Activity 5.2.

Preparing tailor-made training programme and training materials

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Gender Equality Law in Practice

A manual for judges and legal practitioners

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1. INTRODUCTION

This manual is based on the experiences of three rounds of training sessions with judges and judicial advisers in Zagreb in February and March 2017. These sessions have been conducted in close cooperation with the Croatian Judicial Academy and received very positive feedback.

The manual aims at recalling the basic principles of gender equality law enshrined in various European directives as well as Croatian domestic legislation. It reiterates the clarification of these concepts already given by the Court of Justice of the European Union and points to some issues which have not yet found there way to the European level courts, but are arising with a predictable certainty.

2. METHODOLOGICAL APPROACH

This manual tries not to be too academic in its approach but a user-friendly and hands-down guidance for practitioners. Therefore, it contains four hypothetical cases, modelled after some real cases from the European or national levels. These cases raise certain legal questions that touch upon the basic principles of gender equality law. Each case functions as a starting point for scrutinizing some of these principles. In solving these hypothetical cases – step by step – the readers and participants of training sessions will rehearse the basic knowledge and be prepared to act upon it when similar cases reach their court.

The manual does not even try to be fully comprehensive regarding the European acquis on gender equality but merely focuses on the underlying basic principles, which form the foundation for understanding the issue in substance and thereby, trains users to think within the special logic of anti-discrimination and gender equality legislation and legal practice.

Generally, this manual is designed to serve two purposes: For one it can be used as a source for self-study, just by reading through it and trying to solve the cases. Secondly, it can as well be used as basic manual for trainers conducting interactive trainings for legal practitioners.

3. CASE STUDY 1 (PREGNANCY, DISMISSAL AND FIXED TERM CONTRACT)

THE X FILE

Ms X is a teacher on a fixed term work contract. As Ms X has been considered suitable for the job, the work contract has been given to Ms X each year in late December for one calendar year and it has been renewed automatically, without competition, for the last five years. The reason for the fixed term work contracts is that the person holding the permanent post has been on a number of consecutive periods of maternity and parental leave.

Ms X becomes pregnant. She informs her employer about her pregnancy in October 2016. Her maternity leave is to begin on 1 February 2017.

In early December 2016, the employer informs MS X that her work contract will not be automatically renewed but that a vacancy for a one year work contract has been announced for open competition. The job description for the new fixed term work contract is identical to the one Ms X has done for the last six years. Ms X applies for the job.

Ms X does not get the job. Her employer informs her that the reason for this is that she will be on maternity leave from 1 February 2017 and, consequently, she would be able to do the job for only one month. The new one year fixed term work contract is given to a woman with a similar work experience as MS X. Ms X files a complaint on discrimination based on sex.

1. Can Ms X file a complaint on discrimination based on gender although the job was given to another woman?
2. Can Ms X credibly argue on having been discriminated against in the renewal of a fixed term work contract? Does Ms X have the right to the renewal of her fixed term work contract?
3. Can the employer base its action on the argument that Ms X did not get the job as she would have been able to take care of her teaching responsibilities for only one month before the beginning of her maternity leave?
4. Does it make a difference that the employer changed its practice on how to fill the one year fixed term work contract?

MAIN QUESTIONS AND RELATED PRINCIPLES OF GENDER EQUALITY LAW TO BE DETECTED IN THE CASE NR I

- Is it a case of **direct discrimination**?
- Are **pregnancy** and **maternity** special grounds for protection against discrimination?
- What is a "**comparable situation**"?
- Is there a possibility for the employer to **justify the difference of treatment**?
- Does it matter that the relationship with the employer was a **fix-term** one?
- How is the **burden of proof** divided between the parties of the case?

WHAT IS DIRECT DISCRIMINATION?

LEGAL DEFINITION EU BASIS:

Directive 2006/54/EC Gender "Recast" Directive

Art 2/1/a

`direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

Art 2/2/c

For the purposes of this Directive, discrimination includes: (…) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC

LEGAL PROHIBITION OF DISCRIMINATION OF THIS KIND IN EU DIRECTIVE

Directive 2006/54/EC Gender "Recast" Directive

Art 14:

"There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

… employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;"

Directive 92/85/EEC, Pregnant Workers Directive

Art 10:

"(1) Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/ or practice and, where applicable, provided that the competent authority has given its consent;

(2) if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1 , the employer must cite duly substantiated grounds for her dismissal in writing;

(3) Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1."

THE MAIN ELEMENTS OF DIRECT DISCRIMINATION:

"**Less favourable treatment**" – ruling out justifications like "I did not discriminate against you – I treat you normally, I just treated another person a bit better". The notion of treatment also implies that what is needed is an **actual act** of discrimination.

"**on grounds of sex**" means that the reason, motive or effect of the act is directly linked to the sex of the person. This includes also perceived sex (mistaken for a member of the opposite sex and discriminated therefore); it also includes discrimination by association (e.g. male member of a feminist group). This requirement can be tested by using the "but for" –test. If it is true that a person has been treated in a less favourable way "**but for his/her** (real/ assumed/ associated) **sex**" then we have established that it happened "on grounds of sex". The definition also expands to pregnancy and maternity. This means that discrimination based on these grounds is seen as **directly** based on sex.

"than another is, has been or would be treated in a **comparable situation**" means that we are looking for a comparator to establish a specific difference in treatment. The comparator can be a real one or a hypothetical one (arg: …would be treated…). For cases based on **pregnancy** there is **no** need to find a **comparator** (as men are never pregnant and non-pregnant women are not in a comparable situation).

POSSIBLE JUSTIFICATION OF DIRECT DISCRIMINATION

As a principle, **direct discrimination cannot be justified**. There are only **two exceptions** to this rule: positive action and the "genuine and determining occupational requirement" clause.

In its Artide 3 the Directive 2006/54/EC allows to "maintain or adopt measures (…) with a view to ensuring full equality in practice between men and women in working life". Such **positive measures** are only allowed if and as long as a situation exists where one sex is significantly and frequently placed in a less favourable position compared to the other one. Once the imbalance is mitigated, the positive measure has to stop.

In Article 14/2 the same directive states the other exception: "(…) a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a **genuine and determining occupational requirement**, provided that its objective is legitimate and the requirement is proportionate." This exception has to be **interpreted narrowly** and shall not in any way undermine the principle of non-discrimination. Classic examples (though not undisputed) stem from the employment of strictly female employees to work in special shelters for women who have suffered from domestic or sexual violence or from the field of performing arts (theatre, film, photography) and commercials when looking for actors/actresses or models of a particular sex. It might also be applied in the field of religious services for faith communities or churches, where positions are often restricted to males only. There is not yet sufficient case law on the European level on this issue to have a clearer picture of the actual scope of this exception.

DOES THE NATURE OF THE WORK CONTRACT AFFECT THE SCOPE OF PROTECTION AGAINST DISCRIMINATION?

