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The Principle of Equal Treatment in the Labour Laws of European Union

Abstract

The principle of equal treatment which will be able to state as having equal rights encountering equally behaviours or enduring equal obediational obligations is based on searching of justice at all points. The organizations in the law of Union had been arranged in the formation that will help cessionaries in terms of demanding their rights in the labour relations. The principle of equality in the law of Union has been betrayed as an opinion of value which will be able to serve for social mobilization and integration. Originally, not only equality among sexes but equal treatment and equal opportunity also has been composing the legal outline of European social model. In that outline of view, the importance and place of the principle of equality in the labour laws of Union had been tried to be emphasized.

Key Terms

European Union, Labour Law, The Principle of Equal Treatment, Social Security Right.

Avrupa Birliđi İş Hukukunda Eşitlik İlkesi

Özet

Eşit haklara sahip olma, eşit ölçüde davranışlarla karşılaşma veya eşit külfetlere katlanma şeklinde ifade edebileceğimiz eşit muamele ilkesi, her yönüyle adalet arayışına dayanır. Avrupa Birliđi hukukundaki düzenlemeler, bu anlayışa hizmet edecek ve çalışma ilişkilerinde hak

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sahibine hakkını isteme hakkı verecek şekilde düzenlenmiştir. Birlik hukukunda eşitlik ilkesi sosyal mobilizasyona ve bütünleşmeye hizmet edecek bir değer yargısı olarak ortaya konulmaktadır. Başta cinsiyetler arası eşitlik olmak üzere eşit muamele ve fırsat eşitliği Avrupa sosyal modelinin yasal çerçevesini oluşturmaktadır. Bu bakış çerçevesinde eşitlik ilkesinin Avrupa Birliği'nin iş hukukundaki yeri ve önemi vurgulanmaya çalışılmıştır.

Anahtar Terimler

Avrupa Birliği, İş Hukuku, Eşit Muamele İlkesi, Sosyal Güvenlik Hakkı.

Introduction

In Labour Law, principle of equality had been essentially exerted as a means for the solution of post-war problems. Especially, after the world war I and world war II, the belief that everyone must be respected for their dignity, personality and liberty, and people has equal rights on the grounds of being human irrespective of their race, language, religion, sex or ideology come into being. Accordingly, this concept existing in general equality had been moved as liability of equal treatment against discriminatory approaches in the periods where the expressions of freedom moved higher.

Fundamentally, the principle of equal treatment which will be able to state as having equal rights encountering equally behaviours or enduring equal obediential obligations is based on searching of justice at all points. The organizations in the law of Union had been arranged in the formation that will help cessionaries in terms of demanding their rights in the labour relations. The principle of equality in the law of Union has been betrayed as an opinion of value which will be able to serve for social mobilization and integration. Originally, not only equality among sexes but equal treatment and equal opportunity also has been composing the legal outline of European social model. In that outline of view, the importance and place of the principle of equality in the labour laws of Union had been tried to be emphasized.

A General Framework for the “Principle of Equality” in the Union’s Labour Law

In the law of Union, “equality” is set as a right and a moral value. The social model of Europe is based on individual rights, market economy, and free collective bargaining, equal opportunities for welfare and solidarity which are regarded as the fundamental values of democracy¹. The principle of “equal pay for men and women for

¹ Catherina Barnard, EC Employment Law, Oxford Univ.Press 2000, p. 197; see also Commission of the European Communities, Report from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of the Regions, on equality between woman and man, 2005, Brussels, 14.2.2005, Com (2005), 44 Final, pp. 8-9.

equal work”, which is pursuant to Rome Agreement article 119 (new 141), is the main norm providing legal equality between men and women in the matter of equality in the employment. The application scope of equality principle is enlarged in the length of time with the contribution of secondary sources of law comprising vocational training, social security, parental obligations and access to employment beside wages.² Today, “equality principle” is seen as one of the main instruments for the Union’s social policy, which has been arranged with the Charte of EU, and Constitution (has not yet put into force) and in many other directives of the EU.

