

Gender Perspectives in Law 3

Ivana Krstić

Marco Evola

Maria Isabel Ribes Moreno *Editors*

# Legal Issues of International Law from a Gender Perspective



Springer

# **Gender Perspectives in Law**

Volume 3

## **Series Editors**

Dragica Vujadinović, Faculty of Law, University of Belgrade, Belgrade, Serbia

Ivana Krstić, Faculty of Law, University of Belgrade, Belgrade, Serbia

The series 'Gender Perspectives in Law' discusses all-encompassing gender-competent legal questions. Having a gender-competent approach is required when considering the highest values and normative standards of modern international, European, and national law. Raising awareness about gender equality issues means investing in the creation, interpretation, and implementation of legislation that is more fair, just, and equitable and will also contribute to a comprehensive understanding of social reality, as well as to gender-competent political, legal and economic decision-making and public policies.

The series accepts monographs focusing on a specific topic, as well as edited collections of articles covering a specific theme or collections of articles.

Ivana Krstić • Marco Evola • Maria Isabel Ribes  
Moreno  
Editors

# Legal Issues of International Law from a Gender Perspective



*Editors*

Ivana Krstić  
University of Belgrade  
Belgrade, Serbia

Marco Evola  
Department of Law  
LUMSA  
Palermo, Italy

Maria Isabel Ribes Moreno  
University of Cádiz  
Cadiz, Spain

This project has been funded with support from the European Commission. This publication [communication] reflects the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

ISSN 2731-8346

ISSN 2731-8354 (electronic)

Gender Perspectives in Law

ISBN 978-3-031-13458-6

ISBN 978-3-031-13459-3 (eBook)

<https://doi.org/10.1007/978-3-031-13459-3>

© The Editor(s) (if applicable) and The Author(s), under exclusive license to Springer Nature Switzerland AG 2023

This work is subject to copyright. All rights are solely and exclusively licensed by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors, and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, expressed or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Switzerland AG  
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

# Preface

The book series *Gender Perspectives in Law* is a systemic attempt to provide all-encompassing gender-competent legal knowledge. The term gender-competent legal knowledge is used to accentuate the reconsideration of different fields of legal knowledge from the point of gender equality approach and with offering relevant and convincing arguments in that regard. This term is sometimes replaced with the term “gender-sensitive”, which also refers to awareness about the importance of gender equality approach and to its implementing in theoretical and scientific knowledge production. Having a gender-competent approach in legal education is required when considering the highest values and normative standards of modern international, European, and national law. Raising awareness about gender equality issues among researchers and academic scholars in the field of law and other multidisciplinary fields relevant for legal theory and practice, educating in a gender-sensitive manner law students (future lawyers, judges, prosecutors, public officials, members of parliament, and governmental bodies), as well as students of humanities-social sciences, means investing in the creation, interpretation, and implementation of legislation that is more fair, just, and equitable. Prosecutors and judges in particular, but also other legal professionals in all fields of legal practice, public administration, and policy decision-making need to be trained and sensitized in order to encourage a gender-sensitive approach. This will contribute to a more rich and comprehensive understanding of social reality, as well as to gender-competent political, legal, and economic decision-making and public policies. In other words, it means investing into the future based on more gender justice and more social justice and human rights protection in general. In the end, it will help fulfil the essence of contemporary law—equal respect and protection for all individuals, which leads to their equal opportunities and diminishes the possibility of gender discrimination.

This book series, *Gender Perspectives in Law*, attempts to cover all relevant subjects of legal knowledge from a gender equality perspective. The plural designation is entitled because there is a plurality of feminist understanding of gender equality issues generally speaking and insofar also within the law. The call for papers was open for professionals in legal, political, sociological, and historical

fields of interest with an attempt to cover, as much as possible, specific relevant topics, in order to provide an overview of the gender competent deconstructing and reconsidering the way they are articulated in the dominant thought, i.e. the mainstream within the law. The authors in the series' volumes try to establish a gender equality approach to different fields of law while taking into consideration specific issues of their interest and attempting to consider chosen different aspects of legal knowledge and practice in a paradigmatic gender-competent manner. They attempt to critically reconsider the dominant moulds of legal knowledge and present innovative gender-sensitive and gender-competent insights relating to different issues within all fields of law, in order to introduce new research topics relevant for gender equality in law, as well as to stimulate the development of a legal and institutional framework for achieving gender equality in real life. The degree to which mainstream knowledge has been reconsidered from a gender equality perspective differs between contributors. Moreover, a variety of relevant legal subjects and other closely related subject matters are covered in varying degrees by the selected texts.

This book series *Gender Perspectives in Law* encouraged scholars and experts from different fields of law and humanities-social sciences to reconstruct their legal and multidisciplinary knowledge from the standpoint of gender equality. This book series should inspire further attempts of this kind, as a reconsideration of legal and multidisciplinary knowledge from a gender perspective has become an axiomatic task. If contemporary law is defined primarily from the human rights point of view, then it is necessary to take a gender equality perspective; the human rights foundation of law cannot be regarded as the civilizational standard without also incorporating women's rights and gender equality approach in general, articulating them in the mainstream legal and political thought, and eliminating gender-based biases and discrimination within the dominant legal systems.

