Sex Discrimination – a Starting Point for Anti-Discrimination Law

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15 Years of Equality Bodies – 27 Years Austrian Ombud for Equal Treatment

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Introduction (1)

Sex discrimination – a starting point?

- Titel given to me for this presentation, without a question mark.

- Is it a starting point in reality?
  - E.g. not in the Crash Course U.S. Government and Politics: Episode 30.
  - But yes to some degree in EU anti-discrimination law, as noted in the instructions given to me for today's address.

Introduction (2)

But first: a much older, cultural-legal starting point

- Perhaps surprising: the Jewish-Christian heritage of our society.

- A story in the Bible, Numeri 27:
  - Of five women called Mahlah, Noah, Hoglah, Milkah and Tirzah;
  - Of speaking up for, and working towards, sex equality through the law;
  - That perhaps might be seen as the historical background to Ingrid Nikolay-Leitner's invaluable work.

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Introduction (3)

Mahlah, Noah, Hoglah, Milkah and Tirzah

- Mother unknown, father Zelophehad, no brothers. Father dies; heritage to go to the next male relatives.

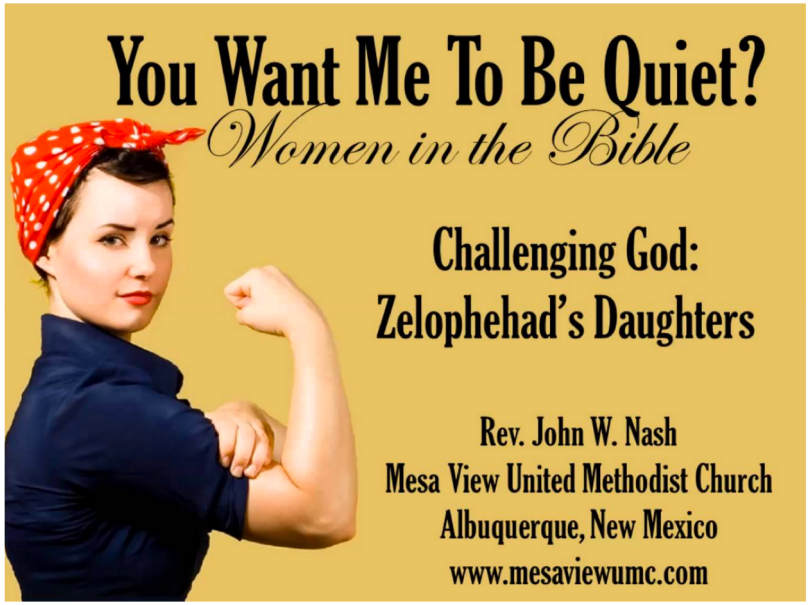
- Mahlah, Noah, Hoglah, Milkah and Tirzah disagree, complain and win:

They came forward and stood before Moses, Eleazar the priest, the leaders and the whole assembly at the entrance to the tent of meeting and said: "[...] Why should our father's name disappear from his clan because he had no son? Give us property among our father's relatives." So Moses brought their case before the LORD. The LORD said to him: "What Zelophehad's daughters are saying is right. You must certainly give them property as an inheritance among their father's relatives and give their father's inheritance to them."

Introduction (4)

Challenging conventions

- **Lesson 1 from the story:** Speak up for equality! Complain about discrimination! Do something! Precisely what Ingrid Nikolay-Leitner has done, dedicating her professional life to this cause.



- **Lesson 2:** Mahlah, Noah, Hoglah, Milkah and Tirzah did not achieve full equality at once, just one step. Others had to continue after that.

- **Lesson 3:** Conventions and even God can and should be challenged!

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Turning back to EU law

The starting point in terms of discrimination

- Substantive rules on discrimination in the EEC Treaty (1957):
  - Internal market: nationality, the origin of a good
  - Equal pay for men and women: sex (understood as a binary concept: men – women)

- = the oldest discrimination grounds of EU law.

- Other grounds are considerably younger, such as:
  Sexual orientation, race and ethnic origin, religion or belief, age, disability, part-time work, fixed-term work and temporal work.

Sex discrimination

A long line of case law … and a special place

- Accordingly, long history of legislation and of case law of the Court of Justice of the European Union (CJEU) ...

- ... very relevant for the question of how and to what extent the law on sex discrimination has influenced other fields of EU law (other non-discrimination law, EU law in general).

- Probably as a result of its EU history, sex equality holds a special place in the EU's legal architecture.

