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Integrating or Reshaping Harmonized Law? The National Background Influence on the National Application of EU Non-discrimination Law

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Abstract: This paper compares how German and Dutch courts integrate the European equality framework within their national systems. Within the EU, the principle of non-discrimination is well developed and prohibits vertical as well as horizontal discrimination in order to foster substantive equality. Today, it is one of the key elements of the EU human rights policy and covers a wide range of protected grounds. As a result, national courts cannot ignore the EU equality framework. However, the reception of EU non-discrimination law still depends on the national legal and cultural background and, in particular, the national courts' response to the European challenge to readdress national equality concepts, which often focus on vertical relationships alone. This paper evaluates how and to what extent the EU non-discrimination law framework impacted on the national approaches towards equality, using pregnancy discrimination as an example. As such, it highlights the differences between the Member States and the national influences on the application of the EU rules but also demonstrates the EU influence, which can promote but also hinder the development of a coherent equality framework.

Key words: Comparative law, national culture, pregnancy discrimination, equality framework, European harmonisation process,

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1. Introduction

This article compares how the German and Dutch courts integrate the European equality framework within their national systems. On European level, the principle of non-discrimination is well developed and prohibits vertical as well as horizontal discrimination in order to foster substantive equality. Today, it is one of the key elements of the EU human rights policy and covers a wide range of protected grounds,[1] including characteristics like age, which reflects the demographic changes within the Member States.[2] This, along with the Charter of Fundamental Rights of the European Union's[3] new emphasis on human rights protection and EU supremacy,[4] means, that national courts cannot ignore the EU equality framework. However, the reception of EU non-discrimination law at national level and, in particular, the national courts' response to the European challenge to readdress national equality concepts (which often focus on vertical relationships and public law alone)[5] still depends on the national legal and cultural background. This paper evaluates how, and to what extent, the EU non-discrimination law framework had an impact on the German and Dutch courts' approaches towards equality by analysing national approaches towards pregnancy discrimination and the Court of Justice of the European Union (CJEU) case law's influence upon them. It highlights the differences between the Member States and the national influences on the application of the EU equality framework and demonstrates the EU's indispensable influence in ensuring that national non-discrimination law fosters substantive equality. However, the article also shows how EU law and the CJEU approach can sometimes limit the protection at the national level. It thus aims to demonstrate how EU non-discrimination law has shaped national approaches towards equality in a way which is often contrary to national doctrine, but also highlights manifold national and European factors which limit the EU influence and advancement of equality law.

The success story of EU equality law and the CJEU's pro-active approach in developing a substantive European equality principle, in particular regarding sex-equality law, have been discussed repeatedly[6] and there is little doubt that the EU activism within the field has improved and widened the application of horizontal non-discrimination law within the Member States. It has been suggested that the EU is particularly active within the field of equality because there are few competing national concepts intertwined with the national legal traditions.[7] This leaves space for the

[1] Beyond nationality discrimination, EU non-discrimination law currently prohibits the discrimination on grounds of sex, sexual orientation, race and ethnic origin, religion and belief, disability, and age. See in particular: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000, L180/22); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000, L303/16); Recast Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L204/23); Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004, L373/37).

[2] Dagmar Schiek, 'Age Discrimination Before The ECJ - Conceptual and Theoretical Issues' 48(3) *CMLR* 777-799 (2011).

[3] OJ 2007, C303/01.

[4] CJEU, *Mangold*, C-144/04, EU:C:2005:709; *Kücükdeveci*, C-555/07, EU:C:2010:21.

[5] Dagmar Schiek, Lisa Waddington and Mark Bell, 'A Comparative Perspective on Non-Discrimination law' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds) *Non-Discrimination Law* (Hart 2007) 1, 18.

[6] Sacha Prechal, 'Equality of treatment, non-discrimination and social policy: achievements in three themes' 41(2) *CMLR* 533-551 (2004).

[7] Fritz W Scharpf, *Crisis and Choice* (translated by R Crowley and F Thomson, Cornell University Press, London 1991); recently Alexander Somek, *Engineering Equality* (OUP 2011) 51.

CJEU to be active, to demonstrate its commitment to social progress and legitimise further European (political) integration.[8] However, the paper will demonstrate that the CJEU's approach to substantive equality, while progressive at times, is also timid and occasionally inconsistent. Such approach leaves much space to the national courts to adopt application strategies they deem most appropriate and thus undermines the harmonisation process. Moreover, the lack of similar legal institutions within national social or labour law may also hinder the adoption of the approaches developed by the CJEU, as they may be perceived as unnecessary, unconstitutional or poorly reasoned. For example, national legal systems with strong labour law protection may address issues relating to equality by other protective measures,[9] or such social issues may be addressed in a more collective way without creating individual rights. Additionally, national cultural and historical factors may affect the application of EU equality law, even if the national legal systems share many common features and are based on similar legal paradigms. The case law comparison will demonstrate that these national influences still have a major role in shaping national rights to equal treatment and non-discrimination and that the CJEU's lack of consistency de facto leaves much discretion to the national courts and thus prevents the development of a consistent equality framework within the Member States. The article will first discuss factors of the German and Dutch cultural background which may be relevant for the national courts' application of horizontal non-discrimination law and will then analyse the national courts case law on pregnancy discrimination focusing on the national courts' reasoning and the influence of the national factors and CJEU case law upon it.

2. Comparing the application of EU non-discrimination law

To highlight the European contribution to the development of comprehensive equality frameworks within the Member States, the comparison of Germany and the Netherlands can be particularly fruitful as their national courts' approach towards (European) non-discrimination law is rather different despite similarities in their respective legal systems. The countries are founding members of the EU, they are neighbouring countries with extensive trade relationships, both are civil law countries, and their legal systems (including employment law) have similarities, especially when compared to Scandinavian or common law countries.[10] Moreover, both countries only implemented national law prohibiting horizontal (sex) discrimination once the EU issued corresponding directives on the matter and put significant pressure on the Member States to be more active within the field of employment (sex) discrimination.[11] There would thus be an expectation that there are few differences between both legal orders, which only arise from Germany relying on dualism and the Netherlands on monism regarding the impact of international law (which can also colour the application of EU law) on their national systems.[12] Accordingly, a comparison between the two would not be considered worthwhile.[13] However, even a cursory appreciation of Dutch and German

[8] Catherine Barnard, 'The Principle of Equality in the Community Context' 57(2) C*ambridge Law Journal* 352 (1998); Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (2nd ed., OUP 2012) 25.
[9] Karen J Alter, 'Explaining Variation in the Use of European Litigation Strategies' *The European Court's Political Power* (OUP 2009) 159, 174.
[10] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (translated by Tony Weir, 3rd ed., Clarendon Press 1998).
[11] Anna van der Vleuten, *The Price of Gender Equality* (Ashgate 2007).
[12] Helen Keller and Alec Stone-Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in Helen Keller and Alec Stone-Sweet (eds) *A Europe of Rights* (OUP 2008) 677, 684.
[13] Zweigert and Kötz, *supra* n 10.

case law within the area of non-discrimination law shows that there are more differences than one would expect if committed to the traditional approaches towards comparative law. This suggests that the wider cultural context remains relevant and influences the application of EU non-discrimination law. A comparison can highlight these influential factors and thus uncover challenges which may be encountered by the EU legislator and the CJEU promoting the harmonisation process and the effect of EU law going beyond more general difficulties between different legal families. Moreover, the detailed engagement with the national case law can also uncover problems which are caused by the CJEU case law itself, and can thus highlight shortcomings within the EU's promotion of substantive equality. Regarding the application of EU non-discrimination law, two features of the German and Dutch cultural background will be discussed in more detail as they seem particular relevant within the context of non-discrimination law.