This third book in the series *Gender Perspectives in Law*, which is titled *Legal Issues of International Law from a Gender Perspective*, offers a new perspective on international law, that was, for a long time, male-dominant and gender-neutral. However, this gender blindness led to many injustices, non-recognition of certain rights, and to impunity for serious crimes. The book covers the development of gender perspectives in different branches of international law. Thus, some universal standards are covered and explained. However, particular attention is reserved for the European human rights system. Therefore, the book provides an explanation of external policies of the EU in relation to sex, sexual orientation, and gender identity. Also, special focus is given to the relevant jurisprudence of the European Court of Human Rights in relation to gender and sexual orientation, female reproduction, and sexuality. The authors explain not only the importance of an adequate legal framework for combating gender inequality but also the detrimental effect of deeply rooted gender stereotypes and prejudices. Afterward, the development of particular branches is presented, such as a gender-sensitive approach to the prevention of war crimes, gender perspectives in refugee law, as well as the development of gender-sensitive environmental law. Additionally, the problematic situation of discrimination in the workplace is addressed from different approaches. Many discussions, especially among EU member states, are reserved for the issue of women's

participation in the company boards, while another interesting topic is growing awareness of gender equality in an international trade agreement. Finally, the book also offers a historical perspective of the development of international law in the interwar period, with a particular focus on the situation in Yugoslavia. This book aims to critically reconsider the dominant moulds of legal knowledge and present innovative gender-sensitive and gender-competent insights relating to different issues within international law, in order to introduce new research topics relevant to gender equality, as well as to stimulate the development of an international legal and institutional framework for achieving greater gender equality in practice. The collection of essays offered in this book will be of interest to all those working in the field of international law, as well as to students and academics who can broaden and deepen their research on different legal issues of international law from gender perspectives.

This book includes papers written by Marco Evola, Ivana Jelić, Ludovica Poli, Berfu Yalçın and Alparslan Özalutğ, Rigmor Argren, Ivana Krstić, Bojana Čučković, Linde Verhoeven and Alexandra Timmer, Mareike Froehlich, and Sanja Djajić.

Marco Evola deals with the scope and content of the EU external action. He evaluates how non-discrimination provisions based on sex, sexual orientation, and gender identity are framed within EU external relations and concludes that the approach is neither holistic, nor homogeneous. EU external action covers issues such as political participation, family law, marriage, birth registry, registration of same-sex partnerships, same-sex marriage, property rights, and inheritance. The author argues that gender equality is enshrined in all fields of its external relations, while non-discrimination on the ground of sexual orientation and gender identity is limited only to EU accession and the EU Neighbourhood Policy. Evola thus finds that non-discrimination on mentioned grounds is not important per se, but only in terms of its contribution to the EU's broader set of goals that it has set itself. The EU's external gender equality action is exposed to two different approaches: one based on economic reasons, which have been the driving force since the establishment of the organization, and the other based on human rights protection in the EU, which has just recently come into focus. It is crucial to strike the balance between these two approaches towards non-discrimination. The author argues that the EU institutions' practice shows that the economic approach has weakened the rationale of advancing human rights and combating prejudices and root causes of discrimination against women and LGBTIQ persons. Evola identifies several factors that decrease the capacity of the EU's external action to enhance human rights protection and concludes that these factors influence EU strategies and can seriously affect the attainment of the objective of promoting gender equality and the LGBTIQ community's rights.

Ivana Jelić evaluates the jurisprudence of the European Court of Human Rights (ECtHR) in relation to gender equality. The author's starting position is that gender equality is one of the main principles enshrined in the European Convention on Human Rights (ECHR), and its promotion demonstrates the evolving interpretation of the Convention as a living instrument. Non-discrimination in the Court's view

was broadened by recognizing indirect discrimination and positive measures as a means of achieving substantial equality. According to the author, this is crucial as direct discrimination cases are rare and women are exposed to inequalities usually as a result of gender-neutral norms and practices. Jelić classifies jurisprudence of the ECtHR in relation to gender equality into three segments: (1) case-law in relation to Article 14 of the ECHR that covers direct gender discrimination; (2) domestic violence and trafficking that disproportionately affect women in practice and require their special protection; and (3) specific issues that affect women, such as violence against women and reproductive rights. An overview of the most relevant cases shows that, unlike gender religious identity cases, the Court provides extensive protection in cases that concern domestic violence, when the States' margin of appreciation is limited. Jelić also notes that the ECtHR very much relies on international jurisprudence on gender equality protection, and that cases of other international bodies influence gender sensitivity in the interpretation of norms by the Court itself. However, the author claims that feminist justice is still underdeveloped, when compared to what is needed to truly protect women, and argues that the Court avoids discovering the gendered aspects of violations, especially in cases of indirect discrimination against women. Nevertheless, the author concludes that the most recent gender-sensitive judgments are quite significant from the perspective of feminist justice and can help in the creation of a gender equality culture.

