limits of Existing Law*, in *MJECL*, 2006, 13, 3, 351-364; Hodapp, Trelogan, Mazurana, *Positive Action and European Union Law in the Year 2000*, in *ASICL*, 2002, 8, 1, 33-51.

[27] ECJ, 17 October 1995, Case C-450/93, *Kalanke v Freie Hansestadt Bremen*, ECLI:EU:C:1995:322, paras. 21-24, in *CMLR*, 1996, 33, 1245-1259, with a note by Prechal.

sessed individually, and that male candidates could demonstrate superior qualifications.[28] In *Marschall*, the Court undertook that «[m]ale candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life».[29] This direct recognition of gender stereotypes marked a significant legal development: by acknowledging that discrimination can arise not only from explicit prohibitions, but also from deeply rooted social biases, the Court embraced a more substantive conception of equality.

Further elaboration occurred in *Badeck and Others*, where the Court allowed a range of positive action measures that did not confer automatic preference but sought to address underrepresentation and structural disparity at different stages of recruitment and career progression.[30]

The cumulative effect of this line of case law was to endorse the idea that formal equality was insufficient in contexts where substantive disadvantage and social stereotypes persisted. Instead, positive action tailored to counteract structural inequalities could be compatible with, and indeed required by, the broader aims of EU equality law.[31]

3.3. From Biological Sex to Gender

A decisive conceptual shift occurred when the ECJ was called upon to interpret the scope of discrimination on grounds of sex in cases concerning transgender persons. In *P v. S and Cornwall County Council*, the Court was asked to rule on whether dismissal on the grounds of gender reassignment was prohibited under Directive 76/207/EEC. The judges ruled that the dismissal constituted discrimination based on sex and was therefore incompatible with the directive. They explained that «Article 5(1) of the directive precludes the dismissal of a transsexual for a reason arising from the gender reassignment of the person concerned».[32]

In its reasoning, the Court emphasised that the directive aimed to implement «the principle of equal treatment for men and women», and this principle could not be confined «simply to discrimination based on the fact that a person is of one or other sex».[33] Instead, the Court held that discrimination arising from gender reassignment must be understood as discrimination based «essentially if not exclusively» on the sex of the person concerned, since dismissal for that reason treats the individual «unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender

[28] ECJ, 22 October 1997, Case C-409/95, *Marschall v Land Nordrhein-Westfalen*, EU:C:1997:533, paras. 29-35, in *CMLR*, 1999, 36, 2, 443-456, with a note by More.

[29] ECJ, 22 October 1997, Case C-409/95, op. cit., para. 29.

[30] ECJ, 20 February 2002, Case C-158/97, *Badeck and Others*, EU:C:2000:163, paras. 31-36, in *IJL*, 2001, 30. 1, 116-120, with a note by Küchhold.

[31] ECJ, 20 February 2002, Case C-158/97, op. cit., para. 38.

[32] ECJ, 30 April 1996, Case C-13/94, op. cit., para. 24.

[33] ECJ, 30 April 1996, Case C-13/94, op. cit., para. 20.

reassignment».[34] These formulations indicate that the legal category of «sex» encompasses discrimination linked to gender identity and transition: a significant expansion beyond a purely biological understanding. This result was achieved through a material conception of discrimination: the important factor is not biological anatomy, but the social disadvantage produced by the contested measure.[35]

The interpretation was confirmed in the *Richards v. Secretary of State for Work and Pensions* case. The court affirmed that gender reassignment-related discrimination is «based essentially, if not exclusively, on the sex of the person concerned» and therefore falls under the law that prohibits gender-based discrimination.[36] These landmark rulings demonstrate the ECJ's commitment to interpreting the traditional sex-based equality framework expansively. This approach covers forms of disadvantage arising at the intersection of biological sex and gender identity, even though the term «gender» does not appear in primary and secondary EU legislation.

3.4. Gender Stereotypes and Socially Constructed Roles

Beyond cases involving transgender persons, the Court began to address the role of gender stereotypes and socially constructed roles in its case law on work-life balance and family-related discrimination. This marked another step in the legal evolution towards a more substantial interpretation of equality.

Initially, the Court had to determine whether the traditional comparative model of sex discrimination could adequately capture discrimination related to pregnancy. In key decisions such as *Dekker*, *Webb* and *Tele Danmark*, the Court decisively departed from strict comparator-based logic, developing a material conception of discrimination, grounded in the specific disadvantages women face in the labour market.

In *Dekker*, the Court held that the refusal to employ a woman because of pregnancy constituted direct discrimination «on grounds of sex», even though no male comparator could exist. The decisive element was not differential treatment between men and women, but the fact that pregnancy is a characteristic unique to women, such that any disadvantage connected to it necessarily affects women as a social group.[37] Thus, the ECJ implicitly recognised that discrimination can arise from the interaction between biological difference and labour-market structures, rather than from formal distinctions between workers.[38]

This reasoning was reaffirmed and strengthened in *Webb* case, in which a woman was dismissed after it was discovered that she had been pregnant at the time of recruitment.

[34] ECJ, 30 April 1996, Case C-13/94, op. cit., para. 21.

[35] Sciortino, op. cit., 31–32.

[36] ECJ, 15 June 2006, Case C-423/04, *Richards v Secretary of State for Work and Pensions*, EU:C:2006:256, para 24.

[37] ECJ, 8 November 1990, Case C-177/88, Elisabeth *Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum)*, EU:C:1990:383, para. 12, in *CMLR*, 1992, 29, 160-169, with a note by Nielsen.

