

# The German and Dutch national courts' application of EU non-discrimination law: is there a common framework?

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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 on national level and, in particular, the national courts' responds to the European challenge to readdress national equality concepts, which often focus on vertical relationships alone, 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 national approaches towards equality, using pregnancy discrimination as example. As such, it highlights the differences between the Member States and the national influences on the application but also demonstrates the EU influence, which can promote but also hinder the development of a coherent equality framework.*

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## 1. Introduction

This paper compares how the German and Dutch courts integrate the European equality framework within their national systems, in particular focusing on case-law dealing with the personal scope of sex discrimination. 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,<sup>1</sup> including characteristics like age, which reflects the demographic changes within the Member States.<sup>2</sup> This, along with the Charter of Fundamental Rights of the European Union new emphasis on human rights protection and EU supremacy,<sup>3</sup> has the effect, 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)<sup>4</sup> 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 national approaches towards equality by analysing national approaches towards sex 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 but also demonstrates the EU's indispensable influence, in ensuring that the national non-discrimination law fosters substantive equality. However, the paper also shows how EU law and the CJEU approach can sometimes limit the protection on national level. It thus aims to demonstrate how EU equality 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. In order to reveal the differences between the national approaches and the (limited) influence of the CJEU, the paper will discuss the courts' (and quasi-judicial bodies') approaches towards pregnancy discrimination.

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<sup>5</sup> 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. Much research has been done on EU non-discrimination law and the CJEU and on the national application of EU law. However, most of these works either focus on one country or one protected characteristic, whilst only few take a comparative approach, often including international law. This paper builds upon this work but attempts to take a different perspective by focusing on national case-laws, thus revealing the limitations to the harmonisation process within the area of equality law as well as the de-facto (sometimes limiting) effect of the CJEU case-law. It has been suggested that the EU is particularly

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<sup>1</sup> 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: The Race Directive 2000/43/EC; the Framework Directive 2000/78/EC; the Recast Directive 2006/54/EC; the Goods and Services Directive 2004/113/EC.

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

<sup>3</sup> *Mangold*, C-144/04, ECLI:EU:C:2005:709.

<sup>4</sup> D Schiek, L Waddington and M Bell, 'A Comparative Perspective on Non-Discrimination law' in D Schiek et.al. (eds.) *Non-Discrimination Law* (Hart, Oxford 2007) 1, 18.

<sup>5</sup> S Prechal, 'Equality of treatment, non-discrimination and social policy: achievements in three themes' [2004] 41(2) *CMLR* 533-551.

active within the field of equality because there are few competing national concepts intertwined with the national legal traditions.<sup>6</sup> This leaves space for the CJEU to be active, to demonstrate its commitment to social progress and legitimise further European (political) integration.<sup>7</sup> However, the paper will demonstrate that the CJEU's approach to substantive equality, while progressive at times, is also timid and occasionally inconsistent, which de-facto leaves much discretion to the national courts to adopt approaches 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,<sup>8</sup> or such social issues may be addressed in a more collective way without creating individual rights. Additionally, national cultural and historic factors<sup>9</sup> may affect the application of EU equality law differently, even if the national legal systems share many common features and are based on similar paradigms. The case-law comparison will demonstrate that these national influences still take a major role in shaping national rights to equal treatment and non-discrimination 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.

## 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 courts' approach towards European non-discrimination law and the law implementing the equality directives 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.<sup>10</sup> Moreover, both countries only implemented law protecting from discrimination law on horizontal level after significant pressure from Europe.<sup>11</sup> Within traditional approaches of comparative law, there would 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

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<sup>6</sup> F Scharpf, *Crisis and Choice* (translated by R Crowley and F Thomson, Cornell University Press, London 1991); recently A Somek, *Engineering Equality* (OUP, Oxford 2011) 51.

<sup>7</sup> C Barnard, 'The Principle of Equality in the Community Context' [1998] 57(2) *Cambridge Law Journal* 352; E Ellis and P Watson, *EU Anti-Discrimination Law* (2<sup>nd</sup> Edition, OUP, Oxford 2012), 25.

<sup>8</sup> K Alter, 'Explaining Variation in the Use of European Litigation Strategies' in K Alter *The European Court's Political Power* (OUP, Oxford 2009) 159, 174.

<sup>9</sup> Comparing legal cultures has also been developed as a sub category of critical approaches towards comparative law. D Nelken, 'Using Legal Culture' in D Nelken (ed.) *Using Legal Culture* (Wildy, Simmonds and Hill, London 2012) 1-51; R Cotterell, 'The Concept of Legal Culture' in D Nelken (ed.) *Comparing Legal Cultures* (Dartmouth, Aldershot 1997) 13-31; *ibid*, *Law, Culture and Society* (Ashgate, Aldershot 2006). As far as relevant for inter-EU comparison, its critical approach further underlines the need to be culturally informed.