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Influence on other EU law (1)

Enforcement - an issue of very general relevance

- Decisive influence of sex equality law in many specific respects:
  - E.g. the burden of proof: From *Bilka* to modern legislation, also on other discrimination grounds (e.g. Art. 10 of Directive 2000/78).
  - E.g. a meaningful remedy for discrimination and to levelling up:
    - *von Colson and Kamann* – various social law Directives - internal market Directive 2014/54.
    - *Jonkmann – Pöpperl,* relating to Art. 45 TFEU.

- Though: not equality bodies (remember Nikolay-Leitner's activities).

See already Christa Tobler, 'The Impact of Non-Discrimination Law in Developing a General Doctrine of Enforcement Under EU Law', in: Evelyn Ellis/Kristín Benediktsdottír (eds), *Equality into Reality. Action for Diversity and Non-Discrimination in Iceland*, Reykjavík: University of Iceland Press 2011, 67-107.

Influence on other EU law (2)

Substance

- E.g. forms of discrimination – direct and indirect discimination: Interaction with with free movement law; definitions in modern social legislation; certain problematic elements in relation to sex.

- Though: not harassment.

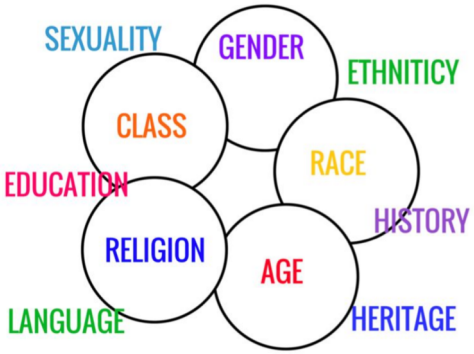
See already Christa Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Habilitation thesis (University of Basel), Antwerp/Oxford: Intersentia 2005.

- BUT: What about multiple identities, i.e. mulitple grounds?

Influence on other EU law (3)

Multiple identities

- May lead to multiple discrimination, as recognised in the preambles of certain Directives.



- 2 basic forms:
  - Cumulative: recognised in EU law in principle.
  - Intersectional (Crenshaw): not recognised under present EU law; *Parris* (2016), in the context of sexual orientation and age – reflects back on sex discrimination law.

- Result: a real and worrying gap in EU anti-discrimination law. Nikolay-Leitner suggests an open list of discrimination grounds.

A special place (1)

Legal architecture of the EU: Treaty level

- Special provisions on sex equality, in addition to more general provisions, notably:
  - Fundamental value, Art. 2 TEU ("equality between men and women").
  - Gender mainstreaming, Art. 8 TFEU.
  - Fundamental right, Art. 23 of the EU Charter of Fundamental Rights.

- A substantive, directly effective Treaty provision (rather than only a competence):
  Art. 157(1) and (2) TFEU, if only for one issue (different from nationality).

A special place (1)

More action than in other fields on the secondary level

- Proposal: gender representation on company boards (2012).

- Proposal: work-life balance for parents and carers (2017):

A special place (2)

More action (continued)

- EU Gender Pay Gap Action Plan (2017):

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

EU Action Plan 2017-2019
Tackling the gender pay gap

- Gender mainstreaming, also in external relations – EU Gender Action Plan 2016-2020:

A special place (3)

More action (continued)

- Commission Recommendation and European Parliament Resolutions: income transparency.

- Council of Europe Istanbul Convention and the EU: violence against women.

https://www.womenlobby.org/Factsheet-EU-ratification-of-the-Istanbul-Convention-A-vital-opportunity-to-end-7715?lang=en

A special place (4)

Good practices

- The work of equality bodies
- The work of women's organisations
- Men's initiatives such as the Barbershop Conferences, e.g. May 2017, Reykjavik, Iceland: "Gender inequality is one of the most significant global challenges today."

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Even so: is it enough? (1)

Obviously not …

- Consider the practical problems in Europe (and beyond) – two examples from a very broad range:
  - 1) the EEC's "very first sex equality issue", the gender pay gap, combined with social security problems – (and, in this context, Nikolay-Leitner's insistence on the importance of women's economic independence).

Even so: is it enough? (2)

Obviously not …

- Examples (continued):
  - 2) *"Wildplassen"* or "toilet or no toilets":
    The judge acknowledged there were fewer facilities for women but said the Amsterdam city council was not obliged to provide them.

