

Children's rights, equal rights of men and women and the promotion of gender equality under European law

I. Introduction to the parallelism of human and fundamental rights regimes in Europe

- 1) On terminology: human and fundamental rights
 - see special material
- 2) The parallelism of human and fundamental rights regimes
 - a) the primary responsibility of the state for the effective protection of human rights
 - a conclusive consequence of the sovereignty of the state
 - b) the plurality of human and fundamental rights regimes
 - c) the reasons for the plurality of human and fundamental rights regimes
 - the recurring insufficiency of the national protection of human rights
 - intern. human rights treaties as instruments of "mutual insurance", operating like a second safety net
 - the need of particular fundamental rights regimes for supranational powers
 - geo-regional human rights regimes as expressions of identity of civilisations
 - d) general aspects of the parallelism of human and fundamental rights regimes
 - intensified protection through cumulative requirements
 - parallel operation without correlation or interference
 - mutual influence of interpretation
 - risk of conflicts in case of concepts obliging authorities to intervene
 - such as prohibition clauses, rights with direct horizontal effect or duties of protection
- 3) Overview of the human and fundamental rights regimes applicable in Europe
 - global, pan-European, European Union's, national and sub-national human/fundamental rights law

II. Children's rights under European law

- 1) The protection of children by pan-European human rights law
 - a) No European convention on children's rights
 - b) No special children's rights under the European Convention on Human Rights
 - but protection by classical Convention rights, as interpreted by the European Court of Human Rights
 - e.g. against forced child labour, abuse as child soldiers, enforced prostitution and sexual slavery under art. 4 ECHR (prohibition of slavery and forced labour)
 - e.g. against separation from family or other violations of the integrity of family relationships under art. 8 ECHR (right to respect for family life)
 - e.g. right to education (as participation right and institutional guarantee) under art. 2 Prot. 1
 - c) Children's rights in the European Social Charter (ESC)
 - aa) Two versions of a European treaty on economic and social rights
 - original version of 1961 and revised version of 1996 (not ratified by UK, Germany, Spain, Poland)
 - rights recapitulated, extended and enhanced and control mechanisms improved in revised version
 - states in both versions *only obliged to take measures to promote* the realisation of the rights
 - weak control mechanisms: *no enforcement by the European Court of Human Rights* but
 - state reporting procedure and general comments of the Council of Europe's Committee of Ministers (under revised version after examination by a European Committee of Social Rights [ECSR])
 - collective complaints of registered NGOs (political procedure) under OP
 - bb) The right of children and young persons to protection (art. 7 ESC)
 - enhanced in revised version
 - minimum age of employment 15 years, for dangerous, unhealthy or night work 18 years
 - limited working hours for persons under 18 years
 - school-age persons must not be deprived of full benefit of their education
 - right of young workers and apprentices to fair wage or allowances
 - right of persons under 18 years to 4 weeks annual holiday
 - special protection against physical and moral dangers

- cc) The right to vocational training (art. 10 ESC)
 - in particular obligation to promote systems of apprenticeship (no 2.)
- dd) The right of the family to social, legal and economic protection (art. 16 ESC)
 - by social and family benefits, fiscal arrangements, provision of family housing etc.
- ee) The right of children and young persons to social, legal and economic protection (art. 17 ESC)
 - redesigned in revised version
 - right to care, assistance, education (incl. free primary and secondary education) and training
 - protection against negligence, violence or exploitation
 - protection and special aid for those deprived of their family's support
- ff) The right of migrant workers and their families to protection and assistance (art. 19)
 - extended in revised version

2) The protection of children under the Charter of Fundamental Rights of the European Union