<sup>10</sup> K Zweigert and H Kötz, *Introduction to Comparative Law* (translated by Tony Weir, 3<sup>rd</sup> Edition, Clarendon Press, Oxford 1998).

<sup>11</sup> A van der Vleuten, *The Price of Gender Equality* (Ashgate, Hampshire 2007).

systems.<sup>12</sup> Accordingly, a comparison between the two would not be considered worthwhile. Instead, one would mainly focus on the comparison between different legal families; i.e. between common and civil law countries.<sup>13</sup> However, even a cursory appreciation of Dutch and German 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. The comparison can thus highlight challenges which may be encountered by the EU legislator and the CJEU once they want to implement the harmonisation process and the effect of EU law going beyond more general difficulties promoting harmonisation 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 thus can highlight shortcomings within the EU's promotion of equality.

Regarding the application of EU non-discrimination law one main difference between the German and Dutch context seem particular relevant, the German 'constitutional patriotism' and the 'Dutch culture of tolerance'. The following will describe these features in more detail. The so called Dutch 'culture of tolerance'<sup>14</sup> refers to a political system which focuses on taking pragmatic political approaches towards controversial issues, such as abortion, prostitution or drugs.<sup>15</sup> This does not mean that the majority of the population actually endorse such acts.<sup>16</sup> Tolerance is an important feature of Dutch cultural self-identity.<sup>17</sup> The Dutch 'culture of tolerance' was institutionalised via the pillarization (*verzuiling*) of the political system after 1945. This constituted the 'permanent manifestation of peaceful separate coexistence'<sup>18</sup> and aimed at pacifying the political process (*pacificatie-politiek*).<sup>19</sup> Pillarization describes the cultural segregation of the state, traditionally divided into Catholic, Protestant, socialist and liberal groups.<sup>20</sup> These four groups could mainly act freely within their group and only needed to reach consensus at the top-level.<sup>21</sup> Those agreements reached by the elites are then assumed to permeate down to the lower levels of society<sup>22</sup> who generally accept the elites' compromises.<sup>23</sup> This separation ensured a great deal of conformity within the groups<sup>24</sup> but also institutionalised pluralism<sup>25</sup> by ensuring unity despite diversity<sup>26</sup> and

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<sup>12</sup> H Keller and A Stone-Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in H Keller and A Stone-Sweet (eds.) *A Europe of Rights* (OUP, Oxford 2008) 677, 684.

<sup>13</sup> Zweigert and Kötz, footnote 10.

<sup>14</sup> K Schuyt, *Steunberen van de samenleving* (AUP, Amsterdam 2006) 251-253.

<sup>15</sup> J Outshoorn, 'Incorporating feminism the women's policy network in the Netherlands' in F Gardiner (ed.) *Sex Equality Policy in Western Europe* (Routledge, London 1997) 109, 110-111.

<sup>16</sup> Schuyt, footnote 14, 253-255.

<sup>17</sup> K Schuyt, 'Tolerance and democracy' in D Fokkema and F Grijzenhout (eds.) *Dutch Culture in a European Perspective* (volume 5, Palgrave-McMillan, Assen 2004) 113.

<sup>18</sup> *Ibid.*, 113, 134-135.

<sup>19</sup> A Lijphart, *Verzuiling, pacificatie en Kentering in de Nederlandse politiek* (3<sup>rd</sup> Edition, De Bussy, Amsterdam 1979) 13.

<sup>20</sup> *Ibid.*, 35.

<sup>21</sup> *Ibid.*, 119.

<sup>22</sup> *Ibid.*, 68; Schuyt, footnote 17, 113, 134.

<sup>23</sup> F Gardiner and M Leijenaar, 'The timid and the bold' in F Gardiner (ed.) *Sex Equality Policy in Western Europe* (Routledge, London 1997) 60, 70.

<sup>24</sup> Schuyt, footnote 14, 299; J Plantenga, 'Double lives' in J Bussemaker and R Voet (eds.) *Gender, Participation and Citizenship in the Netherlands* (Ashgate, London 1998) 51, 60.

<sup>25</sup> J Bussemaker, 'Gender and the separation of sphere in twentieth century Dutch society' in J Bussemaker and R Voet (eds.) *Gender, Participation and Citizenship in the Netherlands* (Ashgate, Aldershot 1998) 25, 28-29.

