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Meaning and Dimensions of “Gender Equality” in EU Policies and Law

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Meaning and Dimensions of “Gender Equality” in EU Policies and Law.

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Introduction

Gender equality—understood both as a legal principle and as a political objective, as well as a social and philosophical concept—appears as a polysemic, variable, and even conflicting object, not only across space and time but also within the same political community. The causes of such differentiation lie primarily in the different legal, political, and social conceptions that characterize the concepts of *equality* and *gender*, both of which are also significantly differentiated.

Thus, within a process such as European integration, gender equality has not constituted a unified and unequivocal concept (Verloo, 2007); rather, it has undergone significant evolution closely linked to the transformation of the supranational legal system (Weiler, 1998), the meanings political and social actors attribute to European integration (Kantola & Lombardo, 2018, p. 332), as well as the different influences exerted by the legal and political cultures of various member states (Crespi & Lomazzi, 2019, p. 101). This is a research object that possesses the characteristics of what has been effectively defined as a “*moving target*” (Woodward, 2012, p. 87).

The case of the European Union appears to differ from many national experiences. In the latter, a principle set by law in a fixed manner often remains static, with varying interpretation and implementation over time. For example, gender equality is enshrined in constitutional norms and has evolved legislatively and through jurisprudence without altering the original text. In contrast, in the EU legal framework, gender equality has undergone continuous development, even at the level of primary law in the Treaties, with a significant role played by the jurisprudence of the Court of Justice. Beginning with a specific prohibition against sex-based pay discrimination in the Treaty of Rome (1957), this process has evolved to elaborate a general principle of non-discrimination in the workplace, eventually affirming a broad principle of gender equality across all aspects of social life (Sciortino, 2020, p. 21).

Building on these premises, this paper aims to explore—from the legal perspective of constitutional law and EU law—the meaning and dimensions of “gender equality” within European Union policies and law. To achieve this, the paper will first examine the legal evolution of gender equality, followed by an analysis of how this principle has been implemented in EU policies. Finally, it will outline the key phases in the evolution of thought on gender equality and how these phases relate to the broader process of European integration.

1. The Legal Development of Gender Equality in the European Union

1.1 From the Treaty of Rome to the *Defrenne* Judgments

From a legal perspective, the issue of equality between men and women first appeared in the Treaty of Rome of 1957 (Treaty establishing the European Economic Community, TEEC), where Article 119 stipulated: “Each Member State shall ensure [...] the application of the principle of equal pay for male and female workers for equal work”. At this stage, however, equal pay was not part of a broader political goal of achieving gender equality within the European Economic Community but rather served as a tool to ensure undistorted market competition among the states (More, 1996, p. 266; Kantola, 2010, p. 27)¹, similar to other non-discrimination prohibitions in the Treaties.

Indeed, the Treaty of Rome did not yet include a general principle of non-discrimination based on gender, nor a broad principle of equality, which can be attributed to the limited competences of

¹ There was both a general prohibition of discrimination on the basis of nationality (Article 7 TEEC, later Article 12 TEC, finally Article 18 TFEU), as well as specific prohibitions in different economic sectors.

the emerging European Community. Article 119 regulated only a specific aspect of the employment relationship (pay), without addressing other work-related dynamics. The rationale behind this was the concern expressed by certain states—particularly France—about the risk of wage dumping due to the lower cost of female labour, which could potentially be concentrated in a specific sector of production (Sciortino, 2020, p. 27-28; Ciano, 2016, p. 2; Pollicino, 2005, p. 29; Crespi & Lomazzi, 2018, p. 24).

Although Article 119 of the Treaty required Member States to apply the principle of equal pay through national legislation, it remained largely unimplemented during the first phase of the integration process, at least until the 1970s. The economic focus underlying Article 119's rationale rendered its immediate implementation unnecessary in a context where the common market had not yet been fully realized (Debusscher, 2015, p. 4).

In the 1970s, profound socio-economic changes and pressure from feminist movements also influenced the European Community, where its legal framework was leveraged as an alternative tool to national political processes (Donà, 2006, p. 23-24; Debusscher, 2015, p. 4). This included the strategic use of litigation before the Court of Justice (Hilson, 2002; Debusscher, 2015, p. 5). In other words, some political actors sought to achieve through the European Community and its institutions the results they were unable to attain in their national contexts.

In this way, the application and scope of the equal pay provision in Article 119 became the basis for significant jurisprudential developments by the Court of Justice. This progress was achieved through two converging innovations by the Court:

1. In the *Defrenne cases against Sabena*², the Court redefined the role and value of European law through the doctrine of “direct effects”;
2. In parallel decisions, the Court elaborated a judicial protection of fundamental rights at the European level, at least starting with the *Nold* decision³ (Cannizzaro, 2022, p. 235).

² Court of Justice, judgment of 25 May 1971, C-80/70, *Defrenne v. Sabena – Defrenne I*; Court of Justice, sentence. 8 April 1976, C-43/75, *Defrenne v. Sabena – Defrenne II*; Court of Justice, sentence. 15 June 1978, C-149/77, *Defrenne v. Sabena – Defrenne III*.

³ Court of Justice, judgment of 14 May 1974, C4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*.

The Defrenne Judgments. The Court of Justice established its case law on equality between men and women with the *Defrenne* judgments. In *Defrenne I*, the Court clarified the definition of “pay”, while in *Defrenne II*, the Court developed the doctrine of horizontal direct effect, using Article 119 as a basis. In these decisions, the Court offered a dual interpretation of Article 119: on the one hand, it aimed to prevent unfair wage competition among states, but on the other hand, the judges noted that “this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples” (§ 7/11), thus elevating the principle of equal pay to “one of the foundations of the Community” (§ 12/15). The Court also emphasized that this principle not only creates obligations for Member States, but it also grants individual rights (§ 24-26). As a result, this principle is directly applicable before national courts, even in disputes between private parties (known as “horizontal direct effect”). Shortly afterward, the *Defrenne III* decision confirmed a restrictive interpretation of Article 119 as applying only to pay, not to other working conditions, while nonetheless highlighting that “the elimination of discrimination based on sex” is part of the fundamental rights guaranteed by European law (§§ 26-27), thus at least partially freeing the principle from a strictly economic perspective (Sciortino, 2020, p. 30).

In parallel with the Court’s case law, European Union law was also enriched by secondary legislation implementing Article 119 of the EEC Treaty. This included Directive 75/117/EEC on equal pay⁴, Directive 76/207/EEC extending the principle of equal treatment to other aspects of the employment relationship⁵; and Directive 79/7/EEC on social security⁶ followed by other directives in the 1980s and 1990s⁷. However, because there was no specific legal basis for adopting secondary legislation on gender equality, the Commission had to rely on Articles 100 and 235, concerning the internal market and residual competences, respectively, with the unanimous vote of the Council (Donà, 2006, p. 26).