- a) A special fundamental rights catalogue for the European Union
 - necessary because EU exercises on a large scale public power
 - most up-to-date f.r. catalogue in the world, binding primarily the EU institutions as primary Union law (cf. art. 6(1) EU Treaty); member states only bound when implementing or executing EU law or interfering with economic fundamental freedoms (cf. art. 51(1) ChFR)
- b) The rights of the child (art. 24 ChFR)
 - inspired by the CRC but taken more seriously in practice
 - not just principles but fundamental rights (DISPUTED)
 - rights of the children (→ taught at school), not of their parents
- aa) The right to protection and care (art. 24(1) phrase 1)
- bb) The child's freedom of expression (art. 24(1) phrase 2)
 - with direct horizontal effect - binding also the parents (DISPUTED)
- cc) The right of the child to have its own views taken into consideration on matters concerning it in accordance with age and maturity (art. 24(1) phrase 3)
 - with direct horizontal effect (DISPUTED) - limits considerably the exercise of parental authority
- dd) The right to primary consideration of the child's best interests (art. 24(2))
- ee) The right to regular personal relationship and direct contact with both parents (art. 24(3))
- c) Prohibition of child labour and protection of young people at work (art. 32 ChFR)
 - right of young people to working conditions appropriate to their age (art. 32(2))
 - protection of young people against economic exploitation and work that could harm their safety, health or development or interfere with their education (art. 32(2))
- d) The right to legal, economic and social protection of the family (art. 33)
 - modelled on art. 16 ESC
- c) Other fundamental rights protecting in particular children
 - right to respect for family life (art. 7 ChFR)
 - right to education, in particular free compulsory education (art. 14 ChFR)

III. Equal rights of men and women and the promotion of gender equality under European law

- 1) The European approach to focus not on special women's rights but generally on equal rights of men and women and on actual gender equality
 - due to the specific social and cultural background: "women's rights" is just not enough...
- a) No European convention on women's rights
 - but protection by conventions against crimes that typically affect women
 - Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 2011
 - Council of Europe Convention on Action against Trafficking in Human Beings of 2005
- b) No special women's rights under the European Convention on Human Rights
 - but protection by classical Convention rights, e.g. under art. 4, 8 ECHR (see above, II.1.b)
- c) No special women's rights in the Charter of Fundamental Rights of the European Union
 - but protection by some classical rights modelled on ECHR rights
 - e.g. under art. 5 ChFR (prohibition of slavery, forced labour and human trafficking)
 - e.g. under art. 7 ChFR (right to respect for family life)
- d) A traditional exception: maternity protection
 - aa) The right of employed women to protection of maternity (art. 8 ESC)
 - guarantee of maternity leave, no dismissal for maternity, protection of pregnant women and young mothers
 - bb) The right to social, legal and economic protection of the family (art. 16 ESC and 33(1) ChFR)
 - cc) Protection against dismissal for maternity and right to paid maternity leave under art. 33(2) ChFR

- e) A public debate focusing on non-discrimination, gender mainstreaming and actual gender equality
- Council of Europe has Gender Equality Commission to ensure mainstreaming of gender equality into its policies
 - EU even runs a European Institute for Gender Equality and a European Equality Law Network (of legal experts in gender equality and non-discrimination) for this purpose
- 2) Non-discrimination and equal rights of men and women under pan-European human rights law
- a) The prohibition of discrimination on the ground of sex in the enjoyment of ECHR rights (art. 14 ECHR)
- not a general prohibition of discrimination...
 - a difference in treatment between persons (here: men and women) due to personal characteristics (here: the gender) in analogous or relevantly similar positions is discriminatory if it has *no objective and reasonable justification*, that is if it does *not pursue a legitimate aim* or if there is *not a reasonable relationship of proportionality between the means employed and the aim* sought to be realised (ECHR, 29.04.2002, 2346/02, Pretty v. UK, no. 88)
 - European Court of Human Rights stresses the *margin of appreciation* of the states but requires for unequal treatment on the ground of sex particularly important reasons
- b) The general prohibition of discrimination on the ground of sex (art. 1 Prot. 12 ECHR)
- general (→ "enjoyment of any right set forth by law") but ratified by 20 countries only (not by France, Germany, UK)
- c) The equality of rights and responsibilities under private law between spouses (art. 5 Prot. 7 ECHR)
- historical background: widespread legal privileges of the husband until the second half of the 20th century
 - guarantee of equal rights in the relations with their children, as to marriage, during marriage and to divorce
 - guarantee of equal rights under private law only - not under tax, labour, admin. or criminal law...
- d) The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (art. 20 Revised European Social Charter)
- aims at equal conditions concerning access to employment, protection against dismissal, occupational reintegration, vocational guidance, training and rehabilitation, terms of employment and working conditions (incl. remuneration) and career development
- 3) Non-discrimination and equal rights of men and women in European Union law
- a) The prohibition of discrimination based on the ground of sex (art. 21(1) ChFR)
- partially corresponds to art. 14 ECHR, 1 Prot. 12 ECHR and imposes similar requirements; moreover, unequal treatments need a legal basis (cf. art. 52(1) ChFR)
- b) The principle of equal pay for male and female employees (art. 157 FEU Treaty)
- directly applicable with direct horizontal effect (European Court of Justice, case 43/75, Defrenne II)
 - for all kinds of employees (also public servants)
 - prohibits also indirect discriminations (typically affecting one gender only, e.g. of part-time employees)
 - wide concept of "pay" (art. 157(2))
 - concretised and ensured on the basis of art. 157(3) FEU Treaty in art. 4 Equal Treatment Directive (see infra, III.4.b)
- c) Equality between women and men (art. 23 ChFR)
- a comprehensive fundamental right to equal treatment of women and men; relation to art. 21(1) ChFR unclear
 - prohibits also indirect discriminations
 - justification of unequal treatment requires particularly important reasons
 - art. 23(2) *allows measures providing for specific advantages in favour of the under-represented sex* (e.g. women in higher positions) to facilitate their vocational activity or to prevent or compensate for disadvantages in their careers - however, no rigid quotas or favouring of less qualified competitors
- 4) The active promotion of gender equality under European Union law
- a) The Union's aim to eliminate inequalities and to promote equality between men and women (art. 3(3) subsect. 2 EU Treaty, art. 8, 10 FEU Treaty)
- in all its activities, Union must aim to eliminate inequalities, promote gender equality and combat discrimination
- b) Secondary Union law to ensure equal opportunities and treatment of men and women in matters of employment and occupation, including equal pay, under art. 157(3) FEU Treaty
- does not exclude member states measures providing for advantages for the under-represented sex (art. 157(4))
 - Equal Treatment Directive (Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation)
 - combats direct and indirect discrimination (also if related to pregnancy or maternity leave), instruction to discrimination, harassment and sexual harassment
 - equality standards for remuneration (art. 4), occupational social security schemes (art. 5 et seq.), access to employment, vocational training, promotion, working conditions and return from maternity leave (art. 14 et seq.)
 - provides for judicial remedies (art. 17), compensation or reparation (art. 18) and measures against victimisation after complaints (art. 24)
 - reversal of burden of proof (art. 19)
 - Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security
 - Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity

- c) Secondary Union law to combat discrimination based on sex outside work life under art. 19 FEU Treaty
- Equal Treatment in Goods and Services Directive (Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services)
 - concerns any supply of goods and services available to the public (except media, advertising, education)
 - combats direct and indirect discrimination, instruction to discrimination, harassment and sexual harassment
 - limits considerably the private autonomy in business life
 - prohibits to take account of gender and pregnancy and maternity costs in the calculation of premiums and benefits of insurances (art. 5)
 - reversal of burden of proof (art. 9)

IV. Conclusion

- an effective but complicated protection of children and women and guarantee of equal rights of men and women, and a series of ambitious but yet not sufficiently effective steps to achieve actual gender equality, in a complex and intransparent conglomerate of pan-European human rights law, European Union's fundamental rights, secondary European Union law and, last but not least, aligning national law
- to achieve real gender equality in professional life, in some EU member states more measures to improve specific working conditions for parents (flexible working times, leave in case of sickness of the children etc.) and social infrastructure (more and better kindergartens with longer business hours, all-day schools etc.) are imperative

Further Reading

Burri, Susanne: EU gender equality law - update 2018, 2018, www.equalitylaw.eu/downloads/4767-eu-gender-equality-law-update-2018-pdf-444-kb

European Union Agency for Fundamental Rights; Council of Europe (editors): Handbook on European law relating to the rights of the child, 2015, <https://fra.europa.eu/en/publication/2015/handbook-european-law-relating-rights-child>

O'Conneide, Colm: Equality and non-discrimination rights within the framework of the European Social Charter, European equality law review 2015/1, 1

Timmer, Alexandra; Senden, Linda: Gender equality law in Europe. How are EU rules transposed into national law in 2018?, 2019, <https://op.europa.eu/en/publication-detail/-/publication/9b101483-3a44-11e9-8d04-01aa75ed71a1>

Xenidis, Raphaële; Masse-Dessen, Hélène: Positive action in practice: some dos and don'ts in the field of EU gender equality law, European equality law review 2018/2, 36

See also the periodical *European equality law review* (www.equalitylaw.eu/publications/law-reviews) and the materials of the *European Institute for Gender Equality* (<https://eige.europa.eu>) and the *European Equality Law Network* (<http://www.equalitylaw.eu>).