

Pregnancy discrimination in the national courts: is there a common EU framework?

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Abstract: This paper compares how German and Dutch courts integrate the European equality framework within their national systems using pregnancy discrimination within employment law as a case study. 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 pregnancy discrimination. 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, non-discrimination law

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1. INTRODUCTION

This article compares how the German and Dutch courts integrate the European equality framework within their national systems. It does so by focusing on pregnancy discrimination within employment as a case study. The CJEU case law on pregnancy discrimination is interesting because the courts' inconsistencies within the reasoning, exposes its limited commitment to substantive sex equality and the development of a coherent equality framework.¹ This case law then had very different effects within the national sphere, depending on the national context, and often limits the scope of substantive equality rather than promoting it.

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,² including characteristics like age, which reflects the demographic changes within the Member States.³ This, along with the Charter of Fundamental Rights of the European Union's⁴ new emphasis on human rights protection and EU supremacy,⁵ 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)⁶ 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. The aim of the comparison is thus twofold. Firstly, it aims to demonstrate the significant differences in the national approaches towards pregnancy discrimination, which challenge the idea of successful harmonisation within the area of non-discrimination law. Secondly, it aims to uncover national and European influences affecting the national approaches towards pregnancy discrimination. It thus aims to provide some explanation as to why different national approaches prevail even though the applied legislation leaves has the same European origin and national courts are required to recognise the CJEU's competence in interpreting EU law.⁷ The case law comparison will demonstrate that 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 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

¹ Similar inconsistencies can be found within the CJEU's case law on age discrimination.

² 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: Race Directive 2000/43/EC (OJ 2000, L180/22); Framework Directive 2000/78/EC (OJ 2000, L303/16); Recast Directive 2006/54/EC (OJ 2006 L204/23); and Goods and Services Directive 2004/113/EC (OJ 2004, L373/37).

³ D. Schiek, *Age Discrimination Before The ECJ - Conceptual and Theoretical Issues* 48(3) CMLR 777-799 (2011).

⁴ OJ 2007, C303/01.

⁵ Case C-144/04 *Mangold* [2005] ECR I-9981; C-555/07 *Kücükdeveci* [2010] ECR I-365.

⁶ D. Schiek, L. Waddington & M. Bell, *A Comparative Perspective on Non-Discrimination Law*, in *Non-Discrimination Law* 1-32 at 18 (D. Schiek, L. Waddington & M. Bell (eds) Oxford: Hart Publishing, 2007).

⁷ Art 267 TFEU.

repeatedly⁸ 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.⁹ This leaves space for the CJEU to be active, to demonstrate its commitment to social progress and legitimise further European (political) integration.¹⁰ 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,¹¹ 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 they share many common features and are based on similar legal paradigms.

In order to uncover the influences on national approaches towards pregnancy discrimination, the article employs a culturally-informed comparative law method.¹² This method aims to leave room for multi-layered narratives exploring the interaction of harmonised law and the national context as well as normative considerations linked to the harmonisation process. The approach is thus somewhat asymmetrical. The aim is to explore key cultural factors influencing the national implementation and application of non-discrimination law. These influences may very well have a different quality to them and may not generally be considered functional equivalents or 'likes'. However, that does not mean that they cannot be contrasted or compared regarding their influence on the implementation and application of harmonised law. Taking a multi-layered approach allows space for the recognition of these different explicit and implicit factors which shape the legal mentality.¹³ This article will explore some of the key features influencing the application and implementation of EU non-discrimination law, with a special focus on pregnancy discrimination, and demonstrate how these cultural factors are reflected in the case law alongside European influences.

⁸ S. Prechal, *Equality of treatment, non-discrimination and social policy: achievements in three themes* 41(2) CMLR 533-551 (2004).

⁹ F. W. Scharpf, *Crisis and Choice* (translated by R Crowley and F Thomson, London: Cornell University Press, 1991); A. Somek, *Engineering Equality* (Oxford: Oxford University Press, 2011) 51.

¹⁰ C. Barnard, *The Principle of Equality in the Community Context* 57(2) Cambridge Law Journal 352 (1998); E. Ellis & P. Watson, *EU Anti-Discrimination Law* (2nd ed., Oxford: Oxford University Press 2012) 25.

¹¹ K. J. Alter, *Explaining Variation in the Use of European Litigation Strategies*, in *The European Court's Political Power*, 159-183, at 174 (Oxford: Oxford University Press, 2009).

¹² J. Mulder, *How to compare European harmonised law? A culturally-informed three-step approach to disentangle the complexities of comparing harmonised law* (University of Leicester School of Law Research Paper No. 14-34).

¹³ There is lots of research on the issue of legal mentality and the shortcomings of comparative projects focusing on functional equivalence alone, particularly within structuralism and critical (or post-modernist) comparative law. For example: G. Frankenberg, *Critical Comparison: Re-thinking Comparative Law* 26(2) Harvard International Law Journal 411-456 (1985); R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* 39(1) The American Journal of Comparative Law 1-34 (1991). A detailed critique of their different approaches and arguments would divert from the aim of this article.

In order to do this in a structured and transparent manner, the article will first discuss some features of the German and Dutch cultural background deemed influential regarding the national approaches towards pregnancy discrimination. This section will end with a hypothesis which provides the framework for the further case law comparison. In a second step the relevant CJEU case law on pregnancy discrimination law will be discussed. In the third step, the German and Dutch case law is assessed and compared. This will include a special focus on the courts' reasoning and how the national influences and CJEU approaches are reflected in the reasoning.