[38] Sciortino, op. cit., 36.

The Court rejected the argument that her temporary inability to perform the job could justify dismissal. Instead, it concluded that pregnancy-related disadvantage constitutes sex discrimination. Once again, the Court refused to treat pregnancy as a neutral biological inconvenience, instead framing it as a legally protected condition whose social and economic consequences should be borne by the employer rather than imposed on women.[39]
The same logic was applied in the case of *Tele Danmark*, where a pregnant employee was dismissed during her probationary period. The court ruled that pregnancy could not be considered a factor affecting suitability for employment, even at the beginning of the employment relationship.[40]
Collectively, these cases represent a significant departure from the traditional model of equality. Pregnancy discrimination is direct discrimination rather than indirect discrimination requiring statistical proof because it reflects the structural vulnerability of women in a labour market designed around uninterrupted male career patterns. However, this case law also illustrates a conception of protection anchored in biology, focusing on safeguarding women's reproductive function rather than challenging the gendered organisation of care and work. Early pregnancy case law was therefore ambivalent in this respect; while it protected women against being excluded from employment, it did not challenge the broader social allocation of caregiving responsibilities.[41]
A crucial progress was made when the Court began to address not only pregnancy, but also parenthood and care, particularly the distribution of caregiving roles between women and men. In *Roca Álvarez*, the Court examined a Spanish measure that granted breastfeeding leave and benefits primarily to mothers. The Court rejected the Government's justification that the measure was aimed at protecting women's biological condition, holding that the contested rule «was liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties».[42] This explicit reference to the traditional allocation of gender roles and its identification as an inequality-promoting factor marks one of the clearest instances in which the Court engaged substantively with the social construction of gender roles rather than merely the biological characteristics of workers.
The Court reiterated this reasoning in *Maistrellis*, overturning a national rule that prevented male judges from taking parental leave. The ECJ emphasised again that equality requires

[39] ECJ, 14 July 1994, Case C-32/93, *Webb v EMO Air Cargo (UK) Ltd*, EU:C:1994:300, paras 20–29, in *MLR*, 1995, 58, 6, 771-917, with a note by Szyszczak.

[40] ECJ, 4 October 2001, Case C-109/00, *Tele Danmark A/S v Handels-og Kontorfunktionærernes Forbund i Danmark (HK)*, C-109/00, EU:C:2001:513, paras. 31-34; Ellis, Watson, *Discrimination on the grounds of pregnancy and maternity*, in Ellis, Watson, *EU Anti-Discrimination Law*, Oxford Academic, 2013, 328-360.

[41] Sciortino, op. cit., 32-33.

[42] ECJ, 30 September 2010, Case C-104/09, *Roca Álvarez*, EU:C:2010:561, para 36, in *QC*, 2011, 165-168, with a note by Cappuccio and in *RJS*, 2011, 2, 102-103, with a note by Lhernould, Leone, *Towards a more shared parenthood? The case of Roca Alvarez in context*, in ELLJ, 2010, 1, 4, 513-516.

more than just formal access to rights; it also requires the removal of legal incentives that reinforce stereotypical role allocations. This aligns case law with a more comprehensive understanding of gender equality.[43]

Yet the Court's case law in this area has not been entirely consistent. In *Betriu Montull*, for example, the Court upheld a maternity benefit regime by emphasising protective rationales linked to biological difference, reverting at times to reasoning that risks reinforcing traditional assumptions about gender roles.[44]

In the context of social security, the Court also addressed measures that discriminated against women based on their caregiving roles. In *Soukupová*, the Court ruled that a national rule setting different retirement ages for women based on the number of children they had raised was incompatible with the principle of equal treatment.[45] Although the Court did not explicitly frame its reasoning in terms of stereotypes, the judgment highlights the limitations of policies that treat women's caregiving roles as essential rather than addressing structural inequalities.

This internal ambivalence reveals the conflict between protective measures based on biological characteristics and the goal of substantive equality, which seeks to eliminate broader social disadvantages. Nevertheless, the evolution of EU gender equality law is clear. What began as protection against exclusion based on biological differences has evolved into a legal framework that addresses disadvantages based on gender, stemming from social roles, power relations and institutional design.

3.5. Interpreting the Trajectory

Overall, the case law of the ECJ indicates a gradual, albeit not always linear, shift from a formal conception of gender equality to a more context-sensitive understanding of gender equality.[46] While the Treaties are still written in terms of «sex» and «equality between women and men», the Court increasingly interprets these terms in light of the evolution of secondary legislation, the practical operation of labour markets and the broader European environment of fundamental rights.

[43] ECJ, 2 April 2015, Case C-222/14, *Maistrellis*, EU:C:2015:473, para. 50, in *ILRCL*, 2016, 2, 254-259 with a note by Busby, Weldon-Johns, *EU work-family policies revisited: Finally challenging caring roles?*, in *ELLJ*, 2020, 12, 3, 301-321.

[44] ECJ, 19 September 2013, Case C-5/12, *Betriu Montull v Instituto Nacional de la Seguridad Social*, ECLI:EU:C:2013:571; Burri, *Parents who want to reconcile work and care: which equality under EU law?*, in Van den Brink; Burri, Goldschmidt, *Equality and human rights: nothing but trouble? Liber amicorum Titia Loenen*, Utrecht University, 2015, 261-279; Burri, *Protection et droits liés à la grossesse et à la maternité en droit de l'UE*, in *RDCTSS*, 2019, 1, 88-97.