Amsterdam city officials have questioned whether investing in public loos for women are worth the money

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Dutch sexism outcry after woman fined for peeing in public

By Anna Holligan
BBC News, The Hague

20 September 2017 | 198

Even so: is it enough? (3)

Unresolved root causes for discrimination

- Gender remains a social construct:
  E.g. Scott (1986): "a constitutive element of social relationships based on perceived differences between the sexes", "a primary way of signifying relationships of power."

- There remains lots of structural discrimination:
  E.g. CoE Manual for Human Rights Education with Young People: "discrimination is based on the very way in which our society is organised", "challenge to make it visible, as we often grow up with it being self-evident and unquestioned".

- Much remains to be done to reach the standard of CEDAW!

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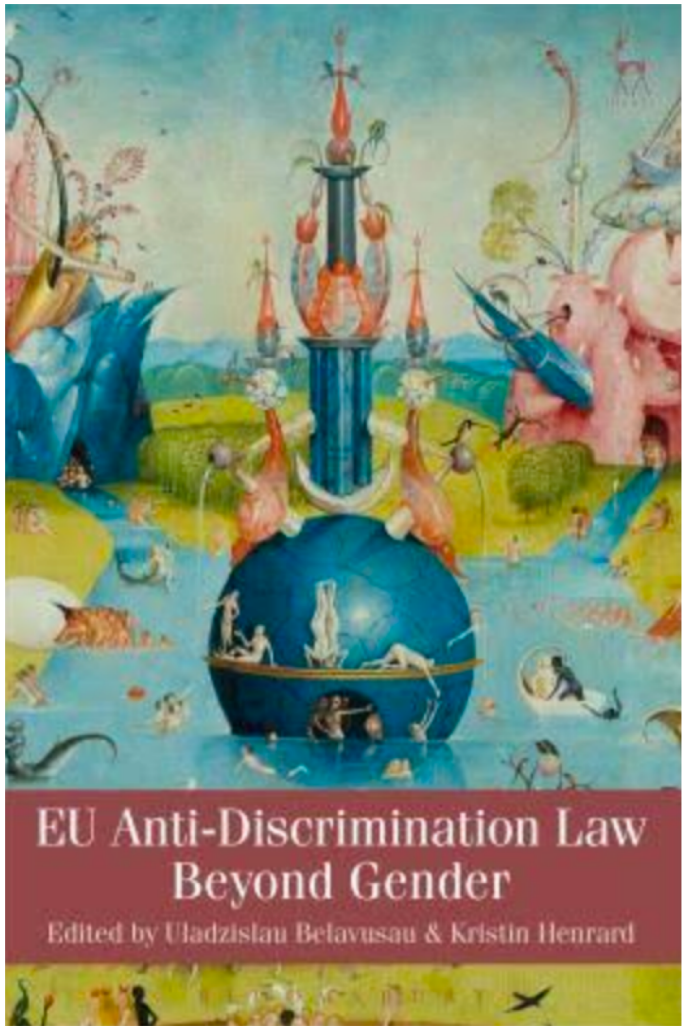
And the other grounds? (1)

The Garden of Equal Delights

- Uladzislau Belavusau/Kristin Henrard (2018):
  - "Directives 2000/43 and 2000/78 can be seen as launching the transition from the Garden of Earthly Delights opened for mobile EU citizens into a European Garden of Equal Delights, with the anti-discrimination norm increasingly regulating human interactions in wholly internal situations as well."
  - Despite all its flaws, the EU "offers one of the highest standards of protection in comparative anti-discrimination law."



And the other grounds? (2)

Interdependent categories

- Elisabeth Greif/Silvia Ulrich (2017):
  - Sexuality and gender never stand on their own.
  - When analysing interdependen-- cies and influences of sexuality and gender, categories such as ethnicity, age or disability must be taken into account.

- But then note the title, with "Legal Gender Studies" first.

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And the other grounds? (3)

So?

- Should gender law stand back and join ranks with the other grounds?

- I do not believe so:
  - Sex discrimination / gender is not just a, but rather the starting point.
  - E.g. Jojanneke van der Toorn, professor in International Lesbian, Gay, Bisexual and Transgender Workplace Inclusion, 6.4.2018, Leiden University: "Hetero norm is deeply rooted, including among LGBT people."

  - E.g. multiple discrimination of women – even just from a numerical point of view.

- Whilst linked to other matters, sex discrimination should remain "Episode 1"!

Thank you for your attention!

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