

Gender Stereotypes and EU Antidiscrimination Case Law: (Fighting) a Hidden Threat to the EU Value of Equality?

Abstract

Nowadays law is considered to be an effective instrument of shaping social reality. In this context special attention must be paid to gender equality law and jurisprudence which setting protection against unequal treatment because of someone's gender intend to make a balance between individual's identity and social expectations related to his or her role. These social preconceptions based on gender stereotypes must be contested insofar as they serve as an instrument to rationalize inequality between women and men.

The aim of the article to explore the gender stereotypes in the anti-discriminatory judgments of the Court of Justice of the European Union. The article claims that the CJEU's case law is unambiguous with respect to this. On the one hand the Court contributes to eradication of stereotypes based on gender in some cases, on the other – it reinforces them in the other. The article starts with explanation of the role of the gender equality principle in the EU legal system. It also makes some general remarks on stereotypes, biases and discrimination. The second part is devoted to the CJEU case law in which the Court, explicitly or implicitly, avoids applying the gender stereotypes lens to equality issue. The third part of the article analyses those of the CJEU judgments which, unfortunately, can be considered as perpetuating gender stereotypes and as such discrimination based on them.

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Introduction

Stereotypes constitute a part of society and an indispensable element of law, which is inevitably based on categories. The problem with stereotypes occurs when they are used to create hierarchy between majority and minority group and serve as an instrument to rationalize inequality. This is quite visible when it comes to gender equality. As masculinity and femininity are not considered equally, stereotypes attached to the social roles of men and women result in gender discrimination. Thus gender stereotypes must be eradicated, as they hinder one of the EU values: equality between women and men.

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The EU Equality Principle: A Tool for Breaking the Discrimination Chain?

The relevance of EU gender equality law results from the role of gender equality principle in the EU system. Equality, including gender equality, is an ideal underlying the European Union.¹ It is clear from the art. 2 TEU, which stipulates that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. What's important is that these values, including gender equality, are common to the Member States “in a society in which plu-

¹ See also: E. Ellis, P. Watson, *EU Anti-Discrimination Law*, Oxford 2014, p. 23.

ralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail” (art. 2 TEU). Despite being criticized for an illusory character,² the EU values are not only “a beautiful declaration, both righteous and self-congratulatory”.³ They are intended to be a black letter setting operational aims for the EU and its Member States (art. 3 TEU) and imposing on them obligations to observe these values, violation of which may be sanctioned under the enforcement mechanism described in art. 7 TEU. This is particularly true with respect to gender equality, which as a horizontal principle shall be observed in all EU activities. This obligation of the EU is expressed in art. 8 TFEU (“...the Union shall aim to eliminate inequalities, and to promote equality, between men and women”) and art. 10 TFEU (“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”). When it comes to Member States, their gender equality obligations cannot be reduced to ensuring that the principle of equal pay for male and female workers for equal work or work of equal value is applied as a basic element of construction of the Internal Market (art. 157.1 TFEU) as equality between men and women must be ensured in all areas by the Member States while implementing EU law (art. 23 of the Charter of the Fundamental Rights). The aim of the gender equality instruments is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in all matters covered by the EU law⁴ and the Court of Justice has constantly supported achieving this substantive equality. Ensuring full equality in practice between men and women requires fighting stereotypes.

Stereotypes are preconceptions about the characteristics, roles and attributes of groups of people that are attributed to all individual representative of the group in question, regardless of his or her individual’s actual situation.⁵ As such, they give rise to prejudices that refer to a person’s feelings or attitudes about a group and its members. Prejudice is commonly associated with stereotypes as evaluations of others reflect what is

² See especially: D. Kochenov, *On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed*, “Polish Yearbook of International Law”, no. XXXIII/2013, p. 149.

³ *Ibidem*.

⁴ See i.a.: art. 1 of the directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23.