Ludovica Poli considers the impact of gender stereotypes on women's rights. Her starting point is that the female role in reproduction pushes and incites gender stereotypes about motherhood and sexuality. Childbearing and motherhood have a strong cultural dimension, given that in many societies, they represent a requirement and a clearly defined social function ascribed to women. She explores the jurisprudence of the European Court of Human Rights (ECtHR) and UN treaty bodies, which is divided into three segments: (1) reproductive capacity of girls and women; (2) access to reproductive health services; and (3) preconceptions about female sexuality. As for the last segment, the author devotes a section to the analysis of the *Carvalho Pinto v. Portugal* case, where the ECtHR recognized the violation of the ECHR, considering that the national court's decision to reduce the compensation amount was based on the applicant's age and sex, confirming prejudices held by the Portuguese judiciary with regard to the applicant's sexuality. Poli highlights the detrimental effect that gender stereotypes about female sexuality and reproduction have on women's fundamental rights, as they can lead to child marriage, female genital mutilations, ostracism, and other harmful practices. She believes that their growing recognition increases attention to obstetric violence, where she cites the CEDAW Committee's case *S.F.M. v. Spain*. She also refers to the CEDAW Committee's findings that denying access to contraception is considered to be gender discrimination. However, addressing the issue of abortion requires a deeper understanding of gender discrimination, as well as women's right to sex life separate from reproduction. Poli claims that violent acts in reproductive healthcare are persistent due to the lack of knowledge on the sexual and reproductive rights of women.

Berfu Yalçın and Alparslan Özaltuğ contributed to this volume with a paper dealing with discrimination in the workplace for LGBTQ persons. Yalçın and

Oyaltug claim that sexual orientation discrimination can occur in the workplace in many forms. The authors focus on European standards enshrined in the EU law and the relevant jurisprudence of the European Court of Human Rights (ECtHR). They contend that while the right to work is not guaranteed by the European Convention on Human Rights (ECHR), the ECtHR has assessed certain employment relationships within Article 8 (the privacy rights). On the other side, they present some of the most important provisions of the Employment Framework Directive (2000/78/EC), which provide protection from discrimination in the EU, and which is further supported by a broad interpretation of the Court of Justice of the EU (CJEU). Although the authors acknowledge the Directive's importance, they also highlight some challenges, such as discrimination during job interviews, discrimination in the workplace, whether sincere statements from the victim be sufficient for the prima facie case, the degree of victim status, and the degree of *ratione personae*. They argue that the victim status should be interpreted broadly in order to provide proper protection. Their position is also that both courts accept that the impartiality of the enterprise might be a justification for some rules that are discriminatory. The obligation to conform to heteronormative social rules, on the other hand, is not considered a legitimate cause. The same judgement holds true for an employer's homophobic speech, which directly hinders LGBTQ individuals' access to work and is not protected under Article 10 of the ECHR, which guarantees the freedom of expression. Moreover, it can bring about the positive obligation of States in order to protect the LGBTQ population. Finally, the authors devote a segment to the analyses of the Directive's exception for churches, which has been accepted by many European States and, they argue, allows the homophobic dynamics to survive. Their conclusion is that national courts, as well as influences and trends in human rights law, can minimize the effect of this exception.

Rigmor Argren offers a reconsideration of the Law on Armed Conflict (LOAC) from the feminist viewpoint. The analysis applies the feminist legal theory to the LOAC as a preventive legal regime. The author argues that a refined understanding of gender perspectives could contribute to enhancing resilience and strengthening the overall respect for the LOAC, thus increasing the protection of all persons in an armed conflict. The intention of this paper is to explore what insights a feminist reading of the obligation to prevent war crimes might bring to the table. The author seeks to address the gap in research by applying a gender lens to the (civil) legal obligation that States have to prevent war crimes in the first place. For that purpose, Argren considers critically the gendered nature of public international law. She assumes that from both a historical and contemporary perspective, the fundamental observation of international law as decidedly masculine still holds true, which can be evidenced in both organizational and normative terms. Public law has its roots in public/private dichotomy, insofar as the whole area of public international law has been described as gendered: the public being male, the private being female. It follows that the State has been seen as intrinsically male. She accentuates the social/political reality that war brings monumental suffering, directly and indirectly, which is not limited to civilian women only. But it is important to remember that when the veil of victimhood is lifted from women in armed conflict, wars can also serve as

springboards, especially for women to gain access to the public domain, for example, as indispensable workers. However, as soon as the war is over, the need for women's return to the private realm of household duties resurfaces. The author also points to the differences in how males and females experience living through conflict. However, the differences in experiences of armed conflict do not stop at gender: its impact will also vary depending on race, class, socioeconomic circumstances, urban or rural location, family situation, age, employment, sexuality, and health. The author remarks that the LOAC should be applied without discrimination on any ground, as is customary in international and non-international armed conflicts.