2.1 The Dutch 'culture of tolerance'

The so called Dutch 'culture of tolerance'[14] refers to a political system which focuses on taking pragmatic political approaches towards controversial issues, such as abortion or prostitution,[15] without the majority of the population endorsing such acts.[16] The 'culture of tolerance' is an important feature of Dutch cultural self-identity[17] and was first institutionalised via the pillarization (*verzuiling*) of the political system. It constituted the 'permanent manifestation of peaceful separate coexistence'[18] and aimed at pacifying the political process (*pacificatie-politiek*).[19] Pillarization describes the cultural segregation of the state, traditionally divided into Catholic, Protestant, socialist and liberal groups.[20] These four pillars within society could mainly act freely within their group and only needed to reach consensuses at the top-level.[21] Those agreements reached by the elites were then assumed to permeate down to the lower levels of society[22] who generally accept the elites' compromises.[23] This separation ensured a great deal of conformity within the groups,[24] but also institutionalised pluralism[25] by ensuring unity despite diversity[26] and accommodating different life-styles.[27] As a consequence, Dutch society was able to integrate diverse life-styles and new progressive ideologies, despite traditional Christian influences on politics.[28] Such a tolerant

[14] Kees Schuyt, *Steunberen van de samenleving* (AUP 2006) 251-253.
[15] Joyce Outshoorn, 'Incorporating feminism the women's policy network in the Netherlands' in Frances Gardiner (ed.) *Sex Equality Policy in Western Europe* (Routledge 1997) 109, 110-111.
[16] Schuyt, *supra* n 14, at 253-255.
[17] Kees Schuyt, 'Tolerance and democracy' in D Fokkema and F Grijzenhout (eds.) *Dutch Culture in a European Perspective* (volume 5, Palgrave-McMillan 2004) 113.
[18] Ibid., 134-135.
[19] Arend Lijphart, *Verzuiling, pacificatie en Kentering in de Nederlandse politiek* (3rd Edition, De Bussy 1979) 13.
[20] Ibid., 35.
[21] Ibid., 119.
[22] Ibid., 68; Schuyt, *supra* n 17, at 134.
[23] Frances Gardiner and Monique Leijenaar, 'The timid and the bold' in Frances Gardiner (ed.) *Sex Equality Policy in Western Europe* (Routledge 1997) 60, 70.
[24] Schuyt, *supra* n 14, at 299; Janneke Plantenga, 'Double lives' in Jet Bussemaker and Rian Voet (eds) *Gender, Participation and Citizenship in the Netherlands* (Ashgate 1998) 51, 60.
[25] Jet Bussemaker, 'Gender and the separation of sphere in twentieth century Dutch society' in Jet Bussemaker and Rian Voet (eds) *Gender, Participation and Citizenship in the Netherlands* (Ashgate 1998) 25, 28-29.
[26] Schuyt, *supra* n 17, at 134.
[27] Arend Lijphart, *The Politics of Accommodation* (UCP 1975); Schuyt, *supra* n 14, at 278; Robert C Tash, *Dutch Pluralism* (Peter-Lang 1991) 28-29, 92.
[28] Schuyt, see footnote 17 *supra*, 113, 134.

approach towards different life-styles alongside a rather strong feminist movement[29] made it possible to introduce non-discrimination law aimed at ensuring equal economic participation,[30] against the overriding existence of a conservative view on family values. Arguably the feminist movement itself gained some of its strength from the system of *pillarization* because the different strands of the feminist movement, although disagreeing with each other on many topics, still found a way to work and lobby together and therefore could put more pressure on the political development.[31]

Today Dutch 'subcultures' are less separated, less homogenous and less hierarchically organised, the political debate is more adversarial, and a clear political pillarization is not as dominant as it once was. Nevertheless, much of the political and social culture is still intact and the manifold number of overlapping 'pillars' still benefit from the general tolerance of different value communities.[32] Moral pluralism is thus still institutionalised[33] by avoiding political polarisation[34] and focusing on compromises and the accommodation of differences.[35] The equality principle is commonly regarded as the 'heart of the constitutional state'.[36] Accordingly, non-discrimination law is seen as a key constitutional feature and is considered to have more horizontal effects than other constitutional rights.[37] The rather unique Dutch political process aims at including most political perspectives and tries to reach consensus between the government and the opposition. Doctrinal 'absolutism' is suspect.[38] Instead, all stakeholders are forced to engage in an unemotional, rational, pragmatic and depolarised political discourse to find proportional compromises.[39] Non-discrimination law fits well with such a system, as it does not promote a specific life-style but instead protects individual choices and minorities. This political culture makes it possible to implement and foster its effective application because it focuses on pragmatic accommodation and equal economic participation and not on doctrinal principles or morality.

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[29] Anna van der Vleuten 'Princers and Prestige: Explaining the Implementation of EU Gender Equality Legislation' 3 *Comparative European Politics*, 464, 467 (2005); Tjitske Akkerman, 'Political participation and social right. The triumph of the breadwinner in the Netherlands' in Jet Bussemaker and Rian Voet (eds) *Gender, Participation and Citizenship in the Netherlands* (Ashgate 1998) 38, 39-41.

[30] Tjitske Akklerman, 'Werk, werk, werk!' 4(4) *Tijdschrift voor Genderstudies* 5-12 (2001); Trudie Knijn, 'Participation through care?' in Jet Bussemaker and Rian Voet (eds) Gender, *Participation and Citizenship in the Netherlands* (Ashgate 1998) 65, 75.

[31] Margo Brouns, 'De worteling van de normade Kwaliteiten en tradities van vrouwenstudies in Nederland' in Caronien Brouw, Jeanne de Bruijn and Sione van der Heiden (eds) *Van alle Markten thuis Vrouwen en genderstudies in Nederland* (Uitgeverij Babylon 1994) 19, 32-36.