⁴ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

⁵ Council Directive 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.

⁶ 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.

⁷ 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; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; 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; Council Directive 96/34/EC of 3 June 1996 concerning the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC; Council Directive 97/75/EC of 15 December 1997 amending and extending Directive 96/34/EC; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

1.2 The Novelties of the Treaty of Amsterdam: *Gender Mainstreaming* and the Legal Basis for Positive Actions

It is with the **Treaty of Amsterdam of 1997** that the most important and radical shift in perspective occurs (Masselot, 2007, p. 153). First of all, for the first time, the Community is granted the competence to take actions against discrimination based on sex (Article 13 TEC⁸). Moreover, equality between men and women is adopted as a Community objective through the amendment of Articles 2 and 3 of the EC Treaty⁹. Furthermore, former Article 119 TEEC/TEC¹⁰, which became Article 141 TEC, was revised, extending the application of equal pay to all employment conditions and granting a stronger legal basis for **positive actions**.

Table 1. Main Treaty provisions on equality between women and men after Amsterdam

Article 2	The Community shall have as its task, by establishing a common market and an economic and monetary union and <i>by implementing common policies or activities referred to in Articles 3 and 4</i> , to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, <i>a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life</i> , and economic and social cohesion and solidarity among Member States.
Article 3(2)	In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.
Article 13	Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, <i>the Council</i> , acting unanimously on a proposal from the Commission and after consulting the European Parliament, <i>may take appropriate action to combat discrimination based on sex</i> , racial or ethnic origin, religion or belief, disability, age or sexual orientation.
Art. 141	1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied [...]. 3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. 4. With a view to ensuring <i>full equality in practice between men and women in working life</i>, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures <i>providing for specific advantages in order to make</i>

⁸ Consolidated version of the Treaty establishing the European Community, as amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (11997D/AFI/EC).

⁹ *Ibid.* The changes in the Treaty of Amsterdam came after the Treaty on European Union (Maastricht, 1992), in which Article G(1) had changed the name of the “Treaty establishing the European Economic Community (TEEC)” to the “Treaty establishing the European Community (TEC)”.

¹⁰ Article 119 TEEC kept the same numbering even after the Maastricht Treaty of 1992 (see the previous footnote).

	<i>it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.</i>
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The most significant changes primarily concerned an expansion, through Article 13 (now Article 19 TFEU, *post-Lisbon*), of the scope of competence of the EU institutions, enabling them to adopt actions and regulations to combat discrimination beyond the realms of employment and professional sectors¹¹.

Secondly, Article 3(2), which, after the Lisbon Treaty, was incorporated into the current Article 8 TFEU, is of particular importance. This article sets a general principle that applies across all areas of competence within the Community (Article 2(1)), serving as a standard for the validity of all European laws. According to this principle, in all of its activities, the Community must aim to “eliminate inequalities, and to promote equality, between men and women”. This is not a standalone objective but a principle that must be integrated into all potential areas of intervention.

The implementation of a unified strategy oriented toward gender equality is known as *gender mainstreaming*. This represents the second fundamental shift in the European conception of gender parity. The concept of *gender mainstreaming* was adopted at the international level by the United Nations and was formally discussed during the Fourth World Conference on Women, held in Beijing in 1995.

Gender mainstreaming. An official definition was provided by the UN Economic and Social Council in 1997: «*Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality*» (UN Economic and Social Council, 1999, p. 24). A similar definition, from around the same period, was provided by the Council of Europe, stating that: *Gender mainstreaming is the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making*» (Council of Europe, 2004, p. 12).

Although the concept of *gender mainstreaming* is not entirely straightforward (Verloo, 2005; Rees, 2005; Crespi, 2009), especially given the various interpretations of the concepts of “gender”, “mainstreaming”, and “gender equality” (Crespi & Lomazzi, 2018, p. 26), it remains the key tool for addressing gender issues. It is capable of respecting and including gender differences, rather than promoting the uniform assimilation of women into male social and institutional constructs (Crespi, 2009, p. 172).

¹¹ However, it should be noted that—also in accordance with the case-law of the Court (cf. Court of Justice, sentence. 17 February 1998, C-249/96, *Grant*)—Art. 141 remains with direct effect, while 13 is a mere attribution of powers to the Community, to be exercised according to the procedures indicated (Sciortino, 2020, p. 30).

Positive (UK), affirmative (US) action (measures). Preferential treatment (ECJ).

Action aimed at favouring access by members of certain categories of people, in this particular case, women, to rights which they are guaranteed, to the same extent as members of other categories, in this particular case, men. These measures may include, among other things: reserved quotas, preferential access initiatives, specialised training, and anti-discrimination policies (EIGE, from eige.europa.eu).

Another significant issue introduced by the Treaty of Amsterdam, as previously mentioned, is the concept of so-called positive actions, defined as “measures providing specific advantages” for the underrepresented sex (Article 141). Positive actions were later explicitly referenced in the EU Charter of Fundamental Rights of 2000 (the so-called “Charter of Nice”), where they gained greater prominence and scope. Article 23, in fact, declares that “equality between women and men must be ensured in all areas, including employment, work and pay”, and in its second paragraph, specifies that “the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex”, thereby extending the applicability of positive actions beyond the workplace (which had been the limitation of Article 141 TEC).

The issue of positive actions has been a focal point of extensive case law from the Court of Justice, at least since the *Kalanke* judgment¹². The central question revolves around whether there are limits to the implementation of positive actions and whether they extend beyond ensuring equal opportunities to also guarantee equal outcomes (Sciortino, 2020, p. 40; Kantola, 2010, p. 44).

The novelties introduced by the Amsterdam Treaty led to a series of secondary law acts—the so-called “second-generation” directives—which, on the one hand, expanded the range of non-discrimination prohibitions beyond mere gender issues and, on the other hand, extended the scope of the prohibition to all aspects related to the employment relationship and working conditions (Sciortino, 2020, p. 45)¹³.

Additionally, it is particularly important to emphasize that, starting from the Amsterdam Treaty, the area of equal treatment was subjected to the codecision procedure: this eliminated the requirement for unanimous consent among the member states in the Council and granted the European Parliament a role in the implementation of the principles in question.

1.3 The Charter of Fundamental Rights and the Lisbon Treaty

The latest step in the primary legislative evolution concerning gender equality is represented by the Lisbon Treaty (signed in 2007 and entered into force in 2009). As is well known, the Treaty conferred upon the Charter of Fundamental Rights of the European Union the same legal value as the Treaties, thereby elevating the principles set out in Article 23 of the Charter to the level of primary law.

¹² Court of Justice, judgment of 17 October 1995, Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*.

¹³ See, for example, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; 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 promotion, and working conditions.