Ivana Krstić focuses on the international refugee law and the recognition of women who need international protection. Although a large number of women have been forced into displacement and face many challenges, the international refugee law, which is based on the 1951 Convention on the Status of Refugees and its 1967 Protocol, has been gender-neutral for a long time. The five grounds explicitly recognized in the 1951 Convention as prosecution grounds do not include "sex/gender". However, the author argues that refugee women are protected by the 1951 Convention either as a "social group", or in a more individualized and at the same time more complex manner when gender-related claims intersect with other prohibited grounds, such as race, nationality, ethnicity, or religion. Krstić also claims that gender-based persecution has very specific forms, and it needs to be recognized in national legislation and understood by public authorities in order to provide adequate protection to women refugees. In addition, the author emphasizes that this protection cannot be granted without the introduction of a gender-sensitive procedure, development of gender-sensitive reception procedures and support services, and the issuing of gender guidelines. However, the author underlines that this does not mean that women are subjected to different asylum procedures than men, but that their specific position is recognized and that some phases in the procedure are designed to remove obstacles to their access to asylum and an efficient and just procedure. The author concludes that it is fair to say that despite its significant development, the refugee law is "not yet there" in terms of providing the full recognition and protection of women. Krstić points to the major challenges to the refugee regime for women, such as the existence of stereotypical views, lack of understanding of different forms of gender-based violence and their consequences to women, the need for a better assessment of asylum claims through the lenses of female refugees, and the acceptance that actors of persecution can also be private actors.

Bojana Čučković analyzes international law through gender lenses claiming first, that international regulations are gradually incorporating the gender equality perspective, and second, that international law has become gender-sensitive but not yet gender-responsive and gender responsible. The author also finds that the international environmental law (IEL) is more gender-sensitive than other branches of public international law. The initial silence on the matter has been steadily overcome with international instruments adopted from the 1990s onward. These instruments first acknowledged the influence that environmental degradation has had on women

and the role they play in addressing it, and later included gender equality as an integral part of the treaty commitments. The author challenges the practical implications of gender-sensitive provisions contained in international environmental instruments and the potential for achieving concrete results from the point of “their capability to enhance the prospects of a more successful implementation of gender-responsive international environmental commitments”. The author also remarks that many international environmental instruments have either acknowledged the vital role of women in environmental management or required States to consider gender-responsiveness of specific measures stipulated by international environmental treaties. The author highlights the shift from “man” to women, then from women to gender, as well as from gender-sensitive to gender-responsive approach in the IEL. She also mentions the shift from the dominant focus on a more gender-balanced participation in decision-making, to a focus on more essential issues of gender equality, as well as the shift from gender being considered an ad hoc issue to one that is permanently discussed. The background idea is that there is an internal link between gender (in)equality and the environmental issue. In addition, Čučković notes that environmental degradation impacts women in general, especially certain categories of women, in a much more detrimental way than men. At the same time, women in general had far less access and control over resources, and participated lesser in decision-making, than men had. The author concludes that gender issues need to be addressed by taking into account other relevant criteria for differentiation, as well as that it is necessary to shift from gender-sensitive towards a gender-responsive IEL.

Linde Verhoeven and Alexandra Timmer consider women’s right to participate on company boards to be a human rights law issue. They present their approach as new, while offering a critical reflection on the question as to the extent in which international human rights law mandates the use of positive measures to improve the participation of women on company boards, as well as what obligations this entails on the state and on companies themselves. The authors argue that there is no human right as such to become a company board member, and that human rights bodies pay little attention to the subject of women’s underrepresentation on company boards. They state that this issue is not taken seriously, unlike, for example, violence against women. This is due to women’s underrepresentation in company boards not directly affecting a large group of women, and even more, the fact that women who gain directly from positive measures to improve gender balance on company boards are already privileged. Verhoeven and Timmer argue in favour of gender diversity in boardrooms due to financial benefits from diversity in decision-making, societal economic prosperity, and improvement of (sustainable) development outcomes. Additionally, inclusive and diverse leadership is needed to solve the complex challenges that decision-makers face today. Corporate social responsibility policy (CSR) and the policy on business and human rights (BHR) overlap to some extent as both strive towards socially beneficial action by businesses beyond profit maximization and increasing wealth. The authors highlight the CEDAW’s focus on formal equality (equality of opportunity or close to it), substantive equality (equality of results or close to it), and transformative equality (questioning gendered power

relations in practice), and state that these three obligations are intertwined and each is essential in itself to accomplish full gender equality in regard to equal participation in boards, enjoying the same income levels, equality in decision-making and political influence. Substantive equality includes a three-step gender framework—gender-responsive assessment, gender transformative measures, and gender transformative remedies. The authors point to the obligation of the States to explain to business enterprises what is expected from them in terms of human rights compliance by giving concrete and specific guidance, such as indicating expected outcomes and sharing best practices.

Mareike Fröhlich suggests that international trade agreements used to be gender-blind, but have lately started to include gender or gender-related provisions. This process has been sparked by the inclusion of the themes of sustainability and environmental protection, which require a multi-faceted approach. The author argues that trade facilitation has both a positive and a negative effect on women's economic activity and, therefore, on gender equality. Fröhlich covers four distinct aspects: (1) types of agreements and main actors; (2) types of regulations; (3) enforcement of regulations; and (4) impact of gender provisions in trade agreements. The author explains that gender provisions are found in different parts of the agreements, in the preamble with the general references to gender equality, and as specific gender-related provisions in particular gender chapters. She also claims that it is imperative to take the gender perspective of trade liberalization into account, as different trade barriers can make a notable difference for gender equality and women's economic empowerment. The removal of these barriers, especially in female-dominated trade sectors, could lead to higher wages and better working conditions. Furthermore, improved access to education and finances leads to the better inclusion of women in male-dominated sectors and as entrepreneurs. The author notes that this will bring economic prosperity, as well as respect of gender equality. However, the author argues that this development requires a better understanding of the impact of trade barriers, which may be achieved by gender-related assessments, as the global standard in the ex-ante and ex-post evaluation of all trade negotiations. The author's primary focus is the 2021 gender-only Global Trade and Gender Arrangement between Canada, Chile, and New Zealand, but she says that there are various other agreements that include gender provisions or gender-related provisions. Therefore, she concludes that some major progress has been made, but that there are still many countries and regions that continue to completely ignore the gender perspective.