<sup>26</sup> Schuyt, footnote 17, 113, 134.

accommodating different life-styles.<sup>27</sup> As a consequence, Dutch society was able to integrate diverse life-styles, homosexuality, and new progressive ideologies, despite Christian influences on politics.<sup>28</sup> Such a tolerant approach towards different life-styles alongside a rather strong feminist movement<sup>29</sup> made it possible to introduce non-discrimination law aimed at ensuring equal economic participation,<sup>30</sup> 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 *pillarsation* because the different strains 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.<sup>31</sup>

Today Dutch 'subcultures' are less separated, less homogenous and less hierarchically organised than they used to be. A clear political pillarization is, therefore, 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. Women, homosexuals and people living in non-traditional and non-sexual forms of cohabitation, are all recognised and accommodated by both the law and political agendas.<sup>32</sup> Moral pluralism is thus still institutionalised<sup>33</sup> by avoiding political polarisation<sup>34</sup> and focusing on compromises and the accommodation of differences.<sup>35</sup> These principles are commonly regarded as the 'heart of the constitutional state'.<sup>36</sup> Accordingly, the right to equal treatment and non-discrimination is seen as a key constitutional feature and is considered to have more horizontal effects than other constitutional rights.<sup>37</sup> 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.<sup>38</sup> Instead, all stakeholders are forced to engage in an unemotional, rational,

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<sup>27</sup> A Lijphart, *The Politics of Accommodation* (UCP, Berkeley 1975); Schuyt, footnote 14, 278; R Tash, *Dutch Pluralism* (Peter-Lang, New York 1991) 28-29, 92.

<sup>28</sup> Schuyt, footnote 17, 113, 134.

<sup>29</sup> A van der Vleuten 'Princers and Prestige: Explaining the Implementation of EU Gender Equality Legislation' [2005] 3 *Comparative European Politics*, 464, 467; T Akkerman, 'Political participation and social right. The triumph of the breadwinner in the Netherlands' in J Bussemaker and R Voet (ed), *Gender, Participation and Citizenship in the Netherlands* (Ashgate, Aldershot, Brookfield USA, Singapore, Sydney 1998) 38, 39-41.

<sup>30</sup> T Akkerman, 'Werk, werk, werk!' [2001] 4(4) *Tijdschrift voor Genderstudies* 5-12; T Knijn, 'Participation through care?' in J Bussemaker and R Voet (eds.) *Gender, Participation and Citizenship in the Netherlands* (Ashgate, London 1998) 65, 75.

<sup>31</sup> M Brouns, 'De worteling van de normade Kwaliteiten en tradities van vrouwenstudies in Nederland' in C Brouw and J de Bruijn and S van der Heiden (ed) *Van alle Markten thuis Vrouwen en genderstudies in Nederland* (Uitgeverij Babylon, Amsterdam 1994) 19, 32-36.

<sup>32</sup> Schuyt, footnote 14, 279; J Duyvendak, 'Be gay, ofwel een lichte verplichting tot vrolijkheid' M van der Klein and S Wieringa (eds.) *Alles kon anders* (Alsant, Amsterdam 2006) 145, 157.

<sup>33</sup> Tash, footnote 27, 5-9.

<sup>34</sup> Schuyt, footnote 14, 277.

<sup>35</sup> Outshoorn, footnote 15, 109, 110.

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

<sup>37</sup> K Waaldijk, 'Netherlands' in K Waaldijk and M Bonini-Baraldi (eds.) *Combating sexual orientation discrimination in employment*, Leiden 2004, available online:

<https://openaccess.leidenuniv.nl/handle/1887/12587> (accessed 02.01.2012) 341, 342.

<sup>38</sup> M Brouns, 'De worteling van de nomade' in C Bouw, J de Bruijn and D van der Heiden (eds.) *Van alle markten thuis* (Babylon-DeGeus, Amsterdam 1994) 19, 33.

pragmatic and depolarised political discourse to find proportional compromises.<sup>39</sup> 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 fosters its effective application because it focuses on pragmatic accommodation and equal economic participation and not on doctrinal principles or morality.

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'.<sup>40</sup> Since Germans generally refrain from national patriotism after the Shoah, German collective identity upholds constitutional values such as freedom, equality, commitment to western values, and human rights protection.<sup>41</sup> Habermas believed patriotism to be based on collective guilt within German identity which led it to develop into a nation of culture<sup>42</sup> and offered an identity beyond national borders.<sup>43</sup> It is symbolic of a political and historical new beginning towards a 'better future'.<sup>44</sup> Constitutional integrity and the protection of human rights are the foundation of German culture and society and produce normative appreciation.<sup>45</sup> Constitutional patriotism converts patriotism from being proud to being responsible. Accordingly, the 'indignant democrat' practises civil disobedience to protect constitutional values<sup>46</sup> 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. For example, it has been suggested that Article 3 GG is sufficient to ensure equal treatment, and the implementation of a more coherent body of horizontal anti-discrimination law

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<sup>39</sup> M Leijenaar, 'Political empowerment of women in the Netherlands' in J Bussemaker and R Voet (eds.) *Gender, Participation and Citizenship in the Netherlands* (Ashgate, London 1998) 91; Lijphart, footnote 19, 116-125.