The principle of equality was first for the elimination of discriminations in the matter of wage and employment between men and women workers; thereafter it began to seek equality for race, religion, ethnicity, sex, belief, political thought and social statute. The legislation of EU which is directly for the regulation of equality can be summarized as follows: Article 141 of Rome Agreement, European Social Charte, Third chapter of the Community Charter of Fundamental Social Rights, Council directive 75/117/EEC of 10 February 1975 “on the approximation of the laws of Member-States relating to application of the principle of equality for men and women”, and in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of “equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (Directive 2002/73/EC of the European Parliament and of The Council of 23 September 2002 amended Council Directive 76/207/EEC)”, Council Directive 79/7/EEC of 19 December on the progressive implementation of the principle of “equal treatment for men and women in matters of social security”, Directive 86/378/EEC of 1986 on the protection of maternity and equal treatment on the workplace basis and on social security, Council Directive 97/80/EC of 15 December 1997 on the “burden of proof in cases of discrimination based on sex”, Directive 2000/78/EC of 27 November 2000 establishing a general framework for “equal treatment in employment and occupation” which define direct and indirect discrimination, Directive 2000/43/EC of 29 June 2000 on the principle of “equal treatment between persons irrespective of racial or ethnic origin”³, Directive 2001/23/EC of 12 March 2001 on “approximation of the laws of Member-States relating to the safeguarding of employees’ rights in the event of transfer of undertakings, business or parts of undertakings or business”⁴, Council Directive 2004/113/EC of 13 December 2004 implementing to the principle of “equal treatment between woman and

² Catherina Barnard (2000) *Ibid.*, pp.199-200; see also, Ali Güzel, ‘Türk İş Hukuku’nun Avrupa Topluluğu İş Hukuku açısından Değerlendirilmesi [Evaluation of Turkish Labour Law From The Point of View of European Labour Law]; 1990’lı yıllarda Türk Çalışma Mevzuatının Avrupa Topluluğu Çalışma Mevzuatı Açısından Değerlendirilmesi, Dokuz Eylül Üniversitesi, ATMER, yayın no: 1, İzmir, 1992, pp. 25–26.

³ Roger Blanpain, *European Labour Law*, Kluwer Law-International, 2003, pp. 376–377.

⁴ Council Directive 2001/23/EC of 12 March 2001 on approximation of the laws of Member-States relating to the safeguarding of employees rights in the event of transfer of undertakings, business or parts of undertakings or business, Eur-Lex 32001, L0023, Eng., p.1.

man in the access to and supply of goods and services”⁵ and many other directives indirectly stress the importance of equality.

Furthermore, there are lots of Council decisions on the implantation of the principle of equal treatment in the labour laws of the Union: Some of these are: Council decision 86/613 of 1986 on the fundamental principle of equal treatment between women and men who are employed in independent fields including agriculture, decision of 1982 on the encouragement of women in the matter of equal opportunities, Council recommendation 84/635 of 1984 on taking positive measures for women, second decision of Council of 1986 on the encouragement of women in the matter of equal opportunities, Commission recommendation 87/567 of 1987 on the vocational treatment of women, the recommendation 92/131 of 1991 on protecting the dignity of men and women in workplace, Council recommendation 92/241 of 1992 on children care, Council decision of 1994 on the necessity of women to have equal rights in the development strategy of EU, Commission proposal Com(88)269, 269 end of 1988 on the regulation of a directive in the matters of burden of proof on equal treatment between women and men, equal pay, and Commission proposal Com (96) 340 end of 1996 on the burden of proof in the matter of discrimination on the ground of sex.⁶

Equality of Opportunity in Acquiring Employment and Occupation

In the law of Union, acquiring employment and occupation, detailed arrangements regarding the application of the equality of opportunity have been included. In the law of Union, prohibiting the discrimination in access to work, promoting in it, acquiring a profession and utilizing in vocational education, career development, organization of work environment and changing the profession and spreading the application of equality in the whole working area have been tried. The equality among employees has been taken into consideration as a goal especially for making use of consultation services for career selection and getting vocational training without being bound to economical branch and occupational hierarchy. The decision of European Court of Justice for the equality in getting an employment or occupation has been effective as much as legal arrangements. Moreover, the European Court of Justice’s equality interpretation has been the initiator of making new arrangements at Union level⁷.

The Council Directive, 76/ 207/EEC of 9 February 1976 on the “implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions” is the most solid paper that secures equality principle. According to this, application of the principle of equal treatment, there shall be no direct or indirect discrimination on the grounds of

⁵ Council Directive 2004/113/EC of 13 December 2004 on implementing the principle of Equal Treatment between woman and man in access to and supply of goods and services, Official Journal of the European Union, L373/37, p. 1.

⁶ Altan Heper, *Avrupa İş Hukuku ve Türkiye (European Labour Law and Turkey)*, İstanbul, 1997, pp. 124 -125.