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.¹⁴ 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.¹⁵ There would thus be an expectation that differences 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.¹⁶ Accordingly, a comparison between the two would not be considered worthwhile.¹⁷ 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, and that they go beyond differences regarding the reception of law coming from outside the legal system. This suggests that the wider cultural context remains relevant and influences the application of EU non-discrimination law. Regarding the application of EU non-discrimination law, two features of the German and Dutch cultural context will be discussed in more detail; the so called 'Dutch culture of tolerance' and the 'German constitutional patriotism'. Both features seem particularly relevant within the context of non-discrimination law.

2.1 The Dutch 'culture of tolerance'

The so called Dutch 'culture of tolerance'¹⁸ refers to a political system which focuses on taking pragmatic political approaches towards controversial issues, such as abortion or prostitution,¹⁹ without the majority of the population endorsing such acts.²⁰ The 'culture of tolerance' is an

¹⁴ K. Zweigert & H. Kötz, *Introduction to Comparative Law* (translated by Tony Weir, 3rd ed., Oxford: Clarendon Press, 1998).

¹⁵ Anna van der Vleuten, *The Price of Gender Equality* (Hampshire: Ashgate, 2007).

¹⁶ H. Keller & A. Stone-Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in *A Europe of Rights*, 677-712, at 684 (Helen Keller and Alec Stone-Sweet (eds) Oxford: Oxford University Press, 2008).

¹⁷ Zweigert & Kötz, *supra* n. 14.

¹⁸ K. Schuyt, *Steunberen van de samenleving* (Amsterdam: AUP,, 2006) 251-253.

¹⁹ J. Outshoorn, *Incorporating feminism the women's policy network in the Netherlands* in *Sex Equality Policy in Western Europe*, 109-126, at 110-111 (F. Gardiner (ed.), London: Routledge, 1997).

²⁰ Schuyt, *supra* n.18, at 253-255.

important feature of Dutch cultural self-identity²¹ and was first institutionalised via the pillarization (*verzuiling*) of the political system. It constituted the ‘permanent manifestation of peaceful separate coexistence’²² and aimed at pacifying the political process (*pacificatie-politiek*).²³ Pillarization describes the cultural segregation of the state, traditionally divided into Catholic, Protestant, socialist and liberal groups.²⁴ These four pillars within society could mainly act freely within their group and only needed to reach consensus at the top-level.²⁵ Those agreements reached by the elites were then assumed to permeate down to the lower levels of society²⁶ who generally accept the elites’ compromises.²⁷ This separation ensured a great deal of conformity within the groups,²⁸ but also institutionalised pluralism²⁹ by ensuring unity despite diversity³⁰ and accommodating different life-styles.³¹ As a consequence, Dutch society was able to integrate diverse life-styles and new progressive ideologies, despite traditional Christian influences on politics.³² Such an institutionalized approach towards tolerance alongside a rather strong feminist movement for equal economic participation³³ made it possible to introduce non-discrimination law within employment,³⁴ 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*: firstly, because it enabled the different strands of the feminist movement to find ways to put joined pressure on the political development; secondly, because the political process allowed space for moderate and radical views to be heard.³⁵

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

²¹ K. Schuyt, *Tolerance and democracy in Dutch Culture in a European Perspective* 113-140 (D. Fokkema and F. Grijzenhout (eds.), volume 5, Assen: Palgrave-McMillan, 2004).

²² *Ibid.*, at 134-135.

²³ A. Lijphart, *Verzuiling, pacificatie en Kentering in de Nederlandse politiek* (3rd ed., Amsterdam: De Bussy, 1979) 13.

²⁴ *Ibid.*, at 35.

²⁵ *Ibid.*, at 119.

²⁶ *Ibid.*, at 68; Schuyt, *supra* n.21, at 134.

²⁷ F. Gardiner & M. Leijenaar, *The timid and the bold in Sex Equality Policy in Western Europe*, 60-87, at 70 (Frances Gardiner (ed.) London: Routledge, 1997).

²⁸ Schuyt, *supra* n. 18, at 299; J. Plantenga, *Double lives in Gender, Participation and Citizenship in the Netherlands*, 51-64, at 60 (J. Bussemaker & R. Voet (eds) London: Ashgate, 1998).

²⁹ J. Bussemaker, *Gender and the separation of sphere in twentieth century Dutch society in Gender, Participation and Citizenship in the Netherlands*, 25-50, at 28-29 (J. Bussemaker & R. Voet (eds), London: Ashgate, 1998).

³⁰ Schuyt, *supra* n. 21, at 134.

³¹ A. Lijphart, *The Politics of Accommodation* (Berkeley: University of California Press, 1975); Schuyt, *supra* n.18, at 278; R. C. Tash, *Dutch Pluralism* (Peter-Lang 1991) 28-29, 92.

³² Schuyt, *supra* n. 21 at 113, 134.

³³ A. van der Vleuten, *Princers and Prestige* 3 *Comparative European Politics*, 464, 467 (2005); T. Akkerman, *Political participation and social right in Gender, Participation and Citizenship in the Netherlands*, 38-64, at 39-41 (J. Bussemaker & R. Voet (eds) London: Ashgate 1998) 38, 39-41.

³⁴ T. Akkerman, *Werk, werk, werk!* 4(4) *Tijdschrift voor Genderstudies* 5-12 (2001); T. Knijn, *Participation through care?* in *Gender, Participation and Citizenship in the Netherlands*, 65-78, at 75 (J. Bussemaker and R. Voet (eds) London: Ashgate 1998).