<sup>40</sup> J Habermas, 'Citizenship and National Identity' in *Between Facts and Norms* (translated by W Rehg, Polity Press, Cambridge 1996) 491-515; *ibid*, 'Struggles for Recognition in the Democratic Constitutional State', in C Ciaran and P De Greif (eds.) *The inclusion of the Other* (2<sup>nd</sup> Edition, translated by the Massachusetts Institute for Technology, MIT Press, Cambridge 1999) 203, 225-226.

<sup>41</sup> J Habermas, 'Geschichtsbewusstsein und posttraditionale Identität' in *Eine Art Schadensabwicklung* (Suhrkamp, Frankfurt a.M. 1987) 159-179; *ibid*, *Die nachholende Revolution* (volume VII, Suhrkamp, Frankfurt a.M. 1990) 152; U Wenzel, 'Jürgen Habermas und der Verfassungspatriotismus der Bonner Republick' [2005] 34 *Sozialwissenschaftliche Information* 394-397; R Krechel, 'Social Integration, National Identity and German Unification' in J Marcel (ed.) *Surviving the Twentieth Century* (Transaction Publishers, New Brunswick NJ 1983) 85, 91.-95.

<sup>42</sup> J Habermas, 'Apologetische Tendenzen' in J Habermas *Eine Art Schadensabwicklung* (volume VI, Suhrkamp, Frankfurt a.M. 1987) 120, 135.

<sup>43</sup> P Molt, 'Abschied vom Verfassungspatriotismus?' [2006] 51(435) *Die Politische Meinung* 29-36.

<sup>44</sup> *Ibid*, 29, 34; R Göhner, 'Wertgrundlagen des demokratischen Verfassungsstaats' in J Goyddke et al. (eds.) *Vertrauen in den Rechtsstaat* (Carl-Heymanns, Kassel 1995) 149-158.

<sup>45</sup> C Möller, *Das Grundgesetz* (Beck, Munich 2009) 92; C Knill, *The Europeanization of National Administration* (CUP, Cambridge 2001).

<sup>46</sup> J Müller, *Verfassungspatriotismus* (Suhrkamp, Berlin 2010) 45-46.

has generated an unprecedented opposition within German academia.<sup>47</sup> 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 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(4)) is particularly important, but other right, like the right to freedom of contract (embodied in Article 2), has also been referred to<sup>48</sup> in order to limit any horizontal non-discrimination law or horizontal effects of the constitution.

Accordingly, the German feminist movement did not focus on equality law but instead on special protective measures for, for example, housewives. 'Moderate' voices concentrated on differences between men and women, demanding freedom of choice between housework and work outside the home,<sup>49</sup> and, in particular, emphasising women's connection to nature and women rights.<sup>50</sup> 'Female tasks' were to be reevaluated 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.<sup>51</sup> Accordingly, a 1977 conference for women's organisations concluded that non-discrimination law was not useful, instead emphasising the need for special protection<sup>52</sup> in line with constitutional values.

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, while the German 'constitutional patriotism' limits the effect of horizontal non-discrimination law, as it suppresses human rights protection contrary to constitutional doctrinal paradigms. This 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<sup>53</sup> and the competence of the CJEU to interpret EU law.<sup>54</sup>

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<sup>47</sup> B Schöbener and F Stork, 'Anti-Diskriminierungsregelungen der Europäischen Union im Zivilrecht' [2004] 7(1) *ZEuS* 43, 47.

<sup>48</sup> Among many: FJ Säcker, 'Vertragsfreiheit und Schutz vor Diskriminierung' [2006] 14 *ZEuP* 1-6.

<sup>49</sup> I Ostner, 'Slow Motion' in J Lewis (ed.) *Women and Social Policies in Europe* (Edward-Elgar, Aldershot 1993) 92-155.

<sup>50</sup> M Hochgeschurz, 'Zwischen Anpassung und Widerstand' in F Hervé (ed.) *Geschichte der Deutschen Frauenbewegung* (PapyRossa, Cologne 1995) 155, 165; R Nave-Herz, *Die Geschichte der Frauenbewegung in Deutschland* (LzfpB, Hannover 1997) 49-49.

<sup>51</sup> Ostner, footnote 49, 92, 94

<sup>52</sup> C Hoskyns, 'Give Us Equal Pay and We'll Open Our Door' in M Buckley and M Anderson (eds.) *Women, Equality and Europe* (MacMillan, London 1988) 33, 41.

