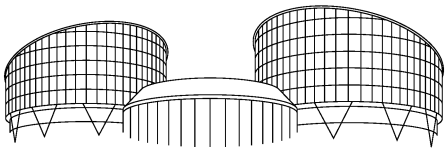

EUROPEAN COURT OF HUMAN RIGHTS
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Opening of the Judicial Year
Seminar

"The European Convention on Human Rights: a 70 year-old living instrument"

The ECHR and the CJEU – social engineers and "mouthpieces of the law" as regards gender equality

Speech by Juliane Kokott

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In 2020 the European Convention on Human Rights ("the Convention") turned seventy. In the seven decades since it was drafted in 1950, this living instrument has undergone remarkable developments, reflecting at the same time changes across our societies. The case-law of the European Court of Human Rights ("the ECHR") in the area of gender equality is a perfect illustration of this point.

Women's status in a society is frequently an indicator of social progress: one example concerns women's right to vote in national elections, which was enacted by the majority of the Council of Europe's member States in the first half of the last century. The granting of this right was preceded by a long struggle, which was waged by the women's movement and begun in the 18th century.

Equally, where the requirement for a woman to obtain the agreement of a man – usually her husband or father – in order to choose her place of residence, enter into an employment contract or even open a bank account was abolished, this was merely the logical conclusion to a more modern train of thought which had gradually taken root in people's minds.

However, none of the significant achievements made over the course of recent decades and centuries in terms of equal treatment would have been imaginable without a case-law which implements and facilitates progress. In certain cases, the adoption of judicial rules was simply the culmination of a social development which had already made itself felt and been underway for some time. In other cases, this development was triggered by judicial decisions.

What then is the role of the courts in implementing the principle of equality between the sexes? Can the courts be simultaneously "mouthpieces for the law" and "social engineers"? A brief overview of the relevant case-law of the ECHR and of the Court of Justice of the European Union ("the CJEU") seems to support this view.

The two European courts have always paid close attention to societal changes. In this context, developments in the Council of Europe and the European Union have provided mutual inspiration.

At European Union level, tangible implementation of the principle of gender equality began with the insertion of a provision in the Treaty of Rome, namely Article 119 of the EEC Treaty, today Article 157 of the TFEU. This provision established the principle that men and women should receive equal pay for equal work or work of equal value.

In the 1950s this was a particularly progressive clause, one which by no means reflected the economic reality. However, France, whose domestic legislation already contained a rule concerning equal pay and which was afraid of finding its industries at a competitive disadvantage, had insisted on the need for an equivalent provision throughout the Common Market[1]. The initiative was thus motivated, at least at the outset, more by financial than by social considerations.

In the 1970s, however, the CJEU took the opportunity to underline the two-fold aim of this provision. Thus, it ruled that gender equality was also a principle of social law, which was to be implemented not only by means of legislation, but also through case-law. In consequence, in the context of three well-known judgments named for Ms Defrenne[2], an air-hostess for the former airline Sabena, it enshrined, among other points, the direct effect of the principle of equal pay.

Several acts of secondary legislation were subsequently enacted on the basis of the current Article 157 of the TFEU. These acts were intended to implement the principle of gender equality in all aspects of professional life.

However, the principle of gender equality is not only an instrument which serves to promote women's rights. The ban on gender-based discrimination has also been the starting point for recognition of the rights of transsexual people in the CJEU's case-law.

This subject – which has also preoccupied the Strasbourg Court on several occasions over the years – illustrates the interaction between the two institutions and the two legal systems.

Of course, this is a very sensitive area. For this reason, in 1986 the ECHR held that it could not discern a consensus among the States Parties to the Convention with regard to recognition of the legal situation of transsexuals. Accordingly, it held in the *Rees* case that the refusal to amend the civil-status records of a transsexual person did not breach Article 8 of the Convention (right to respect for private life)[3]. Equally, the fact that it was impossible for such a person to marry a person of the opposite sex to his or her newly acquired sex did not entail a violation of Article 12 of the Convention (right to marriage), given that there was no obligation to recognise in law the post-operative gender[4].

Ten years later, in 1996, the CJEU took a step forward in this area. It extended the scope of the principle of gender equality to include gender reassignment surgery. In the case in question, *P v. S*, a female employee was dismissed on the sole ground that she had changed sex. The CJEU held that the prohibition of gender-based discrimination was not limited to forms of discrimination flowing from the fact of belonging to one or the other gender. It considered that, on the contrary, this prohibition also applied to forms of discrimination which originated in an individual's post-operative gender[5].

In his conclusions in this case, Advocate General Tesauro had emphasised the need for the law to adjust to social change[6]. He considered that there was a clear trend towards granting legal recognition of the situation of transsexual persons within the Member States of the European Union as it stood at that time.

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[1] Kokott, Juliane, "Le statut des femmes et l'état de droit : la perspective européenne", *Le statut des femmes et l'état de droit*, ed. Alain Grosjean, Bruylant, 1st edition, 2018, p. 40.

[2] CJEU, judgments *Defrenne* I, 25 May 1971 (80/70, EU:C:1971:55), *Defrenne* II, 8 April 1976 (43/75, EU:C:1976:56), and *Defrenne* III, 15 June 1978 (149/77, EU:C:1978:130).

