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Article 23

Article 23

Equality between Women and Men

Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex.

Text of Explanatory Note on Article 23

The first paragraph has been based on Articles 2 and 3(2) of the EC Treaty, now replaced by Article 3 of the Treaty on European Union and Article 8 of the Treaty on the Functioning of the European Union which impose the objective of promoting equality between men and women on the Union, and on Article 157(1) of the Treaty on the Functioning of the European Union. It draws on Article 20 of the revised European Social Charter of 3 May 1996 and on point 16 of the Community Charter on the rights of workers.

It is also based on Article 157(3) of the Treaty on the Functioning of the European Union and Article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The second paragraph takes over in shorter form Article 157(4) of the Treaty on the Functioning of the European Union which provides that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. In accordance with Article 52(2), the present paragraph does not amend Article 157(4).

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A. Field of Application of Article 23

23.01 Article 23 has a potentially limitless field of application. Because the division of labour and other roles between women and men lies at the core of any human society, any policy or piece of legislation will impact upon it, or be impacted upon by it. The duty to ensure equality between women and men thus affects any activity the EU engages in, as well as any implementing policies of its Member States.

23.02 The EU treaties and their predecessors have from 2000 contained competences explicitly aimed at equality of women and men, partly preceded by competences contained in the Social Policy Agreement (1992).[1] The oldest of these is Article 153(1) letter (i) TFEU, which repeats the wording of Article 2(1) Social Policy Agreement (1992) and allows the EU to complement and support the activities of its Member States in the field of 'equality between men and women with regard to labour market opportunities and treatment at work'. Further, Article 157(3) TFEU provides for the adoption of 'measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value'. This provision was first introduced as Article 141(3) of the Treaty of Amsterdam (1997/1999).[2] Also, Article 19 TFEU, first introduced

[1] The Social Policy Agreement was concluded in 1992 by 11 out of the then 12 Member States, and annexed to the Treaty of Maastricht through a protocol. This enabled the Member States to bring forward EU social policy in parallel with the founding of Economic and Monetary Union, although the UK was strictly opposed to it. When the Treaty of Amsterdam was negotiated, the UK government had changed, and the provisions of the Social Policy Agreement were integrated into the then Treaty on European Community. The protocol and the agreement are reprinted in [1992] OJ C224/126–29.

[2] The Treaty of Amsterdam was adopted in 1997, but its coming into force was delayed by referenda held in Denmark and Ireland before those Member States ratified the Treaty. It entered into force in May 1999.

by the same treaty as Article 13 EC, enables the EU to adopt legislation combating discrimination based on sex beyond the field of employment. All these competences can be used to take measures that contribute to ensuring equality between women and men.

However, the EU still lacks competences in some fields decisive for equality between women and men. Before the Treaty of Lisbon, most core feminist legal policy fields[3] such as politics on gendered violence within the family or legal restrictions of the relation of mothers and children were outside the European Communities' competences. Since the Treaty of Lisbon integrated what remained of the 'Third Pillar' into the mainstream of European Union polity, this has been changed. The EU now has a competence for cooperation in police and criminal matters,[4] and would thus also be able to ensure equality of women and men in this field. Coordination in civil justice may comprise some elements of family law, in particular relating to fathers' rights over children, which can be used to prevent women from leaving a relationship tainted by physical or emotional violence.[5] Although family law and policing remain national competences in the main, the EU has some opportunities to address violence against women.[6] However, some policies of core relevance for equality of women and men in European societies still lie beyond the EU's core legislative competences, while laws and policies relating to economic integration and the newly reinforced social goals of the EU will also impact upon equality of women and men. Even beyond its legislative competences, the European Union engages in coordinating policies of its Member States, notably through the Open Method of Coordination. While the resulting documents and policy processes are not legally binding, they still have considerable impact on Member States' policies. Accordingly, Charter provisions must also be complied with when engaging in such policy processes. Policies pursuing any other aim can and must be scrutinised in order to also promote equality between women and men under Article 23. 23.03

Further, the applicability of the Charter depends on the categorisation of provisions as principles or rights. Principles can only be used to interpret EU legislation, but rights may be directly enforceable (Art 52(5)). Regarding Article 23, the explanations state that it consists of rights and principles, without any reference to its individual paragraphs.[7] This corresponds to the fact that Article 23 does not contain a classical human right—ie a right to be wielded by individuals against the European Union and its Member States, restricting their actions.[8] Article 23's two distinct 23.04

[3] J Conaghan (ed), *Feminist Legal Studies* (London, Routledge, 2009), vols I–IV.

[4] See also 23.14 below, on the Council of Europe's Istanbul Convention.

[5] The multiple opportunities of fathers to use domestic law on custody to maintain control over a woman who has left a violent relationship (see for example C Shalansky, J Ericksen and A Henderson, 'Abused women and child custody: the ongoing exposure to abusive ex-partners', (1999) 29 *Journal of Advanced Nursing* 416–26; V Elizabeth, N Gavey and J Tolmie, '"He's Just Swapped His Fists for the System." The Governance of Gender through Custody Law' (2012) 26 *Gender and Society* 239–60) are compounded by the practice of abducting children to other countries if custody or contact is denied. The insufficient protection of women by international law is well documented (CS Bruch, 'The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases' (2004) 38 *Family Law Quarterly* 529–45). Coordination of civil procedure could be used to alleviate some of those deficits. There is some argument in academic literature that existing Regulations on recognition and enforcement of judgments in matrimonial matters and family responsibility can be used to address some of these concerns (see R Lamont, 'International Child Abduction and Domestic Violence in the European Union' in Helen Salford et al (eds), *Gender and Migration in 21st Century* (Ashgate: Dartmouth, 2009), 27–43).

[6] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA on victims' protection, actually mentions domestic violence against women in its recital 18, which means that its provisions have to be interpreted as to provide adequate protection in this situation.

[7] Explanations Relating to the Charter of Fundamental Rights [2007] OJ 303/17, 32.

[8] The distinction between classical human rights and modern human rights is often framed as the distinction between *status negativus* (in which citizens are protected against states' and the Union's intervention in their personal freedoms)

paragraphs provide first a positive duty on the Union and its Member States to ensure equality (para 1), and second a modification of the prohibition of sex discrimination of Article 21 by clarifying that positive action is not excluded by this classical human right (para 2). Though some of its relevance lies in programming future politics, other aspects of Article 23 are enforceable before the Court. This creates opportunities in particular as regards programming the interpretation and application of provisions of the Charter, the EU Treaties and secondary legislation, as will be shown below.

B. Interrelationship of Article 23 with Other Provisions of the Charter

I. Article 23 and Articles 20 and 21

23.05 Laws and policy relevant to equality of women and men can be seen as embracing two dimensions—a negative dimension, under which discrimination against women on grounds of sex should be prohibited, and a positive dimension under which measures are taken to ensure equality between the sexes.[9] Within the Charter, the non-discrimination dimension is enacted by Article 21, while Article 23 is dedicated to the positive dimension. Further, Article 20 contains the individual right to be treated equally before the law.

23.06 The respective wording of Articles 20, 21 and 23 indicates that they each have a distinct content. Of course, an obligation to ensure equality between women and men (Art 23(1)) will include a prohibition to discriminate against women (Art 21). However, given that Article 21 contains the prohibition of sex discrimination, Article 23 must be interpreted as specifying its interpretation rather than establishing the prohibition itself. Further, while Article 20 uses the term equality in its heading, its text only uses the adjective 'equal', thus demanding equality as consistency[10] in application of the law. The resulting obligation of administrators and courts to use the same standards for everyone in applying the law (Art 20) differs fundamentally from the grand aim of ensuring equality of women and men (Art 23). Ensuring equality aims at changing socio-economic reality as well as at achieving de facto equality of the sexes.[11] In contrast, equality before the law in Western legal thought is usually construed in line with Aristotle's formula, which will prevent the realisation of de facto equality between groups and individuals who are constructed as unequal in social reality. The reason for this lies in the fact that, according to Aristotle, justice only required equal treatment for those who are equal. Accordingly, any inequality, whether

and *status positivus* (in which citizens demand that the Union and states actively create the preconditions for the enjoyment of human rights) (see on this J Kühling, 'Fundamental Rights' in A von Bogdandy and J Bast (eds), *Principles of EU Constitutional Law*, 2nd edn (Oxford, Hart Publishing, 2010) 479–515). In modern democracies, which also provide for enjoyment of rights in so-called private spheres such as the economy and the family, a *status social activus* should be added, allowing individuals to cooperate in order to ward off private power rather than being forced to rely on state protection. (See on this D Schiek, 'Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017) 341–368.

[9] Political science literature usually distinguishes three dimensions: non-discrimination law, positive action and gender mainstreaming: T Rees, *Mainstreaming Equality in the European Union: Education, Training and Labour Market Policies* (London, Routledge, 1998).

[10] S Fredman, *Discrimination Law*, 2nd edn (Oxford, Oxford University Press, 2011) 8–14; D Schiek, 'Torn between Arithmetic and substantive equality?' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 149–68, 150; see further Bell's commentary on Art 20 in this volume, 20.20–20.27.

[11] On the dangers of applying equality as consistency, in other words Aristotle's formula, in the field of sex equality law see Schiek, 'Torn between Arithmetic and substantive equality?' (n 10).

socially constructed or real, can be relied upon to justify unequal treatment.[12] If the duty to ensure equality between women and men is to be acquitted, any prohibition of discrimination must not be read as a specification of the Aristotelian formula. Further, since ensuring equality between women and men requires changing reality,[13] it cannot be achieved by a mere prohibition to discriminate—as is also clarified by Article 23(2) with its explicit scope for positive action.[14] Article 23 must thus be distinguished from formal equality before the law under Article 20 as well as from non-discrimination under Article 21, though it impacts on the interpretation and application of both those articles.

23.07 If the Court of Justice refers to the Charter at all in its case law on gender equality,[15] it has not always been as clear in its analysis, partly following imprecise opinions of its Advocates General.[16] First, Articles 21 and 23 are frequently mentioned together when the prohibition of sex discrimination is at stake, instead of clearly distinguishing between non-discrimination and a positive duty to ensure equality.[17] More problematically, the Court and its AGs have at times been inspired by the Aristotelian formula in applying the prohibition of sex discrimination, which again contradicts Article 23. This shall be illustrated by one example, the *Test Achats*[18] ruling on sex discrimination in insurance premiums.