[32] Schuyt, *supra* n 14, at 279; Jan Willem Duyvendak, 'Be gay, ofwel een lichte verplichting tot vrolijkheid' Marian van der Klein and Saskia Wieringa (eds) *Alles kon anders* (Alsant 2006) 145, 157.

[33] Tash, *supra* n 27, at 5-9.

[34] Schuyt, *supra* n 14, at 277.

[35] Outshoorn, *supra* n 15, at 109, 110.

[36] Marc Hertogh, 'What's in a Handshake?' 18(2) *Social & Legal Studies* 221, 229 (2009).

[37] Kees Waaldijk, 'Netherlands' in Kees Waaldijk and Matteo Bonini-Baraldi (eds) *Combating sexual orientation discrimination in employment*, Leiden 2004, https://openaccess.leidenuniv.nl/handle/1887/12587 (accessed 22 July 2014) 341, 342.

[38] Brouns, *supra* n 31, at 33.

[39] Monique Leijenaar, 'Political empowerment of women in the Netherlands' in Jet Bussemaker and Rian Voet (eds) *Gender, Participation and Citizenship in the Netherlands* (Ashgate 1998) 91; Lijphart, *supra* n 19, at 116-125.

2.2 The German 'constitutional patriotism'

In contrast, within the German context, the dominance of the German constitution and with it the focus on doctrinal approaches and the special constitutional protection provided to mothers is undeniable. This can be linked to what Habermas referred to as 'constitutional patriotism'.[40] Since Germans generally refrain from national patriotism after the experience of fascism and genocide, German collective identity upholds constitutional values such as freedom, equality, commitment to western values, and human rights protection.[41] Habermas believed patriotism to be based on collective guilt within German identity which led it to develop into a nation of culture[42] and offered an identity beyond national borders.[43] It is symbolic of a political and historical new beginning towards a 'better future'.[44] Constitutional integrity and the protection of human rights are the foundation of German culture and society and produce normative appreciation.[45] It converts patriotism from being proud to being responsible. Accordingly, the 'indignant democrat' practises civil disobedience to protect constitutional values,[46] and both, supporters and opponents of horizontal equality law consider themselves defenders of the constitution.

Considering the high status of human rights protection within German society, it may come as a surprise when national courts only reluctantly apply non-discrimination law. However, the focus on the constitution can produce several problems regarding the implementation of an effective equality framework. Constitutional human rights focus on the relation between the state and the individual and leave little space for other national legislation aiming to protect human rights between individuals. Accordingly, it has been suggested that Article 3 of the German constitution (*Grundgesetz*, hereafter GG) is sufficient to ensure equal treatment, and the implementation of a more coherent body of horizontal anti-discrimination law has generated an unprecedented opposition within German academia.[47]

The dominance of the constitution can thus both protect and limit legislatively embodied rights such as horizontal non-discrimination law. Moreover, the dominance of the German constitution also

[40] Jürgen Habermas, 'Citizenship and National Identity' in *Between Facts and Norms* (translated by William Rehg, Polity Press 1996) 491-515; Id., 'Struggles for Recognition in the Democratic Constitutional State', in Cronin Ciaran and Pablo de Greiff (eds) *The inclusion of the Other* (2nd ed., translated by the Massachusetts Institute for Technology, MIT Press 1999) 203, 225-226.

[41] Jürgen Habermas, Geschichtsbewusstsein und posttraditionale Identität' *Eine Art Schadensabwicklung* (Suhrkamp 1987) 159-179; Jürgen Habermas, *Die nachholende Revolution* (volume VII, Suhrkamp1990) 152; Uwe J Wenzel, 'Jürgen Habermas und der Verfassungspatriotismus der Bonner Republick' 34 *Sozialwissenschaftliche Information* 394-397 (2005); Reinhard Krechel, 'Social Integration, National Identity and German Unification' in Judith T Marcel (ed.) *Surviving the Twentieth Century* (Transaction Publishers 1983) 85, 91-95.

[42] Jürgen Habermas, 'Apologetische Tendenzen' *Eine Art Schadensabwicklung* (volume VI, Suhrkamp 1987) 120, 135.

[43] Peter Molt, 'Abschied vom Verfassungspatriotismus?' 51(435) *Die Politische Meinung* 29-36 (2006).

[44] Ibid., 29, 34; Reinhard Göhner, 'Wertegrundlagen des demokratischen Verfassungsstaats' in Jürgen Goyddke et al. (eds) *Vertrauen in den Rechtstaat* (Carl-Heymanns 1995) 149-158.

[45] Christoph Möller, *Das Grundgesetz* (Beck 2009) 92; Christoph Knill, *The Europeanization of National Administration* (CUP 2001).

[46] Jan Werner Müller, *Verfassungspatriotismus* (Suhrkamp 2010) 45-46.

[47] Burkhard Schöbener and Florian Stork, 'Anti-Diskriminierungsregelungen der Europäischen Union im Zivilrecht' 7(1) *ZEuS* 43, 47 (2004).

refocuses the courts' attention away from a coherent equality framework, as special protection provided to certain vulnerable groups often trump equality rights. Regarding pregnancy discrimination, the constitutional protection which 'entitles mother to protection and care of the community' (Article 6 para. 4) is particular important, but other rights, like the right to freedom of contract (embodied in Article 2), has also been referred to[48] in order to limit any horizontal non-discrimination law or horizontal effects of the constitution.

Moreover, the German feminist movement did not focus on anti-discrimination law alone but instead on special protective measures often emphasising the differences between men and women and demanding freedom of choice between housework and work outside the home.[49] 'Female tasks' were to be revaluated and the social context of women's responsibilities, recognised. Equal treatment was seen as upholding the *male* standard, ignoring and devaluing feminine qualities and traits. Economic activities were thus not the centrepiece and independent employment was not seen as a possible pathway to equality.[50]

2.3 Effects of this national background on the reception of EU equality law: a hypothesis

Within this article, I argue that the Dutch 'culture of tolerance' and the pillarization of the political culture encouraged pragmatic solutions, consensus and flexibility which aided to the success of non-discrimination law as it encouraged Dutch courts (and quasi-judicial bodies) to properly engage with the rationale behind non-discrimination law. On the other hand, the German 'constitutional patriotism' limits the effect of horizontal non-discrimination law, as it supresses human rights protection contrary to constitutional doctrinal paradigms. The hypothesis of this article is that these different national factors have the effect that German and Dutch courts apply EU equality law and the law implementing the equality law directives differently, although the national legislation derives from the same set of EU legislation and national courts have to accept the principle of supremacy[51] and the competence of the CJEU to interpret EU law.[52]