[45] ECJ, 12 June 2013, Case C-401/11, *Soukupová v Ministerstvo zemědělství*, EU:C:2013:223, paras. 25–30, in *La Semaine Jur.-Soc.*, 2013, 24, 34-35, with a note by Cavallini. Interesting is also the Opinion of AG Jääskinen in Case C-401/11 (*Soukupová*).

[46] Case law evolution from «sex» to «gender» equality: ECJ, 8 April 1976, Case C-43/75, op. cit.; ECJ, 13 May 1986, Case C-170/84, op. cit.; ECJ, 8 November 1990, Case C-177/88, op. cit.; ECJ, 14 July 1994, Case C-32/93, op. cit.; ECJ, 4 October 2001, Case C-109/00, op. cit.; ECJ, 17 October 1995, Case C-450/93, op. cit.; ECJ, 22 October 1997, Case C-409/95, op. cit.; ECJ, 20 February 2002, Case C-158/97, op. cit.; ECJ, 30 April 1996, Case C-13/94, op. cit.; ECJ, 15 June 2006, Case C-423/04, op. cit.; ECJ, 12 June 2013, Case C-401/11, op. cit.; ECJ, 19 September 2013, Case C-5/12, op. cit.; ECJ, 30 September 2010, Case C-104/09, op. cit.; ECJ, 2 April 2015, Case C-222/14, op. cit.

Across key areas of case law, the Court is paying increasing attention to substantive equality. The Court is more willing to look beyond seemingly neutral rules to identify structural disadvantage and treat gender stereotypes and role allocation as mechanisms that produce discrimination. In this way, the Court has developed an equality framework that can capture gender-based discrimination, even when the formal legal category is «discrimination on the ground of sex».

At the same time, the Court has proceeded with doctrinal caution, generally avoiding offering an autonomous, comprehensive definition of gender, and continuing to ground its reasoning in the established categories of sex equality and equal treatment. This restraint reflects both the inherent limits of case law and the competence-sensitive architecture of EU equality law. Yet the overall trajectory remains clear: equality between women and men in EU law is no longer reducible to biological difference alone but increasingly operates as a principle that addresses the social roles, expectations, and power relations.

4. Looking Beyond EU Law: International and Regional Human Rights Standards, and Interpretative Convergence

The previous sections traced the development of EU law on gender equality, highlighting how judicial interpretation has progressively embraced a concept of gender that is not only biological, but also social.[47]

This shift becomes clearer when EU anti-discrimination law is considered alongside the broader international and regional human rights framework within which the Union and its Member States operate. International and regional human rights instruments do not amend EU primary law, nor do they confer new competences on the Union. Instead, their role is interpretative; they contextualise the meaning of EU equality and non-discrimination norms, which are increasingly interpreted in ways that move beyond biological binarism and consider the structural conditions that produce disadvantage. This trajectory is consistent with Fredman's account of substantive equality, which takes a multidimensional view of structural disadvantage, stigma, exclusion and marginalisation. Consequently, this evolution creates legal space for a transition from a limited, formal notion of equality based on «sex» to a broader, more inclusive interpretation of gender equality.[48]

[47] CEDAW Committee, *General Recommendation No. 28* (2010), para. 5: «The term gender refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community».

[48] Fredman, *Substantive Equality Revisited*, cit., 712.

The broader context of human rights is relevant to European Union law for three related reasons. Firstly, the CFR is intended to be interpreted in harmony with the ECHR.[49] Secondly, the Court of Justice has long relied on external reference points (such as international agreements and interpretative practice), even though it does not treat them as formally binding sources of EU law. Thirdly, in politically contested areas such as gender equality, international human rights standards help clarify a central issue: whether «sex», in anti-discrimination law, can also cover disadvantage related to gender identity, stereotypes, and the social organisation of work and care.[50]

In that sense, international law represents a structured body of legal materials that stabilises a broader understanding of equality and supplies a conceptual vocabulary for addressing social role allocation and power asymmetries.[51]

4.1. The European Convention on Human Rights

The ECHR is a fundamental reference point for EU equality law because the treaties establish a structured relationship with the Convention system. The EU is not yet a party to the ECHR, but Article 6(2) TEU provides for accession, subject to respect for the Union's competences. The accession procedure is governed by Article 218 TFEU, which includes a compatibility review by the Court of Justice under Article 218(11) TFEU. Opinion 2/13 clearly illustrates the legal sensitivity of this framework, as it found that the draft accession agreement proposed in 2013 was incompatible with the Treaties.[52] Even without accession, Article 52(3) CFR ensures interpretative convergence; where CFR rights correspond to ECHR rights, they must be given the «same meaning and scope» without prejudice to more extensive protection under EU law. While this does not automatically incorporate Strasbourg case law, it creates a strong presumption of coherence, particularly in cases involving equality and private life and identity (Articles 7 and 21 CFR; Articles 8 and 14 ECHR). It is precisely in this area that the shift from a sex-centred approach to a more gender-sensitive one has become most visible.[53]

[49] Article 52(3) CFR.

[50] Verloo, Lombardo, *Contested Gender Equality and Policy Variety in Europe: Introducing a Critical Frame Analysis Approach*, in Verloo (ed.), *Multiple Meanings of Gender Equality*, Central European University Press, 2007, 22, available online: https://doi.org/10.1515/9786155211393-005; Verloo, *Mainstreaming Gender Equality in Europe. A Frame Analysis Approach*, in *GRSR*, 2005, 117, 11-34.