To this question, we have a very clear and strong answer from the Court of Justice of the European Union: The Court has emphasized that neither the Pregnant Workers Directive (92/85/EEC) nor the Recast Gender Equality Directive (2006/54/EC) distinguish between a permanent work contract and a fixed term work contract. In *Tele Danmark* (C-109/00), the Court noted that had the Community legislature wished to exclude fixed-term contracts, which represent a substantial proportion of employment relationships, from the scope of those directives, it would have done so expressly. After the cases of *Melgar* (C-438/99) and *Tele Danmark* (C-109/00) it has therefore been clear that also **employees on fixed term work contracts are covered** by the provisions of the prohibition of discrimination based on sex or gender.

ON WHOM IS THE BURDEN OF PROOF IN DISCRIMINATION CASES?

THE SHIFT OF THE BURDEN OF PROOF

Art 19 (1) of the Recast Gender Equality Directive (2006/54/EC) regulates the division of the burden of proof:

"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them **establish**, before a court or other competent authority, **facts** from which it may be **presumed** that there has been direct or indirect discrimination, it shall be for the **respondent** to **prove** that there has been **no breach** of the principle of equal treatment."

The necessity to shift the burden of proof was developed by the European Court of Justice in the cases Danfoss (C-109/88) and Enderby (C-127/92) and is based on the principle of effectiveness: on the very practical fact that it is normally impossible for the claimant to prove the actual factual basis

or criteria applied in reaching the contested (less favourable) decision in discrimination cases. Often all the relevant facts are only known to the respondent (employer). Such a shift should not be applied to proceedings in which it is for the court or competent body to investigate the facts to the case itself. This comprises proceedings that are inquisitorial or criminal cases.

THE MAIN PROCEDURAL STEPS

1. The claimant must prove some primary facts to establish a prima facie case.
2. The court must evaluate the facts and state that they are suitable to and sufficiently significant to raise a presumption of discrimination.
3. If 1 and 2 are fulfilled, the burden of proof shifts to the respondent. It is now for the respondent to provide an adequate explanation and proof that sex was not any part of the reasons for the contested behaviour.
4. If the respondent fails to achieve point 3, the court has to make a finding of unlawful discrimination.

WHEN DO WE HAVE A PRIMA FACIE CASE?

In practice, it is not always easy to determine the threshold for the burden of proof to be shifted. The figure of prima facie case has been introduced to make anti-discrimination protection more effective. The main issue is a stage where it "looks like we have a case of discrimination" – so that the judge can make a **presumption** of discrimination. It is a bit like the famous "duck test", best interpreted by Douglas Adams: *If it looks like a duck, and quacks like a duck, we have at least to consider the possibility that we have a small aquatic bird of the family Anatidae on our hands*[1].

It seems quite clear that there has to be more evidence at the hands of the claimant in a case concerning discrimination in a recruitment process than just not having gotten the job and a feeling that this decision could be based on sex. So, the burden of proof does not shift simply because there has been a difference in treatment and a difference in sex. There must be additional fact **not proving** that discrimination has occurred, **but supporting the likeliness** of a discrimination occurring.

The claimant may use, for example, **facts** like statistics (proportion of male/female employees), the own qualification fitting the published profile of a job, results of situation testing, the formulation of the job advertisement, prior record of discrimination, non-adherence to standard rules, etc…

It its ruling on the case Meister (C-415/10) the CJEU held that, though Directive 2006/54/EC is **not entitling** a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process, the defendant's **refusal** to grant any **access to information** may be one of the factors to **take into account** when establishing facts for a **prima facie** case.

[1] Adams, Douglas (1987), Dirk Gently's Holistic Detective Agency

AS TO THE QUESTIONS OF THE CASE -MODEL SOLUTION CASE STUDY NR I

With the background knowledge assembled, it is now time to briefly answer the questions asked in the case study:

1) Can Ms X file a complaint on discrimination based on gender although the job was given to another woman?

Yes. A **pregnant** worker does **not need to make a comparison** to another person. It is enough to show a connection between the pregnancy and a less favourable treatment. It is deemed direct discrimination on grounds of sex.

2) Can Ms X credibly argue on having been discriminated against in the renewal of a fixed term work contract? Does Ms X have the right to the renewal of her fixed term work contract?

Yes. It is generally not discrimination if a fixed term work contract is not renewed after the expiry of the old work contract. If, however, a fixed term work contract is not renewed because of a person being pregnant, then it is a question of **direct discrimination based on sex**. According to the jurisprudence of the CJEU, dismissal on grounds of pregnancy is direct discrimination regardless of the nature of the employment.

So, **Ms X has no right to have her fixed term contract renewed as such but a right not to be discriminated in the renewal**.

3) Can the employer base its action on the argument that Ms X did not get the job as she would have been able to take care of her teaching responsibilities for only one month before the beginning of her maternity leave?

No. In the CJEU Tele Danmark case (C-109/00, paras. 20 and 34), the employer stated, among other things, that it was not the pregnancy itself that was the determining reason for the plaintiff's dismissal but the fact that she was unable to perform a substantial part of the contract. On this subject the Court concluded, however, that protection against discrimination extends to a worker from being dismissed on the ground of pregnancy not only when she was recruited for a fixed period but also in a situation where she, because of her pregnancy, was unable to work during a substantial part of the term of that contract.

In this case, the employer could have tried to evoke the exception of "**genuine and determining occupational requirements**" by saying that he needed the person to be able to fill the post for the entire envisaged period. When applying the test for this exception, we find that it might have a legitimate aim, but surely fails the proportionality test, as it would in effect make the whole idea of protection against discrimination on the ground of pregnancy ineffective.

4) Does it make a difference that the employer changed its practice on how to fill the one year fixed term work contract?

The fixed term work contract of Ms X had been automatically renewed five consecutive times. Ms X was also considered suitable for the job- As there is every reason to believe that the fixed term work contract would have been given to Ms X also in December 2016 had she not been pregnant, it would fall on the employer to prove otherwise. So, at least she has a ***prima facie* case**, and the employer's explanation does even **proof** that the reason for her non-renewal was indeed her pregnancy.

4. CASE STUDY II (GOODS AND SERVICES)

THE HAIRDRESSER

A Hairstyling Studio advertised for its services as follows:

Hairstyling for Ladies – including haircut, special shampooing, wellness head massage, blow drying, all styling products – EUR 30,--

Hairstyling for Men – including haircut, special shampooing, wellness head massage, blow drying, all styling products – EUR 17,50

Questions:

1. Do you assess this business policy as discriminatory on the basis of sex?

Variation:

A Hairstyling Studio advertised for its services as follows:

Hairstyling for short hair (up to 5cm of hair length) – including haircut, special shampooing, wellness head massage, blow drying, all styling products –EUR 20,--

Hairstyling for longer hair (up to 15cm of hair length) – including haircut, special shampooing, wellness head massage, blow drying, all styling products – EUR 35,--

Hairstyling for long hair– including haircut, special shampooing, wellness head massage, blow drying, all styling products – EUR 50,--

1. Do you see any indication of gender-based discrimination?

2. Direct or indirect discrimination?

MAIN QUESTIONS AND RELATED PRINCIPLES OF GENDER EQUALITY LAW TO BE DETECTED IN THE CASE NR II

- Is it a case of **direct discrimination** in the field of access to and supply of goods and services?
- As to the variation: Could there be a case of **indirect discrimination**?