3. The recognition of pregnancy discrimination

In order to test this hypothesis, the paper now turns to the comparison of German and Dutch application of EU non-discrimination law and the respective domestic law implementing the equality directives,[53] focusing on pregnancy discrimination and highlighting the national and European factors which influence the national courts' reasoning. The CJEU has long recognised that discrimination based on pregnancy constitutes direct sex discrimination because only (biological)

[48] Among many: Franz J Säcker,'Vertragsfreiheit und Schutz vor Diskriminierung' 14 *ZEuP* 1-6 (2006).
[49] Ilona Ostner, 'Slow Motion' in Jane Lewis (ed.) *Women and Social Policies in Europe* (Edward-Elgar 1993) 92-155; Marianne Hochgeschurz, 'Zwischen Anpassung und Widerstand' in Florence Hervé (ed.) *Geschichte der Deutschen Frauenbewegung* (PapyRossa 1995) 155, 165; Rosemarie Nave-Herz, *Die Geschichte der Frauenbewegung in Deutschland* (LzfpB 1997) 49-49.
[50] Ostner, *supra* n 49, at 94. For example, a 1977 conference for women's organisations concluded that non-discrimination law was not useful, instead emphasising the need for special protection in line with constitutional values. Catherine Hoskyns, 'Give Us Equal Pay and We'll Open Our Door' in Mary Buckley and Malcolm Anderson (eds.) *Women, Equality and Europe* (MacMillan 1988) 33, 41.
[51] CJEU, *Costa v E.N.E.L.*, 6/64, EU:C:1964:66.
[52] Article 267 TFEU.
[53] Both Member States have national General Equal Treatment Act implementing the EU equality directives: The Dutch Algemene wet gelijke behandeling (AWGB) and the German Allgemeines Gleichbehandlungsgesetz's (AGG).

women can become pregnant.[54] By recognising this simple truth, the CJEU resisted comparisons and considered it irrelevant that not all women are or ever will be pregnant. Today, pregnant workers enjoy special protection and may not be discriminated against, even though they cannot be compared to other workers.[55] Over the years, the CJEU had several opportunities to define the scope of prohibited pregnancy discrimination. It thus emphasised that a pregnant women could not be fired or rejected as a candidate only because she was temporarily incapable to perform the contractual obligation (possibly because of legislation preventing her from working in a dangerous environment[56] or overnight[57]) and emphasised that the same applied to temporary employment.[58] Moreover, while on maternity leave, women are still entitled to one-off payments when they reward past behaviour[59], pay rises[60] and promotion[61]. A pregnancy may thus not result in differing treatment even though pregnant workers may not be able to fulfil all the work obligations during the time of pregnancy and may be on leave for a considerable duration of the contract. Today, Article 2II(c) Recast Directive clearly states that discrimination based on pregnancy and maternity constitutes direct sex discrimination.[62] A similar definition can be found in § 3I(2) German General Equality Act (AGG) and Article 1II Dutch General Equality Act (AWGB).

However, more recent case law has demonstrated that the CJEU is not willing to consistently recognise the link between pregnancy and the female sex, in particular regarding pregnancy related illnesses. While the CJEU considers women to be protected from dismissal during pregnancy if they are absent because of pregnancy related illnesses[63] and refused to compare absences because of *in vitro* treatment with other absences[64], it withdraws the legal protection once the child is born.[65] As discussed below, this inconsistency has had a significant effect on the national courts' reasoning, in particular within the Netherlands.

3.1. The German approach

As a general rule, the German courts now accept that pregnancy discrimination constitutes sex discrimination.[66] However, the specific content of the prohibition is still unclear and may conflict with other national legislation relating to maternity and motherhood, namely Article 6 IV GG which entitles mothers to the protection and care of the community and the Maternity Protection Act (MuSchG). This legislation may provide more specific protection than the prohibition of direct

[54] CJEU, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, C-177/88, EU:C:1990:383.
[55] Article 28I Recast Directive; Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992, L348/1) as amended by Directive 2007/30/EC (OJ 2007, L165/21).
[56] CJEU, *Mahlburg*, C-207/98, EU:C:2000:64.
[57] CJEU, *Habermann-Beltermann v Arbeiterwohlfahrt*I, C-421/92, EU:C:1994:187.
[58] CJEU, *Tele Danmark*, C-109/00, EU:C:2001:513; *Jiménez Melgar*, C-438/99, EU:C:2001:509.
[59] CJEU, *Lewen*, C-333/97, EU:C:1999:512.
[60] CJEU, *Gillespie and Others*, C-342/93, EU:C:1996:46.
[61] CJEU, *Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault*, C-136/95, EU:C:1998:178.
[62] CJEU, *Sarkatzis Herrero*, C-294/04, EU:C:2006:109, para. 41.
[63] CJEU, *Brown v Rentokil*, C-394/96, EU:C:1998:331.
[64] CJEU, *Meyr*, C-506/06, EU:C:2008:119.
[65] CJEU, *McKenna*, C-191/03, EU:C:2005:513.
[66] BAG 8 AZR 257/07 (24.04.2008) 61(50) *NJW* 3658-3661 (2008), para. 21; 8 AZR 483/09 (27.07.2011) 28(12) *NZA* 689-693 (2011); LAG Berlin 2 Sa 1776/06 (19.10.2006)–juris, 96-97; ArbG Mainz 3 Ca 1133/08 (02.09.2008) 25 *STREIT* 180-182 (2009); LAG Cologn 5 Ta 89/09 (06.04.2009)–juris; LAG Sachsen 3 Sa 129/12 (27.07.2012)–juris; ArbG Wiesbaden 5 Ca 46/08 (18.12.2008)–juris.

discrimination. However, it can also hinder the German courts from engaging with pregnancy within the context of non-discrimination law and thus undermines the development of a general equality framework. The following discussion will be divided into two sets of case law: firstly, it will discuss national case law in which the court directly refers to and engages with EU law and the CJEU case law; secondly, it will discuss cases in which the German courts 'only' discuss national legislation.