⁵ A. Timmer, *Gender Stereotyping in the case law of the EU Court of Justice*, “European Equality Law Review”, is. 1/2016, p. 38.

believed to be true about them.⁶ This is always based on generalization and refer to actual or assumed abnormality typified by such characteristics as gender. It is the assumption for existence or inexistence of certain attributes (e.g. motivation, driving skills, productivity or competitiveness) based on this characteristic that gives rise to the discrimination.⁷ When it comes to gender stereotypes they contribute to maintaining a hierarchical/unequal relationship between the genders. As masculinity and femininity are not considered equally, this leads to gender discrimination, despite changes to the social roles of men and women and the stereotypes attached to them.⁸

Contesting stereotypes thus inevitably leads to creating a sphere in which one can express his or her identity on equal footing with the rest of society and therefore is closely connected to the anti-discrimination law: the set of legal norms created in order to ensure the principle of equality. One of the best developed anti-discriminatory legal systems is the EU legal system, in which the equality principle plays a fundamental role. It would not be possible to achieve if not for the instances of CJEU case law that can be pointed out as milestones on the road to substantive gender equality.

Good Practices in Contesting Stereotypes: Examples from Jurisprudence of the Court of Justice of the European Union

The CJEU has played an extremely important role in contesting gender stereotypes when dealing with interpretation of EU equality provisions. In this way the Court has contributed to broadening the personal and material scope of application of equality principle.

With respect to gender equality the case law of the CJEU on stereotypes aims, first and foremost, to enhance the position of women in the labour market. In this context the CJEU noticed that “it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates, particularly be-

⁶ <https://cultureplusconsulting.com/2015/05/24/unconscious-bias-stereotypes-prejudice-discrimination/> (3.05.2018).

⁷ Cf. Z. Poposka, *Stereotypes and Prejudices as Cause for Discriminatory Practices – Review of the Case-law of the European Court of Human Rights*, <http://eprints.ugd.edu.mk/16385/>, p. 36 (24.04.2018).

⁸ This development is traced i.a. by E. Lopez-Zafra, R. Garcia-Retamero, *Do gender stereotypes change? The dynamic of gender stereotypes in Spain*, “*Journal of Gender Studies*”, vol. 21 (2)/2012, pp. 169–183.

cause of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances”.⁹ Hence, the Court accepts, under some conditions, so called positive actions, i.e. measures intended to give priority in promotion to women in sectors of the public service where they are under-represented, as compatible with EU anti-discriminatory law.¹⁰ In order to prevent negative consequences women face because of the above-mentioned reasons, namely social attitudes toward pregnancy, the CJEU stated that an employer is in direct contravention of the principle of equal treatment embodied in gender equality directives if they refuse to enter into a contract of employment with a female candidate whom they consider to be suitable for the job if this is caused by the possible adverse consequences for them of employing a pregnant woman, because of the rules on unfitness for work adopted by the public authorities, which include inability to work on account of pregnancy and confinement to inability to work on account of illness¹¹ as well as if they terminate the employment contract of a female worker on account of her pregnancy even if she is unable, because of pregnancy, to perform the task for which she was recruited. This kind of protection granted to women is justified, as incapability of reason of pregnancy of performing professional duties “cannot be compared with that of a man similarly incapable for medical or other reasons, since pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds”.¹²

The CJEU also takes steps to contest male gender role stereotypes and to enhance the position of men in household activities. In the *Roca Álvarez* case the Court found the Spanish law under which only a mother whose status is that of an employed person could be granted the right to leave during the first nine months following the child’s birth, including ‘breastfeeding’ leave, which as a result of the evolution of the national legislation and interpretation by the national courts was detached from the biological fact of breastfeeding, whereas a father with the same status could only enjoy this right but not be the holder of it, incompetent with

⁹ C-409/95 Marschall [1997] ECR I-06363, paras. 29–30.

¹⁰ C-158/97 Badeck [2000] ECR I-01875, par. 23.

¹¹ C-177/88 Dekker [1990] ECR I-03941.