⁷ Catherina Barnard (2000), *Op cit*, pp. 206–207, see also, Roger Blanpain (2003) *op cit*, pp. 380 -381.

sex in the public or private sectors, in relation to conditions for access to employment, to self employment or occupation, whatever the branch of activity is and all levels of professional hierarchy. At the same time, directive makes member states to take necessary measures to protect workers against dismissal due to exercising their rights.⁸

Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, amending Council Directive 76/207 /EEC on the “implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and working conditions”, is an another important paper related with the same issue. The second article of the new directive defines direct and indirect discrimination. And harassment to the sex of a person and sexual harassment are accepted as contrary to the principle of equality between women and men, and aimed to prohibit such forms of discriminations by defining it⁹.

The Principle of Equality in the Labour Relations

Besides The Council Directive 76/207/EEC and 2002/73/EC on the prohibition of discrimination in matters of employment and occupation, there’s also some regulations which carries the principle of equality to labour relations. The first regulation is the Council Directive 2002/78/EC of 2002 establishing a framework for “equal treatment in employment and occupation”. The next one is the Council Directive 2000/43/EC of 2000 on the prohibition of racial and ethnic discrimination. The third is the directive 2006/54 /EC of 2006 on the implementation of the principle of equal treatment in matters of employment and working conditions in the workplace for both women and men.

The Council Directive 2000/78/EC prohibits discrimination on the grounds of employment and occupation and demands member states to take measures to prevent all matters of discrimination including religion, belief, invalidity, age and sexual preference. The same directive also declares null and void the collective agreements, workplace regulations, service contracts which are not compatible with the principle of equality¹⁰. According to Council Directive 2000/43/EC of 29 June 2000, there shall be equal treatment between persons irrespective of racial or ethnic origin thus there shall be no discrimination directly or indirectly on the grounds of race and ethnic origin. The Directive also ensure the implementation of the principle of equality irrespective of their race and ethnic origin as regards, access to employment, occupational preference,

⁸ Council Directive 76/ 207/EEC of 9 February 1976 on the Implementation of the principle of Equal Treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, celex -txt 31976L028, pp. 1–4.

⁹ Council Directive 2002/73/EC of 23 September 2002, Amending Council Directive 76/207 /EEC on the implementation of the principle of Equal Treatment for men and women as regards Access to employment, vocational training and working conditions, Official Journal of the European Communities, L.269 /15, pp. 1–2.

¹⁰ Council Directive 2000/78/EC of 27 November 2000 establishes general framework for equal treatment in employment and occupation, Official Journal, L303, pp. 1–3.

promotion, vocational training, working conditions, remuneration, social protection, career development, union membership in all branches of activities.¹¹

Council Directive 2006/54/EC of 2006 on the implementation of the principle of “equal treatment and equal opportunity for men and women in employment and working conditions” is a new directive which unites the Council Directives of 2002/73/EC, 86/378/EEC and 96/97/EC on the regulation of the principle of equal treatment. Council Directive 2006/54/EC is regulated according to the decisions of European Court of Justice (ECJ), and groups together the principles relating to equality on employment and occupation. Aforementioned directive stick to previous meanings of definitions but stress the importance of social dialogue and gives much active role to non-governmental organizations in order them be more effective on the implementation of the principle of equality.¹²

The Principle of Equal Pay for Work or Work of Equal Value

The principle of “equal pay for equal work” is arranged by Rome Agreement Article 119. This article forms the beginning of such arrangements related with the principle of equality. Aforementioned principle is appropriated to constitutional agreement with economical concerns (especially with French demand). Some decisions of European Court of Justice (ECJ) and Council Directive 75/117/EEC of 1975 on the principle of “equal pay for equal work between men and women” contributed to the social recognition of the principle. At the present day, especially with the broad interpretation of European Court of Justice, the principle on “equal pay for equal work” has gained a character for horizontal and vertical implementation. Article 141(1) of Amsterdam Agreement (signed at 2/10/1997 and put into force at 01/05/1999) proclaim equality between women and men on equal pay for equal work or work of equal value, and impose obligation to member states. Article 141 contains the following definition of ‘pay’:

For the purpose of this article “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employer.

Furthermore at the second paragraph of the mentioned article, it has been told that there should be no discrimination on the grounds of sex in matters of piece-work pay or operation speed.¹³

¹¹ Council Directive 2000/43/EC of 29 June 2000 implements the principle of Equal Treatment between persons irrespective of racial or ethnic origin, Official Journal, L180, pp. 1–2.