The content of pregnancy discrimination has been subject to long-lasting debates between the lower courts and the Federal Labour Court (BAG), because the latter accepted that employers may take an applicant's pregnancy into account if it meant an inability to fulfil contractual obligations.[67] This approach went directly against the CJEU case law, which allows women to keep their pregnancy secret as it may not influence the recruitment decision and thus cannot constitute an (illegal) wilful deception.[68] It is thus not surprising that lower courts did not follow the BAG judgement and instead directly referred to EU law.[69] In 2003, the BAG had the chance to revise its own case law and did so by referring to the CJEU, in particular *Habermann*, *Webb*, and *Mahlburg*.[70] In all three cases, the CJEU emphasised that the temporary inability to fulfil contractual obligations caused by pregnancy did not justify dismissal or refusal to hire.[71] The CJEU recognised that a necessary precondition for the fulfilment of an employment contract is being available at certain times and in a particular environment. However, different treatment is not justified because of absences due to the special protection afforded to pregnant workers.[72] The CJEU clearly rejected the comparator approach, emphasising the unique situation of pregnant workers and requiring employers to treat pregnant workers as if they were not pregnant while also putting the legally required protective measures in place. The BAG accepted this reasoning but only regarding permanent employment[73] and only regarding the rather technical narrow question whether women may or may not keep their pregnancy secret. The court, therefore, continues to refuse to engage clearly with the overall CJEU case law. After all, prior to the BAG decision, the CJEU already recognised, in *Tele Danmark* and *Melgar* that it mattered not whether the employment was temporary or permanent.[74] Accordingly, a pregnancy may never be taken into account even if the employee will be absent for most of the contract's duration. The BAG's ruling neither recognised nor engaged with the CJEU's reasoning and seemed to suggest that pregnancy may still be taken into account if it undermines the whole purpose of the contract. This destabilises the protection provided by non-discrimination law.

This is also true regarding the BAG's reasoning on maternity and discrimination. In 2002, the court was confronted with the differing maternity-leave provided for by the German Federal Republic and the former German Democratic Republic. The 2002 collective agreement included eight weeks of maternity-leave for the purpose of seniority in accordance with § 6 of the German MuSchG. However, under the law of the former German Democratic Republic women could take up to twenty weeks of maternity-leave. Since the time beyond the eight weeks was not recognised under the

[67] BAG 2 AZR 25/93 (01.07.1993) 47(2) *NJW* 148 (1994).
[68] CJEU, *Tele Danmark*, *supra* n 58.
[69] LAG Sachsen 7 Sa 828/00 L (06.06.2001)–juris; LAG Cologne 6 Sa 641/12 (11.10.2012) 18(5) *Neue Zeitschrift für Arbeitsrecht-RR* 232 (2013); OVG Saxony-Anhalt 1 L 26/10 (21.04.2011) 27(4) *STREIT* 173-176 (2011).
[70] BAG 2 AZR 621/01 (06.02.2003) BAGE 104, 304-308.
[71] CJEU, *Habermann*, *supra* n 57; *Webb v EMO Air Cargo,* C-32/93, EU:C:1994:300.
[72] CJEU, *Mahlburg*, *supra* n 56, paras 24-27.
[73] BAG, *supra* n 70, para. 26; Eva Koch, 'Die Erwerbstätigkeit von Frauen und ihre Auswirkung auf das Arbeitsrecht - oder umgekehrt…' in Beate Rudolf (ed.) *Querelles* (Wallstein 2009) 216, 227.
[74] CJEU, *Tele Danmark*, *supra* n 58; *Jiménez Melgar, supra* n 58.

2002 collective agreement, women who had taken the longer leave, then available to them, reached seniority later than their male counterparts.[75] The case produced the *Sass*-judgment.[76] The CJEU emphasised that non-discrimination law 'intends to bring about equality in substance rather than in form'. Accordingly, it was not the length of the leave but the purpose which was decisive. If the leave aimed at the protection of 'the woman's biological condition and the special relationship between the woman and her child', it constituted maternity-leave and thus could not result in less favourable treatment. The question was thus whether the leave indeed was maternity-leave and not (disguised) parental-leave. Regarding the latter there is little justification in differentiating between men and women in respect to care-taking or bonding,[77] since this fosters the stereotype of mothers as care-givers[78] and confuses motherhood with pregnancy.[79]

When the case returned, the BAG carefully assessed the former German Democratic Republic's law on maternity. The relevant legislation provided for a six-week leave and a longer leave. The latter was not granted to all birth-mothers, but only if the child lived in the same household. The BAG thus concluded that whilst shorter leave aimed at giving mothers time to recover from the birth and to build an intensive relationship with the child, the longer leave aimed at general care and therefore constituted parental-leave.[80] This seems to be the correct assessment considering the CJEU reasoning. Its (admittedly technical) preliminary question forced the BAG to recognise the reasoning of the CJEU and undertake a substantive assessment regarding the purpose of leave. However, the CJEU and the BAG totally neglected that Ms Sass could not retroactively change her past choice to take a leave, which at the time did not have the same consequences for her career, and thus suffered a disadvantage. Moreover, the courts ignored that both leaves were only available to mothers and therefore did not constitute parental leave as we understand it today.[81] The substantive value of the case is therefore limited and demonstrates that the German courts are mainly willing to follow the CJEU regarding minor technical issues. This does not mean that they develop a coherent equality framework or consistently engage with the principles developed by the CJUE.

In particular, the BAG continues to distinguish between the EU approach and approaches under national law. It held that national law allowed the exclusion from seniority of those on maternity-leave because their relationship with work was on hold. Since the employee was not accumulating skills and experience during that time, the exclusion was based on an objective reason.[82] The court thus applies the constitutional general equality principle (Article 3II) which prohibits arbitrary different treatment and does not distinguish between the (constitutional) equality principle and horizontal non-discrimination approach which protects disadvantages based on specific

[75] BAG 6 AZR 108/01-A (21.03.2002) BAGE 101, 21-30.
[76] CJEU, *Sass*, C-284/02, EU:C:2004:722, paras 34-39.
[77] Sophia Koukoulis-Spiliotopoulos, 'The amended equal treatment directive' 12(4) *MJ* 327, 342-343 (2005).
[78] Cathryn Costello and Gareth Davies, 'The case-law of the Court of Justice in the field of sex equality since 2000' 43(6) *CMLR* 1567, 1608-1609 (2006); Prechal, *supra* n 6, at 533, 539.
[79] The CJEU case law may not reach such a clear distinction as it continues to refer to the mother's right to develop a 'special relationship with the child'.
[80] BAG 6 AZR 108/01-B (16.06.2005) BAGE 115, 113-121, paras 20-24.
[81] Under current EU law, men and women are equally entitled to parental leave. Council Directive 2010/18/EU implementing the revised Framework agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 93/34/EC (OJ 2010 L 68/13).
[82] BAG, see footnote 75 *supra*, paras 44-47.