¹² C- 32/93 Webb [1994] ECR I-03567.

gender equality provisions. This is because, among other reasons, this kind of national law perpetuates, in the Court's view, 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.¹³

The CJEU contributed to contest gender stereotypes also outside the employment, namely in access to good and services. The Court encountered them, although it didn't address them directly, in the milestone *Test Achats* case in which the Court dealt with car insurance premium calculated differently for men and women that fell under art. 5(2) of the directive 2004/113. When analyzing this exception to gender equality principle in the context of a car insurance company, the Court confirmed the comparability of the respective situations of men and women with regard to insurance premiums and benefits that implies that the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals.¹⁴ As a result, the use of a person's sex as a kind of substitute criterion for other distinguishing and objective features, such as the kind and extent of the professional activity carried out, the family and social environment, eating habits, consumption of stimulants and/or drugs, leisure activities and sporting activities, that strongly affects life expectancy of insured persons and as such must be taken into account when calculating insurance risk and insurance premiums and benefits, was prohibited. This risk factor, in view of social change and the accompanying loss of meaning of traditional role models, cannot from the outset be linked to one or other of the sexes and social preconceptions about the sexes.¹⁵ The equality between men and women with respect to insurance services requires, in a light of the *Test Achats* case, that premiums and benefits cannot be calculated due to the use of stereotypical thinking about gender essential features. It does not, however, prohibit the use of gender as an objective risk-rating factor where certain physiological differences between men and women may constitute the basis of differentiation of calculation of premiums and benefits at the aggregate level.¹⁶

¹³ C-104/09 *Roca Álvarez* [2010] ECR I-08661, para. 36.

¹⁴ C-236/09 *Test-Achats* [2011] ECR I-00773, para. 30.

¹⁵ See: Opinion of Advocate General Kokott C-236/09 *Test-Achats* [2011] ECR I-00773, paras. 62–63.

¹⁶ See: A. Szczerba-Zawada, *Zasada równego traktowania kobiet i mężczyzn w zakresie składek i świadczeń ubezpieczeniowych – glosa do wyroku TS z 01.03.2011 r. w sprawie C-236/09 Association Belge des Consommateurs Test-Achats ASBL i inni przeciwko Conseil des ministres (The Principle of Equal Treatment of Women and Men in the Field of Insurance Premiums and Benefits – Comment on the Judgment of the CoJ of 1 March 2011 in Case C-236/09 Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres)*, „Europejski Przegląd Sądowy”, no. 6/2012, pp. 43 et seq.

The CJEU and Gender Stereotypes: The Missed Opportunity to Strengthen the Equality Principle

Despite its leading role in fighting biases and discrimination based on gender stereotypes the CJEU in some of its judgments has contributed to reinforcing stereotypes as well. This thesis will be further verified through the prism of equality cases which have arisen on the ground of gender (motherhood issues).

With respect to the protection granted to women during pregnancy and maternity leave, it must be noted that the relevant EU provisions are adopted in the area of employment considered as a public sphere, but they affect the sphere deemed to be private (and in fact outside the scope of EU competences) – the area of family life. Considering the rights of women and men in the sphere of family life as subordinated to economic aspects of integration influenced the law at issue, which inevitably normalized the existing social relations, based largely on the stereotypical division of gender roles and legitimized dichotomous division between the female private family sphere and male public sphere, which includes the sphere of employment. That perpetuated the picture of women as caregivers and men as breadwinners, and gave priority to the respective model of family life. This model of family was sanctified by the CJEU, which stated that the aim of the gender equality directive is neither to settle questions concerned with the organization of the family, nor to alter the division of responsibility between parents.¹⁷ This division was based on the biological differences between sexes according to which pregnancy and childbirth as characteristics exclusively to one sex (what *per se* is based on stereotypical gender binarism) is considered as justification for the female primary obligation to take care of the newborn child. This is confirmed by the aim of maternity leave in EU law, which is to “protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.”¹⁸ This is discriminatory in a twofold way. First, it constitutes an obstacle to women’s wide and active participation in the labour market, and second, it limits the rights of males to performing a fatherly role, proving that “gender stereotypes are concerned with the social and cultural construction of men and women, due to their different physical, biological, sexual and social functions”.¹⁹

¹⁷ C-184/83 Hoffman [1984] ECR 03047, par. 24.