<sup>53</sup> *Costa*, 6/64, ECLI:EU:C:1964:66.

<sup>54</sup> Article 267 TFEU.

### 3. The recognition of pregnancy discrimination

The paper now turns to the comparison of German and Dutch application of EU non-discrimination law and law implementing the equality directives,<sup>55</sup> focusing in particular on pregnancy discrimination. The CJEU has long recognised that discrimination based on pregnancy constitutes direct sex discrimination because only (biological) women can become pregnant.<sup>56</sup> 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.<sup>57</sup> Over the years, the CJEU had several opportunities to define the scope of pregnancy discrimination. It thus emphasised that a pregnant women could not be fired or rejected only because she was temporarily incapable to perform the contractual obligation, possibly because of legislation preventing her from working in a dangerous environment<sup>58</sup> or overnight<sup>59</sup> and emphasised that the same applied to temporary employment.<sup>60</sup> Moreover, while on maternity leave, women are still entitled to one-off payments when they reward past behaviour<sup>61</sup>, pay rises<sup>62</sup> and promotion<sup>63</sup>. 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 21(c) Recast Directive clearly states that discrimination based on pregnancy and maternity constitutes direct sex discrimination.<sup>64</sup> A similar definition can be found in § 31(2) German General Equality Act (AGG) and Article 111 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 Court thus still considers women to be protected from dismissal during pregnancy if they are absent because of pregnancy related illnesses<sup>65</sup> and also recognises the absence because of in vitro treatment cannot be compared to other absences<sup>66</sup>, it withdraws its special protection once the child is born.<sup>67</sup> The effect of the inconsistency within the case-law will be discussed within the comparison of the national case-law.

#### 3.1. The German approach

As a general rule, the German courts now accept that pregnancy discrimination constitutes sex discrimination.<sup>68</sup> However, the specific content of the prohibition is still unclear and may conflict

<sup>55</sup> 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).

<sup>56</sup> *Dekker*, C-177/88, ECLI:EU:C:1990:383.

<sup>57</sup> Article 281 Recast Directive; Pregnancy Directive.

<sup>58</sup> *Mahlburg*, C-207/98, ECLI:EU:C:2000:64.

<sup>59</sup> *Habermann*, C-421/92, ECLI:EU:C:1994:187.

<sup>60</sup> *Tele Danmark*, C-109/00, ECLI:EU:C:2001:513; *Melgar*, C-438/99, ECLI:EU:C:2001:509.

<sup>61</sup> *Lewen*, C-333/97, ECLI:EU:C:1999:512.

<sup>62</sup> *Gillespie*, C-342/93, ECLI:EU:C:1996:46.

<sup>63</sup> *Thibault*, C-136/95, ECLI:EU:C:1998:178.

<sup>64</sup> *Sarkatzis Herrero*, C-294/04, ECLI:EU:C:2006:109, para. 41.

<sup>65</sup> *Brown*, C-394/96, ECLI:EU:C:1998:331.

<sup>66</sup> *Meyr*, C-506/06, ECLI:EU:C:2008:119.

<sup>67</sup> *McKenna*, C-191/03, ECLI:EU:C:2005:513.

<sup>68</sup> BAG 8 AZR 257/07 (24.04.2008) [2008] 61(50) *NJW* 3658-3661, para. 21; 8 AZR 483/09 (27.07.2011) [2011] 28(12) *NZA* 689-693; LAG Berlin 2 Sa 1776/06 (19.10.2006)—*juris*, 96-97; ArbG Mainz 3 Ca 1133/08

with other national legislation relating to maternity and motherhood, namely Article 6 IV of the Constitution 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 discrimination. However, it can also hinder the German courts from engaging with pregnancy from a non-discrimination approach and thus undermines the development of a general equality framework. The following analysis will first focus on the national case-law referring directly to EU law and the CJEU case-law. In a second step, it will discuss cases in which the German courts 'only' applied 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.<sup>69</sup> 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.<sup>70</sup> It is thus not surprising that lower courts did not follow the BAG judgement and instead directly referred to EU law.<sup>71</sup> 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*.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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.

In 2003, the BAG finally accepted this reasoning but only regarding permanent employment<sup>75</sup> 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.<sup>76</sup> Accordingly, a pregnancy may never be taken into account even if the employee will be absent for most of the contract's duration. Whilst the BAG's ruling thus 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.

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(02.09.2008) [2009] 25 *STREIT* 180-182; LAG Cologne 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.

<sup>69</sup> BAG 2 AZR 25/93 (01.07.1993) [1994] 47(2) *NJW* 148.

<sup>70</sup> *Tele Danmark*, C-109/00, ECLI:EU:C:2001:513.