³⁵ M. Brouns, *De worteling van de normade* in *Van alle Markten thuis!*, 19-39, at 32-36 (in C. Brouw et al (eds), Amsterdam: Uitgeverij Babylon 1994).

overlapping 'pillars' still benefit from the general tolerance of different value communities.³⁶ Moral pluralism is thus still institutionalised³⁷ by avoiding political polarisation³⁸ and focusing on compromises and the accommodation of differences.³⁹ Linked to that, the equality principle is commonly regarded as the 'heart of the constitutional state'.⁴⁰ Accordingly, non-discrimination law is seen as a key constitutional feature and is considered to have more horizontal effects than other constitutional rights.⁴¹ 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 suspicious.⁴² Instead, all stakeholders are forced to engage in an unemotional, rational, pragmatic and depolarised political discourse to find proportional compromises.⁴³ 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.

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'.⁴⁴ 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.⁴⁵ Habermas believed patriotism to be based on collective guilt within German identity which led it to develop into a nation of culture⁴⁶ and offered an identity beyond national borders.⁴⁷ It is symbolic of a political and historical new beginning

³⁶ Schuyt, *supra* n. 18, at 279; J. W. Duyvendak, *Be gay, ofwel een lichte verplichting tot vrolijkheid* in *Alles kon anders*, 145-158, at 157 (M. van der Klein & S. Wieringa (eds), Amsterdam: Alsent, 2006) 145, 157.

³⁷ Tash, *supra* n. 31, at 5-9.

³⁸ Schuyt, *supra* n. 18, at 277.

³⁹ Outshoorn, *supra* n. 19, at 109, 110.

⁴⁰ M. Hertogh, *What's in a Handshake?* 18(2) *Social & Legal Studies* 221, 229 (2009).

⁴¹ K. Waaldijk, *Netherlands in Combating sexual orientation discrimination in employment*, 341-375, at 342, K. Waaldijk and M. Bonini-Baraldi (eds), Leiden 2004, <https://openaccess.leidenuniv.nl/handle/1887/12587> (accessed 22 July 2014).

⁴² Brouns, *supra* n. 35, at 33.

⁴³ M. Leijenaar, Political empowerment of women in the Netherlands in *Gender, Participation and Citizenship in the Netherlands* 91-107 (J. Bussemaker & R. Voet (eds) London: Ashgate, 1998); Lijphart, *supra* n. 23, at 116-125.

⁴⁴ J. Habermas, *Citizenship and National Identity in Between Facts and Norms* 491-515 (translated by William Rehg, Cambridge: Polity Press, 1996); *Struggles for Recognition in the Democratic Constitutional State in The inclusion of the Other*, 203-238, at 225-226 (2nd ed., Cronin C. & P. de Greiff (eds), translated by the Massachusetts Institute for Technology, Cambridge: MIT Press 1999).

⁴⁵ J. Habermas, *Geschichtsbewusstsein und posttraditionale Identität* in *Eine Art Schadensabwicklung* 159-179 (Frankfurt a.M.: Suhrkamp, 1987); *Die nachholende Revolution* (volume VII, Frankfurt a.M.: Suhrkamp, 1990) 152; U. J. Wenzel, *Jürgen Habermas und der Verfassungspatriotismus der Bonner Republick* 34 *Sozialwissenschaftliche Information* 394-397 (2005); R. Krechel, *Social Integration, National Identity and German Unification in Surviving the Twentieth Century*, 85-95 (J.T. Marcel (ed.), New Brunswick: Transaction Publishers 1983).

⁴⁶ J. Habermas, *Apologetische Tendenzen* in *Eine Art Schadensabwicklung* 120-136 (volume VI, Frankfurt a.M.: Suhrkamp, 1987) 120, 135.

⁴⁷ P. Molt, *Abschied vom Verfassungspatriotismus?* 51(435) *Die Politische Meinung* 29-36 (2006).

towards a 'better future'.⁴⁸ Constitutional integrity and the protection of human rights are the foundation of German culture and society and produce normative appreciation.⁴⁹ It converts patriotism from being proud to being responsible. The constitution becomes more than a legal document which protects specific rights, it becomes part of the cultural identity: the 'indignant democrat' practises civil disobedience to protect constitutional values.⁵⁰ 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. The constitutional principle of equality mainly refers to the relationship between the state and the individual. It may also affect the interpretation of the general equal treatment principle within employment law (*arbeitsrechtliche Gleichbehandlungsgrundsatz*) which original doctrinal bases can be found in customary law.⁵¹ Beyond that, however, any horizontal application is considered of little legal value, as it goes further than the Constitutional protection and is thus seen as either over limiting personal freedom or unnecessary. Accordingly, it has been suggested that Article 3 of the German Constitution 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.⁵² The dominance of the constitution can thus both protect and limit legislatively embodied 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 mothers to protection and care of the community' (Article 6 para. 4) is particularly important, but other rights, like the right to freedom of contract (embodied in Article 2), has also been referred to in order to limit any horizontal non-discrimination law.⁵³

Moreover, the German feminist movement did not focus on equal economic participation alone but on special protective measures. Employment non-discrimination law was often seen as upholding the *male* standard, independent economic activities were not seen as a possible pathway to equality.⁵⁴ Instead, there was a focus on ensuring freedom of choice between housework and work outside the home and the revaluation of 'female tasks' and feminine traits.⁵⁵ This does not mean to

⁴⁸ Ibid., at 34; R. Göhner, *Wertgrundlagen des demokratischen Verfassungsstaats in Vertrauen in den Rechtsstaat*, 149-158 (J. Goyddke et al. (eds), Kassel: Carl-Heymanns, 1995).