Furthermore, the new Treaty on European Union (TEU) includes several provisions in its first two titles on non-discrimination and equality between women and men, establishing them as central principles of the European legal order, as reflected in their prominent placement.

Article 2, located in Title I (“General Provisions”), lists among the founding values of the Union “equality”, stating that these are values “common to the Member States in a society in which pluralism, *non-discrimination*, tolerance, justice, solidarity and *equality between men and women*”. The subsequent Article 3(3) further states that the Union “shall combat social exclusion and *discrimination*, and shall promote [...] *equality between women and men*”.

Fundamental changes also derive from the Treaty on the Functioning of the European Union (TFEU). Article 8 reiterates Article 3(2) of the EC Treaty (as amended in Amsterdam), reaffirming that “in all its activities, the Union shall aim to eliminate *inequalities*, and to promote equality between men and women”, while Article 10 adds that “in defining and implementing its policies and activities, the Union shall aim to combat *discrimination* based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation”.

As opposed to Article 13 of the EC Treaty, which was transferred to Article 19 TFEU—according to which the Council, acting unanimously, “*may take* appropriate action to combat *discrimination based on sex*, racial or ethnic origin, religion or belief, disability, age, or sexual orientation”—which has a general scope, the combined provisions of Articles 8 and 10 elevate the principle of *gender mainstreaming* to a dual mandatory commitment (see Article 19), both for eliminating *inequalities* and for combating *discrimination*.

Table 2. Main Treaty provisions on equality between women and men after Lisbon

Article 2 TEU	The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and <i>equality between women and men prevail</i> .
Article 3(3) TEU	[...] It shall combat social exclusion and discrimination, and shall promote social justice and protection, <i>equality between women and men</i> , solidarity between generations and the protection of the rights of the child.
Article 8 TFEU (ex Article 3(2) TEC)	In all its activities, the Union shall aim to <i>eliminate inequalities</i> , and to <i>promote equality between men and women</i> .
Article 19 TFEU (ex Article 13 TEC)	1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.
Article 153 TFUE (ex Article 137 TEC)	With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: [...] i) equality between men and women with regard to labour market opportunities and treatment at work.
Article 157 TFEU (ex	1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. [...].

Article 141 TEC)	3. The European Parliament and the Council, <i>acting in accordance with the ordinary legislative procedure</i>, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women <i>in matters of employment and occupation</i>, including the principle of equal pay for equal work or work of equal value. 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.
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2. History and Implementation of Gender Policies in the European Union

2.1 The 1970s and 1980s

Building on the legal framework described, the European institutions, particularly the Commission, implemented various policies to enforce the principle of gender equality.

In the 1970s, the activism of feminist movements had significant impacts on both the international and European levels (Debusscher, 2015, p. 6). The years between 1975 and 1985 were declared the “UN Decade for Women”, and in 1979, the UN General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), which contained, in addition to several definitions, an agenda for states to undertake actions aimed at ending discrimination.

From the perspective of European institutions, the *Defrenne* judgments paved the way for Community social interventions, carried out by the Commission between 1975 and 1979 through the three directives mentioned earlier (Kantola, 2010, p. 32). Furthermore, from 1979, after the first direct elections to the European Parliament in June of that year, the Parliament decided to set up a special committee chaired by Yvette Roudy to examine the situation of women in the European Community. The work of this committee led, in February 1981, to the adoption of a resolution entitled “The Position of Women in the European Community”. In June of the same year, the European Parliament created a committee of inquiry to verify whether the objectives set by the resolution were being pursued. Following a resolution adopted in January 1984, this committee was institutionalized as a permanent body¹⁴. This development marked what has been described as a true “change of scene” within the European institutions, with Parliament beginning to play an active role in shaping gender policies, culminating in the co-decision powers it acquired under the Amsterdam Treaty (Di Sarcina, 2010, p. 175). The European Parliament has since been characterized as an institution particularly attentive to gender issues, playing an important role in the implementation of more progressive European gender policies (Debusscher, 2015, p. 8).

Despite the 1980s not being marked by significant social policy advancements in European states, the Community managed to make progress in the field of gender equality (Di Sarcina, 2010, p. 173), even though the number of legislative acts was limited due to the influence of a more

¹⁴ This is the so-called “Committee on Women’s Rights and Gender Equality” (FEMM).

structured feminist movement at the European level (Debusscher, 2015, p. 7). Particularly attentive to gender policies was the European Commission under the presidency of Jacques Delors, which presented the so-called second *Multi-Annual Action Programme*¹⁵ for the period 1986-1990, leading to the approval of Directives 86/378/EEC on equal treatment in occupational social security schemes, and 86/613/EEC on equal treatment in self-employment.

2.2 The 1990s and 2000s: The Implementation of *Gender Mainstreaming*

Starting in the 1990s, the application of *gender mainstreaming* concepts led to a general rethinking of the previous perspectives. This new approach aimed to shift the focus on gender issues from viewing women as *workers* to recognising women as *citizens*, or more broadly, as *individuals*. In this regard, the accession of Finland and Sweden into the European Community was crucial, as these nations brought with them advanced legal and social systems regarding gender equality. At the 1996 Intergovernmental Conference, these two Scandinavian countries promoted the issue of equal opportunities, advocating for a revision of the Treaties, thus facilitating the introduction of *gender mainstreaming* in the Amsterdam Treaty (Donà, 2006, p. 33).

From that point onward, *gender mainstreaming* has guided the approach of European institutions on gender issues. In 2000, the *Community framework strategy on gender equality (2001-2005)* was established, in which the European Commission¹⁶ proposed a dual approach:

1. On one hand, “gender mainstreaming in all Community policies having a direct or indirect impact on the gender equality objective (proactive intervention)”;
2. On the other hand, implementing “special measures for women; these are still needed to remove persistent gender inequalities. This mainstreaming approach marks a major change compared to past Community action in this area which was based mainly on separate activities and programmes”.

The action plan was divided into various sectors, with specific actions provided for each: economic life, equal participation and representation, social rights, civil life, and male and female roles and stereotypes.

In subsequent years, alongside the work on the Lisbon Treaty and in continuity with the previous plan, the European Commission introduced the *Roadmap for equality between women and men (2006-2010)*¹⁷. This Roadmap identified six priority areas and proposed key objectives and actions for each, aimed at facilitating their achievement. The six priority areas identified were:

1. Equal economic independence for women and men;
2. Reconciliation of private and professional life;
3. Equal representation in decision-making;
4. Eradication of all forms of gender-based violence;
5. Elimination of gender stereotypes;
6. Promotion of gender equality in third countries.

Based on the contents of the Roadmap, the Commission’s actions were endorsed by the Member States, which, at the March 2006 European Council, approved the so-called first *European*

¹⁵ European Commission, Draft Council resolution on the adoption of a new Community medium-term programme to promote equal opportunities for women, COM(85) 80 final (85/C 356/06).