<sup>71</sup> LAG Sachsen 7 Sa 828/00 L (06.06.2001)–juris; LAG Cologne 6 Sa 641/12 (11.10.2012) [2013] 18(5) *Neue Zeitschrift für Arbeitsrecht-RR* 232; OVG Saxony-Anhalt 1 L 26/10 (21.04.2011) [2011] 27(4) *STREIT* 173-176.

<sup>72</sup> BAG 2 AZR 621/01 (06.02.2003) *BAGE* 104, 304-308.

<sup>73</sup> *Habermann*, C-421/92, ECLI:EU:C:1994:187; *Webb*, C-32/93, ECLI:EU:C:1994:300.

<sup>74</sup> *Mahlburg*, footnote 58, paras 24-27.

<sup>75</sup> BAG, footnote 72, para. 26; E Koch, 'Die Erwerbstätigkeit von Frauen und ihre Auswirkung auf das Arbeitsrecht - oder umgekehrt...' in B Rudolf (ed.) *Querelles* (Wallstein, Göttingen 2009) 216, 227.

<sup>76</sup> Footnote 70, *Melgar*, footnote 60.

Similar can be seen regarding the BAG case-law on maternity. In 2002, it was confronted with the differing maternity-leave provided for by the Federal Republic and the German Democratic Republic (DDR). The collective agreement included eight weeks of maternity-leave for the purpose of seniority as required by § 6 MuSchG. Under DDR law women could take up to 20 weeks of maternity-leave. Since the time beyond the eight weeks was not recognised under the collective agreement, women who had taken the longer leave reached seniority later than their male counterparts.<sup>77</sup> The case produced the *Sass*-judgment. 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.<sup>78</sup> 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,<sup>79</sup> since this fosters the stereotype of mothers as care-givers<sup>80</sup> and confuses motherhood with pregnancy. However, the court's case-law may not reach such a clear distinction as it continues to uphold the mother's right to develop a 'special relationship with the child'.

When the case returned, the BAG carefully assessed DDR law on maternity. The relevant legislation provided for a short 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.<sup>81</sup> 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 and thus suffered a disadvantage and moreover ignored that the leave was only available to mothers and therefore did not constitute parental leave as we understand it today. 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 CJEU.

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.<sup>82</sup> The court thus applies the constitutional general equality principle (Art. 3I) 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 characteristics. The

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<sup>77</sup> BAG 6 AZR 108/01-A (21.03.2002) BAGE 101, 21-30.

<sup>78</sup> *Sass*, C-284/02, ECLI:EU:C:2004:722, paras 34-39.

<sup>79</sup> S Koukoulis-Spiliotopoulos, 'The amended equal treatment directive' [2005] 12(4) *MJ* 327, 342-343.

<sup>80</sup> C Costello and G Davies, 'The case-law of the Court of Justice in the field of sex equality since 2000' [2006] 43(6) *CMLR* 1567, 1608-1609; Prechal, footnote 5, 533, 539.

<sup>81</sup> BAG 6 AZR 108/01-B (16.06.2005) BAGE 115, 113-121, paras 20-24.

<sup>82</sup> BAG, footnote 77, paras 44-47.

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<sup>83</sup> and rejected that the retention of a legally void dismissal of a pregnant worker amounted to sex discrimination.<sup>84</sup> 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 nevertheless suffers sex discrimination<sup>85</sup> 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.<sup>86</sup> Laws protecting pregnant workers do not cover such gender discrimination and fail to dismantle structural disadvantages.<sup>87</sup> 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.<sup>88</sup>

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*<sup>89</sup> 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.<sup>90</sup> The BAG did not follow this reasoning but instead focused on Article 6IV Constitution which ensures that every mother is entitled to the protection and care of the community. § 2II MuSchG would have allowed the claimant to continue working until the end of March. The BAG considered that, contrary to Article 6IV GG<sup>91</sup>, this, combined with the 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 last possible moment even if not feeling fit for work. The BAG thus based rights to vacation pay on the special constitutional

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<sup>83</sup> LAG Berlin- Brandenburg 15 Sa 1717/08 (07.02.2009)–juris.

<sup>84</sup> LAG Hamm 3 Sa 1420/11 (16.05.2012)–juris.

<sup>85</sup> Footnote 66.

<sup>86</sup> ArbG Dresden 9 Ca 576/10 (21.04.2011)–juris.

<sup>87</sup> Ellis and Watson, footnote 7, 341-343.

<sup>88</sup> BAG 8 AZR 257/07, footnote 68, para. 31. Such an approach may very well constitute an infringement of EU law following *Traghetti del Mediterraneo*, C-173/03, ECLI:EU:C:2006:391.