¹⁸ Ibidem, para. 25.

¹⁹ R. Cook, S. Cusack, *Gender Stereotyping Transnational Legal Perspectives*, Pennsylvania 2010, p. 20.

At the same time, it applies a paternalistic approach aiming at the protection of women.²⁰ This protective language embeds images of women as the delicate sex, which is in conformity with the Court's view that mothers are 'burdened' if they are professionally active next to their role as caregivers.²¹ This woman's role as primary caregiver was taken for granted by the CJEU. This is confirmed by its judgment in the case *Commission v Italy* (C-163/82), in which, without detailed explanation, the Court accepted as compatible with gender equality the difference in treatment in national law, to the effect that the adoptive father does not have the right given to the adoptive mother of maternity leave for the first three months following the actual entry of the child into the adoptive family. That distinction, the Court argued, is justified by the legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a new-born child in the family during the very delicate initial period.²² During this period, it is a woman's obligation to take care of a child as results from the settled case-law of the CJEU. Similarly, in the *Hoffman* case the Court concluded that equality directives do not require the Member States to grant to fathers, respectively, a period of maternity leave which the state encourages women to take by the payment of an allowance, even when the parents would wish otherwise. This differentiation of treatment is justified, in Court's opinion, by the (stereotypical) fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely.²³ Suffice to say, the stereotypical approach to pregnancy as exclusively a women's issue can also adversely affect women.

Conclusion

The purpose of EU anti-discrimination law is twofold: to combat exclusion on the grounds of ascribed otherness and protecting individuation as well as respecting social diversity. Ascribing otherness is a process through which persons are categorized by society.²⁴ Such categorization may affect an individual's right to participate in different spheres of ac-

²⁰ Although in the cases concerning prohibition women from doing night work CJEU found this kind of explanation as not able to justify the difference in treatment between men and women. See: A. Timmer, *op. cit.*, p. 43.

²¹ See: especially M. Weldon-Johns, *EU work-family policies – Challenging parental roles or reinforcing gendered stereotypes?*, "European Law Journal", vol. 19(5)/2013, pp. 666–667.

²² C-163/82 *Commission v Italy* [1983] ECR 03273.

²³ C-184/83, *Hofmann*, paras. 26 and 28.

²⁴ See: D. Schiek, *Intersectionality and the Notion of Disability in EU discrimination law*, "Common Market Law Review", is. 53/2016, p. 62.

tivities on an equal footing with others. This happens when arbitrary and prejudicial assumptions about the capabilities of representatives of minority groups is used to define their proper place in society. These kinds of social expectations is particularly strong with respect to gender roles. EU anti-discrimination law should be used in this perspective to break down such harmful stereotypes.²⁵

This should be the main objective of CJEU activity while deciding on interpretation and validity of EU gender equality law. Nevertheless, as the above analysis has proven, the Court's case law lacks consistency with regard to fighting gender stereotypes. In many cases the CJEU has contributed to combating them, in some others – it has either reinforced them or missed the opportunity to eradicate them. This dualism is a *signum specificum* of all CJEU anti-discriminatory case law and can be exemplified by judgments in cases claiming disability discrimination. As a result of the Court's progressive interpretation, the mode of protection against discrimination based on disability has evolved into a definition of disability grounded in the social model, enhancing the level of protection against discrimination based on this characteristic, but on the other hand, the CJEU has failed to include stereotypes, prejudices and stigma as sources of attitudinal and psychological barriers to the full and effective participation of an individual with disability in professional life.²⁶ As CJEU case law determines the meaning and the scope of application of the EU equality principle, the Court should unequivocally contest stereotypes and biases as a source of discrimination, constituting a threat to one of the fundamental EU values. This refers first and foremost to the gender equality principle.

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²⁵ M. Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT*, "European Law Journal", vol. 5 (1)/1999, p. 65.

²⁶ P. McTigu, *From Navas to Kaltoft: The European Court of Justice's evolving definition of disability and the implications for HIV-positive individuals*, "International Journal of Discrimination and the Law", no. 15(4)/2015, pp. 11 *et seq.*

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