¹⁶ Communication from the Commission of 7 June 2000 Towards a Community Framework Strategy for equality between women and men (2001-2005), COM(2000) 335 final.

¹⁷ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *A Roadmap for equality between women and men 2006-2010*, COM(2006) 92 final.

*Pact for Gender Equality*¹⁸. The Pact identified three key areas for action and introduced measures to:

1. Close gender gaps and combat gender stereotypes in the labour market;
2. Promote better work-life balance for all;
3. Strengthen governance through gender integration and enhanced monitoring.

The first legislative act resulting from the *Roadmap* and the *Pact* was Directive 2006/54/EC on gender equality in the workplace¹⁹. The directive prohibits discriminatory treatment in terms of pay, occupational social security schemes, access to employment, vocational training, promotion, and working conditions. Additionally, it reaffirms and updates other related aspects, including the burden of proof. In the event of a trial, the burden lies with the respondent to prove the absence of a breach of the principle of equal treatment, rather than with the plaintiff, who is only required to present factual evidence suggesting that direct or indirect discrimination may have occurred (Article 19).

Another important development was the creation of the European Institute for Gender Equality (EIGE)²⁰, operational since 2007. The institute's task is to support and strengthen the promotion of gender equality by integrating the gender perspective into all EU and national policies, combating sex-based discrimination, raising awareness among EU citizens about the importance of gender equality, and providing technical support to EU institutions, especially the Commission, and national authorities.

2.3 After Lisbon: Seeking an Intersectional Approach

At the expiration of the *Roadmap*, the Commission renewed its gender equality plans, first with the so-called *Women's Charter*²¹, introduced on the occasion of International Women's Day in 2010, and then with the *Strategy for Equality between Women and Men 2010-2015*²².

In this strategy, the Commission set specific gender equality objectives for each priority area. Moreover, it invited various Directorates-General to establish gender equality goals within the annual programming cycle and the Commission's work program. As for the content of the strategy, priority was given to increasing female participation in the labour market, reducing the gender pay gap, promoting gender equality in decision-making processes, combating gender-based violence, and promoting gender equality in relations with third countries.

As in the previous five-year period, the actions of the Commission were followed by those of the Council of the European Union, which approved the second European Pact for Gender Equality

¹⁸ Council of the European Union, *Presidency Conclusions – 23/24 March 2006*, 7775/1/06 Rev 1, Annex II, Brussels, 18 May 2006.

¹⁹ Directive 2006/54/EC of the European Parliament and of 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.

²⁰ Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 establishing a European Institute for Gender Equality.

²¹ Communication from the Commission, Greater commitment to equality between women and men, *Women's Charter*, Brussels, 5 Mar. 2010, COM(2010) 78 final.

²² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 21 September 2010, *Strategy for equality between women and men 2010-2015*, COM(2010) 491 final.

(2011-2020)²³ in 2011. In this Pact, the Member States reaffirm their commitment to implementing the Union's gender equality programs, specifically to:

- 1) "Close the gender gaps in employment and social protection, including the gender pay gap, with a view to meeting the objectives of the Europe 2020 Strategy, especially in three areas of great relevance to gender equality, namely employment, education and promoting social inclusion in particular through the reduction of poverty, thus contributing to the growth potential of the European labour force;
- 2) Promote better work-life balance for women and men throughout the life-course, so as to enhance gender equality, increase women's participation in the labour market and contribute to meeting the demographic challenges; and
- 3) Combat all forms of violence against women in order to ensure the full enjoyment by women of their human rights and achieve gender equality, including with a view to inclusive growth".

After the *Strategy for Equality (2010-2015)*, the Commission continued its efforts with the *Strategic Engagement for Gender Equality (2016-2019)*, aligning it with the Second European Pact for Gender Equality (2011-2020). This document established a reference framework for advancing gender equality at all levels—European, national, and local. The promotion of gender equality was emphasized as a key activity for the EU, viewing gender equality not only as a fundamental value but also as a driver of economic growth.

The next document prepared by the Commission is the Gender Equality Strategy 2020-2025²⁴, which is the most recent one to date. In this document, the European Commission outlines its initiatives and sets forth the political objectives and key actions for the period from 2020 to 2025.

The Commission starts from the assumption that men and women should be considered "in all their diversity", referring to "heterogeneous categories including in relation to their sex, gender identity, gender expression or sex characteristics". It also stresses that the implementation of the strategy must proceed along a "dual track" combining targeted measures to achieve gender equality with a greater integration of the gender dimension. This second perspective—gender mainstreaming—is understood by the Commission as the systematic application of the gender perspective in every stage of policy development in all areas of action, both internal and external to the Union. The "cross-cutting" principle for implementing *gender mainstreaming* is *intersectionality*, defined as "the combination of gender with other personal characteristics or identities, and the way these intersections contribute to unique experiences of discrimination".

Objectives and action of the Gender Equality Strategy 2020-2025	
1. Being free from violence and stereotypes	• Ending gender-based violence • Challenging gender stereotypes
2. Thriving in a gender-equal economy	• Closing gender gaps in the labour market • Achieving equal participation across different sectors of the economy • Addressing the gender pay and pension gap

²³ Council conclusions of 7 March 2011 on the European Pact for Gender Equality (2011-2020), 2011/C 155/02.

²⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Union of Equality: Gender Equality Strategy 2020-2025*, Brussels, 5.3.2020, COM(2020) 152 fin.

	• Closing the gender care gap
3. Leading equally throughout society	• Achieving gender balance in decision-making and politics
4. Gender mainstreaming and an intersectional perspective in EU policies	
5. Funding actions to make progress in gender equality in the EU	
6. Addressing gender equality and women's empowerment across the world	

3. Historical and Conceptual Overview: In Search of *Gender and Equality*

3.1 Relationships Between Feminist Thought and the Evolution of Gender Equality in the European Legal System

As outlined in the legal analysis presented in Section 2, the evolution of the integration process has shaped the scope and objectives of institutional action, starting with the economic focus that defined equal pay in the original Treaty of Rome. In this context, a mutual interdependence can be observed between the Union's legal framework and the political, philosophical, and scientific discourse of gender equality embraced by socio-political actors. It has been emphasised that, within the context of the Union, the role of social partners can be pivotal in both advancing and undermining gender equality (Elomäki, Kantola, & Koskinen Sandberg, 2022).

The topic of gender equality is also characterized by a notable diversity of visions. There is not just one form of *feminism*, nor a single European women's movement. Instead, there is a significant diversity of perspectives—sometimes conflicting—over time, between states, and even within states themselves (Woodward, 2012, p. 86) on how to answer fundamental questions of gender.