[51] On the relation between gender stereotyping and power see, for instance, Human Rights Council Resolution 26/15 (2014); Human Rights Council Resolution 26/5 (2014); Human Rights Council Resolution 35/18 (2017).

[52] On this topic, among others, see Lock, *Implications of the Revised Draft EU Accession Agreement for the ECHR*, in *ECHR Law Review*, 2025, 6, 1, 65-101, available online: https://doi.org/10.1163/26663236-bja10115; Tzevelekos, *The EU's Accession to the ECHR: The Future of the Revised Draft Accession Agreement and a Call to End the Bosphorus Doctrine*, in *ECHR Law Review*, 2025, 6, 1, 1-14, available online: https://doi.org/10.1163/26663236-bja10120; Kosta et al., *The EU Accession to the ECHR*, Bloomsbury, 2014.

[53] On the teleological approach, see Lock, *Article 52 CFR*, in Kellerbauer et al. (eds..), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, 2019, available online: https://doi.org/10.1093/oso/9780198759393.003.577; Schermers, Waelbroeck, *Judicial Protection in the European Union*, Kluwer, 2001, 21; Scheingold,

The ECtHR's contribution to the expansion of equality law is most evident in its recognition of gender identity as a matter of private life and personal identity. Without requiring the Convention text to contain a definition of «gender», the Court has ruled that gender identity falls within the sphere of Article 8 ECHR and has required States to provide legal recognition and protection in line with evolving social and scientific understanding. In the case of *Goodwin v. United Kingdom*, the Court rejected the idea of relying solely on biological criteria and affirmed the importance of legal recognition for transgender people in terms of their private lives and dignity.[54] In the EU context, the key point is not only that the ECtHR protects gender identity. The deeper doctrinal significance is that, for corresponding EU rights (particularly Article 7 CFR) an interpretation of private life and identity that is structurally attentive to gender identity becomes part of the normative framework for applying EU law whenever the CFR is engaged.

Another key ECtHR case is *Konstantin Markin v. Russia*, concerning the authorities' refusal to grant a male serviceman parental leave.[55] The Court ruled that traditional assumptions about caregiving roles could not justify differential treatment under Article 14 ECHR.[56] This interpretation moves beyond a purely formal, comparator-based view of equality, focusing instead on how the law allocates social roles and responsibilities, particularly with regard to work and family life.[57] The relevance for EU law is direct: ECJ case law on work-life

The Rule of Law in European Integration: The Path of the Schuman Plan, Yale University Press, 1965, 17; Dehousse, *The European Court of Justice*, Macmillan, 1998, 76, available online: https://doi.org/10.1007/978-1-349-26954-9; Slynn, *The Court of Justice of the European Communities*, in *ICLQ*, 1984, 33, 416–418. On the originalist approach, see Brittain, *The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: An Originalist Analysis*, in *ECLR*, 2015, 3, 482-511, available online: https://doi.org/10.1017/S1574019615000255.

[54] This case represented a complete overruling of previous Strasbourg Court case law, which had always adopted a strictly binary approach to gender. See, in this regard, the following cases: ECtHR, 12 June 2003, Application No. 35968/97, *Van Kück v Germany*, in *EHRR*, 2003, 37, 51; ECtHR, 11 September 2007, Application No. 27527/03, *L. v Lithuania*, in *EHRR*, 2008, 46, 22; ECtHR, 10 March 2015, Application No. 14793/08, *Y.Y. v Turkey*, in *IHRL*, 2015, 39-44; ECtHR, 1 December 2022, Application Nos. 57864/17, 79087/17 and 55353/19, *A.D. and Others v Georgia*, in *ECHR*, 2022. For the previous interpretation, see: ECtHR, 17 October 1986, Application No. 9532/81, *Rees v United Kingdom*, in *EHRR*, 1987, 9, 56; ECtHR, 27 September 1990, *Cossey v United Kingdom*, Application No. 10843/84, in *EHRR*, 1991, 13, 622; ECtHR, 22 April 1997, Application No. 21830/93, *X, Y and Z v United Kingdom*, in *EHRR*, 1997, 24, 143; ECtHR (GC), 30 July 1998, Application Nos. 22985/93 and 23390/94, *Sheffield and Horsham v United Kingdom*, in *EHRR*, 1998, 27, 163; ECtHR (GC), 11 July 2002, Application No. 28957/95, *Christine Goodwin v United Kingdom*, in *EHRR*, 2002, 35, 18.

[55] On parental leave, see ECtHR (GC), 22 March 2012, Application No. 30078/06, *Konstantin Markin v Russia*, in *EHRR*, 2013, 56, 8; ECtHR, 27 March 1998, Application No. 20458/92, *Petrovic v Austria*, in *EHRR*, 2001, 33, 307.

[56] On gender stereotypes in judicial reasoning and in social policies, see: ECtHR, 24 June 1993, Application No. 14518/89, *Schuler-Zgraggen v Switzerland*, in *EHRR*, 1993, 16, 405; ECtHR, 2 February 2016, Application No. 7186/09, *Di Trizio v Switzerland*, HUDOC; ECtHR, 25 July 2017, Application No. 17484/15, *Carvalho Pinto de Sousa Morais v Portugal*, in *EHRR*, 2018, 66, 25; ECtHR, 2 December 2014, Application No. 61960/08, *Emel Boyraz v Turkey*, in *EHRR*, 2015, 60, 30.