¹² Report from the Commission to the Council, The European Parliament the European Economic and Social Committee and the Committee of Regions, on equality between women and men -2006, Brussels, Com (2006), 71 Final, pp. 3–4.

¹³ Catherina Barnard (2000), *Op. cit.*, pp. 228–230, see also, Can Tuncay, ‘Türk İş Hukukunun Avrupa Birliği İş Hukukuna Uyumu [Adjustment of Turkish Labour Law to European Labour Law]’, AB –Türkiye ve Endüstri İlişkileri [EU-Turkey and Labour Relations], (Ed. Alpay Hekimler), İstanbul, 2004, pp.56–57; Kübra Doğan Yenisey, ‘Kadın-Erkek Eşitliği

The Council Directive 75/117/EEC of 1975 on the principle of “equal pay for equal work between men and women” is the solidification of article 119 of Rome Agreement. Council directive prohibits all kinds of discrimination on grounds of sex in matters of equal pay for equal work and work of equal value, objective job evaluation, and pay and pay supplements.¹⁴

Protection of the Principle of Equality in Case of Pregnancy or Maternity

In the Labour Law of Union, right to work and maternity of women is undertaken together. There has been some regulations on elimination or minimizing the problems that working women face, from the point of view of income loss, health and employment, especially for women who get pregnant while working. These arrangements include following grants: giving enough time to pregnant or breastfeeding women for rest, provide employment in light jobs that will not treat her health, health assistance in case of her child bearing, supplying income guarantee while she couldn't go to work, and prohibiting dismissal for childbearing and to restore woman employee to her old place.¹⁵ Beside the article 8 of European Social Charte on the protection of women in case of maternity and pregnancy (This article is re-arranged in 1996), there're two important directives on the protection of women worker in case of maternity. One of this is the 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”, and the other is the Council Directive 96/34/EC of 3 June 1996 “on the framework agreement on parental leave”. Both directives give place to regulations on preventing women worker of discrimination in case of maternity.

Council directive 92/85/EC does not bring protections just in case of pregnancy, maternity and brest feeding but also aim to protect women worker for income, employment security, promotion and about another rights while they are entitled to leave.¹⁶ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC, regulates the measures to enable men and women workers to reconcile their occupational and family obligations. The

Bakımından Türk İş Hukukunun Avrupa Birliği İş Hukuku ile Olası Uyum Sorunları [Potential Problems of Adjustment of Turkish Labour Law to European Labour Law on the Grounds of Equality between Men and Women]’, Kamu -İş,(Yargıç. Dr. Aydın Özkul’a Armağan), İş Hukuku ve İktisat Dergisi, cilt: 6, sayı: 4, Ankara, 2002, pp. 49, 50, 51

¹⁴ Council Directive 75/117/EEC of 10 February 1975 on the approximation at the laws of the Member States relating to application of the principle at equal pay for men and women, celex -txt 31975 L 0117, p. 2

¹⁵ Can Tuncay, “Çalışan Kadının Analık Durumunda İzin ve Ücret Güvencesi [Leave Entitlement and Wage Guarantee of Working Women In Case of Maternity]”, Mercek, Cilt: 10, Sayı: 39, İst, 2005, p:30. see also Catherina Barnard (2000), Op cit. pp. 266 – 267.

¹⁶ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvement in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding (tenth individual directive within the meaning of Article 16 (1) of directive 89/331/EEC), EUR – lex – 31992L0085 – Eng, pp. 1–2.

Directive also, grants men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a age given up to 8 years. In the directive, promotion of equal opportunities and equal treatment between men and women is defined on a non-transferable basis.¹⁷

Application of Equality Principle for the Safeguard of Social Security Right

In the Labour Law of European Union, the arrangements on social security is basically includes following topics: ensuring the social security right of member states' citizens in case of their free movement, ensuring their acquired rights and unification of their acquired rights. Social security legislation of the Union arranges the social security rights of immigrant workers in a manner that there shall be no discrimination, on the other hand, efforts to harmonize social security norms of Member States. Especially with the decisions of European Court of Justice on the implantation of social security norms, discrimination between persons of member states are prohibited by reason of religion, race, belief, ethnic origin, sex, political ideology, sexual preference etc.¹⁸.