⁴⁹ C. Möller, *Das Grundgesetz* (Munich: Beck, 2009) 92; C. Knill, *The Europeanization of National Administration* (Cambridge: Cambridge University Press, 2001).

⁵⁰ J. W. Müller, *Verfassungspatriotismus* (Frankfurt a.M.: Suhrkamp, 2010) 45-46.

⁵¹ U. Preis, *Vertragstypische Pflichten beim Dienstvertrag in Erfurter Kommentar zum Arbeitsrecht*, at marginal number 574 (R. Müller-Glöge et al. (eds.) 13th ed., Munich: Beck, 2013); BAG 5 AZR 806/98 (21.06.2000) 53(48) *Neue Juristische Wochenschrift* 3589-3590 (2000), para. 20.

⁵² B. Schöbener and F. Stork, *Anti-Diskriminierungsregelungen der Europäischen Union im Zivilrecht* 7(1) ZEuS 43, 47 (2004).

⁵³ Among many: F. J. Säcker, *Vertragsfreiheit und Schutz vor Diskriminierung* 14 ZEuP 1-6 (2006).

⁵⁴ Ostner, *supra* n. 55, at 94; C. Hoskyns, *Give Us Equal Pay and We'll Open Our Door in Women, Equality and Europe*, 33-55, at 41 (M. Buckley & M. Anderson (eds.), London: MacMillan 1988).

⁵⁵ I. Ostner, *Slow Motion in Women and Social Policies in Europe*, 92-155 (J. Lewis (ed.), Aldershot: Edward-Elgar 1993); M. Hochgeschurz, *Zwischen Anpassung und Widerstand in Geschichte der Deutschen*

suggest that Dutch society is more equal than German society,⁵⁶ but that horizontal non-discrimination law is much less dominant in the German public consciousness than in the Netherlands and enjoyed much less (political) attention.

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

The hypothesis for the following case law comparison is thus as follows. Within the Netherlands the 'culture of tolerance' and linked 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. Besides the monist tradition that supported the adoption of the CJEU approaches on national level, non-discrimination law fits well with national cultural consciousness and identity. On the other hand, the German 'constitutional patriotism' limits the effect of *horizontal* non-discrimination law, as it hinders approaches that promote equality beyond and beside constitutional doctrinal paradigms. These features of both cultures are deemed particularly relevant regarding the application and implementation of EU non-discrimination law. However, they are not considered functional equivalents. The Dutch constitution also plays an important part within the Dutch legal context and in fact upholds the principle of equality and non-discrimination in Article 1. Moreover, emphasising that constitutional values as spelled out in the German constitution dominate the German legal and political discourse and the national application of non-discrimination law says nothing about the level of tolerance in German society. The argument is thus not that one country is more tolerant than the other, but that the discussed values dominating the national cultural consciousness or identity frame the legal discourse within non-discrimination law, and influence the national courts' reasoning and application. In order to test this hypothesis, the discussion will now turn to the case law. Once the relevant CJEU case law on pregnancy discrimination is discussed, the focus will thus turn to the comparison of German and Dutch application of EU non-discrimination law and the respective domestic law implementing the equality directives, focusing on pregnancy discrimination and highlighting the national and European factors which influence the national courts' reasoning.

3. THE RECOGNITION OF PREGNANCY DISCRIMINATION BY THE CJEU

The CJEU has long recognised that discrimination based on pregnancy constitutes direct sex discrimination because only women can become pregnant.⁵⁷ Albeit only true regarding biological female women, the CJEU resisted comparisons and considered it irrelevant that not all women are or will ever be pregnant. Today, pregnant workers enjoy special protection and may not be discriminated against, even though they cannot be compared to other workers.⁵⁸ Over the years, the

Frauenbewegung, 155-184, at 165 (F. Hervé (ed.), Cologne: PapyRossa 1995); R. Nave-Herz, *Die Geschichte der Frauenbewegung in Deutschland* (Bonn: LzfpB 1997) 49-49.

⁵⁶ In fact, the overwhelming number of Dutch women working part-time suggests quite the opposite.

R. Holtmaat, *The Netherlands in Sex Discrimination in Relation to Part-Time and Fixed-Term Work*, 246-265 (S. Burri & H. Aune (eds), European Commission, 2013).

⁵⁷ Case C-177/88 *Dekker* [1990] ECR I-3941.

⁵⁸ 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).

CJEU had several opportunities to define the scope of prohibited pregnancy discrimination. It thus emphasised that a pregnant woman 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 environment⁵⁹ or overnight⁶⁰) and emphasised that the same applied to temporary employment.⁶¹ Moreover, while on maternity leave, women are still entitled to one-off payments when they reward past behaviour,⁶² pay rises⁶³ and promotion⁶⁴. The CJEU emphasises that the temporary inability to fulfil contractual obligations caused by pregnancy does not justify dismissal or refusal to hire.⁶⁵ It recognises 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.⁶⁶ The CJEU thus 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. Today, Article 21(c) Recast Directive clearly states that discrimination based on pregnancy and maternity constitutes direct sex discrimination.⁶⁷

However, the CJEU is not willing to consistently recognise the link between pregnancy (including pregnancy-related illnesses) and the female sex.⁶⁸ While the CJEU considers women to be protected from dismissal during pregnancy if they are absent because of pregnancy-related illnesses⁶⁹ and refused to compare absences because of *in vitro* treatment with other absences,⁷⁰ it withdraws the legal protection once the child is born. In *McKenna*,⁷¹ 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'.⁷² Moreover, pregnancy-related illnesses after maternity may lead to reductions of pay if other illnesses are treated in the same way.⁷³ The CJEU thus upheld the comparator test within pay discrimination linked to pregnancy.⁷⁴ This makes little sense considering the CJEU's reasoning that equates pregnancy and sex discrimination.⁷⁵ Just as only women can become pregnant, only women can have pregnancy-related illnesses. The different approach opens the door

⁵⁹ Case C-207/98 *Mahlburg* [2000] ECR I-00549.