[57] Renzulli, *Discrimination and Gender Stereotypes in Judicial Decisions: The Jurisprudence of the European Court of Human Rights in Light of JL v Italy. A Retreat into the Shadows?*, in *NQHR*, 2023, 41, 3, 155-173, available online: https://doi.org/10.1177/09240519231191172; Hansen, *Dismantling or Perpetuating Gender Stereotypes. The Case of Trans Rights in the European Court of Human Rights' Jurisprudence*, in *AHRJ*, 2022, 18, 143-161, available online: https://doi.org/10.17561/tahrj.v18.7022; Timmer, *Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law*, in *AJCL*, 2015, 63, 1, 239-284, available online: https://doi.org/10.5131/AJCL.2015.0007; Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, in *HRLR*, 2011, 11, 4, 707–738, available online:

balance, particularly where rules reinforce the primary caregiving role of women and the secondary role of men, aligns with the anti-stereotyping approach of the Strasbourg Court. When national measures fall within the scope of EU law and must comply with the CFR, the Charter's consistency rule with the ECHR strengthens an anti-stereotyping understanding.[58]

These developments highlight an important methodological point: the absence of a term in the text of a treaty does not limit, *per se*, the scope of protection. This is particularly true when courts employ evolutive interpretation and work with open-textured concepts such as «private life» and «non-discrimination». The same is true in EU law. EU law relies on open-textured concepts (sex, equality, non-discrimination) and purposive reasoning. For this reason, Strasbourg offers a strong comparative example of how a legal text based on «sex equality» can facilitate gender-sensitive adjudication without the need for any formal amendments to the text.

4.2. Convention on the Elimination of all forms of Discrimination Against Women and the UN treaty-body turn

If the ECHR illustrates the evolutive interpretation in a regional human rights system, the CEDAW illustrates an equally important development: the shift from sex discrimination to gender-based discrimination through authoritative treaty-body interpretation. CEDAW is formally framed in terms of discrimination against women, and Article 1 defines discrimination as distinctions on the basis of «sex» that hinder women's enjoyment of their rights. However, the CEDAW Committee has long insisted that the Convention cannot be understood as addressing only distinctions based on biology; its purpose requires attention to the social organisation of roles and cultural patterns that subordinate women as a group.[59] This interpretative evolution is stated with precision in CEDAW Committee General Recommendation No. 28 (2010).[60] While acknowledging that the Convention's wording «only refers to sex-based discrimination», the Committee makes clear that: «Interpreting article

https://doi.org/10.1093/hrlr/ngr036.

[58] The 'Explanations Relating to the Charter of Fundamental Rights' clarify that Article 7 CFR corresponds to Article 8 ECHR and, pursuant to Article 52(3) CFR, that the «meaning and scope» of corresponding Charter rights are the same as those laid down by the Convention; accordingly, whenever the Charter is engaged, Strasbourg case law on private/family life (and its interaction with equality under Article 14 ECHR) operates as a structurally relevant interpretative benchmark for the application of Article 7 CFR.

[59] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19*, CEDAW/C/GC/35 (2017), available online: https://docs.un.org/en/CEDAW/C/GC/35; UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (2010), available online: https://www.refworld.org/legal/general/cedaw/2010/en/77255; UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19 on Violence against Women*, CEDAW/C/GC/19 (1992), available online: https://www.refworld.org/legal/resolution/cedaw/1992/en/96542.

[60] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28*, cit.

1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women». On that basis, the Recommendation draws a sharp conceptual distinction between «sex» and «gender»: sex is framed in biological terms,[61] whereas gender is framed as a social and normative construct that attaches meaning to biology and establishes hierarchy.[62] The Committee then links gender not merely to social roles but to power and hierarchy, explicitly describing gender as the medium through which unequal distributions of power and rights are produced and maintained: «Social and cultural meaning for these biological differences» results in «hierarchical relationships» and «distribution of power and rights … disadvantaging women».

Fundamentally, this is not just a simple lexical issue. Article 1, interpreted by General Recommendation No. 28, defines discrimination as an unlawful distinction of a structural and/or indirect nature. The Committee emphasises that discrimination exists even without discriminatory intent: «Any distinction, exclusion or restriction» that has the «effect or purpose» of impairing women's rights is discrimination, «even where discrimination was not intended». This effects orientation has concrete doctrinal consequences. It means that formal equality (including identical treatment) may be insufficient and even unlawful where it ignores the baseline of gendered disadvantage.[63]

Read together, these propositions give «gender» a distinctly legal function in the CEDAW framework: it refers to the socially constructed conditions (*i.e.* roles, expectations and institutional patterns) that perpetuate unequal power relations. Accordingly, State obligations extend beyond removing explicit sex-based exclusions to include active measures aimed at transforming the underlying structures that sustain inequality, including the duty to address discriminatory «social and cultural patterns» rather than only overt rules.[64]

The Committee's subsequent interpretative work confirms and deepens this orientation. General Recommendation No. 35 (2017), updating General Recommendation No. 19, adopts «gender-based violence against women» as «a more precise term» because it «makes explicit the gendered causes and impacts of the violence» and «strengthens the understanding of the violence as a social rather than an individual problem», requiring «comprehensive responses» beyond reactions to «specific events, individual perpetrators and victims/survivors».[65] Although centred on violence, this framing is conceptually transferable to

[61] «The term 'sex' here refers to biological differences between men and women» see UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28*, cit., para. 5.