characteristics. The court seems to assume, rather, that a duty of including maternity for the purpose of attaining seniority is only based on § 6I MuSchG and does not consider a similar obligation within the meaning of substantive equality. Contrary to the CJEU approach, the court thus refuses to clearly consider the connection between maternity, pregnancy, the female sex, and sex discrimination. As a consequence, some lower courts still consider the exclusion of maternity-leave for the purpose of seniority within indirect discrimination[83] and rejected that the retention of a legally void dismissal of a pregnant worker amounted to sex discrimination.[84] This leaves a gap in the protection because the MuSchG does not provide protection to (future) mothers. A woman, who is dismissed for undergoing *in vitro* fertilisation, for example, cannot refer to the MuSchG because she is not pregnant yet, but may nevertheless suffers sex discrimination[85] because of the expected gender role assuming that the pregnant women will also be the main care-taker and thus a less valuable employee. If a court wants to recognise this disadvantage it can only directly refer to CJEU case law.[86] Laws protecting pregnant workers do not cover such gender discrimination and fail to dismantle structural disadvantages.[87] The BAG distinguishes between EU and national law even though the AGG directly implemented the equality directives. As a consequence the EU influence seems to be overshadowed by national (constitutional) concepts of equality. The AGG is thereby supposed to give effect to Article 3II(2) of the Constitution which imposing a duty on the state to promote de facto equality between men and women and not the EU directives.[88]

There is no consistent application of EU non-discrimination law. This can also be demonstrated by a case concerning the loss of vacation pay because of consecutive maternity and parental-leave. Under the collective agreement, a female worker lost her right to vacation pay because she was on maternity-leave from mid-March and on parental-leave in July. Had she worked three complete calendar months, she would have been entitled to the whole pay. The lower court (correctly) referred to the CJEU decision in *Lewen*[89] regarding Christmas gratification and concluded that Article 141 EC (now Article 156 TFEU) imposed a duty upon the employer to include periods of maternity (but not parental) leave for the purposes of one-off payments, if those payments aim at remunerating past behaviour, such as loyalty to the company. It did not consider the Constitutional general equality principle, as the BAG previously accepted that workers on maternity could be excluded from one-off payments under the principle.[90] The BAG did not follow this reasoning but instead focused on Article 6IV GG which entitles mothers to the protection and care of the community and the MuSchG. According to § 2II MuSchG the claimant would have been allowed, but not required, to continue working until the end of March. The BAG considered that because of the flexibility regarding the start of the maternity leave, the collective agreement's requirement to work for at least three months in the first half year, put undue pressure on the pregnant worker to take maternity-leave at the latest possible moment even if not feeling fit for work. This, it held, was

[83] LAG Berlin- Brandenburg 15 Sa 1717/08 (07.02.2009)–juris.
[84] LAG Hamm 3 Sa 1420/11 (16.05.2012)–juris.
[85] *Supra* n 64.
[86] ArbG Dresden 9 Ca 576/10 (21.04.2011)–juris.
[87] Ellis and Watson, *supra* n 8, at 341-343.
[88] BAG 8 AZR 257/07, *supra* n 66, para. 31. Such an approach may very well constitute an infringement of EU law following CJEU, *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391; Nicolo Zingales, 'Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?' 11(4) *German Law Journal* 419-438 (2010).
[89] *Supra* n 59.
[90] BAG 6 AZR 297/95 (14.12.1995) 13(18) *NZA* 996-998 (1996).

contrary to Article 6IV GG.[91] The BAG thus solely based the right to vacation pay on the special constitutional protection. It neither engaged in a wider debate about sex equality in connection with maternity, nor accepted the CJEU approach that generally rejects future disadvantages grounded on the worker taking maternity-leave. Whilst the BAG approach may ensure the same outcome, it did not aid the development of a consistent equality framework and may produce a very different level of protection. After all, once the period of compulsory maternity-leave has started, it cannot be said that the worker is put under pressure because she has no choice but to take the leave and the BAG's reasoning would consequently be irrelevant. A non-discrimination approach would enable the courts to develop a more consistent line and it would not matter whether the leave was compulsory or voluntary. This demonstrates how the focus on special constitutional protection hinders the courts from effectively integrating the EU approach to direct sex discrimination into their national system. Whilst the AGG has a European origin, it is considered to give effect to the constitutional equal treatment principle. However, the obligations under the constitution potentially differ from obligations under EU law. The focus on the constitutional protection therefore weakens the influence of CJEU approaches and can limit their substantive potential at national level. It also undermines the development of a comprehensive equality framework which recognises different kinds of possible disadvantages men and women may suffer because of gender roles, expectations and stereotypes.

3.2. The Dutch approach

Within the Dutch context, constitutional principles are less likely to interfere with the development of a general equality framework. Here the constitution is less dominant within the legal debate and the AWGB clearly states that pregnancy discrimination constitutes direct sex discrimination.[92] Moreover, the overall equality movement very much focused on non-discrimination law which was seen as a useful tool to ensure equality and enable women to combine work with domestic tasks. This is a much more important aim within Dutch than German politics. There was thus more focus on the economic participation of all citizens whilst also recognising the need of care, which often remains the responsibility of women.

The former Equal Treatment Commission (CGB)[93] interpreted pregnancy and maternity broadly. Therefore, an applicant who was asked in an interview if she would like to have children suffered direct sex discrimination even if she was not pregnant at the time.[94] The CGB correctly assessed that it is not the same to ask women and men about family plans because only female workers will actually be pregnant and are often assumed to be less flexible once they are mothers because of

[91] BAG 9 AZR 353/01 (20.08.2002) BAGE 102, 218-225, paras 36-39.
[92] Article 1II AWGB.
[93] The CGB (Commissie gelijke behandeling), since 2012 incorporated in the College for Human Rights (http://www.mensenrechten.nl/), was a quasi-judicial body which investigated discrimination complaints by exclusively interpreting AWGB and other non-discrimination law. The results of the CGB's investigation were written in the style of, and published as, so called 'judgments' (*oordelen*). However, they were not legally enforceable and were more like persuasive opinions. However, the commission nevertheless significantly influenced the Dutch equality framework and the Dutch Supreme Court emphasised that the courts need to provide informed reasoning if they want to depart from the judgement of the CGB (HR (13.11.1987) NJ 1989, 698).
[94] Eva Cremers-Hartman and MSA Vegter, 'Geslacht' in Caroline J Forder (ed.) *Gelijke behandeling* (Wolf 2012) 93, 110.

childcare obligations.[95] The (stereotypical) gender role gives the question a different quality.[96] Employment practice may not be based on such stereotypes because, by excluding pregnant workers from the economic sphere, they cement structural gender inequality.[97] The District Court Schiedam recognised this also in case of dismissal after the maternity-leave. Accordingly, an employer could not justify the dismissal on the presumed inflexibility of the female worker, as the presumption was based on the fact that she had a conservative Moroccan husband who, the employer assumed, would not help with the domestic responsibilities, and therefore based on presumed stereotypical gender roles.[98]