⁶⁰ Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657.

⁶¹ Case C-109/00 *Tele Danmark* [2001] ECR I-6993; Case C-438/99 *Jiménez Melgar* [2001] ECR I-6915.

⁶² Case C-333/97 *Lewen* [1999] ECR I-7243.

⁶³ Case C-342/93 *Gillespie* [1996] ECR I-475.

⁶⁴ Case C-136/95 *Thibault* [1998] ECR I-2011.

⁶⁵ *Habermann*, *supra* n. 60; Case C-32/93 *Webb* [1994] ECR I-3567.

⁶⁶ *Mahlburg*, *supra* n. 59, paras 24-27.

⁶⁷ Case C-294/04 *Sarkatzis Herrero* [2006] ECR I-1513, para. 41.

⁶⁸ E. Caracciolo Di Torella & A. Masselot, *Pregnancy, maternity and the organisation of family life* 26(3) *European Law Review* 239-260 (2001); S. Simon, *Discrimination on the ground of pregnancy: chaos or consistency from the ECJ?* 3(2) *Edinburgh Law Review* 217-228 (1999).

⁶⁹ Case C-394/96 *Brown* [1998] ECR I-4185.

⁷⁰ Case C-506/06 *Meyr* [2008] ECR I-01017.

⁷¹ Case C-191/03 *McKenna* [2005] ECR I-07631. See also older cases on equal treatment *Brown*, *supra* n. 69, at para. 26.

⁷² *McKenna*, *supra* n. 71, at para. 67.

⁷³ *McKenna*, *supra* n. 71, at paras 45, 54; case C-232/09 *Danosa* [2010] ECR I-11405, para. 68.

⁷⁴ S. Fredman, *Discrimination Law* (2nd ed., Oxford: Oxford University Press 2011) 171.

⁷⁵ T. Hervey, *Thirty years of EU sex equality law* 12(4) *MJ* 307, 313 (2005); C. Boch, *Official: during pregnancy, females are pregnant* 23(5) *European Law Review* 488, 493 (1998).

for subjective judgements regarding what should and should not be protected.⁷⁶ 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 voluntarily terminate their pregnancy'.⁷⁷ 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.⁷⁸ 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, which the CJEU deems unnecessary once the child is born.

The focus on special protection rather than equal treatment is also apparent once the CJEU assesses the meaning of maternity leave. In the *Sass*-judgement, the CJEU was asked whether a twenty-week maternity leave which was available to mothers under the law of the Former German Democratic Republic could constitute maternity leave and thus had to be included for the purpose of seniority.⁷⁹ Within the dispute on national level this became an issue, because the challenged collective agreement only recognised 8 weeks of maternity leave as required by § 6 of the German Maternity Act. As a consequence, mothers from the Former German Democratic Republic who, like Mrs Sass, had taken the maximum possible leave in the past when it was available to them reached seniority at least 12 weeks later than their male comparator who started working at the same time and indeed mothers from the Federal Republic who had taken the 8 weeks of maternity leave available to them.⁸⁰ 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,⁸¹ since this fosters the stereotype of mothers as care-givers⁸² and confuses motherhood with pregnancy.⁸³ However, it is

⁷⁶ Ellis & Watson, *supra* n. 10, at 336-337.

⁷⁷ *Danosa*, *supra* n. 73, at paras 61, 70; *McKenna*, *supra* n. 71, at para. 48.

⁷⁸ Caracciolo Di Torella & Masselot, *supra* n. 68, 239, 254-256 (2001).

⁷⁹ Case C-284/02 *Sass* [2004] ECR I-11143, paras 34-39.

⁸⁰ For a discussion of the proceedings on national level, see section 4.1. National Cases Engaging the CJEU case law *infra*.

⁸¹ S. Koukoulis-Spiliotopoulos, *The amended equal treatment directive* 12(4) MJ 327, 342-343 (2005).

⁸² C. Costello and G. 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. 8, at 533, 539.

also true, that Mrs Sass was not able to retroactively change her past behaviour. Thus, she still suffered a disadvantage because she took a leave which was only available to her as a mother compared to men starting to work at the same time. The CJEU did not engage with this issue of structural inequality and de facto failed to foster substantive equality.

As discussed below, these inconsistencies have had a significant effect on the national courts' reasoning. However, within both jurisdictions different CJEU cases were particularly relevant. The following chapters on the national courts' approaches towards pregnancy discrimination will thus only flag the relevant cases, and how the national courts engaged with the specific, and possibly inconsistent, reasoning.

4 THE GERMAN APPROACH

As a general rule, the German courts now accept that pregnancy discrimination constitutes sex discrimination.⁸⁴ However, the specific content of the prohibition is still unclear and may conflict with other national ordinary or constitutional law relating to maternity and motherhood. This legislation may provide more specific protection than the prohibition of direct discrimination and can hinder the German courts from (or enable them to avoid) 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 'only' engages with the national context.