WHAT IS THE SCOPE OF PROTECTION AGAINST DISCRIMINATION BASED ON SEX IN THE FIELD OF ACCESS TO AND SUPPLY OF GOODS AND SERVICES?

LEGAL DEFINITION EU BASIS:

Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services enshrines in EU law the principle of equal treatment between men and women in the access to and supply of goods and services.

Art. 3 defines the scope as follows:

Art 3 (1) (…) this Directive shall apply to all persons who provide **goods and services**, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.

(2) This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.

(3) This Directive shall not apply to the content of media and advertising nor to education.

(4) This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.

Art. 4 (5) states, that the Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Art 5(1) emphasizes the core principle, that Member States shall ensure that in all new contracts (…), the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

RELEVANT CASE LAW

There is only one ECJ ruling on Directive 2004/113/EC, access to goods and services so far: **Test-Achats (C-236/09)**.

The Court had to decide whether different insurance premiums and benefits where sex is a determining factor in the assessment of risk on the basis of relevant and accurate actuarial and statistical data for men and women (especially health insurance and car insurance) are in accordance with the directive.

The Arguments of the insurance industry were that a total ban on using gender when calculating insurance premiums would have a considerable detrimental effect on companies' competitiveness and, ultimately, on consumers who would be forced to pay more.

On the other hand, it has been argued that there are a number of factors, which are not linked to sex, that are equally important in establishing life expectancy (socio-economic, marital status, the region where a person lives …).

Furthermore, EU equality law focuses on *individual* rather than *group* characteristics. Thus, to allow the use of sex as a criterion would violate a fundamental right.

The Court emphasized that Article 3(3) TEU provides that the European Union is to combat social exclusion and discrimination and to promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child, and that Article 8 TFEU, under which, in all its activities, the European Union is to aim to eliminate inequalities, promotes equality between men and women.

The Council expressed its doubts as to whether, in the context of certain branches of private insurance, the respective situations of men and women policyholders may be regarded as comparable, given that, from the point of view of the modus operandi of insurers, in accordance with which risks are placed in categories on the basis of statistics, the levels of insured risk may be different for men and for women.

The Court has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified

Recital 18 to Directive 2004/113/EC expressly states that, in order to guarantee equal treatment between men and women, the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals.

Different **insurance premiums and benefits for women and men are not admissible.**

In the case of **Lindorfer v Council of the European Union C-277/04P** AG Jacob stated:

"In order to see such discrimination in perspective, it might be helpful to imagine a situation in which (as is perfectly plausible) statistics might show that a member of one ethnic group lived on average longer than those of another. To take those differences into account when determining the correlation between contributions and entitlements under the Community pension scheme would be wholly unacceptable, and I cannot see that the use of the criterion of sex rather than ethnic origin can be more acceptable"

One case concerning hairdressers pricing policy very similar to the case study used as case Nr 2 here was brought before the **Austrian Commission for Equal Treatment** in 2010.

The **respondent** – a chain of hairstyling studios in Vienna – put up the following **arguments**, trying to prove that their pricing policy was not discriminatory:

- Women put more importance on fashion than men do
- Women have longer hair than men
- Women are more demanding when it comes to haircuts than men
- Women stay longer at the hairdresser than men do
- Women want to discuss the haircut / hairstyle before they come to a decision; this takes more time
- Extra services like special shampoos, hairspray etc, play a greater role for female customers than for male ones
- It is more difficult and time consuming to bow-dry a woman's haircut than a man's
- Cutting techniques and drying techniques are different for women and men (women's being more complicated and time consuming)
- Women's and men's hair differ in thickness
- Women and men have a different head form / face form

The Commission stated that these arguments were mainly based on common **prejudices and stereotypes** ascribed to the **gender concept** of male /female.

The pricing policy was found to be a model for **direct sex discrimination** because women are treated less favourably than men, purely on grounds of sex, in a comparable situation.

WHAT IS INDIRECT DISCRIMINATION?

Directive 2004/113/EC defines gender-based indirect discrimination in Art. 2 (b):

"indirect discrimination: 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 provision, criterion or practice is **objectively justified** by a **legitimate aim** and the means of achieving that aim are **appropriate** and **necessary**;"[2]

THE MAIN ELEMENTS OF INDIRECT DISCRIMINATION:

Indirect discrimination may occur in cases where there is **no direct reference to sex** in a provision, criterion or practice, but the **effect** of it is a disadvantage for person of one particular sex.

While in cases of **direct** discrimination sex is one aspect taken into account **obviously** as a decisive factor, in **indirect discrimination** it might just **turn out to affect** one sex differently than the other. It also takes into account the effects for the **whole group** (arg: persons) and does, therefore, **not**

[2] see equivalent provision for the sphere of employment and occupation in Art 2/1/b Recast Equality Directive (2006/54/EC)

necessarily affect **all** persons of a certain sex in the same way. In that, indirect discrimination also takes into account the unbalanced distribution of certain criteria under certain circumstances like set out in the Bilka Case (C-170/84) by the CJEU, where the difference in treatment of full-time and part-time workers amounted to indirect sex discrimination, as women were found to be working full-time in a much lower proportion to men. This landmark case was actually the "birth" of the definition of indirect discrimination.

POSSIBLE JUSTIFICATION OF INDIRECT DISCRIMINATION

Provisions, criteria or practices that have been found posing a certain disadvantage for one sex compared to the other, might **still** be found **lawful** if they are **objectively justified** by a **legitimate aim** and the means of achieving that aim are **appropriate** and **necessary.**

The legitimate aim is the **broadest** of the concepts used for the justification test. It simply comprises all aims that are reasonable and legally allowed – and especially – not contradicting the strive for equal treatment as such.

"Appropriate" means that the measure taken must be **suitable** to achieve the envisaged aim.

"Necessary" contains the **strictest** of all the tests. It means that there shall be **no other** (less affecting) way of achieving the legitimate aim **possible** than the actual means used.

The elements "**appropriate and necessary**" read together also imply a **test of proportionality**. So, even if the means in question might be able to achieve a legitimate aim and they are necessary to achieve it, the **justification might still fail**, if the court – weighing the effect of the discrimination against the aims and needs of the discriminator – finds it disproportional. This is where the reasonability and importance of the **legitimate aim** becomes an important factor.