<sup>89</sup> Footnote 61.

<sup>90</sup> BAG 6 AZR 297/95 (14.12.1995) [1996] 13(18) NZA 996-998.

<sup>91</sup> BAG 9 AZR 353/01 (20.08.2002) BAGE 102, 218-225, paras 36-39.

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 thus 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 be irrelevant. A non-discrimination approach would enable the courts to develop a more consistent line; 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 and 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 Equal Treatment Commission (CGB)<sup>92</sup> only considers non-discrimination law which clearly states that pregnancy discrimination constitutes direct sex discrimination.<sup>93</sup> 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, an aim much more important 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 CGB interprets 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.<sup>94</sup> The commission 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 childcare obligations.<sup>95</sup> The (stereotypical) gender role gives the question a different quality.<sup>96</sup> Employment practice may not be based on such stereotypes because, by excluding pregnant workers from the economic sphere, they

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<sup>92</sup> The CGB (Commissie gelijke behandeling), since 2012 incorporated in the College for Human Rights, 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).

<sup>93</sup> Article 11I AWGB.

<sup>94</sup> E Cremers-Hartman and M Vegter, 'Geslacht' in C J Forder (ed.) *Gelijke behandeling* (Wolf, Nijmegen 2012) 93, 110.

<sup>95</sup> CGB 2011-186, para. 3.8; CGB 2009-117. See also, 2007-120 regarding planning *in vitro* fertilisation.

<sup>96</sup> CGB 2006-7, para.7; 2006-08, para 3.11.

cement structural gender inequality.<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup> The commission refers to the settled CJEU case-law regarding pregnancy discrimination. In *Gillespie*<sup>100</sup> the Court held that women on maternity-leave should receive pay rises awarded before or during their leave. *Thibault*<sup>101</sup> held that women on maternity-leave may not be deprived from promotion opportunities because of their absence, and in *Brown*<sup>102</sup>, 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 Hof '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 Hof 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 which was contrary to non-discrimination law.<sup>103</sup> This is a rather broad interpretation of the *Brown* case since the female claimant's absence did not constitute maternity-leave. Nevertheless, her career break was related to motherhood and breastfeeding is clearly related to the biological female sex.<sup>104</sup>

Newer case-law concerning pregnancy related illnesses seems to adopt a looser stance. In a 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 related illnesses.<sup>105</sup> It justified this by reference to the above mentioned cases, in particular *Brown* and *Lewen* where the Court distinguished between parental-leave and maternity-leave for the purpose of a Christmas bonus. The ruling was confirmed by the District Court Utrecht<sup>106</sup> and the

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<sup>97</sup> CGB 2006-241; CGB 2011-166. See also, CGB 2011-12; 2008-22; 2006-14; 2006-15; 2006-141; S Burri and E Cremers-Hartman, 'Geslacht' in J Gerards (ed.) *Gelijke behandeling* (Wolf, Nijmegen 2007) 59,67-68.

<sup>98</sup> Ktr Schiedam Nr 307844\verz 00-326 (05.07.2000) JAR 2000, 180.

<sup>99</sup> CGB 2011-103/104/105.

<sup>100</sup> *Gillespie*, C-342/93, ECLI:EU:C:1996:46.

<sup>101</sup> *Thibault*, ECLI:EU:C:1998:178.

<sup>102</sup> Footnote 65.

<sup>103</sup> Hof 's-Gravenhage LJN BC5086 (22.02.2008) JAR 2008/90.

<sup>104</sup> Within German case-law, such protection could only arise from Article 6 GG, if at all. However, such protection can also be detrimental for women, since they risk becoming less desirable as employees.

<sup>105</sup> CGB 2008-7; 2008-142; 2006-185. CGB 2007-188; 2007-90, para. 3.5; 2008-142, paras 3.6 e- 3.7.; 2006-115; 2006-187; S Burri and E Cremers-Hartman, 'Geslacht' in D de Wolff (ed.) *Gelijke behandeling* (Kluwer, Deventer 2004) 33, 43, 46-48.

<sup>106</sup> Ktr Utrecht LJN BG4779 (08.10.2008) JAR 2009/9

Administrative Court.<sup>107</sup> The courts thus accepted that equality treatment of men and women requires the different treatment of pregnancy related absences as compared to other absences.