4.1. National Cases Engaging the CJEU case law

The content of pregnancy discrimination has been subject to long-lasting debates between the lower courts and the Federal Labour Court because the latter accepted that employers may take an applicant's pregnancy into account if it meant an inability to fulfil contractual obligations.⁸⁵ 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.⁸⁶ It is thus not surprising that lower courts did not follow the BAG judgement and instead directly referred to EU law.⁸⁷ In 2003, the Federal Labour Court had the chance to revise its own case law. Within the case, the question was whether an employer is able to contest an employment contract because the applicant did not disclose her pregnancy, although she was directly asked about it.⁸⁸ The court directly referred to the CJEU case law and held that keeping a pregnancy secret does not constitute a wilful deception because employers are not allowed to take a pregnancy into

⁸³ 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'.

⁸⁴ 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 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.

⁸⁵ BAG 2 AZR 25/93 (01.07.1993) 47(2) *NJW* 148 (1994).

⁸⁶ *Tele Danmark*, supra n. 61.

⁸⁷ 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).

⁸⁸ BAG 2 AZR 621/01 (06.02.2003) *BAGE* 104, 304-308.

account. However, it only accepted this regarding permanent employment⁸⁹ and only regarding the rather technical narrow question whether women may or may not keep their pregnancy secret. It continues to refuse to engage clearly with the overall CJEU case law. After all, prior to the decision, the CJEU already ruled that it was immaterial whether the employment was temporary or permanent.⁹⁰ A pregnancy may never be taken into account even if the employee will be absent for most of the contract's duration. The Federal Labour Court'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 its reasoning on maternity and discrimination once the CJEU delivered its preliminary ruling in the *Sass* case.⁹¹ Being asked to assess the purpose of the leave, the Federal Labour Court 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. It thus concluded that whilst the 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.⁹² This seems to be the correct assessment considering the CJEU reasoning. Its (admittedly technical) preliminary question forced the court to recognise the reasoning of the CJEU and undertake a substantive assessment regarding the purpose of leave. However, like the CJEU, it refused to engage with the broader aspects of structural inequality beyond the technical question whether something constitutes maternity leave. After all, 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 leave was only available to mothers and therefore did not constitute parental leave as we understand it today.⁹³ The case thus does little to give effect to a coherent equality framework regarding pregnancy which fosters substantive equality and the CJEU lack of engagement with it is mirrored in the national case law.

4.2. Cases limited to the domestic legal context

In particular, the Federal Labour Court 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.⁹⁴ 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

⁸⁹ BAG, *supra* n. **Error! Bookmark not defined.**, at para. 26; E. Koch, *Die Erwerbstätigkeit von Frauen und ihre Auswirkung auf das Arbeitsrecht - oder umgekehrt...* in *Querelles*, 216-246, at 227 (B. Rudolf (ed.) Göttingen: Wallstein, 2009).

⁹⁰ *Tele Danmark*, *supra* n. 61; *Jiménez Melgar*, *supra* n. 61.

⁹¹ BAG 6 AZR 108/01-A (21.03.2002) BAGE 101, 21-30. For a discussion of the CJEU ruling see: section 3. THE RECOGNITION OF PREGNANCY DISCRIMINATION BY THE CJEU *supra*.

⁹² BAG 6 AZR 108/01-B (16.06.2005) BAGE 115, 113-121, paras 20-24.

⁹³ 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).

⁹⁴ BAG, see *supra* n. 91, at paras 44-47.

on specific characteristics. The court seems to assume, rather, that a duty of including maternity for the purpose of attaining seniority is only based on § 6I Maternity Protection Act and does not consider a similar obligation within the meaning of substantive equality. The court thus refuses to clearly consider the connection between maternity, pregnancy, the female sex, and sex discrimination; an approach which is fostered by the CJEU inconsistency in that regard. As a consequence, some lower courts still consider the exclusion of maternity-leave for the purpose of seniority within indirect discrimination⁹⁵ and reject that the retention of a legally void dismissal of a pregnant worker amounts to sex discrimination.⁹⁶ Moreover, a woman, who is dismissed for undergoing *in vitro* fertilisation cannot refer to the law on maternity because she is not pregnant yet, but may nevertheless suffer sex discrimination⁹⁷ 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.⁹⁸ Laws protecting pregnant workers do not cover such gender discrimination and fail to dismantle structural disadvantages.⁹⁹ The Federal Labour Court distinguishes between EU and national law even though the General Equality Act (AGG) directly implemented the equality directives. As a consequence the EU influence seems to be overshadowed by national (constitutional) concepts of equality.

The inconsistent application of EU non-discrimination law can also be demonstrated by a case concerning the loss of vacation pay. 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 vacation pay. The lower court (correctly) referred to the CJEU decision in *Lewen*¹⁰⁰ regarding Christmas gratification and concluded that Article 141 EC (now Article 156 TFEU) imposed a duty upon the employer to include periods of maternity 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 equality principle, because it did not prevent the exclusion from one-off payments because of maternity.¹⁰¹ The Federal Labour Court did not follow this European reasoning but instead focused on Article 6IV Constitution which entitles mothers to the protection and care of the community and the legislation on maternity. Accordingly, the claimant would have been allowed, but not required, to continue working until the end of March. Because of the flexibility regarding the start of the maternity leave, it was held that 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 was considered to be contrary to Article 6IV of the Constitution.¹⁰² The Federal Labour Court 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 Federal Labour Court's approach may ensure the same outcome, it did not aid the development of a consistent

⁹⁵ LAG Berlin- Brandenburg 15 Sa 1717/08 (07.02.2009)–juris.