[62] «The term 'gender' refers to socially constructed identities, attributes and roles» see UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28*, cit., para. 5.

[63] In the Committee's formulation: «Identical or neutral treatment … might constitute discrimination» if it fails to recognise «pre-existing gender-based disadvantage» see UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28*, cit., para. 5.

[64] Articles 2(f) and 5(a) of CEDAW.

[65] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 35*, cit., para. 9.

equality law more generally; it treats gender as the social framework through which harm and disadvantage are produced and normalised. This Recommendation also describes gender-based violence as «one of the fundamental social, political and economic means» by which women's «subordinate position … and their stereotyped roles are perpetuated», and as a «critical obstacle» to «substantive equality» and the enjoyment of Convention rights.[66] It further links discrimination to intersecting conditions of disadvantage, stressing that women experience «varying and intersecting forms of discrimination» and that appropriate «legal and policy responses are needed».[67] The implication is that State obligations cannot be satisfied by prohibiting isolated instances of unequal treatment alone: they must also address the background structures (*i.e.*, roles, stereotypes, and power relations) through which inequality is reproduced.

Beyond CEDAW, other UN interpretative materials reinforce the widening of equality categories to include gender identity. The Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 20 (2009) treats the «other status» clause in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as open-ended and states expressly that «gender identity is recognized as among the prohibited grounds of discrimination».[68] The CESCR Comment also identifies the real-world profile of that discrimination, noting that persons who are «transgender, transsexual or intersex often face serious human rights violations … such as harassment … in the workplace».[69] This is important for equality law because it evidences an international understanding that discrimination frameworks must address gender identity, including in employment settings. The same reading is reinforced by Principle 12 of the Yogyakarta Principles (2007), which states that «Everyone has the right to … work … without discrimination on the basis of … gender identity».[70] These international materials positively influence EU law, as they support the ECJ's interpretation that includes gender identity in sexual discrimination. This interpretation has been developed through case law on transgender persons.

[66] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 35*, cit., para. 10.

[67] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 35*, cit., para. 12.

[68] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20 (2009), para. 32, available online: https://docs.un.org/en/E/C.12/GC/20; Bruun; Ribeiro, *Article 2 - Progressive Realisation and Non-discrimination*, in Bruun, Lörcher; Ribeiro, *The International Covenant on Economic, Social and Cultural Rights and the Employment Relation*, Hart Publishing, 2025, 225-266.

[69] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, cit., para. 32.

[70] International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), 18, available online: https://www.refworld.org/legal/resolution/icjurists/2007/en/58135.

Although the United Nations legal framework does not have a direct impact on EU law, these provisions remain important because they contribute to developing and strengthening a broader notion of discrimination that shapes European case law.

4.3. The Istanbul Convention

The Council of Europe's Istanbul Convention represents a significant step in the transition from a legal concept of sexual equality to one of gender equality, as it contains an explicit definition of «gender» in a legally binding document. Article 3(c) defines gender as «the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men». This definition is important for at least two reasons. Firstly, it highlights the fact that the social meaning attributed to gender differences is a key source of inequality and discrimination against women. Secondly, it establishes a clear legal basis for the obligations imposed on states to address stereotypes and social practices in the areas of prevention and protection.

The Convention's Explanatory Report elaborates the rationale for defining gender by expressly situating the duty to prevent and combat violence against women «within the wider framework of achieving equality between women and men», and noting that, for this reason, «the drafters considered it important to define the term 'gender'».[71] The Report explains that gender captures «socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men».[72] Crucially, the document links this conceptual move to empirical insight: «Research has shown that certain roles or stereotypes reproduce unwanted and harmful practices and contribute to make violence against women acceptable».[73]

The legal framework adopts a substantive equality approach, recognising that formal neutrality is insufficient since gender stereotypes and roles contribute to systemic disadvantage against women.[74] Consistently with the approach, the Report notes that Article 12(1) frames the eradication of «prejudices, customs, traditions and other practices» based on women's inferiority or «stereotyped gender roles» as a *general obligation* aimed at prevention.[75] While the Convention's immediate subject matter is violence, the conceptual move is general: it calls for «a gendered understanding of violence» and insists that such violence must be addressed «in the context of the prevailing inequality between women and men, existing stereotypes, gender roles and discrimination against women» in order to respond

[71] Council of Europe, *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, No. 210, Council of Europe Treaty Series, 2011, para. 43.

[72] Council of Europe, *Explanatory Report…*, cit., para. 43.

[73] Council of Europe, *Explanatory Report…*, cit., para. 43.

[74] De Vido, Frulli, (eds.), *Preventing and Combating Violence Against Women and Domestic Violence: A Commentary on the Istanbul Convention*, Edward Elgar, 2023, 5–22, 123–136, available online: https://doi.org/10.4337/9781839107757.

[75] Council of Europe, *Explanatory Report…*, cit., para. 43.

adequately to the phenomenon.[76] In this sense, gender is considered a legally recognised structure of social roles, and the law must address this structure rather than simply condemning individual acts.

The Istanbul Convention has acquired significance for EU law through both institutional practice and legal actions. EU institutions have repeatedly drawn on the Convention's concepts, and European Parliament materials have explicitly referenced its definition of gender.[77] The precise legal status of the Istanbul Convention within the EU and its Member States systems has been politically contentious;[78] yet for interpretative purposes, the key point is that the Convention consolidates a European treaty-level understanding of gender as social construction, thus contributing to an environment in which gender terminology is treated as a normal and legally meaningful expression of equality concerns.