AS TO THE QUESTIONS OF THE CASE - MODEL SOLUTION CASE STUDY II

1. Do you assess this business policy as discriminatory on the basis of sex?

Yes. The pricing policy is based on a difference of sex, only. So, in effect women pay more than men, because they are women. Even if in many cases, female customers may require more effort in terms of working time and products used, the differentiation cannot be made on the basis of sex.

Variation:

1. Do you see any indication of gender-based discrimination?

At a first glimpse, the provision seems to be gender neutral. It is clearly not a case of direct discrimination, as the actual length of hair varies in both men and women. The differentiation based on the length of hair could, though give rise to the question of indirect discrimination.

2. Direct or indirect discrimination?

As it seem to be a fact of common knowledge, that in Croatia a much larger portion of women wear their hair longer than men, we could **see indirect discrimination** on the basis of sex in the pricing policy that is using the length of hair as its decisive point of reference.

It is clear that given this unbalanced distribution of length of hair between the sexes, the policy would **affect many more women** than men. On average, women will pay more than man. Therefore, the main factors of **indirect discrimination are fulfilled** – it is an apparently neutral criterion, which, when applied, has a less favourable effect on women than on men.

Can this practice – the use of hair-length as decisive criterion for pricing the services – be **objectively justified?**

The **aim** of the hairdresser is a **legitimate** one (as long as he/she doesn't just want to charge women more than men) as it can be formulated as wanting a pricing policy that reflects the fact that some haircuts need more effort in terms of working time and use of products. So, the aim is to get paid differently relative to the actual input invested. This could even be supported by an additional legitimate aim, namely to display a simple and transparent pricing policy so that customers can easily assess what price to expect for the service.

Is the use of the criterion **appropriate** to achieve these aims?

Length of hair seems to be one possible criterion to identify the input necessary for different haircuts. Whether or not this is really the **crucial criterion** of different input needed by hairdressers is indeed the factual **question** at the **core of this case**. If the defendant can proof that length of hair is the **most decisive factor** and all other possible indicators like working time input, use of products and instruments are depending mainly on this criterion, then the policy will be **appropriate**. If this is the case, the means used can also be seen as **necessary** and **proportionate** as prices are transparent for customers and all other possible means of calculating the price will lead to similar results anyway.

If the length of hair turns out to be **just one of the factors** that can play a role in determining the input necessary, and that other factors (like, for example, the complexity of the haircut as such) – independently from the length of the hair – actually play an equal or even more decisive role in that assessment, then the defendant will **fail the test of necessity** for his/her policy. Then there will have to be a finding of **unjustified indirect discrimination** and the pricing policy will have to be amended in order to reflect those real decisive factors.

It has to be noted that cases like this will not lead to a situation in which women as a group will pay much less for the services of hairdressers, but it will amend a situation where women pay more and men pay less for similar services because prices are calculated according to sex (even indirectly) and not to objective individualised facts.

FOOD FOR THOUGHT: OTHER EXAMPLES OF GENDER-BASED PRICING POLICIES

Just to give the reader an idea of what kinds of cases may be brought before courts throughout the European Union in the years to come, there is a short collection of real-life examples of directly gender-based pricing policies, encountered in Austria.

The examples are taken from the Austrian contexts, but could, most probably be collected similarly in most European countries:

- Movie Theatres offer „Ladies Night“ – a ticket for a romantic comedy, a glass of Champagne and sweets for EUR 8,30
- A discotheque offers “Ladies Night” – free entrance and special drinks for only EUR 2,60 for women
- “Ladies Days” at the casino with a special entrance fee
- Austrian Football Association (ÖFB) offered reduced entrance fees for women for matches of the Austrian National Team. This was challenged in court by a male football fan. ÖFB claimed that this measure was taken to reduce violence in the stadiums, an argument countered by the Austrian Commission for Equal Treatment as using gender Stereotype (women as peace-makers). The policy was stopped.

5. CASE STUDY III (SEXUAL HARASSMENT, VICTIMISATION)

UNWANTED

Ivana worked as a nurse in a big hospital. She had sometimes shifts with Marko, a male colleague and male nurse. Marko worked in the hospital much longer than Ivana, he worked there in the last 18 years. Ivana just started working a few months ago. One day, Ivana and Marko had a short break and spent the time in the break room. Suddenly Marko started to talk about photos he made and showed her a photo of a naked woman on his mobile. Ivana asked him to put the photo away and told him that she was not interested in his photos. Marko stopped. Ivana never mentioned the incident to anyone else since she only started working a few months ago. Three months later, Ivana had a night shift. Marko did not work, but called her at around 1 am. He seemed to be going out celebrating and talked to Ivana about several things. Marko started to mention that he was not having a girlfriend and talked to Ivana about imaginary sexual intercourse with her. Ivana was speechless and terminated the conversation. After that, Ivana complained to her superior. The hospital decided to suspend Marko from work and dismissed him due to sexual harassment. Marko claimed that this was not sexual harassment since he was drunk when he called.

How would you assess Marko's conduct? Do you think, the hospital lawfully dismissed Marko?

Variation 1:

Marko is not Ivana's colleague but head of the unit and in charge of recommending her for the prolongation of her contract. Ivana wanted to talk to Marko about her contract. Marko asked her to come into his office, got very close, moved his hand downwards her back and said 'Well, let's see what we can do.' Then, he asked Ivana to leave his office. Ivana reported to the human resources department and sometime later Marko was dismissed. Apparently, it was not the first time that the human resources department was made aware of Marko's behaviour in this regard.

How would you assess Marko's conduct? Do you think, the hospital lawfully dismissed Marko?

Variation 2:

Ivana reported the incident in Marko's office to the human resources department. For some weeks, the hospital administration does not react at all and did not get back to her. Ivana's shifts were changed and she had to do a lot of work on the weekends. She also had to do a lot of extra shifts for others. At a certain point, she applied for some vacation days. At a gathering of all nurses of the unit, Marko said in front of all her colleagues that Ivana asked for vacation days. Marko said that she would be very lazy and that she would not deserve a vacation for her low-quality work. Marko called her very slow and that she would be a burden for all the colleagues. Shortly before her probation ends, she was told that she would not get a permanent contract because her performance would not be good enough. However, until the staff meeting she never got a negative feedback. She was always

told by her colleagues that she was doing fine. She decided to go to court since she thought that the hospital did not give her the contract due to her complaint about Marko's behaviour.

How would you assess the behaviour of Marko in front of all other nurses? What has to be proven in front of the court in case of any form of harassment?