23.08 AG Kokott reasoned in her opinion that Articles 21(1) and 23(1) establish 'the principle of equal treatment and non-discrimination between men and women', and that there is 'no fundamental difference' between that principle and the principle of equal treatment 'expressed in Article 20 of the Charter'.[19] Scrutinising the EU legislation's compatibility with the prohibition of sex discrimination, AG Kokott clarified that 'the principle of equal treatment or non-discrimination, of which the prohibition of discrimination on grounds of sex is merely a particular expression, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'.[20] This suggests that differences between women and men can be used to justify continued discrimination of women.[21] In the specific case AG Kokott concluded that discrimination of women could not be justified. The question to be decided by the Court was whether Article 5(2) of Directive 2004/113 infringed the prohibition of sex discrimination. That provision allowed Member States to exempt insurance companies from that prohibition, although it should be applied to other contracts concerning access to and provision of goods and services. AG Kokott concluded that

[12] Unsurprisingly, concentration camps in Nazi Germany had an abbreviated version of the Aristotelian formula on their entrance: 'Jedem das Seine' ('Each as he deserves'); see A Nußberger and L Osterloh, 'Commentary on Article 3 subsection 1 GG', marginal note 8, in M Sachs (ed), *Grundgesetz. Kommentar*, 8th edn (Munich, Beck, 2018).

[13] See in more detail below 23.27–23.29.

[14] See in more detail below 23.37–23.48.

[15] In some cases relating to gender equality, even if logged after the Treaty of Lisbon entered into force, the Court does not refer to the Charter (eg Case C-149/10 *Chatzi* [2010] ECR I-8499, relating to parental leave after the birth of twins, for which the objective obligation to ensure equality between women and men under Art 23 could have been used, and Case C-123/10 *Brachner* (20 October 2011), on pension regimes in Austria, although AG Trstenjak referred to Arts 21 and 23 as establishing the prohibition of sex discrimination, paras 49–51 of her opinion). In other cases, even though the question for preliminary ruling explicitly included Article 23, the Court did not engage with it at all (eg Case C-335/15 *Ornano* (14 July 2016) ECLI:EU:C:2016:564).

[16] In the *H v Land Berlin* case, AG Mengozzi did not even mention Article 23, while the Court referred to it in passing (Case C-174/16 *H v Land Berlin* (07 September 2017) ECLI:EU:C:2017:637).

[17] See eg Case C-401/11 *Soukupová* (13 April 2013) [28]; Case C-236/09 *Test Achats* [2001] ECR I-773 [38].

[18] *Test Achats* (n 17) [17].

[19] Para 29 of her Opinion.

[20] Para 41.

[21] See also para 60 of her opinion, stating clearly: 'Direct discrimination on grounds of sex is … permissible if … there are relevant differences between men and women which necessitate such discrimination'.

the statistical probability of being involved in road accidents less frequently, of using medical services more frequently and of living longer results from chosen behaviour and is not based on sex. Accordingly, demanding higher insurance premiums for women in health and life insurance and for men in car insurance was unjustified sex discrimination in her view. However, she might be swayed by 'scientific' evidence that the caution leading women to cause fewer accidents, to seek medical advice on time and to live longer as a result of both is genetically imprinted on the female sex. Prejudices such as those have time and again been used to justify devaluation of women.[22] The Court based its ruling on the principal logic of its AG with a peculiar twist. It stated that 'comparability of situations must be assessed in the light of the subject matter and purpose of the EU measure which makes the distinction'. Considering that the Council's stated intention had been to ensure unisex rules on premiums and benefits, the Court concluded that insurers must indeed not be allowed to discriminate against women.[23] Had the Council stated that there are sufficient differences between women and men for insurers to continue their discrimination, the Court might have accepted that discrimination. This long case report demonstrates that reliance on Aristotle's formula does not confer any valuable substantive equality rights on women, and thus contradicts Article 23. While the immediate result of the *Test Achats* case may be positive,[24] its ideological underpinnings constitute a danger to the effectiveness of Article 23.

II. Article 23 and Other Charter Articles

23.09 The principle of ensuring equality between women and men also constitutes a horizontal principle, which enhances the principle known as 'gender mainstreaming' (see below, 23.32). As such, it relates to any provision of the Charter, and demands that it is interpreted in ways that ensure equality between women and men. Two examples may illustrate the relevance of this. Reading Charter provisions in line with women's equality is particularly challenging where the protection of a specific right is prone to entrench traditional role expectations imposed on women, which often relate to women working more and/or for less recognition than men, or to expecting women to endure violence and other restrictions of their personal freedom. In international human rights law, tensions between protection of minorities and equality of women and men as well as frictions between freedom of thought, conscience and religion and gender equality have long been acknowledged as a problem.[25] Accordingly, there is a potential tension between Article 23 and Article 22, if the latter is read as not only protecting diversity, but also as sheltering the cohesiveness of cultural or religious groups.

[22] Möbius's classical treatise on the biologically induced intellectual incapacity of women (P Möbius, *Über den physiologischen Schwachsinn des Weibes*, 9th edn (Halle, 1908) may seem an outdated example. However, such research results are still achieved on 'objective' bases (see for current repercussions, with critical reflections, MW Matlin, *The Psychology of Women*, 7th edn (Wadsworth, Cengage Learning, 2012) chs 3 and 5).

[23] Paras 29–32 of the judgment; see for a similar position C Tobler, 'Annotation to Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres*' (2011) 48 *Common Market Law Review* 2041, 2052–54.

[24] See the annotation by Tobler, ibid, and E Ellis and P Watson, *EU Anti-Discrimination Law*, 2nd edn (Oxford, Oxford University Press, 2012) 206–09; see also Kilpatrick in this volume, 21.70–21.74.

[25] See CCPR General Comment No 28, Art 3 (The Equality of Rights between Men and Women), adopted by the Committee at its 1834th meeting on 29 March 2000, nos 32 and 21. The issue is also discussed at length in the recent UN Working Group on the issue of discrimination of women in law and in practice's report submitted to the Human Rights Council in June 2018 (A/HRC/38/46, 14.05.2018). On potential tensions between sex equality and religious freedom, see A McColgan, 'Class Wars?: Religion and (In)Equality in the Workplace' (2009) 38 *Industrial Law Journal* 1–29; more recently A McColgan, *Discrimination, Equality and the Law* (Oxford, Hart, 2014), 150–81; on conflicts between minority protection and women's rights, see S Moller Okin, 'Mistress of Their Own Destiny. Group Rights, Gender, and Realistic Rights to Exit' (2002) 112 *Ethics* 205–30.

Further, there is a potential tension between Article 23 and Article 33. Only women can give birth, and this specific gift is made to impact on equality between women and men by social arrangements. Frequently mothers are held responsible for children beyond the act of birthing, and in extreme cases expected to deliver all the work connected to child-raising without being paid for it, to give up any employed work or any other ambition until their children can fend for themselves. Maternity can thus form a burden, shackling women to a life of dependency on others, and limit their ability to be self-contained and to choose activities other than child minding and housework for their children and their father(s). Article 33 of the Charter, in protecting families unconditionally, does not refer to those or any other damaging effects on women's equality potentially flowing from the organisation of family life. 23.10

Article 33, paragraph 2 of the same provision affords 'everyone' rights to maternity leave, protection against dismissal on grounds of maternity and to parental leave—although any maternity rights can only be enjoyed by women. Its focus on leave is also unnecessarily narrow: reconciliation of paid work and unpaid work in families[26] could also be achieved by demanding that the organisation of paid work and publicly financed child care should leave sufficient time for mothers and fathers to care for their children without reducing their paid work. Focusing on leave, particularly if combined with long parental leave after maternity leave, frequently leads to mothers losing any realistic prospect of a career beyond child minding and housework without pay. There is thus a potential tension between Article 33 and Article 23. This tension can be dissolved by interpreting Article 33 in line with Article 23 as to demand ways of protecting families and reconciliation that ensure equality between women and men at the same time. Other ways of protecting families and reconciliation would be unlawful as contradicting Article 23. 23.11

C. Sources of Article 23 Rights

I. Council of Europe Treaties

The ECHR states in Article 14 that its provisions must be applied without discrimination, and Protocol No 12 provides for Article 14 to be transversally applicable.[27] This prohibition against discriminating comprises sex explicitly, but the Charter does not contain any positive obligation complementing that prohibition. There is thus no equivalent to Article 23 in the ECHR.[28] This corresponds to the low prominence of gender equality within the ECHR case law: the first case on sex discrimination dates from 1985, and there is as yet no case law on issues such as positive action.[29] 23.12

[26] On this principle see in more detail E Caracciolo di Torella and A Masselot, *Caring Responsibilities in EU Law and Policy* (New York: Routledge, 2020); D Schiek, 'Collective Bargaining and Unpaid Care as Social Security Risk: An EU Perspective' (2020) 36 *International Journal of Comparative Labour Law and Industrial Relations* 3, 387–408; see also commentary to Art 33.

[27] At the time of writing Protocol No 12 was ratified by 10 EU Member States (Croatia, Cyprus, Finland, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovenia, Spain), signed by 11 (Austria, Belgium, Czechia, Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Slovakia) and neither signed nor ratified by six EU Member States (Bulgaria, Denmark, France, Lithuania, Poland, Sweden). For current status, see: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=f2Zsy7s0.

[28] It is worth noting that Article 5 from Protocol No 7 is also an equality provision dealing with equality in rights in relation to children and property between (heterosexual) spouses during and after marriage. There has been no case law on this provision. See P van Dijk et al (eds), *Theory and Practice of the European Convention on Human Rights*, 5th edn (Antwerp, Intersentia, 2018), 991–95.

[29] On a comparison between ECtHR and ECJ case law on equality between women and men, see S Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) 8 *Human Rights Law Review* 647–82; I Radačić, 'The European Court of Human Rights' Approach to Sex Discrimination' [2012] *European Gender Equality Review* 13–22.

The field of equality between women and men is clearly one where EU law traditionally has provided more extensive protection than the ECHR. The Charter acknowledges that the EU can be ahead of other organisations in its human rights regime, since Article 52(3) recognises that nothing shall 'prevent Union law from providing more extensive protection'.