Sanja Djajić presents the personal history of Anka Godevac Subotić, the first and only female international lawyer of interwar Yugoslavia. She was not only an international lawyer and scholar but also an activist, feminist, journalist, and novelist, active both in Yugoslavia and abroad. Her inclusion in the book is warranted because of her pioneering work in combining feminism and international law in the Balkans, as well as because of the need for overcoming the invisibility of distinguished women in the history of legal theory and practice. The author first illustrates the position of women in Serbia and Yugoslavia through Anka Godevac Subotić's biography. Anka Godevac is the first woman to receive a doctoral degree at the Belgrade Faculty of Law in 1932, covering the field of international public law. This

was the first doctorate in public international law ever awarded to a woman. Anka's passion and interest for women's rights and feminist movements are explained through the presentation of her academic work, but also through an explanation of that time period and the disadvantaged status of women in law in the interwar period. The second part of the paper is dedicated to gender exclusion and women's feminist solidarity in international law. Here, the author explains different feminist movements that gravitated towards international law and succeeded in making women's status an international concern. Their role in the League of Nations was highlighted in particular. In this part, the author explains women's movements in the Balkans through the activities of Anka Godevac, including her engagement in international feminist movements. Academic, intellectual, and political interests of Anka Godevac Subotić are presented, especially her interest in the issues of peaceful settlement of international disputes, the responsibility of states, nationality, and cooperation in the Balkans. She was the only female member of the Yugoslav Association of International Law during that time and the only woman who published texts on international law. Through this personal history, the contribution effectively illustrates the trajectory of Yugoslavia's history and the development of interwar international law.

The papers obviously deal with very different topics related to the field of international law. Interesting and indicative enough is also the fact that there are authors from many countries. The converging aim and axis is gender equality—its clarification, articulation, promotion within public law theory and practice. The global relevance of the gender equality perspective in legal education, legislation, and legal professions has been expressed and confirmed in the content and authorship of this book.

The editors of the book series *Gender Perspectives in Law* are grateful to the authors of this volume for offering relevant insights related to different fields of international law. They owe them appreciation for demonstrating a strong motivation and devotion to outlining, clarifying, and affirming the gender equality perspective in different fields of international law and through various issues of interest.

The series editors owe a great debt of gratitude and appreciation to the editors of this third volume *Gender Perspective in International Law*, for their enthusiasm and great contributions. They are also grateful to the publisher, who believed in and supported this pioneering attempt to collect gender-competent and gender-sensitive legal and multidisciplinary analyses. Finally, they believe that the synergy and successful cooperation between authors, reviewers, editors, and the publisher contributed to the quality of all papers in this book and the book series as a whole.

Belgrade, Serbia  
June 2022

Dragica Vujadinović  
Ivana Krstić

# Contents

|  |            |
|--|------------|
| <b>The Fight Against Discrimination on the Grounds of Sex, Sexual Orientation and Gender Identity in the External Relations of the European Union . . . . .</b>                | <b>1</b>   |
| Marco Evola  |            |
| <b>Feminist Justice and the European Court of Human Rights . . . . .</b>   | <b>35</b>  |
| Ivana Jelić  |            |
| <b>Female Reproduction and Sexuality: The Impact of Gender Stereotypes on Women’s Rights in International Jurisprudence . . . . .</b>  | <b>55</b>  |
| Ludovica Poli  |            |
| <b>Workplace Discrimination Towards LGBTQ Employees and Employee Candidates in the Job Market: A European Approach to the Workplace Discrimination Towards LGBTQ . . . . .</b> | <b>69</b>  |
| Alparslan Özalтуğ and Berfu Yalçın   |            |
| <b>A Gender-Sensitive Reading of the Obligation to Prevent War Crimes Under the Law of Armed Conflict . . . . .</b>  | <b>91</b>  |
| Rigmor Argren  |            |
| <b>The Recognition of Refugee Women in International Law . . . . .</b>   | <b>113</b> |
| Ivana Krstić   |            |
| <b>Screening International Environmental Law Through Gender Lenses: Already Gender-Sensitive, Still Not Gender-Responsive? . . . . .</b>                                       | <b>133</b> |
| Bojana Čučković  |            |
| <b>Putting Women’s Rights to Work: The Participation of Women on Company Boards As a Human Rights Law Issue . . . . .</b>  | <b>153</b> |
| Linde Verhoeven and Alexandra Timmer   |            |

**Promoting Gender Equality in International Trade Agreements:  
Pioneering or Pipe Dream? . . . . . 179**  
Mareike Fröhlich