As a result, providing a consistent interpretation of this research topic is extremely difficult from both a historical and conceptual point of view. Nevertheless, through a simplification, we can distinguish three main historical phases in the evolution of gender policies at the European institutional level (Debusscher, 2015, p. 9; Woodward, 2012, p. 88):

1. The equal treatment phase lasting until the 1970s;
2. The phase of positive actions during the 1980s;
3. The introduction of gender mainstreaming in the 1990s;
4. A current phase of further evolution.

This chronological framework reflects not only the legal evolution and the development of policies discussed in sections 1 and 2, respectively, but also a broader evolution of the concept of gender. While the three phases exhibit significant differences, they do not necessarily contradict each other; however, they may encounter some points of friction in their practical application of the principles. Regarding the European legal system, the core issue seems to be how to define and give substance to the legal term of “equality between men and women” or, in a more contemporary context, “gender equality”.

The first phase (1950s – late 1970s) was characterized by a primarily formal approach to gender equality, in which equality between men and women was pursued through the elimination of disparities in civil and economic rights that men already possessed (Woodward, 2012, p. 88). This led to an “anti-discriminatory” approach, stemming from the earliest perspective of feminism, whose main goal was related to the demand for full legal equality: an “equality feminism” that was “not

attentive to the reasons for identity and difference, but rather focused on the demand for equal rights between the sexes” (Azzariti, 2022, p. 11).

This perspective (*sameness approach*), close to the longstanding tradition of “first-wave” feminism and *liberal feminism* (Cavarero & Restaino, 2002, p. 8), is based on the assumption that individuals of both sexes should be treated the same way, regardless of their physical or social characteristics, from the legal standpoint of the universalization of rights (Azzariti, 2022, p. 11).

This approach led, within the framework of the nation-state—with significant temporal differences between various countries—especially through a reformist lens, to a formal equality between the sexes in terms of political and civil rights before the law, such as access to public offices and employment and family law.

Alongside this approach, another perspective emerged — socialist in orientation (*socialist feminism*) — which sought to promote material equality in addition to equal rights (Cavarero & Restaino, 2002, p. 14).

However, these approaches proved insufficient to overcome the limits of formal equality, proving ineffective in terms of results. In this sense, although achieving equal treatment in legal terms represented an initial and necessary step, it ended up reproducing, in terms of outcomes, the power imbalances between men and women²⁵ that were already present in society.

From the perspective of European law, the equal treatment approach originated with the issue of remuneration in the Treaty of Rome and is enshrined in the primary law of the Treaties, with its application evident in the early directives on the subject.

Equal treatment. The principle of equal treatment refers to the right of all individuals to receive the same treatment without distinctions based on criteria such as “sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation” (Article 19 TFEU). From the perspective of equal treatment between men and women under EU law, a distinction is made between direct and indirect discrimination, both of which are prohibited. Equal treatment does not guarantee equal outcomes. (Woodward, 2012, p. 90)

Direct discrimination. A situation in which a person is treated less favourably based on their sex than another person is, has been, or would be treated in a comparable situation (Directive 2006/54/EC).

Indirect discrimination. A situation in which an apparently neutral provision, criterion, or practice would put individuals of a particular sex at a disadvantage compared to individuals of the other sex, unless that provision, criterion, or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Directive 2006/54/EC).

The limitations of first-wave feminism are underscored by new approaches that emerged in the post-World War II period, which adopted the principle of “anti-discrimination” as the foundation of their action (Azzariti, 2022).

Thus, the groundwork is laid for the development of a concept of “gender equality” beyond that of the “first wave”, which had focused on the demand for mere equal rights and economic conditions. In this sense—starting from the works of Virginia Woolf (1882-1941) and Simone de Beauvoir (1908-1986)—there was a progressive development and affirmation of a movement of thought aimed at

²⁵ Embracing an intersectional logic, this is also true with reference to other power relations based on further social differences.

framing the gender issue in terms of *difference* rather than equality (*difference approach*), while still within a society that guarantees equal rights and material conditions for each individual, regardless of their sex (Cavarero & Restaino, 2002, p. 20).

In the initial phase, from a legal perspective, the focus shifts from simply advocating for equal treatment to demanding the respect and promotion of the principle of equal opportunities, ensuring meaningful outcomes. This includes identifying the necessary legal instruments to achieve gender balance in compensatory mechanisms, such as positive measures and reserved quotas (Azzariti, 2022, p. 12; Rees, 1998, p. 24).

3.2 (continued) The Central Issue of Positive Actions in European Law

As discussed, the issue of positive action is thoroughly regulated at the European level through the reformulation of Article 141 EC by the Amsterdam Treaty, which recognised such measures as non-discriminatory when aimed at achieving genuine equality. However, these measures were already addressed by Directive 76/207/EEC concerning access to employment and have served as the foundation for significant (and debated) case law from the Court of Justice, which has frequently examined the limits of these actions and their potential conflict with the principle of formal equality.

Beginning with the *Kalanke* case²⁶, although this case saw some evolution, the Court has established a series of criteria to define a proportionality test for the admissibility of preferential treatment, albeit with some evolution over time (Pollicino, 2005). In this decision concerning quotas reserved for women in access to employment, the Court adopts a restrictive interpretation of preferential treatment, deeming admissible (§16) only those measures aimed at eliminating or reducing factual disparities. Consequently, automatic preference clauses are considered illegitimate, as they would lead to discrimination against the less-favoured sex.

According to the judges' interpretation, positive action must influence pathways to employment by creating conditions that genuinely enable both men and women to participate equitably in professional competition. However, interventions must adhere to the principles of proportionality and necessity: any deviation from "neutral" equal treatment must respect the principle of proportionality, which is fundamental in the Community legal system, requiring a balance between the means employed and the objectives pursued. If, however, the preference given to women in hiring exceeds what is necessary to ensure equal opportunities for access, there is a risk of distorting the objective by imposing a result that should instead be achieved through fair and balanced competition (Sciortino, 2020, p. 40).

In this manner, the Court appears to interpret the concept of equality, viewed through the lens of the principle of proportionality, in terms of *equal opportunities*—specifically, equality in access—rather than equality of outcomes (Sciortino, 2020, p. 40). In this context, a latent anthropological interpretation one can discerned—albeit facilitated by Community competencies and the specifics of the case—that is rooted in the model of the *homo oeconomicus* and competitive social relations (Woodward, 2012, p. 96; Kantola, 2010, p. 46).

Subsequent case law (for instance, the *Marschall*²⁷ and *Abrahamsson*²⁸ cases) indicates an evolution in the Court's stance, particularly regarding the criteria governing the proportionality

²⁶ Court of Justice, judgment of 17 October 1995, Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*.

²⁷ Court of Justice, judgment of 11 November 1997, Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*.