The appropriate treatment of pregnancy and maternity in relation to pay seems to be much more problematic. Generally, the CGB rejects any possibility of reducing seniority for the purpose of pay because of maternity-leave.[99] It refers to the settled CJEU case law regarding pregnancy discrimination. In *Gillespie*[100] the CJEU held that women on maternity-leave should receive pay rises awarded before or during their leave. *Thibault*[101] held that women on maternity-leave may not be deprived from promotion opportunities because of their absence, and in *Brown*[102], it was held that a woman may not be fired when pregnancy-related illnesses cause absence from work. The CJEU thus emphasised that pregnancy and maternity-leave should not work to the disadvantage of women. The commission adopted this argument and required employers to include maternity-leave when certain benefits depend on working for a certain time during the previous year. The Court of Justice 's-Gravenhage ruled similarly in a judgement regarding the loss of a pay guarantee after a career break because of child-care obligations. Referring to *Brown*, the court considered that the mother left work due to breastfeeding and this had to be treated the same as pregnancy and maternity and thus was not comparable with a long term illness, which would also result in a loss of pay guarantee. The court emphasised that the rule regarding pay guarantees treated different situations in the same way and that this was contrary to non-discrimination law.[103] This is a rather broad interpretation of the *Brown* case since the female claimant's absence did not constitute maternity-leave. Nevertheless, a career break related to breastfeeding is clearly linked to the biological female sex.[104]

Newer case law concerning pregnancy-related illnesses seems to adopt a looser stance. In 2008, the CGB still considered pregnancy-related illnesses as coming under the scope of pregnancy. Accordingly, a pay practice connecting bonuses with reaching certain targets had to be adjusted if an employee was not available during substantial periods of time because of maternity and pregnancy-

[95] CGB 2011-186, para. 3.8; CGB 2009-117. See also, 2007-120 regarding planning *in vitro* fertilisation.
[96] CGB 2006-7, para.7; 2006-08, para 3.11.
[97] CGB 2006-241; CGB 2011-166. See also, CGB 2011-12; 2008-22; 2006-14; 2006-15; 2006-141; Susanne D Burri and Eva Cremers-Hartman, 'Geslacht' in Janneke H Gerards (ed.) *Gelijke behandeling* (Wolf 2007) 59,67-68.
[98] Ktr Schiedam Nr 307844\vz verz 00-326 (05.07.2000) JAR 2000, 180.
[99] CGB 2011-103/104/105.
[100] CJEU, *Gillespie and Others, supra* n 60.
[101] CJEU, *Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault, supra* n 61.
[102] CJEU, *Brown v Rentokil, supra* n 63.
[103] Gerechtshof 's-Gravenhage LJN BC5086 (22.02.2008) JAR 2008/90.
[104] Within German case law, such protection could only arise from Article 6 GG. However, such protection can also be detrimental for women, since they risk becoming less desirable as employees.

related illnesses.[105] It justified this by reference to the above mentioned cases, in particular *Brown* and *Lewen* where the CJEU distinguished between parental-leave and maternity-leave for the purpose of a Christmas bonus. The ruling was confirmed by the District Court Utrecht[106] and the Administrative Court.[107] The courts thus accepted that equal treatment of men and women requires the different treatment of pregnancy-related absences as compared to other absences.

The *McKenna* case[108] changed this assessment. Within it, the CJEU accepted that maternity pay can be lower than 'normal' pay as long as it not 'so low as to undermine the objectives of protecting pregnant workers'.[109] Moreover, pregnancy-related illnesses after maternity may lead to reductions of pay if other illnesses are treated in the same way.[110] The CJEU reintroduced the comparator into the concept of pregnancy discrimination. This makes little sense considering the CJEU's reasoning that equates pregnancy and sex discrimination.[111] Just as only women can become pregnant, only women can have pregnancy-related illnesses. The different approach opens the door for subjective judgements regarding what should and should not be protected.[112] This can already be seen in the CJEU's reasoning in *McKenna*. It argued that the special protection during pregnancy is *inter alia* explained by the fact that pregnancy, although not a pathological condition, often causes complications and disorders which might make it impossible to work. As this risk is inherent to pregnancy, women might not be dismissed because of it. A dismissal during pregnancy risks having harmful effects on the 'physical and mental state of women including the particularly serious risk that pregnant women may be encouraged to voluntary terminate their pregnancy'.[113] Since only women can be exposed to this risk, their less favourable treatment constitutes direct discrimination. The CJEU seems to assume that the fear of losing work in relation to pregnancy and birth should not influence the decision to have a child. It thus recognises how motherhood often changes gender balances and has detrimental on-going effects for the mother's career. Nevertheless, once the child is born, the CJEU withdraws the protection in favour of the employer's interest of certainty.[114] The CJEU returns to a strictly formal approach. This is clearly inconsistent with its previous assessment, linking pregnancy with the female sex. Surely, if pregnancy discrimination constitutes sex discrimination because only women can become pregnant, pregnancy-related illnesses should be included, since only women can suffer them. The reasoning is contrary to establishing a general non-discrimination framework and only seems to focus on special protection (similar to the one within German Constitutional law) which the CJEU deems unnecessary once the child is born.

Despite inconsistencies, the Dutch courts reassessed their case law according to the CJEU approach. The Court of Justice Amsterdam assessed that women who were absent due to pregnancy-related

[105] CGB 2008-7; 2008-142; 2006-185; 2007-188; 2007-90, para. 3.5; 2008-142, paras 3.6 e- 3.7.; 2006-115; 2006-187; Susanne D Burri and Eva Cremers-Hartman, 'Geslacht' in D de Wolff (ed.) *Gelijke behandeling* (Kluwer 2004) 33, 43, 46-48.
[106] Ktr Utrecht LJN BG4779 (08.10.2008) JAR 2009/9.
[107] CRvB LJN AS9294 (25.02.2005) USZ 2005, 164.
[108] *Supra* n 65. See also *Parviainen*, C-471/08, EU:C:2010:391.
[109] Para. 67.
[110] Paras 45, 54; *Danosa*, C-232/09, EU:C:2010:674, para. 68.
[111] Tamara Hervey, 'Thirty years of EU sex equality law' 12(4) *MJ* 307, 313 (2005); Christine Boch, 'Official: during pregnancy, females are pregnant' 23(5) *European Law Review* 488, 493 (1998).
[112] Ellis and Watson, *supra* n 8, at 336-337.
[113] CJEU, *Danosa*, *supra* n 110, paras 61, 70; *McKenna*, *supra* n 65, para. 48.
[114] Annick Masselot, 'Pregnancy, maternity and the organisation of family life' 26(3) *European Law Review* 239, 254-256 (2001).

illnesses were only entitled to reduced pay, unless other sicknesses were treated differently.[115] This approach has also been accepted by the CGB.[116] The influence of the CJEU and, in the case of the CGB, the national courts, is evident. The older case law engaged with the reasoning of the CJEU and used it to promote a substantive understanding of sex equality in relation to pregnancy. It thus adopted the CJEU approach and applied the same principles to situations which have not been directly discussed by it. However, once the CJEU clearly ruled against this, the national courts seized the chance to reduce the national protection and the CGB had to follow. The CJEU's approaches are dominant, even if the reasoning is inconsistent and prevents the development of a more substantive equality framework. What remains is the rather technical distinction between equal pay and equal treatment. If a bonus does constitute pay, it can be reduced[117] and the courts do not further deal with the disadvantage and the cost of pregnancy.