23.13 However, other instruments of the Council of Europe embrace equality between women and men more fully. Article 20 of the revised European Social Charter[30] provides:

> With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:
>
> a) access to employment, protection against dismissal and occupational reintegration;
> b) vocational guidance, training, retraining and rehabilitation;
> c) terms of employment and working conditions, including remuneration;
> d) career development, including promotion.

23.14 The Council has adopted a special convention on combating violence against women, the Istanbul Convention, which entered into force in August 2014. It has been signed by all Council of Europe members, including the European Union and all EU Member States, save for Azerbaijan and the Russian Federation. Six EU Member States and the European Union itself have not yet ratified the Convention.[31] While containing some overlaps with the EU's Victims' Rights Directive, the ratification of the Convention is expected to enhance the direction and commitment of the Union to counter violence against women.[32]

II. UN Treaties

(a) General Human Rights Instruments

23.15 As with many national constitutions in Europe, as well as the Universal Declaration of Human Rights, the UN International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) each include a specific clause on equality between women and men in addition to a general prohibition of discrimination on a number of grounds. Article 3 of the ICCPR and of the ICESCR require state parties 'to ensure the equal right of men and women to the enjoyment of all (....)rights set forth in the present Covenant'. These follow Article 2 of each convention, under which state parties 'guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The structure of the rights guaranteed in Articles 21 and 23 mirrors this layout. In contrast to the Charter, Articles 2 and 3 of the UN Covenants limit their scope to the rights protected

[30] The 1996 European Social Charter has been ratified by 20 Member States, while seven have only signed, but not (yet) ratified it. The former category comprises Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia and Sweden.

[31] The Convention was adopted on 11 April 2011 and opened for signature on 11 May in Istanbul. The European Union signed it on 13 June 2017 and expected to finalise its ratification by 2019, before the European Parliament challenged the ratification before the CJEU, on grounds of the use of the inadequate legal base and the absence of mutual agreement between all Member States to be bound by it (*Avis 1/19*, pending). Bulgaria, Czechia, Hungary, Latvia, Lithuania and Slovakia are still to ratify the Convention. For current status, see: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures.

[32] K Nousiainen and C Chinkin, *Legal implications of EU accession to the Istanbul Convention* (Brussels, European Commission, 2015) 133.

in those Covenants, and have been considered as parasitic as a consequence.[33] Only the ICCPR contains an independent prohibition of discrimination in Article 26, within which sex is named as one of the grounds on which discrimination is prohibited.

(b) The International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

23.16 The UN main instrument in the field of equality of women and men goes beyond establishing an obligation to ensure equality and allowing special measures in favour of women. This convention was the first to establish an explicitly asymmetric approach to equality rights. Its Article 1 defines discrimination against women as

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

23.17 Article 4 specifies that neither 'temporary special measures aimed at accelerating the de facto equality between men and women' nor 'special measures aimed at protecting maternity' shall be considered as discrimination in the sense of the Convention. As regards measures aimed at accelerating de facto equality, the Convention specifies that these must be discontinued when (not if) the objectives of equality of opportunity and treatment have been achieved. Taken together, this also indicates that the CEDAW obliges state parties to take measures which will achieve equality of opportunity and treatment for women in social reality. These provisions are frequently seen as going beyond the limited space the Court of Justice of the European Union has allowed for positive action in EU law, which of course raises the question of in how far the more restrictive approach of EU law towards 'positive action' may be in conflict with the CEDAW, and what consequences this may have (below, 23.45–23.47). While not a special convention on the rights of women, the 2009 Convention on the Rights of Persons with Disabilities (CRPD)[34] is worthy of note here for its Article 6, according to which the state parties recognise the multiple nature of the discrimination faced by women and girls with disabilities and assume an obligation to undertake 'measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms' including the ones enshrined in the CRPD.

III. EU Law

23.18 Gender equality is frequently considered as one of the best developed aspects of EU law,[35] ranging from the most developed field of social policy to an important human rights policy subject[36]

[33] W Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerp, Intersentia, 2005) 13.

[34] See, for more detail on this convention, C O'Brien, Article 26, 26.31–26.45, in this volume. On the EU disability discrimination law and intersectionality see D Schiek, 'Intersectionality and the Notion of Disability in EU Discrimination Law' (2016) 53 *Common Market Law Review*, 35–64.

[35] On the history of EU gender equality law see T Hervey, 'Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards' (2005) 12 *Maastricht Journal of European and Comparative Law* 307–25, and the contributions to the special issue she is introducing in this article, see also S Sümer, *European Gender Regimes and Policies* (Farnham, Ashgate, 2009) 59–85, for more recent material see E. Holzleithner, 'EU-rechtliche Bestimmungen zum Antidiskriminierungsverbot—Grundlagen und Anwendung' in A Scheer, A El-Mafaalani and G Yüksel (eds), *Handbuch Diskriminierung* (Wiesbaden, Springer VS, 2017) 200–26.

[36] The elegy in the relevant chapter of one of the predecessors of this volume is characteristic in maintaining that 'gender equality is the most robust and highly developed aspect of European Union social policy. While other areas of

and the embodiment of developing innovative ways to regulate, such as the principle of gender mainstreaming.[37] Accordingly, there are numerous emanations and assertions of this principle in European Union law and policy, including so-called soft law instruments, which are not legally binding but must be drawn upon when interpreting EU law. As concerns the latter category, the Community Charter of Fundamental Rights of Workers proclaimed:

> 16. Equal treatment for men and women must be assured. Equal opportunities for men and women must be developed.
>
> To this end, action should be intensified wherever necessary to ensure the implementation of the principle of equality between men and women as regards in particular access to employment, remuneration, working conditions, social protection, education, vocational training and career development.
>
> Measures should also be developed enabling men and women to reconcile their occupational and family obligations.

23.19 This instrument was solemnly declared by the then EU Member States in 1989, with the UK's abstention.[38]

23.20 Long before the Community Charter and the Charter of Fundamental Rights were adopted, equal treatment of men and women had been acknowledged as one of the general principles of Union law. The Court issued the pivotal *Defrenne II* ruling in 1976,[39] just after the Council had agreed that 'achieving equality between men and women' in the world of work should be one of the priorities of its social action programme.[40] Community legislation relating to this aim focused on equal treatment between women and men, ie non-discrimination rather than equality, a subject matter which is covered by Article 21 TFEU. Community legislation also stressed that its purpose was to 'put into effect the principle of equal treatment' (Art 1(1) Directive 1976/207).[41] Today, the purpose of EU gender equality legislation is sometimes a dual one. For example, Directive 2006/54[42] aims to 'ensure the implementation of equal opportunities and equal treatment of men and women in matters of employment and occupation' (Art 1(1)).

23.21 This development reflects the incremental progress of primary EU law towards recognising equality between men and women as an aim to be pursued, going beyond a prohibition of sex discrimination. The Treaty of Amsterdam introduced equality between men and women as an aim of the Community (Art 2 EC), and this aim is maintained in Article 3(3) TEU. The Treaty of Amsterdam[43] also introduced the Community's obligation to 'aim to eliminate inequalities, and to promote equality between men and women' in all its activities (Art 3(2) EC, now Art 8 TFEU).

social policy are characterised by shared competences and flexibility of instruments, gender equality has been described as "federalism encapsulated" … long based on an ethic of enforceable individual rights invocable against Member States and private individuals.' C Costello, 'Gender Equality in the Charter of Fundamental Rights of the European Union' in T Hervey and J Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective* (Oxford, Hart Publishing, 2003) 111, 111–112, references omitted.

[37] F Beveridge and S Velluti, *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Aldershot, Ashgate, 2008).

[38] (1990) 1 *Social Europe* 45.

[39] Case 43/75 *Defrenne II* [1976] ECR 455.

[40] [1974] OJ C13/1.

[41] Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40, now superseded by Directive 2006/54/EC.

[42] Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

[43] [1997] OJ C340/1.

The same treaty introduced into Article 141(4) EC the 'view to ensuring full equality in practice between men and women' (now Art 157(4) TFEU). This clause did not prevent the EU legislator from maintaining a focus on equal treatment. For example, the newest sex equality Directive, though based on Article 157(3), does not reaffirm the obligation to ensure full equality between men and women, but is restricted to mere equal treatment (Directive 2010/41).[44]

Accordingly, Article 23 is underpinned by primary and secondary EU law, both as a right and as a principle. It reinforces the heightened position of gender equality in EU law by also giving this constitutional principle[45] an elevated position within the Charter. The Charter does not offer any comparably all-encompassing provisions relating to any other inequality. Given the elevated relevance of gender equality in EU law, a commentary on Article 23 cannot cover all aspects of the debate. The subsequent sections maintain the focus on exegesis of the positive law in context with its purposes, adding some examples of practical applications. In keeping with the content of Article 23, they do not cover the prohibition of sex discrimination as such. 23.22

D. Analysis

I. General Remarks

As stated already, Article 23 does not establish a classical human right,[46] and it consists of two distinct paragraphs. The first paragraph establishes a positive duty to ensure equality between women and men, and impacts on all provisions of the Charter, including Article 23(2), and other Union law. Paragraph 2 is much narrower, in that it clarifies how the prohibition of sex discrimination contained in Article 21 relates to positive action. Accordingly, each paragraph of Article 23 warrants its own commentary, each of which requires an adaptation of the structure of commentaries devised for classical human rights. The scope of application (a) is followed by the substantive commentary on the specific provision (b) and a section covering judicial review and enforceability (c), since sections on limitations and derogations and on remedies have limited value for provisions mainly modifying a classical human right. Under section E an evaluation of the opportunities and shortcomings of Article 23 will be offered. 23.23

II. Paragraph 1

> Equality between women and men must be ensured in all areas, including employment, work and pay.

(a) Scope of Application: Women and Men

Referring to equality between women and men, Article 23 paragraph 1 seems to indicate that it does not encompass all citizens: after all, nature does not always conform to the social convention of categorising people as either woman or man. Whatever the alleged biological basis of this categorisation—chromosomes, outer genitals, secondary sex identifiers—children 23.24

[44] 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 and repealing Council Directive 86/613/EEC [2010] OJ L180/1.