²⁸ Court of Justice, judgment of 6 July 2000, Case C-407/98, *Abrahamsson v. Leif Anderson v. Elisabet Fogelqvist*.

assessment. Nevertheless, it reaffirms a framework in which positive action must be temporary and not permanently established, as it is intended to address disadvantages that significantly impede equality of opportunity. Within the proportionality assessment—which provides judges with considerable discretion—positive measures must be interpreted in light of the changing social context, employing objective statistical data to demonstrate any discriminations impacting a greater number of workers of one sex compared to the other. Interventions that confer absolute and unconditional preference are not permissible; instead, they must objectively consider qualifications and skills during the hiring process which should be equally represented across in both sexes (Pollicino, 2005; Sciortino, 2020).

3.3 Beyond Positive Actions and the Recognition of Difference: Gender as a Problem of Social Subordination and Rethinking Models

The perspective of positive action, although still fraught with challenges and conflicts today, has been challenged by the evolution of subsequent thought (Apostoli, 2022, p. 45). It has been emphasized that the rationale behind positive action risks remaining tied to a merely symmetrical perspective, ultimately obscuring gender differences and differences *between* the genders, while leaving unchallenged a social, political, and legal framework built on a male model, which is now open to both sexes (Azzariti, 2022, p. 12).

The core issue tackled in political and philosophical arenas revolves around the persistence of male dominance that is no longer based on a disparity of rights (which was the focus of *liberal feminism*) nor strictly economic disparities (the focus of *socialist feminism*), which positive actions have failed to resolve. This is not to say that prior claims for rights and economic equality were exhausted; rather, it points out that discriminatory differences remained *even* for those women who, economically independent, were no longer directly exploited by the “system” or were part of racial minorities exploited both for racial and class reasons (Cavarero & Restaino, 2002, p. 32).

The shift in thinking underlying *radical feminism* eliminates the separation between public and private spheres—a hallmark of the past era—which had hidden rather than resolved the inequalities resulting from the patriarchal structure that dominated society (Rees, 1998, p. 24). The issue now is framed not solely in terms of discrimination but also as a question of hierarchy and subordination (*dominance approach*), with a focus on the principle of *anti-subordination*.

At the roots of male dominance, as argued by certain perspectives within “second-wave” feminism, there is an absolute supremacy in the realms of sexuality and reproduction. In this context, “a biological, anatomical, physiological, ‘sexual’ difference in the literal sense is transformed [...] into a difference in social and familial roles, in ‘gender’, which imposes a subordinate role on women” (Cavarero & Restaino, 2002, p. 32-33). In this sense, the perspective shifts from a purely anti-discriminatory stance: achieving equality, whether on a legal or practical level, is insufficient. Instead, it is crucial to transform the actual relationships that foster conditions of subordination between individuals (Azzariti, 2022, p. 18).

Building on this assumption, various reconstructions emerge, albeit with profound differences in positions, emphases, theoretical motivations, and practical proposals, aimed at transcending the link between *sex* as an anatomical fact and *gender* as a social role (Cavarero & Restaino, 2002, p. 33; Apostoli, 2022, p. 54).

On this point, the reflections of those who explore the compatibility between equality and difference in relation to gender, proposing a reconstruction that emphasises the close complementarity between the *theory of difference* and the *theory of equality*, are significant. This approach juxtaposes, on one hand, *equality* and *inequality*, and on the other, *difference* and *identity*.

In this context, it becomes possible to synthesise perspectives that regard equality as a matter of *dominance* or *oppression* (the theory of difference) with those that see it as fundamentally about *distribution* (the theory of equality), thus framing them in a complementary way (Gianformaggio, 2005, p. 36, 49).

This evolution of thought is linked—though not identical—to the profound changes that the European Union underwent in the 1990s, culminating in the new legal framework for gender policies established in the Amsterdam Treaty (Kantola, 2010, p. 125). The introduction of *gender mainstreaming* at the European level aims to transcend the clear dichotomy between formal equality and positive action. This is achieved by integrating a gender perspective into every stage of political processes—planning, implementation, monitoring, and evaluation—to promote equality between women and men (Debusscher, 2015).

With the implementation of *gender mainstreaming* at the Union level, the concept of *equality* merges, both conceptually and lexically, with that of *gender*. However, while the concept of equality has a significant tradition and has been thoroughly developed in *legal* doctrine—both in the constitutional systems of member states and, in some forms (primarily equal treatment) in EU law—the concept of gender continues to remain largely outside the *legal* sphere.

Elements for the implementation of *gender mainstreaming*. 1. Measurement and monitoring, i.e., analysing the gender situation in a specific *policy* area; 2. Implementation, which generally involves an assessment of the gender implications of a proposed policy and aims to improve them; 3. Creating awareness, ownership, and understanding among stakeholders, to enhance future decision-making; 4. Coverage and gender evaluation, to determine the extent to which proposed policies have had gendered effects (Woodward, 2012, p. 98).

3.4 Intersectional Approach in the European Context

As discussed earlier, one of the main conceptual outcomes of the new framework established by the Amsterdam Treaty and later by the Lisbon Treaty is the connection between the principle of non-discrimination on the grounds of sex and other grounds of discrimination.

Principle of non-discrimination in European Treaties.

Article 21 EU Charter of Fundamental Rights: Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Article 19 TFEU (ex Article 13 TEC): Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, **acting unanimously** in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.

This provision has opened the way for an intersectional reading of gender issues, including within the European Union. The Commission, in its most recent programmatic document—the already mentioned *Gender Equality Strategy 2020-2025*—declares that this strategy “will be implemented using intersectionality—the combination of gender with other personal characteristics

or identities, and how these intersections contribute to unique experiences of discrimination—as a cross-cutting principle”.

The extension of anti-discrimination law beyond the category of gender (and the “historic” one of nationality) seems to rely, both in normative and jurisprudential terms, on the application of the principle of human dignity, thus acquiring a deeply emancipatory and general character (Pollicino, 2005, p. 286).

An intersectional approach to gender issues is undeniably innovative, offering a broader understanding of gender and how, in a gendered society, related constructs and expectations shape personal identities and social interactions. As noted by EIGE, the concept of gender can serve as a crucial framework for addressing multiple asymmetries of power. It plays a significant role in understanding and addressing the structural causes and different manifestations of discrimination rooted in gender constructs and expectations (EIGE, 2022, p. 10-11).

Intersectionality. Analytical tool for studying, understanding and responding to the ways in which sex and gender intersect with other personal characteristics/identities, and how these intersections contribute to unique experiences of discrimination (EIGE – European Institute for Gender Equality, eige.europa.eu).

In other words, a gender perspective can raise both individual and collective awareness of the social and legal construction of the sexes, challenging it without, however, seeking to neutralise sexual difference. The intersectional perspective, in this sense, seems useful for valuing differences, promoting an approach that focuses on the individual as a whole, in order to promote the realization of substantive equality (Ronchetti, 2022, p. 124, 127, 133).