Importantly, this does not entail that EU law must adopt the Istanbul definition wholesale. The EU equality *acquis* has its own structure and competence limits. However, the Istanbul Convention shows that «gender» can function as a treaty-defined legal term, capable of establishing specific legal obligations rather than remaining an ambiguous label.

4.4. The ILO framework

The ILO's instruments are crucial in linking the legal evolution from «sex equality» to «gender equality» to labour regulation. Convention No. 100 (1951) on equal remuneration and Convention No. 111 (1958) on discrimination (employment and occupation) establish the classic obligations of non-discrimination based on «sex» as a prohibited ground. Their legal logic is similar to the fundamental EU provisions on equal pay and equal treatment: discrimination is defined as a distinction or preference on the basis of «sex» that undermines equal opportunities or treatment.

The legal shift becomes visible with more recent instruments, especially ILO Convention No. 190 (2019) on Violence and Harassment.[79] This instrument introduces the term gen-

[76] Council of Europe, *Explanatory Report…*, cit., para. 43.

[77] European Commission, *Baseline Report by the European Union on Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the 'Istanbul Convention' or the 'Convention')*, ISC/2025/07693, 2025; European Parliament, *European Parliament Resolution of 15 February 2023 on the Proposal for a Council Decision on the Conclusion, by the European Union, of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, COM(2016)0109 - 2016/0062R(NLE), 2023; European Parliament, *European Parliament Resolution of 16 September 2021 with Recommendations to the Commission on Identifying Gender-Based Violence as a New Area of Crime Listed in Article 83(1) TFEU*, 2021/2035(INL), 2021.

[78] Even though these were predominantly domestic tensions, they also had repercussions at EU level. Cf. Hivert, *Latvia: Public mobilization grows in support of treaty for preventing violence against women*, in *Le Monde*, 6 November 2025, available online: https://www.lemonde.fr/en/international/article/2025/11/06/in-latvia-public-mobilization-continues-to-grow-in-support-of-the-istanbul-convention-for-preventing-violence-against-women_6747156_4.html; Editorial staff, *Czech Lawmakers Reject International Women's Rights Treaty*, in *AP News*, 25 January 2024, available online: https://apnews.com/article/czech-women-rights-istanbul-convention-treaty-rejected-07815a323a34802761d5051b270ae375; Agence France-Presse, *Hungary's Parliament Blocks Domestic Violence Treaty*, in *The Guardian*, 5 May 2020, available online: https://www.theguardian.com/world/2020/may/05/hungarys-parliament-blocks-domestic-violence-treaty.

[79] Boris, *From Sexual Harassment to Gender Violence at Work: The ILO's Road to Convention No. 190*, in *Labor*, 2022, 19, 1,

der-based violence and harassment and defines it as violence and harassment directed at persons because of their «sex» or «gender», or «affecting persons of a particular sex or gender» disproportionately, including sexual harassment.[80] This language is legally significant because it differentiates «sex» and «gender» as categories, and because it conceptualises workplace harm not only as conduct that targets women as a biological class but as harm that is gendered in its social structure and distribution.

From an EU law perspective, the conceptual importance of Convention 190 is that it normalises the idea that equality at work requires attention to gendered patterns of vulnerability and disproportionate impact.[81] That aligns with a central theme in EU law's own development: indirect discrimination doctrine, the increasing attention to work-life balance, and the explicit confrontation with stereotypes about caregiving roles. ILO Convention 190 strengthens the argument that the conceptual expansion from «sex» to «gender» is not an alien imposition on labour law.[82] Rather, it is part of a broader international recognition that workplace inequality and harm cannot be fully understood through biological categories alone.[83]

This influence is also reflected in EU institutional documents and political debates, which increasingly refer to international labour standards when formulating equality initiatives and identifying gender-based harassment as a structural barrier to equal participation in the labour market. In its Gender Equality Strategy 2020-2025, the Commission emphasises the importance of the Convention's focus on gender-based violence and harassment in the workplace.[84] While these references do not create binding obligations, they demonstrate a path towards regulatory convergence: EU policy and legal discourse increasingly adopts gender-based vocabulary in contexts in which earlier instruments would have relied solely on sex.

109-131, available online: https://doi.org/10.1215/15476715-9475758; Carlson; Olney, A *New Global Mandate to End Violence and Harassment in the World of Work*, in *ABAJLEL*, 2021, 35, 3, 493-510.

80 Art. 1(1)(b), ILO Convention No. 190 (2019).

81 Articles 2 and 8 (c), ILO Recommendation No. 206 (2019).

82 While approving the resolution authorising the Council to invite Member States to ratify ILO Convention No. 190, Parliament also acknowledged the EU's limitations in this matter. Cfr. European Parliament, *Violence and Harassment Convention, 2019 (No. 190) of the ILO: Inviting Member States to Ratify It*, 2020/0011(NLE), Legislative Observatory, 2023, available online: https://oeil.europarl.europa.eu/oeil/en/procedure-file?reference=2020/0011(NLE).