MAIN QUESTIONS AND RELATED PRINCIPLES OF GENDER EQUALITY LAW TO BE DETECTED IN THE CASE NR III

- **What are harassment and sexual harassment?**
- **What is unwanted conduct?**
- **What behaviour is violating the dignity of a person, and/or creating an intimidating, hostile, degrading, humiliating or offensive environment?**
- **What is victimisation?**

WHAT IS (SEXUAL) HARRASSMENT?

Regarding gender, there are **two different types** of harassment:

- Harassment that is based on sex (or also referred to as 'harassment on the grounds of sex'). In this case a woman is harassed where a man would not be.
- Sexual harassment is harassment in which comments or treatment tor behaviour is of a sexual nature.

Within the EU, around 45% to 55% women have experienced sexual harassment since the age of 15. Sexual harassment has different forms and includes for example:

- Physical forms of harassment: unwelcome touching, hugging or kissing
- Verbal acts of harassment: sexually suggestive comments or jokes that offended them
- Non-verbal forms of harassment: unwanted, offensive sexually explicit SMS or emails or inappropriate advances on social networking sites. [3]

Despites the prevalence of sexual harassment, case law in the field of harassment related to gender or sexual harassment is generally scarce and there is **no case of the European Court** of Justice (ECJ) within specifically this area yet.[4] In Croatia, a report shows that Croatian courts treat most cases of harassment (sexual harassment and harassment on the grounds of sex) rather as violation of dignity and refer to them as 'mobbing'- cases than as cases of discrimination.[5] Hence, it seems valuable to stress the importance of addressing cases of harassment as discrimination cases in order to ensure that the reversed burden of proof is applied. Most of the cases in Croatia deal with different forms of harassment in employment; mostly sex harassment cases involve the harassment of a subordinate employee.

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[3] EU FRA, Violence against Women – Main Results (2014), p. 95.

[4] European Network of Legal Experts in the Field of Gender Equality, Harassment related to Sex and Sexual Harassment Law in 33 European Countries (2011), p. 9.

[5] Goran Selanec, Report on Croatia, in European Network of Legal Experts in the Field of Gender Equality, Harassment related to Sex and Sexual Harassment Law in 33 European Countries (2011), p. 63.

LEGAL DEFINITIONS:

Directive 2006/54/EC (Recast Directive) declares harassment and sexual harassment as forms of discrimination.

Article 2(1) (c) and (d) define harassment and sexual harassment as follows:

Harassment: where **unwanted conduct** related to the sex of a person occurs with the **purpose or effect** of **violating** the **dignity** of person, and of **creating** an intimidating, hostile, degrading, humiliating or offensive **environment.**

Sexual harassment: where any form of **unwanted** verbal, non-verbal or physical **conduct** of a **sexual nature** occurs, with the **purpose or effect** of **violating** the **dignity** of a person, in particular when **creating** an intimidating, hostile, degrading, humiliating or offensive **environment**.[6]

Croatian Gender Equality Act

Art 8

(1) Harassment and sexual harassment shall be deemed to be discrimination within the meaning of this Act.

(2) Harassment is any unwanted conduct related to the sex of a person that occurs with the purpose or effect of violating the dignity of a person and of creating an unpleasant, hostile, degrading or offensive environment.

(3) Sexual harassment is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that occurs with the purpose or effect of violating the dignity of a person, in particular when creating an unpleasant, hostile, degrading or offensive environment.

Croatian Anti-Discrimination Act

Art 3

(1) Harassment is any unwanted conduct caused by any of the grounds referred to in Article 1 paragraph 1 of this Act with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading or offensive environment.

[6] Art. 2 (c) and (b) of Directive 2004/113/EC (equal treatment between men and women in the access to and supply of goods and services) are applying the same definitions for harassment and sexual harassment.

(2) Sexual harassment is any verbal, non-verbal or physical unwanted conduct of a sexual nature with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading or offensive environment.

(3) Provisions of this Act referring to discrimination shall apply accordingly to harassment and sexual harassment.

Croatian Labour Act

Article 30

(1) The employer shall protect workers' dignity during work, by providing working conditions in which they will not be exposed to harassment or sexual harassment. This protection also includes taking preventive measures.

(2) Workers' dignity shall be protected from harassment or sexual harassment perpetrated by employers, superiors, co-workers and persons with whom workers come into regular contacts during their work.

(3) The procedures and measures for the protection of workers' dignity are governed by collective agreements, agreements between workers' councils and employers or employment rules.

(4) Harassment and sexual harassment constitute a violation of employment obligations.

(5) An employer employing more than 20 workers shall appoint a person who would, in addition to him, be authorised to receive and deal with complaints related to the protection of workers' dignity.

(6) The employer or person referred to in paragraph 5 of this Article shall, within the time limit prescribed by the collective agreement, the agreement between the workers' council and the employer or employment rules, and within a maximum of eight days from the day of filing the complaint, examine the complaint and take all the necessary measures appropriate for a particular case, to stop the harassment or sexual harassment, if he or she has established that harassment has occurred.

(7) If the employer has failed to take measures for the prevention of harassment or sexual harassment within the time limit referred to in paragraph 6 of this Article, or if the measures taken by him or her are clearly inappropriate, the worker who is a victim of harassment or sexual harassment has the right to stop working until he or she is offered protection, provided that he or she sought protection in the court having jurisdiction within following eight days.

(8) If circumstances occur, which make it improbable to expect that the employer will protect a worker's dignity, the worker is not obliged to file a complaint with the employer and has the right to stop working, provided that he or she sought protection in the court having jurisdiction and notify the employer thereof, within eight days of the date when he or she stopped working.

(9) During the period of interruption of work referred to in paragraphs 7 and 8 of this Article, the worker is entitled to salary compensation in the amount he or she would have received if he or she had actually worked.

(10) All information collected in the procedure for the protection of workers' dignity is confidential.

(11) (…)

(12) In the case of a dispute, the burden of proof shall lie with the employer.

Croatian Criminal Code

Article 156

Any verbal, nonverbal, or physical unwanted conduct of a sexual nature which has the purpose or actually constitutes violation of dignity of a person, causing fear, hostile, humiliating or offensive environment.

THE MAIN ELEMENTS OF (SEXUAL) HARASSMENT:

The definition of harassment and sexual harassment requires conduct with the **purpose or effect** of violating the dignity of a person. Hence, even if the conduct is not harassing intentionally, but has such effect on a person it is still deemed harassment. An intentional action on the other hand can be enough to be deemed harassment, even if the person targeted is not deeply affected emotionally. Furthermore, the conduct also does not have to be directed towards a specific person as creating a general humiliating atmosphere of a sexual nature (e.g. pornographic calendars, jokes,..) can also be considered a form of harassment. The **effect** is always examined from the perspective of the individual person/victim of discrimination.