[45] S Koukoulis-Spiliotopoulos, 'The Amended Equal Treatment Directive (2002/73): An Expression of Constitutional Principles/Fundamental Rights' (2005) 12 *Maastricht Journal of European and Comparative Law* 327, 331–36.

[46] Above, section A, 23.04.

are born in more than two varieties. In a society which insists on two sexes only, this creates problems for those falling between the categories. Children who do not display the expected sex categories at birth are frequently still altered by risky surgery. People who perceive themselves as belonging to a different gender than their bodies suggest often feel compelled to seek surgery, rather than challenging continuing gender stereotypes that prevent them from feeling comfortable in their bodies.[47]

23.25 The binary model of gendered reality, according to which humankind only consists of women and men, is but a social convention, which is again closely linked to requiring women and men to perform different and complementing roles in society. These ascribed roles are ideologically connected to the ability of many women to give birth, from which women's responsibility to deliver unpaid work in raising children and caring for other adults is derived. Since humans are brought up as women and men, most consequently identify with the corresponding values, roles and life styles of one of these identities. Mentioning only women and men, Article 23 latches onto those social conventions perceived as based on biological difference. To avoid perpetuating social inequalities entrenched in these social constructs, it is important to read the notions of women and men in Article 23 as social constructs rather than essential categories.

23.26 In academic writing as well as in EU policy documents, the notion of 'gender' has come to signify the social construction of women and men.[48] Gender is built around social expectations of maintaining a certain organisation of society, which is at the same time closely aligned with an unequal division of labour and resources between those categorised as male and female, and a certain structure of families as the basis for the division of labour and organisation of sexuality. If the notion of women and men together constitutes gender, the notion of gender can comprise trans- and intersex persons who do not neatly fit the binary gender categories. For example, the Court of Justice has acknowledged that sex discrimination also prohibits discrimination on grounds of gender reassignment.[49] In this case AG Tesauro considered that discrimination on grounds of falling 'outside the traditional man/woman classification' must be classified as sex discrimination.[50] This indicates the need to acknowledge the terms woman and man as ends of a continuum from a biological perspective. Going further, and relating the notions to the purpose of Article 23(1) of ensuring equality between women and men, it is necessary to consider the purpose of dividing humankind into women and men. As indicated, gender theory convenes that this purpose is the definition of socio-economic role expectations around division of labour. If equality between women and men should be ensured, the need for the distinction should diminish. Acknowledging its limited value would thus already contribute to ensuring equality. As a result, gender as the notion comprising women and men can be considered as a node[51] comprising not only women and men, but also

[47] There is a growing body of literature on transsexual and transgender people. For an overview considering these problems as part of the gender node, see S Agius and C Tobler, *Trans and Intersex People. Discrimination on Grounds of Sex, Gender Identity and Gender Expression* (Brussels, European Commission, 2011) with numerous academic references. For a recent account, including an analysis of trans and intersex rights and an overview of the recent state of affairs at both EU and Member States' level, see M van den Brink and P Dunne, *Trans and Intersex Equality Rights in Europe—a Comparative Analysis* (Brussels, European Commission, 2018).

[48] See eg Sümer (n 35) 5–6, with further references.

[49] Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

[50] Para 17 of his opinion.

[51] D Schiek, 'Organising EU Equality Law Around the Nodes of "Race", Gender and Disability' in D Schiek and A Lawson (eds), *EU Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Farnham, Ashgate, 2011) 11, 24.

trans-, non-binary,[52] and intersex persons, who do not neatly fit the categories of male and female. If read in the light of its aim, Article 23(1) thus does apply to all humankind, and not only to those who fit the traditional categories of woman and man without any doubt.

(b) Specific Provision

Equality between Women and Men

The aim to be pursued under Article 23 is equality between women and men. Considering that 23.27
women and men are also diversified by a number of other ascribed characteristics, including alleged race, ethnic origin, bodily capacity and being disabled by society's expectations, inequalities between women and men are also widely varied.[53]

With all these varieties, inequalities between women and men can still be captured in general 23.28
terms. This results from social processes causing durable inequalities[54] between those categorised as female and male respectively (women and men). These inequalities privilege men over women. Women are usually made to work more, earn less for the same amount of work, and have more limited access to resources generally.[55] This is achieved by structuring the division of labour between women and men along the lines pre-ordained by expectations of heterosexuality as the norm (hetero-normativity).[56] While the details of inequalities between women and men differ between different societies, the burdening of women with more work, in particular more unpaid or low-paid work, than men is common to societies in all EU Member States. To a large extent, this is achieved by women delivering more unpaid work in families, caring for children, the elderly and servicing men in their reproductive needs.[57] Inequalities between women and men also include sexualisation and emotionalisation of women, and the expectation that women endure physical violence, including sexual violence, and other restrictions of their physical integrity and personal liberty.[58]

[52] A recent report on the rights of trans and intersex persons in Europe (the EU and the EEA) finds that the ECJ 'appears to prefer a more rigid, dichotomous framework for protection' which excludes non-binary people. In addition, the same report identifies that the ECJ approach to trans people seems to revolve around gender reassignment which is a 'highly medicalised picture of trans people [and excludes those] trans EU citizens who cannot or will not access gender confirmation healthcare' (van den Brink and Dunne (n 47)). For similar critique of the 'binary construction of gender' in the context of Art 23 see S Borelli, 'Charter of Fundamental Rights of the European Union' in E Ales et al (eds), *International and European Labour Law* (Baden-Baden: Nomos and Hart, 2018), 209, 210.

[53] On the notion of intersectionality see below, 23.54–23.56.

[54] On the construction of durable inequalities through social interactions, see IM Young, 'Structural Injustice and the Politics of Difference' in E Grabham et al (eds), *Intersectionality and Beyond* (Abingdon, Routledge-Cavendish, 2009) 273, 275.

[55] For the European Union, these indicators are reported in an annual report by the European Commission. The latest of these is available for 2018 (European Commission, Progress on Equality Between Women and Men in 2018 (Brussels, 2018), http://ec.europa.eu/newsroom/just/document.cfm?doc_id=50074). Data is available on the gender pay gap, ie the difference in remuneration for comparable work by sex, which is measured annually (European Commission, *The Gender Pay Gap 2016* (Brussels, 2016), available from https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics).

[56] On the feminist notion of hetero-normativity, see C Ridgeway and S Correll, 'Unpacking the Gender System' [2004] 18(4) *Gender Society* 510–31; A Miller, 'Like a Natural Woman: Negotiating Collective Gender Identity in an Alternative World' [2007] 27(1) *Sociological Spectrum* 3–28.

[57] The time use per gender remains one of the worst documented indicators for gender (in)equality. In 2006, EUROSTAT established that women work between 50 and 200% more than men on domestic tasks (Chr Aliaga, How is the time of women and men distributed in Europe? Statistic in focus 4/2006, available from https://ec.europa.eu/eurostat/web/products-statistics-in-focus/-/KS-NK-06-004 =). ?In 2015, European Institute for Gender Equality calculated the third lowest score in the Gender Equality Index for the domain of time. This domain measures care activities (daily care activities outside of paid work, and cooking and housework) and social activities (weekly sports, cultural or leisure activities and monthly voluntary or charitable activities). Furthermore, with '1 point lower than in 2005 and a further 3.2 points lower than the score of 2012 [...] the situation has become more unequal than it was ten years ago' (see Gender Equality Index: https://eige.europa.eu/gender-equality-index/2015/domain/time).

[58] Statistical capture of violence against women is improving but remains incomplete. The EU Gender Institute nevertheless provides studies on the problem (see https://eige.europa.eu/gender-based-violence/data-collection), and has

23.29 The EU and its predecessors have developed their approach to inequalities between women and men since 1957. From the beginning, equal pay of men and women was to be maintained by Member States. The equal pay clause was initially motivated by the desire to avoid competitive disadvantage for Member States such as France which prohibited pay discrimination.[59] Since 2000, human rights protection was acknowledged as a decisive motive for the demand for gender pay equality.[60] The EU legislator has initially focused on employment and occupation, including social security.[61] With expanding competences (above, section A) it has also expanded gender equality legislation to new fields, such as access to goods and services.[62] Further, gender equality is an element of the OMC where the EU cannot wield legislative competences.[63] With all these developments, some doubt whether the Charter adds anything specifically.[64]

23.30 It is submitted that Article 23 does constitute change. In particular, the clause goes beyond the EU *acquis* developed in this field in one other important aspect, namely in the order of words. While the Treaties and secondary legislation always relate to men and women (equal treatment of men and women, equal pay), the Charter reverses the order and speaks about equality of women and men. While the egalitarian principle is maintained, the change in order also constitutes a further milestone. Naming women first, the Charter acknowledges the asymmetric character of sex inequality to the detriment of women. Asymmetry of equality rights[65] is frequently used to support a reading that does not outlaw discrimination of the privileged group (or sex) in order to achieve equality in socio-economic reality. Such measures can be necessary to overcome the paradox of equality law: modern laws concerning equality and discrimination are not restricted to merely formal equality. They are more ambitious in pursuing the aim of changing socio-economic reality in favour of those who have been at the receiving end of discrimination.[66] To achieve such change, formally neutral rules are not always sufficient. At times it is also necessary to grant privileges to those who have hitherto suffered detriment. Sometimes, taking away a privileged position will also be perceived as detriment, but at times even further positive action will be required. While Article 23(2) provides a more specific rule on positive action, the wording of Article 23(1) changes the conceptual base for such positive action by acknowledging that women are those suffering from detriment, through its revised order of words. It thus suggests that positive duties and positive action are firmly based on a notion of asymmetry.

Ensuring Equality in All Areas, Including Employment, Work and Pay

23.31 In requiring the EU and its Member States to ensure equality, Article 23(1) goes beyond an obligation to refrain from discrimination (Art 21) or to respect diversity (Art 22), as well as beyond

'violence' as one of the eight domains in its Gender Equality Index (see https://eige.europa.eu/gender-equality-index/2015/domain/violence). In 2014, FRA published the report from its 2012 survey, which remains the most up-to-date data set (see https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf).

[59] G More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999) 517–53.

[60] Case C-50/96 *Schröder* [2000] ECR I-743 [57].