**Standing Alone but Standing Tall: A Female Perspective of  
International Law from the Interwar Yugoslavia . . . . . 199**  
Sanja Djajić

## About the Editors

**Ivana Krstić** is a Full Professor of International Human Rights Law and International Public Law at the University of Belgrade, Faculty of Law. She is a Director of the Human Rights Centre and the Institute for Social and Legal Sciences at the University of Belgrade, Faculty of Law. She obtained her LLM (2003) at the School of Law, University of Pittsburgh (USA), along with an LLM (2004) and Ph.D. (2008) at the University of Belgrade, Faculty of Law. In the academic year 2006/2007, she was a Chevening Scholar working on her Ph.D. research at Exeter College, Oxford University. She teaches several courses, including the European Immigration Law and Policy, Non-Discrimination, Law, International Jurisprudence, International Humanitarian law, Gender Equality, and Minority Rights. She is also a member of several governmental bodies, including the Republic Commission for Transgender Persons. As a leading Serbian expert in human rights, she is engaged in many projects run by various international organizations and agencies, such as OHCHR, UNDP, UNICEF, UNWOMEN, and OSCE. She closely cooperates with Serbian Commissioner on Protection of Equality and with the Judicial Academy, coordinating and directing many trainings for judiciary, but also for other public officials. Since 2015, she is engaged as a Serbian expert for both non-discrimination and gender equality stream at the European Equality Law Network (EELN). She has published monographs and textbooks, around 20 handbooks, and more than 60 articles in international human rights law, international refugee law, and international public law.

**Marco Evola** is an Associate Professor of European Union Law at the LUMSA Department of Law Palermo. He obtained his Ph.D. (2008) at the University of Palermo. He was a post-doctoral researcher at the University of Palermo (2009–2013). He has been teaching European Union Law, European Union Private International Law, Human Rights, and European Migration Law. He was a member of different research groups within the framework of projects of research of national interest. He is a professor in Masters and post-lauream courses. He is a member of the Editorial Board of the review *Diritti umani e diritto internazionale* and a Member

of the Scientific Committee of the review *La Magistratura*. He is a member of the College of Professors of the Ph.D course “Mediterranean Studies. History, Law and Economics”. His scientific research focuses on human rights, migration, non-discrimination, accession to and withdrawal from the EU, Rule of Law. He has published a monograph on the legal status of third-country migrant workers in the EU legal system.

**Maria Isabel Ribes Moreno** is an Associated Professor of Labour Law and Social Security Law in the University of Cádiz. She holds a Bachelor’s Degree on Law from the University of Sevilla, Master in Company’s Legal Advice from I.E. (Madrid), and a Ph.D. in Law from the University of Sevilla (with honours). Her research activities have focused mainly on the analysis of Maritime Labour Law and all aspects of social and working conditions of seafarers, posted-workers, workers in port services, fishermen, and general workers, both in their labour and social security dimensions, and about European Labour Law and non-discrimination law regarding gender and disability. She is the author of a monograph and a co-author of many articles published by scientific reviews and chapters included in collective monographs dealing with these issues. Since 2000, she has been a researcher in various Research and Development Projects. She has carried out research stays at some of the most prestigious universities, such as the Institute of European and Comparative Law in the University of Oxford, Institute of Labour Law at KU Leuven, London School of Economics and Political Science, and University of Sheffield. She has experience of teaching in different areas of Labour, Employment, and Social Security Law, giving lectures for master, bachelor degrees and Jean Monnet Module (574698-EPP-1-2016-1-ES-EPPJMO-MODULE) in different degrees and Universities. She is a Mediator in the Extrajudicial Autonomous Service of Resolution of Labour Conflicts of Andalusia, a Member of the International Network Maritime Work Watch (MWW), the CIELO community, a member of the Spanish Association of Labour and Social Security Law and the INDESS (University Institute of Research for Social Sustainable Development) at the University of Cádiz.

# The Fight Against Discrimination on the Grounds of Sex, Sexual Orientation and Gender Identity in the External Relations of the European Union



Marco Evola

## Contents

|   |   |    |
|---|---|----|
| 1 | Introduction .....  | 2  |
| 2 | Non-discrimination on Grounds of Sex in the EU's Internal Action .....  | 5  |
| 3 | Non-discrimination on the Grounds of Sexual Orientation and Gender Identity in the EU's Internal Action .....   | 7  |
| 4 | The Scope of Protection and Promotion of the Rights of Women and LGBTIQ Persons in the EU's External Relations .....  | 10 |
| 5 | Intersectionality As a Common Feature of the EU's External Action in the Fight Against Discrimination on the Basis of Sex, Sexual Orientation and Gender Equality ..... | 15 |
| 6 | The Content of Gender Equality in External Relations of the European Union .....  | 17 |
| 7 | The Content of Non-discrimination on Grounds of Sexual Orientation and Gender Identity in the EU External Action .....  | 22 |
| 8 | Protection of the Rights of Women and LGBTIQ Persons in the EU's External Action and the International Human Rights Protection System .....                             | 23 |
| 9 | Final Remarks .....   | 27 |
|   | References .....  | 29 |

**Abstract** The paper assesses how non-discrimination on the grounds of sex, sexual orientation and gender identity is conceived within European Union (EU) external relations and the legal issues it encompasses. An analysis of the multifarious instruments the EU avails itself in shaping its external action makes it clear that the EU approach towards equality is neither holistic nor homogeneous.