The definitions always **combine subjective and objective elements**. First and foremost, the conduct has to be **unwanted** and of a **sexual nature**. This is an almost entirely **subjective element** whose examination is concentrated at the alleged victim. The main questions here are whether it was known to the perpetrator that the conduct in question was unwanted. This is the case if:

- The victim stated (verbally or non-verbally) that he/she did not want the conduct
- The victim stated or signalled on the occasion of a previous similar conduct that he/ she did not want that
- It is common knowledge that the conduct in question is generally unwanted (e.g. indecent touching, offensive sexual advances, humiliating exposure to procedures involving (partial) nakedness, etc.)

In some workplaces a particular conduct may be tolerated or accepted by some other persons of the same sex as the victim, - this does not in any way affect the right of a person to reject that same behaviour as unwanted for themselves. Any reference to “company culture” or milieu of the workplace is not acceptable as an excuse for unwanted conduct. The victim can even change his/her mind and start rejecting behaviour that was formerly accepted. This, though, needs a clear statement in the direction of the harasser to make clear that the conduct is no longer acceptable.

The other element is an objective one: Is the conduct suitable to be **violating** the **dignity** of a person, in particular when **creating** an intimidating, hostile, degrading, humiliating or offensive **environment?** Unwanted conduct with a sexual connotation can have a strong impact on the further working relationship. Not every form might be deemed to be violating the dignity of a person in a way to overstep the threshold. It can be, for example, unwanted for a person to hear frequent positive comments and compliments about her/his beauty or clothing. If this happens frequently and doesn't stop after a clear statement that it is unwanted it can amount to harassment but it will not be able to violate the dignity if it happens only once or twice. If such comments are negative or obscene, this assessment changes towards having more impact on the working environment.

So, the objective elements mainly look at the possible change of atmosphere in the workplace that occurs after the conduct in question. Does it change the relationship between the involved parties or does it even make it uncomfortable and uneasy to be in the same room or to come to work at all? A single event can be enough to significantly alter the working environment as well as a series of minor actions that, together, amount to harassment.

WHAT IS VICTIMISATION?

Effective protection against victimisation is one of the **core guarantees** of any anti-discrimination legislation. Without that, the number of actual complaints and lawsuits against discrimination will considerable decrease and lose momentum. It has to be **safe** to complain against discrimination without the fear of losing the job or getting drawn into unfavourable situations. It is hard enough to stand up against discrimination as nobody like to see him-/ or herself as a victim and it requires strength and commitment to claim equal treatment.

LEGAL DEFINITIONS:

Directive 2006/54/EC (Recast Directive)

Art 24 Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to **protect employees**, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other **adverse treatment** by the employer **as a reaction** to a **complaint** within the undertaking or to **any legal proceedings** aimed at enforcing compliance with the principle of equal treatment.

Croatian Gender Equality Act

Article 2 (current version)

No one shall suffer adverse effects as a reaction to a statement given, in the capacity of a witness or a victim of discrimination on the grounds of sex, to a competent authority or as a result of making a discrimination case public.

As the amendments to the Gender Equality Act should be passed in the Parliament by April 2017, this is the envisaged version pro futuro:

Article 2 will be amended as follows:

(1)No one shall be placed in a less favourable position or suffer adverse effects, including to be sued or subjected to other legal proceedings, because they have in good faith officially or unofficially reported discrimination, witnessed discrimination, refused an instruction to discriminate, or in any manner testified in proceedings of protection against discrimination based on sex or in any other way participated in any proceedings based on discrimination on grounds of sex.

(2)No one shall be placed in a less favourable position or suffer adverse consequences, including to be sued or subjected to other legal proceedings, because they have, in good faith, warned the public about a case of discrimination.

Croatian Anti-Discrimination Act

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Croatian Labour Act

Article 30/ 11

(11) The worker's resistance to the behaviour constituting harassment or sexual harassment must not be grounds for discrimination against the worker.

THE MAIN ELEMENTS OF VICTIMISATION:

It is very clear that the provisions against victimisation protect the following acts:

- Complaining about discrimination (or harassment)
- Taking the initiative or part in any proceedings in relation to discrimination
- Supporting or assisting another person to complain or bring proceedings relating to discrimination

The protection is **not limited** to the original victim (or alleged) victim of discrimination. Everyone who gets involved in support of the allegation of discrimination is protected.

In regard to the shift of the burden of proof, it should be comparatively easy to have a prima facie case, if there is evidence of adverse treatment and a prior complaint about discrimination.

AS TO THE QUESTIONS OF THE CASE - MODEL SOLUTION CASE STUDY III

1) (Marko shows Ivana a photo and calls her speaking of his phantasies)

How would you assess Marko's conduct? Do you think, the hospital lawfully dismissed Marko?

The case is based on the decision of the State Labour Court of Schleswig-Holstein (Landesarbeitsgericht Schleswig-Holstein, 3 Sa 410/08, 4 March 2009). The court assessed that showing a photo of a naked woman and talking about hypothetical sexual intercourse on the phone amounts to **sexual harassment**.

The court further decided that these forms of sexual harassment can justify an ordinary termination without notice, although the person harassing his colleague was not a superior of the harassed woman and no physical harassment was involved at all.[7]

Variation 1 (Marko is Ivana's superior)

How would you assess Marko's conduct? Do you think, the hospital lawfully dismissed Marko?

This variation has more indicators for sexual harassment, due to physical contact and his abusing his position as her supervisor. This variation shows an example of the 'quid pro quo' situation created by sexual harassment. Early cases related to harassment would take up situations in which for instance in return for sexual favours the victim gets better treatment. However, it is also recognised that creating a humiliating environment can amount to harassment.[8] In this case, it can clearly be seen how his treatment was actually able to impact on the environment or atmosphere heavily. It can easily be empathised that, after that event, Ivana will fear new sexual advances by her superior and will feel some pressure for sexual favours all the time. So, this is a rather clear case of sexual harassment.

As Marko is even misusing his position as a superior, dismissal seems adequate. The employer could also think about demoting him and deploying him to a different environment. The case also gives some indications about a potential claim against the hospital as the employer, as the complaint of Ivana has not been the first of this nature against Marko, the court may find that the duty to protect employees against sexual harassment was not fulfilled by the employer and some compensation might be due.

Variation 2 – (Marko speaking negatively about Ivana in front of other staff members – contract not continued)

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[7] Ulrike Lembke, Report on Germany, in European Network of Legal Experts in the Field of Gender Equality, Harassment related to Sex and Sexual Harassment Law in 33 European Countries (2011), p. 113.

[8] European Network of Legal Experts in the Field of Gender Equality, Harassment related to Sex and Sexual Harassment Law in 33 European Countries (2011), p. 5.

How would you assess the behaviour of Marko in front of all other nurses? What has to be proven in front of the court in case of any form of harassment?