The *McKenna* case 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'.<sup>108</sup> Moreover, pregnancy related illnesses after maternity may lead to reductions of pay if other illnesses are treated in the same way.<sup>109</sup> The Court reintroduced the comparator into the concept of pregnancy discrimination. This makes little sense considering the Court's reasoning that equates pregnancy and sex discrimination,<sup>110</sup> 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.<sup>111</sup> This can already be seen in the Court'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'.<sup>112</sup> Since only women can be exposed to this risk, their less favourable treatment constitutes direct discrimination. The Court 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 Court withdraws the protection in favour of the employer's interest of certainty.<sup>113</sup> The Court returns to a strictly formal approach. This is clearly inconsistent with the Court's 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 have pregnancy related illnesses. 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 Court 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 through pregnancy related illnesses were only entitled to reduced pay, unless other sicknesses were treated differently.<sup>114</sup> This approach has now been accepted by the CGB.<sup>115</sup> The influence of the CJEU and, in 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

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<sup>107</sup> CRvB LJN AS9294 (25.02.2005) USZ 2005, 164.

<sup>108</sup> Footnote 67, para. 67.

<sup>109</sup> *Ibid*, paras 45, 54; *Danosa*, C-232/09, ECLI:EU:C:2010:674, para. 68.

<sup>110</sup> T Hervey, 'Thirty years of EU sex equality law' [2005] 12(4) *MJ* 307, 313; C Boch, 'Official: during pregnancy, females are pregnant' [1998] 23(5) *European Law Review* 488, 493.

<sup>111</sup> Ellis and Watson, footnote 7, 336-337.

<sup>112</sup> *Danosa*, footnote 109, paras 61, 70; *McKenna*, footnote 67, para. 48.

<sup>113</sup> A Masselot, 'Pregnancy, maternity and the organisation of family life' [2001] 26(3) *European Law Review* 239, 254, 256.

<sup>114</sup> Hof Amsterdam, LNJ BM2034 (20.04.2010) JAR 2010/142.

<sup>115</sup> CGB 2011-79; 2011-80/81.

the CJEU approach and applied the same principles to situations which have not been directly discussed by the Court. 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 question whether something constitutes pay or not. If it does, the courts do not further deal with the disadvantage.

#### **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. Within 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 massively 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 difference regarding the desire to protect the own national legal concepts and principles.

Non-discrimination law is much more dominant within the Netherlands than within Germany. I argue that this is because it 'fits' much better with the Dutch 'culture of tolerance' than with the German focus on the constitution. Non-discrimination is seen as a useful tool to foster equality. The German experience is very different and its 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 other Constitutional rights granting special protection often trump the equality right. The dominance of the Constitution has the effect that equal treatment cases are often 'filtered through' constitutional equality 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. Regarding pregnancy/maternity, the constitutional protection of motherhood (Article 6 GG) remains important. Whilst the court generally accepts that pregnancy discrimination constitutes direct sex discrimination under EU law and the AGG, 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. Many pregnancy issues are not considered within an equality framework, and benefits and disadvantages related to it are not considered to constitute discrimination. The BAG did not consider a mother to be discriminated against when she lost her right to vacation pay because she was on maternity-leave. Instead the court 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. There is no comprehensive framework available; lower courts continue to distinguish between sex and pregnancy discrimination and many factual situations are left unprotected. For example, the MuSchG only takes effect once a woman is actually pregnant; case-law concerning the rules which

pressurised a pregnant worker to not take voluntary maternity-leave referred to very special facts and 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. Overall, the German courts seem to be sceptical towards non-discrimination law, take a limited approach towards its application and fail to generally and pro-actively engage with the CJEU's reasoning. Consequently, there is little consistency and different standards apply depending on the circumstances. The CJEU does little to encourage the German courts engagement with broader equality framework. In the *Sass*-judgement the CJEU provided a reasoning which, while providing an answer to the preliminary question, failed to engage with the link between long-term leaves which were only available to women, parental leave, and gender roles. Nor did it recognise that women cannot retroactively amend choices they made under very different circumstances.

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 considering disadvantages due to pregnancy related illnesses engaged with the logic of the CJEU's earlier reasoning and then developed its own conclusion for the slightly different case. Other (constitutional) principles do not seem to challenge the substantive interpretation and application of the AWGB and the commission 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 have these illnesses. In any case, 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 particular evident. The CGB uses the CJEU case-law to support its own approach, but also feels obliged to follow the CJEU if there is a clear contradiction between both approaches. National courts thus may use CJEU case-law to reduce the standard of protection contrary to a substantive equality approach as it suggests a focus on special protection within pregnancy discrimination.

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 sufficient similar to a case decided by the CJEU, and not to develop a more coherent equality framework which is based on common minimum standards and principles. 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 at different more beneficial treatment but then obviously needs to be limited. 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 above 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 course; since national courts have accepted the basic minimum standards set by the Court, it now faces much more challenging questions, exposing its limited commitment to substantive equality and its own inconsistencies within its own reasoning. The national courts are then often left to their own device and potentially challenged, whether they apply and recognise CJEU reasoning or uphold their own national standards.

DRAFT