[3] ECHR, judgment of 10 October 1986, *Rees v. the United Kingdom* (CE:ECHR:1986:1017JUD000953281, § 47).

[4] ECHR, judgment of 10 October 1986, *Rees v. the United Kingdom* (CE:ECHR:1986:1017JUD000953281, §§ 49 and 50).

[5] CJEU, judgment of 30 April 1996, *P v. S* (C-13/94, EU:C:1996:170, § 20).

[6] Conclusions of Advocate-General Tesauro in the case of *P v. S* (C-13/94, EU:C:1995:444, § 9).

Within the considerably more diverse group of States Parties to the Convention, a much larger group than the Member States of the European Union, especially at the relevant time, it was naturally more challenging to establish a consensus on such a sensitive and controversial societal issue.

Nonetheless, subsequent developments bear witness to intense and reciprocal communication between the two legal systems.

Thus, in 2002, or only a few years after the 1996 *P v. S* judgment, the Strasbourg Court received another complaint from a transsexual person, namely Ms Goodwin. On this occasion the ECHR held that the refusal to grant legal recognition to the applicant's gender reassignment gave rise to a violation, "in the light of present-day conditions", of her right to respect for her private life[7]. In reaching this conclusion, it took account of the important developments which had occurred in the meantime in the legal, social and scientific fields. In consequence, it is only the newly acquired gender of a transsexual person which must be considered for the purposes of Article 12 of the Convention (right to marry). It is interesting to note that the Strasbourg Court specifically referred, in its analysis of legal developments, to the content of Article 9 of the Charter of Fundamental Rights of the European Union, which had just been adopted: this article no longer refers to the right of a *man* and a *woman* to marry, but simply to the right to marry[8].

This change in the ECHR's case-law was soon echoed in that of the CJEU. Two years after the *Goodwin* judgment, the CJEU was required to rule on the refusal to pay a widower's pension to the transsexual partner of a female employee[9]. Payment of this pension was restricted to married couples. However, transsexual persons could not marry, given that their post-operative gender was not legally recognised. The situation was thus almost identical to that in the *Goodwin* judgment.

Here again, it was interpretation of the principle of equal pay, the provision which marked the beginning of this development, which enabled the CJEU to strengthen the applicant's rights. The transsexual partner of the employee in question could thus rely on the principle of gender equality in arguing her case. In this way, the case-law of the CJEU contributed to making this rule a key element of European social law.

However, the case-law's influence can also be more subtle. A few years previously, in the case of *Grant*, the CJEU had been asked to rule on a case concerning the fact that it was impossible for a homosexual to satisfy a condition for marriage. Thus, the question also arose in that case whether this barrier amounted to gender discrimination. At the relevant time, in spite of certain developments in the Member States' societies and legal systems, the CJEU was obliged to find that European Union law did not cover discrimination on grounds of sexual orientation[10]. It therefore assumed its role as "mouthpiece of the law".

However, while denying Ms Grant the option of relying on the principle of gender equality in her case, the *Grant* judgment called on the European legislature to take action[11]. As a result, Directive 2000/78 was adopted two years later. This directive established a general framework for equal treatment in the field of employment and occupation. It now includes discrimination on grounds of sexual orientation, as well as religion, age or disability. More recently, the European legislature further extended the principle of equal treatment beyond the traditional area of

[7] ECHR, judgment of 11 July 2002, *Goodwin v. the United Kingdom* (CE:ECHR: 2002:0711JUD002895795, § 93).
[8] ECHR, judgment of 11 July 2002, *Goodwin v. the United Kingdom* (CE:ECHR: 2002:0711JUD002895795, § 100).
[9] CJEU, judgment of 7 January 2004, *K. B.* (C-117/01, EU:C:2004:7, § 34).
[10] CJEU, judgment of 17 February 1998, *Grant* (C-249/96, EU:C:1998:63, § 47).
[11] CJEU, judgment of 17 February 1998, *Grant* (C-249/96, EU:C:1998:63, §§ 36 and 48).

employment. Directive 2004/113, the so-called “anti-discrimination directive”, now also guarantees non-discriminatory access to goods and services.

This development confirms that courts can at one and the same time act as mouthpieces of the law and as social engineers.

Seventy years after the Convention was drafted, it must be recognised that much has been achieved. At the time of Ms Defrenne’s case, the CJEU stated, for the first time, that the elimination of discrimination based on sex forms part of fundamental human rights[12]. In a recent judgment concerning quotas for female election candidates, the ECHR not only pointed out that the promotion of gender equality is now a major goal in society; it also considered that a lack of gender balance in politics was a threat to the very legitimacy of democracy[13].

The principle of gender equality is thus not only an instrument intended to promote the rights of individuals. Today gender equality has in reality a societal dimension. Furthermore, at European Union level this is clearly illustrated by the references to this principle which are found in provisions with cross-sectoral scope, such as Article 3 of the TEU or Articles 8 and 19 of the TFEU.

[12] CJEU, judgment of 15 June 1978, *Defrenne* (149/77, EU:C:1978:130, §§ 26 and 27).
[13] ECHR, decision of 12 November 2019, *Zevnik and Others v. Slovenia* (CE:ECHR:2019:1112DEC005489318, § 34).