[61] Today, the most important directives in these fields are Directive 2006/54 on equal treatment of women and men in employment and occupation and Directive 79/80 on equal treatment of women and men in social security.

[62] Directive 2004/113/EC.

[63] Beveridge and Velluti (n 37).

[64] Costello (n 36) 112; E Ellis, 'The Impact of the Lisbon Treaty on Gender Equality' [2010] *European Gender Equality Law Review* 7–13, 11.

[65] On this see D Schiek, 'Elements of a New Framework for the Principle of Equal Treatment of Persons in EC Law: Directives 2000/43/EC, 2000/78/EC and 2002/73/EC changing Directive 76/207/EEC in context' (2002) 8 *European Law Journal* 137–57.

[66] Schiek, 'Torn between Arithmetic and substantive equality?' (n 10).

gender mainstreaming (Art 8 TFEU). In the British discourse, the term 'positive duties' is used for an obligation to ensure equality. These have recently been codified in the Equality Act,[67] after having given rise to a new philosophy of human rights based on doctrines of equality law.[68] In Continental Member States, the concept of positive state obligations to create preconditions for enjoyment of human rights is frequently derived from social state principles.[69] In addition, some Continental constitutions explicitly demand that equality between women and men must be ensured.[70]

23.32 In international law this corresponds to the obligation to promote human rights. Relating to equality of women and men, the obligation to promote the factual conditions for the enjoyment of rights has first been linked to gender mainstreaming after the 1985 UN women summit[71] and was fully developed as an instrument during the 1995 UN summit on women.[72] The EU Commission had actively contributed to the 1995 summit with a proposal, based on the appraisal of the gender mainstreaming strategy in its Third Action Programme for Equal Opportunities.[73] Immediately after the Beijing Platform had been adopted, EU Commission[74] and Council of Europe[75] documents established definitions of gender mainstreaming that are still quoted as decisive. According to these, gender mainstreaming constitutes a change in strategy in that women's equality is no longer pursued by specific instruments only, but rather through the incorporation of a gender equality perspective into developing, evaluating and improving any policy process.[76] The inclusion of the gender mainstreaming principle into primary EU law was achieved with the Treaty of Amsterdam, which established the wording of today's Article 8 TFEU (see above 23.21).

[67] On this see B Hepple, *Equality—The New Framework*, 2nd edn (Oxford, Hart Publishing, 2014) 155, 163–75.

[68] S Fredman, *Human Rights Transformed* (Oxford, Oxford University Press, 2008).

[69] See, for an English language overview, S Koutnatzis, 'Social Rights as Constitutional Compromise: Lessons from Comparative Experience' (2005) 44 *Columbia Journal of Transnational Law* 74–133; for the German Constitution see D Schiek, 'Artikel 20 Abs. 1–3 V: Sozialstaat' in E. Denninger et al (eds), *Alternativkommentar zum Grundgesetz* (Neuwied: Luchterhand, 2001) II.

[70] For example, under s 6 of the Finnish Constitution, 'Equality between the sexes is promoted in societal activity and working life'; under Art 1 of the French Constitution, 'statutes shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility'; under Art 3(2) of the German Constitution, 'the state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist'; and under Art 114 of the Greek Constitution, the 'state shall take measures for the elimination of inequalities actually existing, in particular to the detriment of women'. The Italian Constitution stresses the obligation of the Republic and its regions to promote equal opportunity between women and men, and to remove hindrances to full equality of men and women in social, cultural and economic life, while also stressing women's 'essential role in the family' (Arts 37, 48, 51, 117). Quotes are taken from J Huckerby, 'Gender Equality and Constitutions of Europe and North America' in UN Entity for Gender Equality and the Empowerment of Women, *Gender Equality and Constitutions. Comparative Provisions* (Geneva, United Nations, 2012) 1–68.

[71] Sümer (n 35) 79.

[72] UN Fourth World Conference on Women, *Global Platform for Action—Beijing* (New York, United Nation Publishing, 1995); J Rubery, 'Gender Mainstreaming and the OMC. Is the Open Method of Coordination too Open for Gender Equality Policy?' in J Zeitlin and P Pochet (eds), *The Open Method of Coordination in Action. The European Employment and Social Inclusion Strategies* (Brussels, PIE/Peter Lang, 2005).

[73] COM 90 (449) final.

[74] Communication from the Commission to the Council, 'Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities' COM (1996) 67.

[75] Council of Europe: Gender Mainstreaming. Conceptual Framework, Methodology and Presentation of Good Practices. Strasbourg (available from www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/EG_S_MS_98_2_rev_en.pdf).

[76] See for summaries and quotes from those instruments, Beveridge and Velluti (n 37) 17; R Nielsen, 'Is European Union Equality Law Capable of Addressing Multiple and Intersectional Discrimination Yet?' in D Schiek and V Chege (eds), *European Union Non-Discrimination Law—Comparative Perspectives on Multidimensional Equality Law* (Abingdon and New York, Routledge-Cavendish, 2009) 29, 39–40.

23.33 However, Article 23(1) once again goes beyond the established *acquis*. While under Article 8 TFEU the Union shall only aim to eliminate inequalities and to promote equality between men and women, Article 23(1) demands that equality must be ensured. Thus, it is not sufficient to integrate a mere gender perspective and to strive for more equality. Instead, the obligation under Article 23(1) is only fulfilled once a change in society has been achieved and secured which may well seem utopian today, given the gross inequality between women and men, which increases whenever there is some crisis leading to scarcity of resources.[77] This enhanced obligation might even quell some of the criticism of gender mainstreaming EU-style, according to which gender mainstreaming is only successful for policies driven by such departments that are conscious of the needs of gender equality anyway[78] or is based on a reductionist approach attributing gender inequality to some economic habits mainly.[79] There is no doubt that a process-focused approach to overcoming inequalities between women and men is necessary, as a corollary to non-discrimination policies, if socio-economic reality should be changed.[80] If EU institutions are not only required to pay some attention to structures by attempting to overcome inequality, but are also under an obligation to ensure equality, this structural perspective may actually yield success. If taken seriously, Article 23 mitigates against a backlash in EU gender equality law, which has been identified by researchers from various disciplines.[81]

23.34 Article 23(1) is phrased more assertively than Article 8 TFEU. Accordingly, it requires more than considering gender equality in policy formulation. If inequalities between women and men persist, ensuring equality will require the taking of specific measures in favour of women overcoming factual disadvantage. The positive obligation to ensure equality of women and men aims at socio-economic reality, frequently also referred to as substantive equality or transformative equality.[82] Overcoming inequalities between women and men 'in all areas' requires that the EU and its Member States strive for such equality, rather than only supporting formal approaches to equal treatment. Article 23(1) demands mainstreaming the obligation to ensure equality applies to all areas, while employment, work and pay are the ones stressed explicitly. The latter is in line with the origins of the EU's gender equality policies (above, 23.29), but the Charter also clarifies that this is today only one fraction of the areas in which equality of women and men must be ensured. This obligation rests on all institutions, the judiciary in interpreting non-discrimination and other law as well as the legislator in adopting new legislation and the EU Commission in developing policies.

[77] See F Bettio et al, *The Impact of the Economic Crisis on the Situation of Women and Men and on Gender Equality Policies* (Brussels, EU Commission, 2012); E Lombardo and M Léon, 'Políticas de igualdad de género y sociales en España: origen, desarrollo y desmantelamiento en un contexto de crisis económica' Investigaciones (2014) 5 *Feministas* 13–35 with ample data for the Spanish context.

[78] Fredman, *Human Rights Transformed* (n 68) 192–94.

[79] C Booth and C Bennet, 'Gender Mainstreaming in the EU: Towards a New Conception and Practice of Equal Opportunity?' (2002) 9 *European Journal of Women's Studies* 430, 441; K Nousiainen, 'Utility-Based Equality and Disparate Diversities: From a Finnish Perspective' in Schiek and Chege (eds), *European Union Non-Discrimination Law* (n 76) 187, 190–92.

[80] Accordingly, there are also optimistic assessments of the EU gender mainstreaming strategy (eg S Walby, 'Gender Mainstreaming. Productive Tensions in Theory and Practice' (2005) 12 *Social Politics* 321–43).

[81] R Kuhar and D Paternotte (eds), *Anti-Gender Campaigns in Europe—Mobilizing against Equality* (New York, London, Rowman & Littlefield International, 2017); M Verloo (ed) *Varieties of Opposition to Gender Equality in Europe* (New York, Routledge, 2018).

[82] For example, by S Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights' in I Boerefijn et al (eds), *Temporary Special Measures. Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Antwerp, Intersentia, 2003) 111, 115; R Holtmaat and J Naber, *Women's Rights and Culture: From Deadlock to Dialogue* (Antwerp, Intersentia, 2011) 267.

(c) Judicial Review, Enforceability ('Justiciability')

As far as Article 23(1) programmes future legislation and policy development, the restrictive text of Article 52 may lead to doubts whether the provision is open to judicial review (or 'justiciable', in the words of the Comments to the Charter). However, once the EU has taken legislative measures, these must at the same time ensure equality between women and men. Article 23(1) can thus be used to challenge existing legislation under Article 263 and 267 TFEU. For example, the Directive on unwelcome migrants is not only worthy of academic critique,[83] but could also constitute a violation of Article 23(1), in that it does not provide specific measures to accommodate the vulnerability of female refugees in camps where refugees without regular status shall be housed. There are no provisions for adequate accommodation for pregnant women or for facilities where it is safe to give birth; and there are no precautions against placing individual women in large groups of men where they are likely to be subjected to gendered violence. Further, the EU Commission and the Council are also bound by Article 23 when engaging in policy coordination without binding legal effects. With the legally binding effect of the Charter, the question how gender mainstreaming has been applied in the Open Method of Coordination[84] has become a constitutional one. 23.35

Finally, Article 23(1), although not conveying individual rights, binds the judiciary at EU and national levels in the interpretation and application of other individually enforceable rights. Such rights include the non-discrimination clauses of Article 21 and primary and secondary Union law (including Arts 18 and 157 TFEU and legislation based on Arts 19 and 157(3) TFEU). Article 23(1) thus ensures a holistic interpretation of all provisions concerning sex discrimination and other discrimination in the light of an asymmetric notion of gender equality and the duty to ensure gender equality. Mainly, an asymmetrical and proactive approach to gender equality requires pursuing substantive (and transformative) equality rather than merely formal equal treatment. There are innumerable practical applications for this within the field of sex discrimination law, as covered by Article 21, including the exact content of the prohibition of sex discrimination, the equation of sexual harassment with discrimination, and the provisions allowing limited positive action measures.[85] To illustrate the opportunities created by Article 23, the evaluating section E will consider how the judiciary must, in the future, shape the concept of indirect sex discrimination, react to intersectional inequalities and shape positive action in favour of women. 23.36

III. Paragraph 2

> The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex.