The EU promotes gender equality in all fields of its external relations, but action to outlaw discrimination on grounds of sexual orientation and gender identity is limited to accession to the EU and the European Neighbourhood Policy. EU external action to advance equality of women and LGBTIQ persons is suspended in a limbo between the protection of human rights and the economic rationale, which has rooted internal action in non-discrimination. The paper argues that the tension between the two approaches and the inconsistencies in promoting human rights in its external

---

M. Evola (✉)  
Department of Law, LUMSA, Palermo, Italy  
e-mail: [m.evola@lumsa.it](mailto:m.evola@lumsa.it)

relations have prevented EU external action from eradicating the prejudices and stereotypes regarding discrimination on the grounds of sex, sexual orientation, and gender identity.

## 1 Introduction

EU engagement in the protection and promotion of the rights of women and lesbian, gay, bisexual, trans, non-binary, intersex and queer (hereinafter LGBTIQ) persons in its relationships with the outer world has been growing more and more over the last years. Notwithstanding this rising importance, scholars have not paid great attention to the activities the EU has been carrying out in this field.<sup>1</sup> The paper aims at contributing to filling up this lacuna in legal literature through an analysis of the scope and content of the EU external action.

Equality is one of the core values of the process of European integration. Pursuant to Article 2 TEU the Union is founded on a series of values, such as “respect for human dignity (. . .) equality (. . .) human rights” which are common “to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Despite the express reference to the relationship between women and men, the value of equality is wider in scope so that it also encompasses the fight against discrimination on grounds of sexual orientation and gender identity. Both of the said outcomes flow from the many provisions of the founding Treaties committing the EU to outlawing and eradicating discrimination on grounds of sex and sexual orientation. The said understanding of the value of equality is also based on the Charter of Fundamental Rights, which prohibits any discrimination on grounds of sex and sexual orientation, highlighting that LGBTIQ persons’ rights are to be protected.

Several rules of the Treaties feature the role of equality within the EU legal system. Article 8 TFEU refers the aim of eliminating inequalities to all activities of the Union. In the same vein, Article 10 TFEU establishes that in defining and implementing its policies and activities the Union shall aim to combat discrimination on a bundle of grounds including sex and sexual orientation. To counteract discrimination on the said grounds, Article 19, para. 1 TFEU confers upon the Union the competence to take appropriate action.

In regulating external action, Article 3, para. 5 TEU establishes that the Union shall uphold and promote its values, and contribute to protection of human rights in its relations with the wider world. The reference to the values of European integration and the guarantee of human rights has to be construed as a commitment to foster the rights of women and LGBTIQ people in external action.

The Lisbon Treaty introduced specific provisions on EU external relations, making equality their centre of gravity. Article 21, para. 1 TEU envisages that the

---

<sup>1</sup>Thies (2020), p. 431.

universality and indivisibility of human rights and the principle of equality are comprised within the guiding principles of EU external action, so that the Union is called on to advance them in third countries. Moreover, Article 21, para. 2 TEU implicitly bolsters the role of equality, setting it as one of the objectives of the EU's common policies and action, for it enlists the following aims: safeguarding the values of the Union, consolidating and supporting human rights, fostering sustainable economic, social and environmental development, and promoting good global governance. The system is complemented by the provision contained in the last paragraph of Article 21, establishing that respect for the principles and attainment of the objectives paragraphs 1 and 2 refer to also cover the external aspect of the internal policies of the Union.<sup>2</sup>

Furthermore, equality is part and parcel of the legal framework of different external policies of the EU. The rules on development cooperation<sup>3</sup> and humanitarian aid,<sup>4</sup> as well as the laws on the common commercial policy (hereinafter CCP)<sup>5</sup> implicitly commit the EU to its attainment by anchoring all of them to the principles and objectives of the EU.

A similar drafting marks Article 24, para. 2 TEU which provides that the Union shall conduct, define and implement a common foreign and security policy “within the framework of the principles and objectives” of the EU's external action. The rule clarifies that equality also underpins the Common Foreign and Security Policy (CFSP).

The reforms of the Lisbon Treaty spurred the EU institutions to pay greater and greater attention to discrimination on grounds of sex, gender identity and sexual orientation in the shaping of external relations.<sup>6</sup> In fact, non-discrimination became part of external action.<sup>7</sup> The Commission stressed that “the promotion of equality between women and men is a task for the Union, in all its activities” in the recent Strategy on equality 2020–2025.<sup>8</sup> The new impetus marking the Strategy lies behind the Agenda for gender equality and women's empowerment in the EU's external action (GAP III). In addition, the Commission elaborated the Agenda considering gender equality as a crucial objective of the Union's external relations, calling it “a core value of the EU and a universally recognised human right, as well as an imperative to well-being, economic growth, prosperity, good governance, peace and security.”<sup>9</sup>

---

<sup>2</sup>Pech and Grogan (2020), p. 332; Thies (2020), p. 434; Cremona (2014), p. 17 *et seq.*; Cremona (2011), p. 280.