3.5 Different Conceptions of *Gender*

The distinction between sex (as a biological fact) and gender (as a cultural construction) is considered fundamental in some schools of thought, particularly within Anglophone feminisms. However, it is much less entrenched in other traditions, such as certain currents of Italian and French feminism, which instead focus on the political emergence of sexual difference and strongly oppose the idea of equality conceived as a neutralising assimilation of biological sex (Di Martino, 2022, p. 196; Olivito, 2022). This has given rise to expressions like “sex-gender” (Pezzini, 2022). In other words, these perspectives argue for the existence of an irreducible, essential, and foundational sexual difference that does not necessarily coincide with the abstract categories of man or woman, but with an individual process of construction (Cozzi, 2023).

Consequently, strong differences and conflicts exist even within feminisms over certain gender-related issues. One example is the Italian debate surrounding a legislative proposal that sought to introduce into legal texts definitions of *sex*, *gender*, *sexual orientation*, and—most notably—*gender identity*²⁹ (Dominijanni, 2020; Non una di meno, 2020; Niccolai, 2021).

In a simplified summary, several definitional approaches to gender can be identified:

²⁹ We refer to the so-called “Zan Bill” (*d.d.l. Zan*), *Measures to prevent and combat discrimination and violence on grounds of sex, gender, sexual orientation, gender identity, and disability*, Italian Senate, XVIII Legislature, Bill No. 2005. It defined *gender* as “any outward manifestation of a person that conforms to or contrasts with social expectations related to sex” and *gender identity* as “the perceived and expressed self-identification in relation to gender, even if it does not correspond to sex, regardless of whether a transition process has been completed”.

1. A conception in which gender is used as a synonym for “sex”, with no substantive distinction between biological and socio-cultural aspects.
2. A cultural construct, encompassing the roles, behaviours, activities, and socially defined attributes deemed appropriate for women and men³⁰, based on sex. Gender, as a cultural expression, is understood neutrally, applying to both men and women.
3. A neutral term—not necessarily tied to male or female identities—encompassing *gender identities* that do not conform to the binary system based on biological, somatic, or chromosomal characteristics (as in *intersex* individuals) or those who identify outside of this binary (such as non-binary, *queer*, bi-gender, or gender-fluid persons). This concept allows for abstraction from biological sex and the body. This provides space for self-determination regarding *gender identity* (Lorenzetti, 2022, p. 205).
4. A cultural interpretation emphasising its relational dimension, defining a binary not only characterised by sex (*sex-gender*), but essentially shaped by hierarchical power relations, in which women are subordinated to men (Lorenzetti, 2022, p. 210; Pezzini, 2022). In this sense, it could be argued that “gender”, in the singular, refers to only one—female gender—since male gender is considered as the standard, supposedly universal and abstract (Apostoli, 2022, p. 33; Wittig, 1983).

3.6 What Concept of Gender for the European Union?

The terms “**gender**”, “**gender equality**”, and “**gender parity**” **are neither mentioned nor defined in the European Treaties** or in the Charter of Fundamental Rights, which makes exclusive reference to “equality between women and men” and to discrimination based on “sex”.

In this context, the methodology adopted in some gender studies related to the **European framework** is noteworthy, as the concept of gender is seen as an “empty signifier that takes on as many meanings as the variety of visions and debates on the issue allow it to take” (Verloo, 2007, p. 22)³¹.

However, since the implementation of the legal basis for *gender mainstreaming* under the Amsterdam Treaty, the development of secondary legislation (such as directives, regulations), policy documents, and the jurisprudence of the Court of Justice has led to the **increasing use of the terms** “gender” and “gender equality” **by EU institutions**, to the point where they became the reference terms³².

As highlighted by the European Institute for Gender Equality (EIGE, 2022, p. 10), this change goes beyond linguistic considerations, reflecting a substantial shift in approach. It emphasises the pursuit of de facto equality between men and women through the lens of the social construction of gender and relationships between the sexes.

From a terminological perspective, the **European Commission**, in its most recent policy documents, clarifies the meaning of gender by using the definition provided in Article 3(c) of the

³⁰ This definition, adopted by the European Commission in *the Gender Equality Strategy 2020-2025* and substantially shared by EIGE, derives from the Council of Europe (cf. *infra*).

³¹ “The concept therefore can be seen as an empty signifier that takes as many meanings as the variety of visions and debates on the issue allow it to take. Feminism in fact has been defined as a cluster of contesting views on the gender problematic. Similarly, gender equality policies can be studied as clusters of contesting views on addressing the gender problematic”.

³² European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “*A Union of Equality: Gender Equality Strategy 2020-2025*”, cit.

Council of Europe Convention on preventing and combating violence against women and domestic violence (commonly known as the Istanbul Convention), which was adopted in 2011 and entered into force in 2014.

Definition of “Gender” in the Istanbul Convention: “Gender shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men” (Article 3(c)).

The journey of the **Istanbul Convention** as a source of EU law has been fraught with challenges and controversy. Initially drafted in 2011 under the auspices of the Council of Europe, it was signed by all EU Member States. However, several countries—specifically Bulgaria, Lithuania, the Czech Republic, Slovakia, and Hungary—did not ratify the Convention

The ratification process progressed after the European Commission initiated action on 4 March 2016, leading to two subsequent Council decisions³³. As a result, the EU signed the Convention on 13 June 2017. However, the ratification of the Convention through a *decision on its conclusion* faced significant delays, as the governments of the member states—many of which had not individually ratified the Convention—conditioned this decision on the achievement of a “common agreement” within the Council concerning areas within their jurisdiction. The Commission has repeatedly expressed its political commitment to moving forward with the ratification, a stance reflected in the 2020-2025 Strategy, which included the “threat” of proposing “measures, within the limits of EU competence, to achieve the same objectives as the Istanbul Convention”, in should ratification be delayed. The European Parliament also joined this effort, seeking an opinion from the Court of Justice³⁴. Ultimately, the EU’s accession to the Istanbul Convention was concluded with the ratification taking effect on 1 October 2023, following two Council decisions³⁵.

From a legal standpoint, the concept of *gender* set out in the Istanbul Convention has become part of European Union’s legal framework. According to the case law of the Court of Justice, it holds an intermediate legal status, positioned between primary law (the Treaties) and secondary law (subordinate to the former, superior to the latter). Naturally, the definitional content applies “for the purposes of the Convention” (Article 3), and is therefore not necessarily applicable to all EU gender-related policies. However, the way the Commission utilise this concept suggests a broader relevance.

As for the member states that have not ratified the Convention, it has nonetheless entered their legal systems via EU secondary law, within the scope of competences attributed by the Treaties. Consequently, it applies in their legal systems only in areas of supranational competence. However, as scholars pointed out (De Vido, 2020), for all member states, regardless of ratification, and for the EU itself, the Istanbul Convention serves as an interpretative tool for existing EU law.