(a) Scope of Application

Article 23(2) specifies the prohibition of sex discrimination in so far as it clarifies the admissibility in principle of positive action. Its scope of application comprises any law or policy establishing preferences for women or men. There is no personal restriction of the scope of application. 23.37

[83] H Askola, 'Illegal Migrants, Gender and Vulnerability: The Case of the EU Returns Directives' (2010) 18 *Feminist Legal Studies* 159–78.

[84] Beveridge and Velluti (n 37).

[85] T Freixes, 'Article 23. Egalité entre hommes et femmes' in EU Network of Independent Experts on Fundamental Rights (eds), *Commentary of the Charter of Fundamental Rights of the European Union* (Brussels, European Commission, 2006) 201–03.

(b) Specific Provision

Origins

23.38 According to the Charter explanations, Article 23(2) originates from the Treaty provision Article 157(4) TFEU. Article 157(4) TFEU reads: 'With a view to securing full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'. This provision again has a specific history. It was inserted into the Treaty of Amsterdam after a particularly controversial ruling by the Court of Justice on so-called positive action in favour of women. The *Kalanke* ruling[86] of 1995 concerned a rule specific to career development in German public services.[87] The German Constitution binds public employers to a specific equality clause, which requires any decision on employment or promotion to be guided by the merit principle (Art 33(2) German Constitution). Accordingly, the person who is best qualified under a predefined set of qualifications, as assessed by public examinations or by in-post assessment following strictly formal rules, must always prevail. These rules resulted in male dominance in senior positions, which motivated the City of Hamburg to task a former judge at the Constitutional Court with drafting potential positive action measures.[88] The judge came up with a 'tie-break rule': in order to overcome persistent under-representation of women, women could be preferred over equally qualified male competitors in employment and promotion until there were as many women as men in the relevant pay bracket.

23.39 Arguably, this tie-break rule was introduced instead of requiring personnel managers to abstain from structural discrimination which was quite usual. For example, in-post assessments traditionally tended to converge on the same grade after employees or civil servants had achieved certain seniority. As a consequence, choices for promotion were made on the basis of 'auxiliary criteria', mainly comprising seniority and number of dependants. Due to strict gender role expectations, the percentage of female employees in the public sector who were responsible for more than one dependant was very low: they would have one dependant if their husband earned less than themselves, or if they were unmarried mothers. Married male employees would typically have three dependants: a wife, if earning only slightly less than the husband, and two children. Seniority, too, tended to favour males in male-dominated sectors, as women had only been given a chance much more recently. The City of Bremen had dared to disable these indirectly discriminatory criteria in favour of a tie-break rule. Thus, Mr Kalanke, a married father of two children, expected to be promoted before Ms Glissman, who was younger and without children and had less seniority (despite having more professional experience, partly accumulated in the private sector). This was very important to him at the time, because any promotion after his 60th birthday would not have been reflected in his final salary pension. Understandably, he challenged the decision to promote Ms Glissman, who had been assessed as equally qualified.

23.40 The Court of Justice based its ruling on Directive 76/207 (since superseded by Directive 2006/54), which established the principle of equal treatment between men and women in employment and occupation. It also contained a clause that was meant to allow positive action,

[86] Case C-450/93 *Kalanke* [1995] ECR I-3051.

[87] For more detail on this see D Schiek, 'Sex Equality Law after *Kalanke* and *Marschall*' (1998) 4 *European Law Journal* 148–68.

[88] E Benda, *Notwendigkeit und Möglichkeit von positiven Maßnahmen zugunsten von Frauen im Öffentlichen Dienst* (Hamburg, City of Hamburg, 1986).

Article 2(4), which read: 'This directive shall be without prejudice to measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women's opportunities'. The Court only focused on the unequal treatment on grounds of sex, without considering the discriminatory policies which were replaced by the 'tie-break rule'. It enounced that 'a national rule that, where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are underrepresented involves discrimination on grounds of sex ... As a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly ... A national rule which guarantees women absolute and unconditional priority for appointment or promotion ... go[es] beyond promoting equal opportunity and overstep[s] the limits of the exception in Article 2(4) of the Directive.'[89] Thus it was held that the City of Bremen should have preferred Kalanke on the basis of having a dependent wife and two children, although his professional experience was less extensive. The City decided to reassess the qualification of both candidates through an extensive interview, which resulted in Ms Glissman being considered as better qualified to fill the post. Had the City relied on independent experts instead of peer review within the same unit from the start, there would have been no case of positive action. Possibly such a policy change would have removed discrimination contravening the principle of equal treatment of women and men in the first place.

23.41 The case roused considerable discussion,[90] including in political circles. The imminent negotiation of the Treaty of Amsterdam was utilised to draft and pass an addition to Article 119 EEC, later renumbered as Article 141 EEC, which is now contained in Article 157(4) TFEU (text quoted above at 23.38). Article 2(4) of Directive 76/207 remained unchanged for the time being. This led to juridical debate on whether Article 141(4) TEC (now Art 157(4) TFEU) allowed more scope for positive action measures than the Directive.[91]

The Court's Subsequent Case Law

23.42 Two subsequent rulings concerning the German public service somehow softened the rigidity of this very first case. In *Marschall*, the Court decided that a tie-break rule could be upheld if it contained a 'savings clause to the effect that women are not to be given priority in promotion if reasons specific to a male candidate tilt the balance in his favour'.[92] In this case, the Court considered realistically that 'where male and female candidates are equally qualified, male 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 and the fear, for example, that women will interrupt their careers more frequently'.[93] It even realised that 'the mere fact that female and male candidates are equally qualified does not mean that they have the same chances',[94] and concluded that 'a national rule in terms of which, subject to a savings

[89] *Kalanke* (n 86) [16], [19], [21], [22].

[90] The list of case annotations maintained by the Court of Justice lists no less than 83 annotations (available from http://curia.europa.eu/juris/liste.jsf?language=en&num=C-450/93); see eg H Fenwick, 'Perpetuating Inequality in the Name of Equal Treatment' (1996) 18 *Journal of Social Welfare and Family Law* 263–70; L Charpentier, 'L'arrêt Kalanke. Expression du discours dualiste de l'égalité' [1996] *Revue trimestrielle de droit européen* 281–303.

[91] See on this historical phase O De Schutter, 'Positive Action' in D Schiek et al (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford, Hart Publishing, 2007) 757 (pp 807–09 with further references).

[92] Case C-409/95 *Marschall* [1997] ECR I-6363 [27].

[93] Ibid [29].

[94] Ibid [30].

clause, female candidates for promotion who are equally as qualified as male candidates are to be treated preferentially in sectors where they are underrepresented may fall within the scope of Article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above',[95] before stressing that the restrictions laid down in *Kalanke* continued to apply.[96] The Court did not refer to Article 141(4) EC, but only relied on Article 2(4) of Directive 76/207.

23.43 The *Badeck* case, decided in 2000,[97] was even more interesting, in that it covered a wide range of positive action measures. The legislation at stake contained binding targets for increasing the proportion of women employees in sectors where they had been under-represented in the past, leaving the way to achieve those targets to the employer. The employer, however, remained bound by the merit principle quoted above. Accordingly, it could only ever prefer women over men if they were at least equally qualified.[98] Further, the legislation contained two cases of strict quotas. For fixed-term positions in universities, which served as a base to obtain a PhD or a Habilitation,[99] the legislation established binding targets. Universities had to employ women as PhD researchers according to the percentage which they constituted among those graduates in the relevant subject who qualified for PhD research. For Habilitation, the same principle applied. This binding target was accepted, under the assumption that women could only be preferred if equally qualified.[100] The Court also sanctioned a strict quota for training places, referring to the fact that these were not employment opportunities, but rather opportunities to obtain employment, without demanding equal qualification for these posts.[101]

23.44 The Court further limited the scope for positive action in the *Abrahamsson* case,[102] concerning a Swedish rule under which universities could waive the requirement that the female candidate should be equally qualified to the best male competitor if employing professors in subjects where women were grossly under-represented. The Court of Justice held that such a rule went beyond the scope allowed by Directive 76/207 and Article 141(4) EC (now Directive 2006/54 and Article 157(4) TFEU). However, the Court stressed that there was ample scope for changing selection criteria in such a way as to prefer criteria that would benefit women.[103]

A Continued Narrow Conception of Positive Action as Exception?