In this variation, Marko calls Ivana for instance 'lazy' or 'slow'. In his speech he does not refer to her sex or use any remarks of a distinctively sexual nature, so it would be rather complicated to subsume his behaviour as sexual harassment or harassment based on sex. It could be seen, though, as a continuation of his power-play with Ivana that already had gotten a sexual connotation by his previous behaviour in his office. If considered this way it could be seen as sexual harassment, as his conduct is definitely unwanted and it is creating a hostile and humiliating environment.

More clearly though, this case is one of **victimisation**. It seems rather obvious that Markos behaviour changed after Ivana's complaint about his actions and that both, Marko and the hospital (human resource department), are victimising her for this.

In terms of the shift of the burden of proof, she has a **prima facie case** if she can show her complaint about harassment, the non-reaction of the employer to it and the adverse treatment that followed it. It will be for the employer to prove that it was her performance at work and not her complaint that triggered the adverse treatment.

6. CASE STUDY IV (PAY DISCRIMINATION AND MATERNITY LEAVE)

THE FLIGHT ATTENDANT

Antonija worked as a flight attendant for several years. She got pregnant and during her pregnancy her company transferred her to alternative duties on the ground. As a flight attendant, Antonija had received a salary that consisted of a basic salary and special allowances. These allowances formed about 40% of the actual payment she received per month. There were two different kinds of allowances she received: one allowance for being a senior flight attendant and one allowance paid for serving on specific long-haul flights.

After her transfer, Antonija does no longer receive the allowances since she does not work as a flight attendant anymore. Antonija complains as she is of the opinion that she should be entitled to the allowances even after her transfer to the ground staff.

After her maternity leave, Antonija wants to continue this job. She returns, but learns immediately that she would be assigned to a different job. The position she had after her transfer as flight attendant was no longer available and with a baby she could do only short flights but not long-haul flights anymore. Therefore, the company transfers her to the department where she would have to work for a hotline for customers. This job is assessed differently and in a different payment system. Antonija would earn considerably less than before, even less than after during her pregnancy. She is upset and complains since she feels entitled to the same payment as before her pregnancy. Her employer argues that special allowances for flight attendants were not part of her basic salary but linked to the specific function and that she would anyway still earn more than others working for the hotline.

- Do you think it was a discriminatory behaviour of Antonija's employer to stop paying the allowances after her transfer?
- Do you see an important difference between the two different allowances at stake?
- Discuss whether the company was rightfully transferring Antonija to the hotline-department. If yes, under which conditions?

MAIN QUESTIONS AND RELATED PRINCIPLES OF GENDER EQUALITY LAW TO BE DETECTED IN THE CASE NR IV

- What is the scope protection of women coming back from maternity leave?
- How does it relate to pay and working conditions?

LEGAL DEFINITIONS:

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding.[9]

Directive 2006/54/EC (Recast Directive)

Art 15 *Return from maternity leave*

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

Croatian Legal Basis

Croatian Labour Code

Art 36 *The right to reinstatement to the former or an equivalent position*

On the expiry of maternity, parental and adoptive leave, a leave for the purpose of taking care of and nursing a child with severe developmental disabilities and the abeyance of the employment relationship until the child's third year of age in accordance with specific provisions, the worker who exercised any of these rights shall be entitled to return to his former position within one month after the date having notified the employer about the end of exercising of such a right.

Where there is no need for the works performed by the worker prior to the exercise of rights referred to in paragraph 1 of this Article, the employer shall be obliged to offer the conclusion of employment contract for an equivalent post with working conditions not less favourable compared to those of the works performed by the worker prior to the exercise of such a right.

The worker who has exercised the right referred to in paragraph 1 of this Article shall be entitled to additional training, where there has been a change in the technique or method of work, and to benefit from any improvement in working conditions during his absence to which he would have been entitled."

[9] See: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31992L0085&from=en

AS TO THE QUESTIONS OF THE CASE - MODEL SOLUTION CASE STUDY IV

- Do you think it was a discriminatory behaviour of Antonija's employer to stop paying the allowances after her transfer?

The case is modelled alongside the **CJEU Case *Parviainen***. The CJEU showed in *Parviainen* (C-471/08) and *Gassmayr* (C-194/08) that basic monthly payment has to be continued. However, employers are not compelled to continue paying pregnant workers in the same way that they did prior to the pregnancy if they can no longer perform the same tasks, even if this is caused by the pregnancy or by placing the employee on health and safety leave.

The CJEU differentiates in *Parviainen* between two different types of allowances: (1) allowances that relate to seniority, length of service or professional qualifications and (2) allowances that are linked to the actual performance of specific functions and that are designed to compensate for disadvantages related to that performance. Thus the Court held that the Pregnant Workers Directive (Directive 92/85/EEC) does **not require** that a woman be paid the equivalent of her average pay before the transfer to other duties. The Court also reminded Member States that they would be free to provide that a woman transferred to alternative duties could be paid the average of her prior average payment without infringing European Union law.

In *Gassmayr* the CJEU decided upon the payment of a doctor during pregnancy and maternity leave. Due to medical reasons she was granted leave from her position. Prior to that she received an on call allowance in addition to her basic salary. She did not receive the on call allowance after her granted leave. As this payment is linked to the actual performance of a specific task and is not linked to her qualification or seniority, the ECJ concluded that the Pregnant Workers Directive does not require the payment of the on-call duty allowance during maternity leave.

- Discuss whether the company was rightfully transferring Antonija to the hotline-department. If yes, under which conditions?

Antonija returns after her maternity leave, but is transferred to a less-paid position. Art. 15 of Directive 2006/54/EC states that after her maternity leave, a woman is entitled 'to return to her job or to an equivalent post on terms and conditions which are not less favourable to her'. So the transfer is **clearly unlawful**, **unless** it is paid equally to her former job.

In line with European law, Article 36 of the Croatian Labour Code clearly prohibits that employers transfer women to less-paid jobs.

A report on the situation in Croatia shows that transfers or even terminations after the maternity leave do take place in practice.[10]

[10] Nada Bodiroga-Vukobrat, Report on Croatia, in European Network of Legal Experts in the Field of Gender Equality, Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood – The application of EU and national law in practice in 33 European countries (2012), pp. 55-56.

7. EXCURSUS: BASIC KEY PRINCIPLES OF CEDAW

Introduction

The Convention on the Elimination of all Forms of Discrimination against Women (the CEDAW Convention) is a human rights treaty for women. The substance of the Convention is based on three interrelated core principles: equality, non-discrimination and state obligation.

The UN General Assembly adopted the CEDAW Convention on 19th December 1979. It came into force as a treaty on 3rd September 1981. The CEDAW Convention is monitored by the CEDAW Committee that operates out of the UN in New York.

CEDAW is one of the most highly ratified international human rights conventions, being ratified by 189 States parties (as of 20 January 2017). This is one of the many benefits of the CEDAW Convention; it can stand as a treaty that has achieved a global awareness and has driven normative standards applicable to women's human rights.