<sup>3</sup>Article 208 para. 1. subpara.1 TFEU.

<sup>4</sup>Article 214 para. 2 TFEU.

<sup>5</sup>Article 207 para. 1 TFEU.

<sup>6</sup>Council of the European Union (2008), Council of the European Union (2013) and European Commission and High Representative of the Union for Foreign Affairs and Security Policy (2015a).

<sup>7</sup>European Commission (2010), p. 27; European Commission (2015b), p. 17.

<sup>8</sup>European Commission (2020a), p. 1.

<sup>9</sup>European Commission (2020b), p. 1.

Furthermore, the LGBTIQ Equality Strategy 2020-2025, which is the first-ever strategy in this field of the EU's anti-discrimination policies, emphasized the need for moving towards "a Union of Equality."<sup>10</sup> The Strategy also impacts upon external action since it stressed the aim of making the EU lead the call for LGBTIQ equality around the world. In laying down this target, the Commission stressed that "LGBTIQ rights are human rights and LGBTIQ people should be able to fully enjoy their rights everywhere, at all times."<sup>11</sup>

The EU's external action covers a wide array of international relationships. Practice shows that the EU avails itself of several different instruments in discharging its commitment to gender equality, combining hard law with soft law.<sup>12</sup> Some of these instruments are bilateral or multilateral in nature, such as association agreements or trade agreements, while others are unilateral in nature, such as the General System of Preferences (GSP), financial assistance, and conditionality within the framework of admission to the EU or the European Neighbourhood Policy (ENP). Furthermore, the EU endorses many international treaties on human rights, such as the CEDAW and ILO Conventions, and cooperates with international organizations in outlawing discrimination on grounds of sex, sexual orientation and gender identity.

The intertwining of external relations with the commitment to eradicate discrimination against women and LGBTIQ persons and the practice which has been developed, pursuant to those provisions, raise interesting legal problems. The first of these legal issues refers to the scope of the EU's engagement in outlawing discrimination on grounds of sex, sexual orientation and gender identity within its external relations. The EU approach could be universal in nature or vary as a consequence of the features of each field of action within which the issue of non-discrimination arises. In this second scenario protection of the rights of women and LGBTIQ persons would not be promoted in all external relations. The second issue of interest is the definition of the content of non-discrimination on grounds of sex, sexual orientation and gender identity. In this perspective it is of utmost importance to identify the areas the EU's external action covers and the legal items the EU takes into consideration in setting up its external relations.

The third issue embraces the relationship between the advancement of gender equality and the LGBTIQ community's rights in the EU's external relations and the international system of protection of human rights.

The fourth item concerns the relationship between the concept of non-discrimination in the external relations of the EU and the concept of non-discrimination in its internal action.

All of the said matters will be examined in the following pages, but a preliminary step is the assessment of the legal framework featuring the EU's internal action in

---

<sup>10</sup>European Commission (2020k), p. 1.

<sup>11</sup>European Commission (2020k), p. 19.

<sup>12</sup>Pech and Grogan (2020), p. 343 *et seq*; Thies (2020), p. 439 *et seq*.

order to identify the legal items it encompasses and the rationale lying behind the rules that have been enacted.

## 2 Non-discrimination on Grounds of Sex in the EU's Internal Action

The Treaty founding the European Economic Community prohibited discrimination between female and male workers (Article 119 EEC) to prevent proper working of the internal market and fair competition from being affected by the pay gap.

The EU's policy on gender equality has evolved along two intertwined lines of development.

The first of these lines is to be found in the widening of the scope of the rules outlawing discrimination between women and men. The reforms of the Treaty provisions extended the prohibition of discrimination on the ground of sex beyond the original boundaries. As a consequence, the EU has enacted a comprehensive bundle of directives aiming at enhancing the legal status of female workers and promoting gender equality in areas other than employment and professional life. This set of secondary laws comprises the following issues: equal treatment of men and women in employment and occupation,<sup>13</sup> equal treatment of men and women in social security<sup>14</sup> and occupational social security schemes,<sup>15</sup> pregnant workers,<sup>16</sup> parental leave,<sup>17</sup> equal treatment between men and women in an activity in

---

<sup>13</sup>Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 *on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*, OJ L 204, (2006), 23–36.

<sup>14</sup>Council Directive 79/7/EEC of 19 December 1978 *on the progressive implementation of the principle of equal treatment for men and women in matters of social security*, OJ L 6, (1979), 24–25.

<sup>15</sup>Council Directive 86/378/EEC of 24 July 1986 *on the implementation of the principle of equal treatment for men and women in occupational social security schemes*, OJ L 225, (1986), 40–42.

<sup>16</sup>Council Directive 92/85/EEC of 19 October 1992 *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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)*, OJ L 348, (1992), 1–7.

<sup>17</sup>Council Directive 2010/18/EU of 8 March 2010 *implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance)*, OJ L 68, (2010), 13–20; Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 *on work-life balance for parents and carers and repealing Council Directive 2010/18/EU*, OJ L188, (2019), 79–93.