Beside indirect arrangements for providing equality on social security rights, there are many direct arrangements for ensuring the sound implementation of the principle. In this connection, the Council Regulation 1408/71/EEC of 1971 on the "social security schemas for wage earners and unwaged earners with their families and rightful those which have free movement in member states of EEC" is an important document. Moreover, Council Directive 79/7/EEC of 1979 on the progressive implementation of the principle of the equal treatment for men and woman in matters of social security, and Council Directive 96/97/EC of 20 December 1996 amending directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, are the direct legislations directly arranging the principle of equality¹⁹.

After the article 42 of European Community Agreement, Regulation 1408/71 is accepted as a primary text on ensuring the social security of workers and their parents, who are mobile across the borders of Community. Essentially, Regulation 1408/71 has

¹⁷ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC, Eur – lex 3199L0034 – Eng, pp. 2–3.

¹⁸ Catherina Barnard (2000), Op cit. P. 299, see also. Kadir Arıcı, "AB Sosyal Güvenlik Hukukunun Temel İlkeleri ve Türk Sosyal Güvenlik Mevzuatının Uyum Meselesi[The Fundamental Principles of Social Security Law of European Union and Harmonization of Turkish Security Legislation] ", AB – Türkiye ve Endüstri İlişkileri[Industrial Relations Between EU-Turkey] (Ed. Alpay Hekimler), İstanbul, 2004, pp. 637–638.

¹⁹ Catherina Barnard (2000), Loc cit. p. 299, see also. Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of the equal treatment for men and woman in matters of social security, Eur – lex – 31979L0007 – Eng, p.1; Council Directive 96/97/EC of 20 December 1996 amending directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, Eur – lex – 31996L0097 –Eng. p. 1.

been regulating dispositions relating to *unemployment, death, sickness, maternity, work accident, vocational disease, invalidity, senectitude, being either viduage or orphan*, which is come up in the contract 102 of ILO on social security. Cited regulation is not restricted to wage earners, but also, students, self-employed people and their parents are involved. In the same regulation, in order to solve potential problems as regards to immigrant worker's free movement, coordination between the social security systems of member states is anticipated. Thus, enjoyment of the right of social security is implemented within the borders of unity and equality.²⁰

Another important regulation of social security law is the Council Directive 79/7/EEC. Directive brings protection for workers in case of sickness, accident and involuntary unemployment etc. Thus, while taking necessary measures for the protection of worker, Member States are obligated for providing equal treatment for men and women in matters of social security against risks.²¹ In this context, another document which should be stressed is the Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes and the Directive 96/97/EC which make some contributions to this directive. Moreover, discrimination between workers on private insurance is also prohibited.²² Additionally, Council directive 96/97/EC cited to desicions of European Court of Justice, for the implementation of equality on the operation of voluntary and contributing social security systems financed by workers in workplace. Above all, the principle on the equal distribution of benefits amongst people with different sexes but similar conditions should be provided.²³

Conclusion

In the labour laws of Union, there is foremost a comprehensive legislation that collocates the equality on the verge of the equality between sexes is under consideration. The arrangements in the laws of Union are not solely guiding documents. They are the dignity-ascribed documents, which are made concrete by the arbitraments of the European Court of Justice directly, in practice. Likewise, besides the judicial dignities of these documents faced in every scope about equality from establishing employment relations to keeping security rights in the legislation of Union, they undertake the arranging function of the social policy of Union. They're seen as the corner stones of a harmonizing and accommodating social policy throughout the integration process.

On the other hand, the European Court of Justice's adherence to equality measures and the way of interpreting the arrangements in Union laws with a broad vision has a positive contribution on the formation of an equality culture at the Union level. Moreover, the juristic technique that the Court applies in its arbitraments has

²⁰ Catherina Barnard (2000), Op cit. pp. 308–309.

²¹ Directive 79/7/EEC, Ibid. P. 1–2.

²² Nazan Morođlu, "Avrupa Birliđi Antlaşmalarında ve Yönergelerinde Kadın ve Erkek Eşitliđi[The Equality between Men and Women in the Directives and Agreements of European Union]", Sicil, İş Hukuku Dergisi, Cilt: 1, Sayı: 4, İstanbul, 2006, p. 213.

²³ Council Directive 96/97/EC, Op cit. P. 1–4

showed the way to the introductory chapters of the new arrangements assented later. If it is needed to convey briefly, the principle of equality is taken as a fundamental value for the labour legislation of Union with the contributory decisions of European Court of Justice. That the contention against the discrimination may be possible through the settling down the principle of equality in the laws of the Member States has been believed.

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