83 Council Decision (EU) 2024/1018 of 25 March 2024 Inviting Member States to Ratify the Violence and Harassment Convention, 2019 (No 190) of the International Labour Organization (2024), available online: http://data.europa.eu/eli/dec/2024/1018/oj; European Parliament Legislative Resolution of 12 March 2024 on the Draft Council Decision Inviting Member States to Ratify the Violence and Harassment Convention, 2019 (No 190) of the International Labour Organization (13106/2023 – C9-0396/2023 – 2020/0011(NLE)) (Consent), EP, EP_LIBE, EP_EMPL, EP_FEMM (2024), available online: http://data.europa.eu/eli/C/2024/6568/oj.

84 European Commission, *A Union of Equality: Gender Equality Strategy 2020–2025*, op. cit..

5. Conclusion

A unifying thread running through the TEU, the TFEU and the CFR is the Union's commitment to substantive equality within a legal order that links economic integration with fundamental rights. Although the Treaties predominantly use the binary language of «sex», EU primary law supports an outcome-oriented conception of equality. Articles 2 and 3 TEU enshrine equality between women and men among the Union's values and objectives, while Articles 8 and 10 TFEU establish the horizontal mainstreaming, requiring the elimination of inequalities and the combatting of discrimination in all Union activities.

The clearest textual expression of substantive equality is the authorisation of corrective measures. Article 157(4) TFEU permits «specific advantages» for the under-represented «sex» «with a view to ensuring full equality in practice… in working life», and Article 23(2) CFR mirrors that rule. While these provisions do not mandate quotas, they reset the interpretative baseline, indicating that equality at work does not automatically follow from identical treatment alone and that targeted interventions may be necessary to achieve equality in practice.

This legal choice is particularly significant considering the ECJ's broader case law trajectory on sex equality. Although the Court has historically adopted a cautious approach to positive action, first limiting automatic preferences in *Kalanke* and subsequently permitting only conditional mechanisms in *Marschall* and *Badeck*, subject to individual assessment and proportionality, and reaffirming the importance of merit in *Abrahamsson*, its overall case law reveals a deeper shift. Equality is no longer viewed as merely a formal symmetry test, but rather as a legal strategy capable of addressing *de facto* and structural disadvantage.

This case law not only defines permissible positive action but also reflects a broader systemic insight: formal equality can reinforce pre-existing inequalities when legal rules interact with gendered patterns of work and care. It is at this point that the conceptual shift from «sex» to «gender» becomes legally relevant within EU law. Although the Treaties largely use the language of sex equality and equality between women and men, disadvantage often arises from social roles and expectations rather than biological differences alone. This is visible not only in case law concerning transgender persons (*P v S*, *Richards*), where sex is interpreted materially to capture discrimination linked to gender reassignment, but also in in case law concerning work-life balance (*Roca Álvarez*) , which addresses role allocation and stereotypes more directly. These judgements reveal an equality logic that considers how law organises social roles at the interface between family and work, even when the doctrinal label remains sex discrimination.

In light of the EU's regulatory framework, international standards confirm that the shift in interpretation from «sex» to «gender» is more than just a change in vocabulary. It signals a change in how equality legislation conceptualises sources of disadvantage and the types of obligations that equality rules entail. For EU law, three implications are particularly salient. Firstly, the shift reframes the object of legal inquiry. A traditional sex equality model

focuses on comparators (less favourable treatment) and, at most, disproportionate impact. A gender-sensitive approach retains the comparison but also considers the social organisation of roles and institutional patterns that perpetuate disadvantage to be legally relevant. This is reflected in CEDAW's reading of «gender» as the social meaning attached to «sex» and in the Istanbul Convention's treaty definition of gender as socially constructed roles, used to structure concrete duties.

Secondly, international materials reinforce the shift from negative to positive obligations. Rather than simply prohibiting discrimination, gender-based approaches are increasingly demanding preventive and remedial frameworks that address the underlying causes of discrimination, such as stereotypes, practices and power relations. The Istanbul Convention's preventive approach, the effects-based concept of discrimination in CEDAW, and the treatment of gender-based violence and harassment as a phenomenon requiring prevention and protection in ILO Convention No. 190 all point in this direction.

Thirdly, the international framework expands the legally protected dimensions of identity. ECtHR case law treats gender identity as an aspect of private life and personal identity, while UN treaty-body guidance identifies gender identity as a prohibited ground of discrimination and acknowledges its significance in professional settings. This development is significant for EU law as it aligns with the ECJ's own approach in cases involving transgender persons: protection is achieved through an expansive interpretation of sex discrimination that extends beyond a strict biological binary.

Regarding international standards integration into EU law, these instruments have an interpretative function. Firstly, Article 52(3) of the CFR structurally mandates consistency with the ECHR when corresponding rights are involved, making it increasingly difficult to uphold a narrow, purely biological conception of sex in rights-based judicial decisions. Secondly, the treaties and the CFR are based on open concepts (such as sex, women, equality...) whose precise meaning is determined through interpretation. International standards provide a functional vocabulary for interpretations that are consistent with the object and purpose. Thirdly, the EU uses treaty-level definitions and international labour standards to shape the discourse on equality, which has led to the normalisation of gender-based terminology in contexts that were previously based on sex.

According to this view, a strictly literal reading of the treaties is insufficient. The absence of the term «gender» in the Treaties does not prevent EU law from interpreting equality rules relating to «sex» carefully and in a gender-sensitive manner. International human rights practice demonstrates that courts and treaty bodies can address stereotypes, gender identity and gender-based disadvantage, even in the absence of an explicit textual reference to «gender». Therefore, the shift from «sex» to «gender» should be viewed as part of a broader, increasingly coherent international understanding of inequality.