23.45 In the past, the Court has clearly treated positive action as an exception from the prevailing principle of formal equal treatment irrespective of sex. It has repeatedly stated that any preference for women constitutes derogation from the right (of men) to equal treatment, and can thus only

[95] Ibid [31].
[96] Ibid [32]–[33].
[97] Case C-158/97 *Badeck* [2000] ECR I-1875. See on this case D Schiek, 'Positive Action before the European Court of Justice—New Conceptions of Equality in Community Law' (2000) 16(2) *International Journal for Comparative Labour Law and Industrial Relations* 251–75.
[98] Paras 33, 36–38.
[99] The Habilitation constitutes a higher-level PhD, traditionally a requirement for obtaining professorial office in addition to a PhD (eg in Germany, Sweden and Poland).
[100] Para 41.
[101] Paras 51–54.
[102] Case C-407/98 *Abrahamsson* [2000] ECR I-5539; see also the parallel ruling on a Norwegian case by the EFTA Court E-1/02 [2004] CMLRev 245 with annotation by C Tobler. These cases prompted a specific conference and subsequent publication, A Numhauser-Henning, *'Aiming High—Falling Short?' Women in Academia and Equality Law* (The Hague, Kluwer Law International, 2006).
[103] On such strategies see De Schutter (n 91) 818–20.

be allowed in exceptional circumstances.[104] Accordingly, under the principle of proportionality, positive action can only be legitimate if it is necessary to achieve a specific aim and no measures that are less intrusive on men's prevailing rights to equal treatment can be envisaged.[105] In the four cases described above, this meant in particular that women could only profit from a preferential rule if they were assessed as equally qualified with a man in a male-dominated environment.[106]

This case law has already been challenged for its incompatibility with CEDAW requirements (see above, 23.17). From the obligation of state parties to accelerate de facto equality, the CEDAW committee derives the obligation of state parties to take temporary special measures, which is the CEDAW terminology of positive action.[107] Since state parties have to ensure compliance with non-discrimination by changing social reality, this may require, rather than merely allow, positive action. 23.46

There is thus some doubt whether this restrictive case law was appropriate under the treaties before the Charter became legally binding. Whether it is still adequate now cannot be derived from the text of Article 23(2) alone, which is modelled on the case law as quoted. However, as with any other norm of the Charter, Article 23(2) must be read in conjunction with Article 23(1). The question whether the restrictive approach to positive action can be aligned with Article 23(1) will be discussed under section E, since it concerns the holistic interpretation of Article 23. 23.47

(c) Judicial Review and Enforcement

Article 23(2) cannot be enforced individually. This does not mean that it is not relevant for judicial proceedings. The provision must be used to interpret the ban on sex discrimination contained in Article 21. For example, Article 23(2) can be relied upon against any allegation that Article 21 prevents positive action measures, even if these have been held to be in violation of EU law before they became legally binding. 23.48

E. Evaluation

In evaluation, Article 23 clearly offers opportunities, while also having severe limitations. 23.49

I. Opportunities

Article 23's achievements mainly derive from its first paragraph, which introduces a strong positive obligation in favour of women's equality with men, and supports an asymmetric perception of gender equality. The potential of this provision can be illustrated through a holistic interpretation 23.50

[104] *Kalanke* (n 86) [21]–[22]; *Marschall* (n 92) [32]. In the subsequent cases these principles were only applied, but no further reasoning was provided. The principled priority of formal equal treatment was made explicit in a ruling on specific advantages for mothers in access to childcare facilities (Case C-476/99 *Lommers* [2002] ECR I-2891 [39], [47]).
[105] Proportionality was explicitly mentioned in *Abrahamsson* (n 102) [55]. These principles have recently been confirmed in relation to positive action in favour of religious groups, see Case C-414/16 *Egenberger* EU:C:2018:257 [68], and Case C-193/17 *Cresco Investigation GmbH* ECLI:EU:C:2018:614 (25 July 2018), Opinion of AG Bobek.
[106] This dogma is also upheld in academic writing, eg by De Schutter (n 91) 775–77.
[107] CEDAW General Recommendation No 25: Art 4 para 1 of the Convention; see on these R Holtmaat and C Tobler, 'CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination' (2005) 12 *Maastricht Journal of European and Comparative Law*, 399–425; L Waddington and L Visser, 'Temporary Special Measures under the Women's Convention and Positive Action under EU Law: Mutually Compatible or Irreconcilable?' in I Westendorp (ed), *The Women's Convention Turned 50* (Cambridge, Intersentia, 2012) 33–63.

of Article 21 and 23 relating to indirect discrimination and intersectional inequalities and of both paragraphs of Article 23 in interpreting the scope for positive action in favour of women under Union law. These examples are meant to demonstrate what a careful argumentation building on Article 23(1) can achieve for any area of European Union non-discrimination law.

(a) Revising Indirect Discrimination Law in Order to Ensure Gender Equality

23.51 Within sex discrimination law, the prohibition of indirect discrimination has been discussed as one which is closely linked to substantive equality.[108] The concept of indirect discrimination, in short, states that discrimination may exist even if a rule or practice does not explicitly refer to, for example, sex, but results, in practice, in excluding women disproportionally from advantages. Prohibiting indirect discrimination may serve to prevent circumvention of a prohibition of direct discrimination, which is unrelated to substantive equality. However, targeting the practical effects of a rule, beyond its motives and even its wording, is also related to socio-economic reality, and thus based on a social engineering perspective.[109] Based on the assumption that inequality between women and men is entrenched in social reality, any rule reinforcing this inequality is prima facie suspect, and discrimination is assumed. Alas, existing EU legislation and case law regarding indirect discrimination does not always embody substantive approaches to sex equality.

23.52 After the harmonisation of EU sex equality law with non-discrimination law on other grounds, indirect sex discrimination is now deemed to exist 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.[110] This definition does not necessarily require statistical evidence, which makes proving indirect sex discrimination easier than it was before. However, it also seems to introduce an element of comparison, which threatens to undermine the efficiency of the concept for achieving substantive equality. For example, the Court had held that women on on-call employment contracts were not comparable with employees on more secure contracts,[111] and stated that women and men on parental leave were not comparable with men absent from work for their military service.[112] This meant that the lower levels of protection against dismissal of workers on parental leave and against overly long working times of workers on on-call contracts could not be challenged under the prohibition of indirect discrimination, although these detriments affected women disproportionally. Furthermore, the case law also reinforced gender stereotypes, such as the assumption that military service is in the public interest while caring for children within the family is merely in one's private interest, or that workers on flexible part-time employment contracts are probably secured elsewhere (through their family relations) and thus less worthy of protection.[113] The feminist classic of whether care work (predominantly delivered by women) constitutes work of equal value to other work has a habit of returning to the Court. It recently decided that foster

[108] Ellis and Watson, *EU Anti-Discrimination Law* (n 24) 142–43.

[109] These deliberations have been developed in more breadth in D Schiek, 'Indirect Discrimination' in D Schiek et al (eds), *Cases, Materials and Text on International, Supranational and National Non-Discrimination Law* (Oxford, Hart Publishing, 2007) 323, 327–31.

[110] Directive 2006/54/EC Art 2(1)(b) for employment-related discrimination, Art 2(b) Directive 2004/113/EC for other areas.

[111] Case C-313/02 *Wippel v Peek and Cloppenburg* [2004] ECR I-9483.

[112] Case C-220/02 *Österreichischer Gewerkschaftsbund (ÖGB), Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich* [2004] ECR I-5907.

[113] See for a critique of these rulings, with further references, Schiek, 'Indirect Discrimination' (n 109), 468–71; A Numhauser-Henning, 'EU sex equality law post-Amsterdam' in H Meenan (ed), *Equality Law in an Enlarged European Union* (Cambridge, Cambridge University Press, 2007) 145–76, 169–70.

parents, even if they are employees, cannot claim annual leave in the same way as any other employee, because carers build a personal relationship with their charges.[114]

23.53 The definition of indirect discrimination in the relevant EU directives is sufficiently ambiguous as to allow a more comprehensive reading, which would also allow accommodating substantive equality. Such a reading is now required by Article 23(1). Accordingly, in the future the Court will have to start from the assumption that not only are women and men comparable in principle, but also that activities that are gendered female are comparable with activities gendered male. Under such an interpretation of indirect discrimination, the cases quoted above would have to be decided differently: for example, excluding parental leave from accruing seniority when leave for completing military service does accrue seniority would have to be classed as indirect discrimination to the detriment of women, because parental and military leave are actually considered as comparable.

(b) Intersectional Inequality

23.54 Intersectional inequalities constitute a further field in which a comprehensive reading of sex discrimination law in the light of the duty to ensure equality between women and men can change existing interpretations. So far, EU non-discrimination legislation protects against discrimination on the basis of six grounds (sex, ethnic and racial origin, religion and belief, age, disability, sexual orientation); Article 21 adds colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth as well as any other ground. Accordingly, discrimination on more than one ground is increasingly likely to be covered by EU non-discrimination law. Such discrimination is debated in socio-legal theory mainly as intersectional disadvantage,[115] while the EU institutions and EU secondary legislation prefer the term 'multiple discrimination'.[116]

23.55 The term intersectionality was first introduced by Crenshaw[117] in order to characterise the specific disadvantage suffered by women of colour which could not be explained by a mere addition of sex and race discrimination and overall tended to be overlooked by the law. The term has hence been used to characterise exactly this: the specific disadvantage suffered by those discriminated against on more than one ground. In recent years, there has been a legal policy debate in the European Union on whether specific legislation is needed in order for EU law to address intersectional discrimination of women.[118]

23.56 It has been argued elsewhere that there is scope for a teleological interpretation of the body of EU anti-discrimination legislation to the effect that these directives already entail a prohibition of intersectional discrimination.[119] Such an interpretation is now required by the obligation under Article 23(1) to ensure equality between women and men. This derives from the fact that, due to the asymmetrical character of all discrimination, intersectional discrimination is

[114] Case C147/17 *Sindicatul Familia Constanța* EU:C:2018:126 (20 November 2018).

[115] Grabham et al (n 56); Schiek and Lawson (eds), *EU Non-Discrimination Law and Intersectionality* (n 51) 12–27; S Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law* (Brussels, European Commission, 2016); D. Schiek, 'Revisiting Intersectionality for EU Anti-Discrimination Law in an Economic Crisis—a Critical Legal Studies Perspective' (2016) 2 *Sociologia del Diritto* 23–44; see also Kilpatrick, 21.40–21.42.

[116] See, eg, Recital 17 Directive 2000/43 and Recital 19 Directive 2000/78.

[117] K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139–67.

[118] See for a summary M Bell, 'Advances in EU Anti-Discrimination Law: The EU Commission's 2008 Proposal for a New Directive' (2008) 3 *The Equal Rights Review* 7–18; D Schiek and J Mulder, 'Intersectionality and EU Law: A Critical Appraisal' in Schiek and Lawson (eds), *EU Law and Intersectionality* (n 51) 259–73.