⁹⁶ LAG Hamm 3 Sa 1420/11 (16.05.2012)–juris.

⁹⁷ *Supra* n. 70.

⁹⁸ ArbG Dresden 9 Ca 576/10 (21.04.2011)–juris.

⁹⁹ Ellis & Watson, *supra* n. 10, at 341-343.

¹⁰⁰ *Supra* n. 62.

¹⁰¹ BAG 6 AZR 297/95 (14.12.1995) 13(18) NZA 996-998 (1996).

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

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. A non-discrimination approach would enable the courts to develop a more consistent line regarding compulsory and voluntary leave. The focus on special constitutional protection and the CJEU failure to consistently conceptualise pregnancy discrimination and maternity within an equality framework enables the German courts to avoid the effective integration of an EU non-discrimination law framework. Whilst the General Equality Act has a European origin, it is considered to give effect to the Constitutional duty of the State to promote de facto equality between men and women and not the EU directives.¹⁰³ Cases dealing with equality issues are filtered through the dominant constitutional value system that is part of the consciousness and German legal mentality. Its dominance is thus a hindrance for the implementation of a coherent equality framework. The focus on the constitutional approach towards equality along with the CJEU hesitation to consistently engage with substantive equality weakens the influence of EU law on national level and can limit its substantive potential. Instead the Federal Labour Court seems particularly concerned with a consistent application of the national (constitutional) principles.

5. 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 likely to dominant the legal debate around equality as international law and ordinary legislation can also protect principles of fundamental importance.¹⁰⁴ Moreover, Article 1 of the Dutch Constitution, implementing the principle of equality and non-discrimination law, is considered to have more horizontal effects than the other articles of the constitution.¹⁰⁵ There is thus no strong national doctrine which is contrary to the implementation of a general equality framework and would provide the courts a possibility to avoid the EU non-discrimination law. Moreover, the General Equal Treatment Act (AWGB) clearly states that pregnancy discrimination constitutes direct sex discrimination.¹⁰⁶ 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 following section will demonstrate how the national courts engage with the CJEU case law and how the CJEU inconsistent approaches to pregnancy discrimination actually limited the protection on national level.

¹⁰³ BAG 8 AZR 257/07, *supra* n. 84, at para. 31. Such an approach may very well constitute an infringement of EU law following case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177; N. Zingales, *Member State Liability vs. National Procedural Autonomy* 11(4) German Law Journal 419-438 (2010).

¹⁰⁴ C. Kortmann, *Zijn grondrechten subjectieve rechten?* in *Op recht* 145-155, at 155 (S Kortmann et al. (eds.) Zwolle: Tjeenk-Willink, 1996).

¹⁰⁵ Waaldijk, *supra* n. 41, at 342.

¹⁰⁶ Article 11I General Equal Treatment Act.

5.1. Expansion within the boundaries of the CJEU case law

The former Equal Treatment Commission¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹ The (stereotypical) gender role gives the question a different quality.¹¹⁰ Employment practice may not be based on such stereotypes because, by excluding pregnant workers from the economic sphere, they cement structural gender inequality.¹¹¹ 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.¹¹²

5.2. Constraining effect of the CJEU case law

The appropriate treatment of pregnancy and maternity in relation to pay seems to be much more problematic. Generally, the Equal Treatment Commission rejects any possibility of reducing seniority for the purpose of pay because of maternity-leave.¹¹³ It refers to the settled CJEU case law regarding pregnancy discrimination which underlines that pregnancy and maternity-leave should not work to the disadvantage of the pregnant worker regarding pay rises during the leave,¹¹⁴ promotion,¹¹⁵ or absences due to pregnancy-related illnesses during pregnancy.¹¹⁶ 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 Appeals Court 's-Gravenhage ruled similarly in a judgment regarding the loss of a pay guarantee after a career break because of childcare 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

¹⁰⁷ The Commissie gelijke behandeling (CGB), 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 the General Equal Treatment Act 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. 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).

¹⁰⁸ E. Cremers-Hartman and M.S.A. Vegter, *Geslacht in Gelijke behandeling*, 93-157, at 110 (C. J. Forder (ed.), Nijmegen: Wolf, 2012).

¹⁰⁹ CGB 2011-186, para. 3.8; CGB 2009-117. See also, 2007-120 regarding planning *in vitro* fertilisation.

¹¹⁰ CGB 2006-7, para.7; 2006-08, para 3.11.

¹¹¹ CGB 2006-241; CGB 2011-166. See also, CGB 2011-12; 2008-22; 2006-14; 2006-15; 2006-141; S. D. Burri and E. Cremers-Hartman, *Geslacht in Gelijke behandeling*, 59-94, at 67-68 (J. H. Gerards (ed.), Nijmegen 2007: Wolf, 2007).

¹¹² Ktr Schiedam Nr 307844\ vz verz 00-326 (05.07.2000) JAR 2000, 180.

¹¹³ CGB 2011-103/104/105.

¹¹⁴ *Gillespie, supra* n. 63.

¹¹⁵ *Thibault, supra* n. 64.