Croatia ratified the Convention in 1992 and the Optional Protocol (Individual Complaints Protocol) in 2001.

The structure of the CEDAW Convention:

Article 1 provides a definition of discrimination and a fundamental basis for eliminating discrimination. Articles 2-4 outline the nature of state obligation in the form of law policy and programmes that the State needs to undertake in order to eliminate discrimination. Articles 5-16 specify the different areas to eliminate discrimination through measures described in articles 1-4. These include sex roles, stereotyping, and customary practices detrimental to women (article 5), prostitution (article 6), political and public life (article 7), participation at the international level (article 8), nationality (article 9), education (article 10), employment (article 11), health care and family planning (article 12), economic and social benefits (article 13), rural women (article 14), equality before the law (article 15), marriage and family relationship (article 16). Articles 17-22 describe the establishment and functions of the CEDAW Committee and articles 23-30 deal largely with procedural aspects of the convention.

The principle of (substantive) equality

The principle of equality is central to the CEDAW Convention. This concept of equality goes clearly beyond an understanding of "the right of women to be equal to men." The concept takes into account that, in fact, women faced gross inequalities in relation to employment opportunities, pay, access to and enjoyment of health, citizenship, property rights, etc.

The problem arose because equality is not reached if it is understood that women must be treated exactly like men if they shall gain equality with men. The implication of this is that women must be treated according to male standards.

Such an approach – taking men as the “normal standard” would not take into account the ways women are different from men. If rules, expected behaviour, traditions and ways to do things are the same for women and men, then women will end up disadvantaged because of the existing differences. So, this approach mainly stresses, that equality does not mean being the same or simply turning a blind eye to existing differences.

The CEDAW Convention promotes the substantive model of equality it stresses the importance of equality of opportunity in terms of women's entitlements on equal terms with men to resources. But the CEDAW Convention goes beyond this in emphasising that the measure of a State's action to secure the human rights of women and men needs to ensure equality of results. Article 2 of the CEDAW Convention puts the states under a duty to ensure the practical realisation of rights. So, having strong policies only on paper is not sufficient, - CEDAW holds states accountable for what they achieve in terms of real change for women.

CEDAW makes clear that only formal equality will not be enough in many instances to achieve real-life equality of opportunity, simply because women and men are not the same. There is significant biological difference between women and men (women bear children, for example), these are largely increased by gender differences (socially-created differences of what is considered male or female, reproduced by tradition, socialisation processes and ideology). Gender differences result in perception of “normality”, and assumptions about women and men's roles in society, what they are capable of, what they are interested in and what they need. Differences between women and men whether based on biological (sex) difference or socially created (gender) differences results in women's asymmetrical experience of:

- disparity, and
- disadvantage

Therefore, the strive for substantive equality needs policy and law to take into account the ways in which women are different from men, and to make sure that these differences are acknowledged accordingly. This approach also holds some dangers, as taking into account differences between women and men is not automatically favourable to women. It could. On the contrary even be discriminatory in effect, even if not in intention.

There are two major ways of responding to gender differences in policy or approach. One is a protectionist approach, which looks at the differences and in response seeks to restrict women's activities, duties or freedoms with the rationale that it is necessary to "protect" women from harm or hardship. Protectionist approaches are generally rather dangerous, as they do not challenge gender discrimination, but reproduce pictures of femininity as the source of weakness and vulnerability. A classic example of a protectionist approach is the ban on women's employment in night shifts, which is really widespread. While such a ban seems to protect women from unsafe environments and unpleasant situations, it, in fact, limits women's freedom to work, and accepts a reality unchanged in which night is an especially dangerous time for women, while men are tough enough to work whatever time it is.

The second approach which could be called a substantive approach, recognises that in order to redistribute benefits equally between women and men, it is necessary to transform the unequal power relations between women and men. This approach does not only need equal opportunities for women but equal access to the opportunities, as well. So, policies and laws must provide the following:

- enabling conditions, in the form of the basic social and economic support services so that women can access the opportunities provided (artide 3).For example: child care centres, transport, access to information, housing, capacity building
- affirmative action in the form of temporary special measures in order to enable women to overcome barriers that are historical or those that arise from longstanding male domination of the system. These measures have to recognize women's needs arising from these socially hampered conditions for access.

This approach recognises that women and men cannot be treated the same in all circumstances, and that for substantive equality women and men may need to be treated differently.

In summarising this approach to equality we can say that the obligation of the state is to ensure:

- Equality of opportunity
- Equality of access to the opportunity and
- Equality of results

The challenge is to know when to take into account difference, and to decide on measures appropriate for different treatment that will facilitate equal access, enjoyment and equal results. This has to be done without compromising the claim for equal rights and equality as a legal standard.

The principle of non-discrimination

Another principle enshrined in CEDAW is the principle of non-discrimination. This principle is based on the understanding that discrimination is socially constructed and that it is not an essential or natural principle of human interaction. All inequality is entirely human-made.

What is discrimination?

According to Art 1 CEDAW it is:

(…) 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.

The above definition is clearly laying down that even if a law or policy may not have the intention of impairing a woman's the enjoyment of rights, it still constitutes discrimination if it has the effect of doing so.

Again, the concept of non-discrimination does not stop at formal neutrality. Historic and traditional discrimination cannot be overcome by simply opening doors that were formerly closed to women. The reduction of formal barriers alone does not automatically lead to access. So under this title, again, temporary special measure or affirmative action has to be put in place to help correct the effect of past discrimination.

CEDAW recognises that longstanding denial of women's rights to economic and social development continues to have an effect on the inclusion of women in decision making positions and prosperous jobs. In seeing this, the Convention bridges the traditional divisions between civil and political and socio-economic rights and it uses both legal and development policy measures to promote the rights of women.

CEDAW puts a focus on power relations between women and men at all levels, including family, community, market and state, and even the international level.

The convention tears down distinctions between the private and the public spheres and stretches classic state human rights obligations by recognising violations of women in the private sphere as violations human rights. It rejects the idea of the "inferiority or the superiority" of either sex or on stereotyped roles for women and men (article 5).

The principle of state obligation

The CEDAW includes the principle of state obligation.

When a country becomes a state party to CEDAW, it voluntarily accepts a range of legally binding obligations to eliminate discrimination against women and bring about equality between women and men.

The rather intense reporting duties of the Convention are enabling the mechanism to keep up a monitoring system (4-years circle) that is also able to work as a constant reminder of the duties enshrined and therefore, can induce change and positive development.

CEDAW creates responsibilities on countries in regard to women from which it cannot withdraw. The state will be held accountable at the national and international levels for what it formally promised by ratifying the Convention.

State obligation include:

- Prevent discrimination
- Prohibit discrimination
- Identify and redress discrimination
- Impose sanctions against discriminating acts
- Monitor women’s rights
- Promote women's rights and equality through proactive measures

Accelerate de facto equality