4. Concluding remarks

European equality law is one of the cornerstones of European social law and has developed remarkably in the last centuries. There is thus no doubt that the EU has significantly contributed to national equality law. In Germany and the Netherlands, European pressure was needed to ensure that some horizontal non-discrimination law was implemented at all, and much of the CJEU case law has improved the legal positions of vulnerable groups in society. However, the specific national framework and the specific scope of the legal protection still depend on the national cultural context. As the discussion of cases on pregnancy discrimination demonstrates; neither German nor Dutch courts can completely ignore the CJEU. However, their reaction is quite different as there seems to be a divergence regarding the desire to protect the own national legal concepts and principles linked to equality.

Non-discrimination law is much more dominant in the Netherlands than Germany. I argue that this is because it 'fits' much better with the Dutch 'culture of tolerance' than with the German focus on constitutional values. In the Netherlands non-discrimination law seems to be seen as a useful tool to foster equality while German courts' approach towards horizontal non-discrimination law has been much more timid. The dominance of constitutional human rights protection ('constitutional patriotism') within the (public) debate upholds equality as a basic principle within a vertical relationship between the State and the citizens. However, other Constitutional rights granting special protection often trump the equality right particularly within horizontal relationships. The dominance of the Constitution has the effect that equal treatment cases are often 'filtered through' other constitutional principles.

Accordingly, German courts generally remain within the logic of the national constitutional concepts of equality which are often trumped by special protection provided by the constitution. Whilst the court generally accepts that pregnancy discrimination constitutes direct sex discrimination under EU law, many of the cases which could have been dealt with under the scope of non-discrimination law are actually considered within the special constitutional protection and the MuSchG. A broader equality framework is neglected. The BAG did not consider a mother to be discriminated against

[115] Gerechtshof Amsterdam, LNJ BM2034 (20.04.2010) JAR 2010/142.
[116] CGB 2011-79; 2011-80/81.
[117] Eva Cremers-Hartman and MSA Vegter, 'Geslacht' in Caroline J Forder (ed.) *Gelijke behandeling: oordelen en commentaar 2011* (Wolf 2012) 93, 115-116.

when she lost her right to vacation pay because she was on maternity-leave. Instead it decided that she was under undue pressure to take leave later. The focus is on protecting mothers in a weak position and not on ensuring that they enjoy equal treatment independently of their sex. By ignoring the non-discrimination approach, the BAG fails to conceptualise pregnancy as sex discrimination. Since there is no comprehensive framework available; lower courts continue to distinguish between sex and pregnancy discrimination and some situations are thus left unprotected. The MuSchG only takes effect once a woman is actually pregnant. Cases such as the case on early maternity and vacation pay deal with very special facts. After all, the BAG reasoning would already be irrelevant once the period of compulsory maternity-leave is exhausted. Nevertheless, the BAG continues to focus on constitutional protection and the general equal treatment principle and thereby fails to incorporate the European equality framework even though the legislator implemented the relevant directives and the BAG recognises CJEU case law regarding more narrow technical matters like the precise meaning of maternity leave. The recognition is thus limited to the settled CJEU case law and often lacks appropriate engagement with the CJEU reasoning. The constitutional dominance is evident. Consequently, there is little consistency and different standards apply depending on the circumstances. The CJEU does little to force the German courts engagement with broader equality framework. This can particularly be seen in the *Sass*-judgement where the CJEU failed to encourage engagement with a broader equality framework and the link between long-term leaves available to women, parental leave, and gender roles.

On the contrary, the Dutch courts and the CGB are generally willing to take a pro-active approach towards the CJEU case law and attempted to integrate EU law and engage with the CJEU reasoning while simultaneously promoting a substantive equality approach regarding sex, gender and sexuality. For example, the CGB engaged with the logic of the CJEU's earlier reasoning and then developed its own conclusion for different cases concerned with pregnancy-related illnesses. Other (constitutional) principles do not seem to challenge the substantive interpretation and application of the AWGB and the CGB often goes beyond the CJEU requirements through engagement with substantive equality arguments. If pregnancy discrimination constitutes sex discrimination because only women can become pregnant, pregnancy-related illnesses must also be covered, because only women can suffer them. The current approach of national courts and CGB exclude pregnancy-related illnesses from the scope of the protection following the CJEU judgements. In these cases the dominance of EU law is particularly evident. The CGB and national courts use the CJEU case law to support its own approach, but also feel obliged to follow the CJEU even if its own approach provides a higher level of protection. National courts thus may use CJEU case law to reduce the standard of protection although EU law only provides minimum protection and the 'implementation of [the directives] shall under no circumstances be sufficient grounds for a reduction in the level of protection of workers in the areas to which it applies'[118].

The Dutch example also demonstrates how the inconsistency within the CJEU case law encourages national courts to apply CJEU case law only on a case-by-case basis, i.e. only if the specific facts of the individual case are sufficiently similar to a case decided by the CJEU. The CJEU approach towards pregnancy discrimination is different than its approach towards pregnancy-related illnesses, although they are both obviously linked. While the first approach recognises the link between pregnancy and sex but aims at equal treatment, the latter focuses on special protection which aims

[118] See for example Article 27 Recast Directive.

at different, possibly beneficial, treatment. It is difficult to see how these approaches can be reconciled. As a consequence, national courts may struggle to apply EU non-discrimination law consistently and are more likely to return to their own national approaches and only give effect to EU non-discrimination law if there is an obvious obligation because the CJEU already decided on the matter.

This assessment makes it difficult to conclusively judge the EU contribution to ensure equal treatment. On the one hand, the EU, and the CJEU in particular, has been very active and occasionally progressive in the area. It can thus truly be proud of its contribution. On the other hand, its success also seems to be its curse. Since national courts have accepted the basic minimum standards set by the CJEU, it now faces much more challenging questions, exposing its limited commitment to substantive equality and the inconsistencies within its own reasoning. The national courts are then often left to their own devises and potentially challenged, whether they apply and recognise CJEU reasoning or uphold their own national standards. If the CJEU wants to ensure that EU non-discrimination law harmonises national equality law and fosters substantive equality irrespectively from the national context of the Member State, it needs to be consistent and challenge national courts to leave familiar legal terrains engaging with the broader equality framework and inequalities beyond specific cases.