¹¹⁶ *Brown, supra* n. 69.

that this was contrary to non-discrimination law.¹¹⁷ 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.¹¹⁸

Newer case law concerning pregnancy-related illnesses seems to adopt a looser stance. In 2008, the Equal Treatment Commission 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.¹¹⁹ 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 Utrecht¹²⁰ and the Administrative Court.¹²¹ 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* case¹²² changed this assessment. Despite the case's inconsistencies, the Dutch courts reassessed their case law according to the CJEU approach and thus distinguished between pregnancy and pregnancy-related illnesses within cases on pay-discrimination. The Appeals Court Amsterdam assessed that women who were absent due to pregnancy-related illnesses were only entitled to a reduced pay, unless other sicknesses were treated differently.¹²³ This approach has also been accepted by the Equal Treatment Commission.¹²⁴ The influence of the CJEU and, in the case of the Equal Treatment Commission, 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 Equal Treatment Commission 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 reduced¹²⁵ and the courts do not further deal with the disadvantage and the cost of pregnancy.

6. CONCLUSION

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

¹¹⁷ Gerechtshof 's-Gravenhage LJN BC5086 (22.02.2008) JAR 2008/90.

¹¹⁸ 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.

¹¹⁹ 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; S. D Burri and E. Cremers-Hartman, *Geslacht in Gelijke behandeling*, 33-56, at 43, 46-48(D. de Wolff (ed.) Deventer: Kluwer 2004).

¹²⁰ Ktr Utrecht LJN BG4779 (08.10.2008) JAR 2009/9.

¹²¹ CRvB LJN AS9294 (25.02.2005) USZ 2005, 164.

¹²² *Supra* n. 71. See also case C-471/08 *Parviainen* [2010] ECR I-6533.

¹²³ Gerechtshof Amsterdam, LNJ BM2034 (20.04.2010) JAR 2010/142.

¹²⁴ CGB 2011-79; 2011-80/81.

¹²⁵ E. Cremers-Hartman and M.S.A. Vegter, *Geslacht in Gelijke behandeling: oordelen en commentaar 2011*, 93-157, at 115-116 (C. J. Forder (ed.), Nijmegen: Wolf 2012).

national developments. In Germany and the Netherlands, European pressure was needed to ensure that some horizontal non-discrimination law was implemented at all, and the CJEU case law on pregnancy discrimination has improved the legal positions of pregnant workers. However, the specific national framework and the specific scope of the legal protection still depend on the national 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 national legal concepts and the adoption of horizontal working equality law.

Non-discrimination law is much more dominant in the Netherlands than Germany. This article argues that this is because it 'fits' much better with the Dutch 'culture of tolerance' than with the German national identity which is closely linked to constitutional values, which resist a general horizontal application of equality principles. In the Netherlands non-discrimination law seems to be seen as a useful tool to foster equality. German courts' approach towards horizontal non-discrimination law has been much more timid. The dominance of constitutional human rights protection ('constitutional patriotism') within the German (public) debate upholds equality as a basic principle within a vertical relationship between the State and the citizens. Other Constitutional rights (such as the right to the protection of mothers) 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 German courts generally accept 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 Maternity Protection Act. A broader equality framework is neglected. The Federal Labour Court does not consider a mother to be discriminated against when she lost her right to vacation pay because she was on maternity-leave. Instead, it assesses the treatments under the scope of special protection clauses. Sex equality and horizontally working non-discrimination law is of secondary concern. The court thus fails to conceptualise pregnancy as sex discrimination. This approach seems to be aided by the CJEU's inconsistent reasoning regarding pregnancy and pregnancy-related illnesses and its focus on 'health and safety', which also ignores the equality dimension. The special protection approach does not protect from non-discrimination or ensure substantive equality. The Maternity Protection Act only takes effect once a woman is pregnant. Moreover, the Federal Labour Court's reasoning regarding the maternity and vacation pay would already be irrelevant once the period of compulsory maternity-leave has started. The Federal Labour Court thus fails to develop a comprehensive approach. Overall the court fails to incorporate the European equality framework even though the legislator implemented the relevant directives and it recognises CJEU case law regarding more narrow technical matters like the precise meaning of maternity leave. The recognition thus lacks appropriate engagement with the CJEU reasoning. Constitutional dominance, which enables the courts to avoid EU law, is evident. Consequently, different standards apply depending on the circumstances. The CJEU's own inconsistencies do 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 Equal Treatment Commission) 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. The Equal Treatment Commission engaged with the logic of the CJEU's earlier reasoning and then developed its own conclusion for different but linked cases. Other (constitutional) principles do not seem to challenge the substantive interpretation and application of the General Equal Treatment Act and the Equal Treatment 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 suffer them. However, Dutch courts are willing to accept inconsistencies within their own approach to give effect to the CJEU. Accordingly, pregnancy-related illnesses are now excluded from the protection of pay-discrimination. In these cases the dominance of EU law is particularly evident. The Equal Treatment Commission 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'¹²⁶.

The Dutch example also demonstrates how the inconsistency within the CJEU case law encourages national courts to apply CJEU case law only if the specific facts of the individual case are sufficiently similar. 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, 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, have advanced sex equality within the Member States by being active and occasionally progressive. On the other hand, its success also seems to be its curse. Once national courts have accepted the basic minimum standards set by the CJEU, it faces much more challenging questions, exposing its limited commitment to substantive equality and the inconsistencies within its reasoning. The national courts are then often left to their own devices 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 and engage with the broader equality framework and inequalities beyond specific cases. If the EU prohibition to discriminate on grounds of pregnancy is supposed to have a permanent impact within the laws of the Member States, the CJEU needs to develop a more coherent and consistent view on pregnancy discrimination.

¹²⁶ Article 27 Recast Directive.