[119] D Schiek, 'Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multi-dimensional Conception of Equality Law' (2005) 12 *Maastricht Journal of European and Comparative Law* 427–66.

suffered by women more frequently than by men. The asymmetry of discrimination means that, while each human being simultaneously has a gender, an ethnicity, an age, a sexual orientation and a religious belief (which may be atheism), not everyone suffers from discrimination in all these dimensions in equal measure. Women will suffer more from sex discrimination than men, those deemed to belong to an ethnic minority suffer more from discrimination on grounds of ethnic origin, those with darker skin colours suffer more from racial discrimination than those of lighter skin colour. Accordingly, a white man considered disabled but not considered as belonging to a minority religion or as being gay will only suffer from disability discrimination, while a white woman in the same situation will suffer from discrimination at the intersection between disability and gender—and numerous examples could be added. Denying victims of intersectional discrimination the protection of EU non-discrimination law thus clearly results in more women lacking protection than men. The recent case law by the Court of Justice on justifying dismissal of women on grounds of wearing a head scarf has not, in contradiction to Article 23, taken into account that such policies only affect women, and not even discussed the impact they may have on ensuring full equality between women and men. Paying due regard to Article 23 could have improved these rulings.[120]

(c) Positive Action in Favour of Women

23.57 Another example of how EU sex discrimination law can contribute to ensuring equality between women and men is the openness for positive action. In so far as paragraph 2 does not alter the wording of existing provisions in treaty and secondary law, paragraph 1 demands a purposive interpretation of its wording reflecting the asymmetric character of sex inequality.

23.58 While Article 23(2) seems to maintain the restrictive approach which the Court has developed on the basis of promotion practices in the German public service, Article 23(1) introduces a positive obligation to ensure equality from an asymmetric perspective. Under such perspectives, positive action can no longer be perceived as an exception to an individual right of men to be treated equally. Rather, positive action becomes a necessary corollary to the prohibition of discrimination on grounds of sex. Both are two sides of the same coin. Ensuring equality requires eliminating discrimination. Since such discrimination has traditionally been to the disadvantage of women, ensuring equality requires preferential treatment of women. There is no need to read a clause allowing for such positive action narrowly, as soon as the asymmetric character of the demand to ensure equality is recognised.

23.59 Nevertheless, positive action should not be maintained forever or without limits. The obligation to ensure equality between women and men demands that special measures going beyond eliminating formal discrimination are carefully tailored to the specific field. Article 23(1) requires a targeted approach to positive action. This excludes justifying policies reinforcing women's sole responsibility for unpaid family work.[120a]

23.60 In particular it is not always necessary that opportunities are only expanded to equally qualified candidates.[121] This specific requirement permeating the Court's case law on access

[120] ECJ 14 March 2017 C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* EU: C:2017:203, and C-188/15 *Asma Bougnaoui and ADDH v Micropole SA* EU: C:2017:204; see on these D Schiek, 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)' (2018) 18 *International Journal of Discrimination and the Law* 82–103. The opinion by AG Rantos to the follow-up cases again proposes to disregard the gender dimension, opinion of 21 February 2021, joint cases C 804/18 and C-341/19 EU:C:2021:144, paragraph 59.

[120a] ECJ 18 November 2020 C-463/19 *Syndicat CFTC* ECLI:EU:C:2020:932 (on special pension credits for mothers exclusively).

[121] This is the preposition made by De Schutter (n 91) 775–77.

and promotion quotas derives from specific obligations of public employers under German law. However, not all employers are required to use predefined criteria to establish qualification. It is more typical that employers maintain discretion allowing them to assemble a range of abilities in their teams. Similarly, schools, universities, teams for cultural activities or sports clubs should not have to apply predefined merit criteria to avoid discrimination claims. As we have seen, the Court of Justice waived the qualification criterion for training posts in the *Badeck* case.[122] The same case also debated quota rules for collective bodies. Although the Court proceeded on the assumption that the relevant paragraph of the disputed legislation was not binding, the short reasoning is still worth mentioning. The Court conceded that different measures could apply for bodies that are established by election, thus suggesting that merit based on formal qualification is not the only way of deciding about access to positions.[123]

23.61 The 2012 Commission proposal regarding the representation of women on company boards[124] constitutes a good example for the detriments of the doctrine that equal qualifications should always prevail. The disputed Commission proposal not only sets a quota for non-executive company directors, but also imposes upon companies the establishment of qualification criteria. Thus, it excludes the model which has been successful in Norway: setting a minimum quota of women, and leaving it for the specific company to decide how to achieve this.[125] The present proposal also excludes the election of non-executive directors by shareholders or workers' representatives, which constitutes an element of industrial relations in a number of Member States.[126] It seems to be based on the assumption that ignorance of women's qualification is the reason for their under-representation on boards. Empirical evidence suggests that this is not the case, but that women are not trusted for reasons of tradition, and only allowed on company boards in a crisis, which again creates suspicion against female board members.[127] The proposal is thus not targeted to the field for which positive action is designed, and is overly narrow. In order for company board 'quotas' to be efficient, a less intrusive construction seems much more adequate to the sector's practices in all Member States.

II. Shortcomings

23.62 Despite all these positive elements, the provision also has severe shortcomings. These are rooted in the fact that it continues to relate women's rights to men's rights, and equality between women

[122] *Badeck* (n 97).

[123] Ibid [65]–[66].

[124] European Commission, Proposal for a Directive improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures COM (2012) 614 fin. See on this in more detail D Schiek, 'Gender Equality under the Charter of Fundamental Rights for the European Union—a New Lease of Life for Positive Action?' in J Fejø et al (eds), *Liber Amicarum et Amicorum in Honour of Ruth Nielsen* (Copenhagen, Jurist- og Økonomforbundes Forlag, 2013) 299, 313–21; see also A Masselot and A Maymont, 'Gendering Economic and Financial Governance through Positive Action Measures The Compatibility of the French Real Equality Measure with the European Union Framework' (2015) Maastricht Journal of European and Comparative Law 22 (1), 57–80.

[125] On the different national rules to achieve the same aim, see C Tvarno, 'Women Quotas on Company Boards in Scandinavia and the EU' in R Nielsen and C Tvarnø (eds), *Scandinavian Women's Law in the 21st Century* (Copenhagen, DJØF, 2012), 265–83; L Senden and S Kruisinga, *Gender-Balanced Company Boards in Europe—a Comparative Analysis of the Regulatory, Policy and Enforcement Approaches in the EU and EEA Member States* (Brussels, European Commission, 2018).

[126] A Conchon, *Board Level Employee Representation Rights in Europe* (Brussels, ETUI, 2011) 11–13.

[127] A Haslam et al, 'Investing with Prejudice: the Relationship Between Women's Presence on Company Boards and Objective and Subjective Measures of Company Performance' (2010) 21 *British Journal of Management* 484–97; M Ryan and A Haslam, 'The Glass Cliff: Exploring the Dynamics Surrounding the Appointment of Women to Precarious Leadership Positions' (2007) 32 *Academy of Management Review* 549–72.

and men. Such fixation of women's rights on equality and comparison has for a long time been the focus of feminist critique.[128]

23.63 Women's law, as for example introduced by Tove Stang Dahl,[129] does not necessarily relate to women and men. Instead it pursues the 'objective to improve the position of women in law and society',[130] an objective that has also been characterised as lying at the base of feminist legal studies.[131] From this perspective, women's rights would aim at enhancing women's capability of governing their own lives in interrelation with others.[132] Any reference to men is not necessarily helpful for achieving that aim. It may even betray women's rights, because it implies for women to assimilate to a male norm. For example, if rights must always be granted to women and men in equal measure, women could not derive rights from birthing or nursing children, as this is something men cannot do. Granting rights only for 'those women who are able to act in the same way as men' is thus a severe critique of EU gender policies.[133] Women's law seems to offer an alternative to this by focusing on women instead of men. Article 23 does not embrace this notion, though.

23.64 Both women's law and the legal struggle for equality between women and men can further be criticised as being implicitly assimilationist for the mere reason that it focuses on women as a seemingly essentialist category, while there are as many differences between women as between women and men. The Nordic model of women's law has been especially criticised: while its policy towards equalising the sexes may imply a movement towards each other, rather than of women towards men, it still maintains the perspective that differences between women and men are the main ones to be overcome.[134] Despite all the potential to derive a constructive approach to intersectional inequalities from Articles 23 and 21, this limitation always harbours the danger of neglecting differences between women.[135]

III. Conclusion

23.65 Article 23 offers opportunities for challenging overly formal perceptions of equal treatment irrespective of sex as compromising the Union's obligation to ensure equality. As the examples of re-constructing indirect discrimination, approaching intersectionality and embracing positive action have demonstrated, this requires a holistic reading of its two paragraphs together and in conjunction with Article 21. However, such constructions only go so far. Article 23's continuing fixation on equality between women and men constitutes a severe restriction to mobilising law for improving women's rights. So far, the Charter compares unfavourably to the UN CEDAW, which takes a more progressive approach to the law.

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[128] As indicated in A McColgan, *Women under the Law: the False Promise of Human Rights* (Harlow, Longman, 1999).

[129] T Stang Dahl, *Introduction to Women's Law* (Oslo, Norwegian University Press, 1987).

[130] A Hellum, 'CEDAW and the Discipline of Women's Law: Continuity and Change in the Understanding of Gender and Law' in Nielsen and Tvarnø (eds), *Scandinavian Women's Law in the 21st Century* (n 125) 31, 32.

[131] E-M Svensson, 'Is there a Future for Scandinavian Women's Law?' in Nielsen and Tvarnø (eds), *Scandinavian Women's Law in the 21st Century* (n 125) 15–29, 25. Arguably, this is an outsider view. Insider feminists are prone to much more complex views. For a statement on Law, Gender and Sexualities, see J Conaghan, 'The Making of a Field or the Building of a Wall? Feminist Legal Studies and Law, Gender and Sexuality' (2009) 17 *Feminist Legal Studies* 303–07.

[132] A similar starting point is taken by S Moller Okin, 'Mistress of Their Own Destiny. Group Rights, Gender, and Realistic Rights to Exit' (2002) 112 *Ethics* 205–30.

[133] S Walby, 'The European Union and Gender Equality: Emergent Varieties of Gender Regimes' (2004) 11 *Social Politics* 4, 5. Walby uses the rest of the article to de-construct this criticism and to defend the view that the EU has indeed achieved much more than a merely assimilationist gender equality regime.

[134] This is also implied by the slogan 'women are the majority, not a group', which was used during the negotiations for the Constitutional Treaty in order to support the enhanced notion of gender equality among all the different equalities. This slogan is also taken up by S Koukoulis-Spiliotopulos (n 45).

[135] Hellum (n 130) 31–61.