Additional insights into the concept of gender can be derived from **the case law of the Court of Justice**. In the line of cases concerning the legality and limits of positive action, starting with the *Kalanke* judgment, the issues have been framed, in line with the Treaties, based on sex, maintaining

³³ These are Decision 2017/865 and Decision 2017/866.

³⁴ Request for an opinion submitted by the European Parliament under Article 218(11) TFEU (Opinion procedure 1/2019), to which the Court replied in its opinion of 6 October 2021. In that opinion, the Court essentially endorsed the Council’s conduct, considering the condition of prior mutual agreement to be legitimate.

³⁵ These are, respectively, Council Decisions No. 2023/1075 and 2023/1076 of 10 June 2023.

a neutral and balanced understanding of the two sexes, consistent with the wording of the Treaties (“equality between men and women”, “under-represented sex”).

This binary understanding persists even in the (limited and dated) case law of the Court of Justice concerning discrimination against transsexual people. In the *P v S and Cornwall County Council* ruling, which concerned a worker dismissed due to their gender reassignment, the Court held that anti-discriminatory protections apply in such cases, stating that “the scope of the Directive cannot be confined simply to discrimination arising from gender reassignment, which is based, essentially if not exclusively, on the sex of the person concerned, since to dismiss a person on the ground that he or she intends to undergo, or has undergone, gender reassignment is to treat him or her unfavourably by comparison with persons of the sex to which he or she was deemed to belong before that operation”³⁶.

Since 1996, there have been no significant developments in the Court’s case law on this matter. It can thus be argued that the Court of Justice views gender protection as being closely linked to the *current* existence of a biological sex, thereby limiting the scope of sex-based anti-discrimination protection to individuals undergoing or who have undergone gender reassignment surgery.

In terms of *gender identity*, several resolutions from the **European Parliament** warrant attention³⁷. In these non-binding documents, the Parliament—drawing on reports from the United Nations and the Council of Europe—calls for the development of policies to combat discrimination based on gender identity. Additionally, it requests that gender identity be included as a prohibited ground for discrimination in any future equality legislation. It is worth noting that these resolutions also broadly address discrimination based on sexual orientation, although anti-discrimination policies on that front have a solid legal basis under Article 19 of the TFEU, which is not the case for gender identity³⁸.

In this regard, the position taken by the **European Institute for Gender Equality (EIGE)** appears to lean not towards a conceptual redefinition of *gender*—which remains tied to the social constructions of sexual difference—but rather towards an expanded, inclusive approach to gender policies (*comprehensive gender equality policy*). We are thus witnessing an extension of policy instruments, such as the *mainstreaming*, to include and address discrimination based on other grounds listed in Article 19 of the TFEU, in pursuit of an intersectional approach (EIGE, 2022)³⁹.

3.7 Limits and Criticisms of the European Union’s Approach to Gender Issues

The European Union’s approach to gender equality, while having contributed to substantial progress on the issue, has not been without criticism. Some of the main limitations of the Union’s approach to gender issues revolve around the following concerns:

³⁶ Court of Justice, judgment of 30 April 1996, *P v. S and Cornwall County Council*, Case C-13/94.

³⁷ See for example the *European Parliament Resolution of 28 September 2011 on human rights, sexual orientation and gender identity in the framework of the United Nations*; as well as the *European Parliament Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity*.

³⁸ Under Article 19 TFEU, “the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*”.

³⁹ See for example EC communications, *A Union of Equality: Strategy for the rights of persons with disabilities 2021 -2030*, COM(2021) 101; *EU Roma strategic framework for equality, inclusion and participation*, COM(2020) 620; *LGBTIQ equality strategy 2020 -2025*, COM(2020) 698; EU anti-racism action plan 2020 -2025, COM(2020) 565.

1. First, the focus of EU gender policy seems largely concentrated on the labour market, with a lack of binding regulations in other areas. This prioritization can be explained by the Union's original purpose, which was primarily to foster economic integration among member states (Kantola, 2010, p. 46; Debusscher, 2015, p. 13). Additionally, the different legal bases between measures related to employment (Article 157 TFEU, which requires qualified majority voting in the Council) and those of a general nature (Article 19 TFEU, which requires unanimity) tend to facilitate some decisions over others (Menéndez, 2019).
2. Additionally, there is a significant concern about the effectiveness of the tools used to implement gender equality policies. While the EU has issued various binding regulations in the area of labour market equality, their impact has often been limited to isolated cases of discrimination addressed by the courts, without achieving broader compliance by member states in updating their legal framework. Moreover, these measures have not succeeded in tackling the deeper, structural causes of inequality. The frequent reliance on soft-law instruments—often due to the lack of consensus needed for comprehensive policy reforms—further undermines the effectiveness of the Union's actions (Kantola, 2010, p. 46; Debusscher, 2015, p. 14; EIGE, 2022, p. 14).
3. Finally, a third area of criticism relates to the *ideological* foundation of gender policies, which is often focused on market considerations, competition, and economic growth. This approach tends to reduce gender equality to mere *equality of competitive conditions*, detaching it from social justice and conceiving it as something instrumental to the market (Kantola, 2010, p. 46; Debusscher, 2015, p. 14; Olivito, 2022, p. 94).

Conclusions

The analysis has illustrated the evolution of the concept of gender equality within EU law and policies. Section 1 focused on the legal and jurisprudential evolution, noting how a ban on sex-based discrimination has early roots in EU law and has gradually evolved: from a ban on discrimination aimed at preventing distortion of competition based on wage dumping, to a general principle of gender equality applicable to all EU policies through the principle of gender mainstreaming. Section 2 then examined the implementation of gender policies by EU institutions, highlighting their progressive development and expansion, driven both by political pressures and legal and jurisprudential evolution.

Finally, Section 3 provided a more in-depth historical and theoretical analysis of the concepts of *equality* and *gender*, highlighting the connections between the evolution of political-philosophical thought, particularly feminist thought, and the developments in EU law, as described in Sections 1 and 2.

In examining equality, the complexity of the concept has been thoroughly explored, leading to the conclusion that a complementary approach in gender policies—one that seeks equality *within* the framework of difference—is both feasible and likely necessary. Such an approach would prompt a broad rethinking of social norms and power relations. It has been noted that, at the European Union level, gender policies have shown greater receptiveness to this perspective than the more rigid evolution of legal norms. Nevertheless, from a legal standpoint, the EU's approach to equality largely relies on the legal-conceptual framework of non-discrimination rather than substantive equality. Although anti-discrimination law carries a significant emancipatory potential, the *case-by-case* nature of the Court of Justice's rulings, coupled with legal constraints such as the unanimity requirement outside the employment sector, have acted as significant obstacles. These factors hinder

the broader application of *gender mainstreaming* across social relations and limit efforts to address the underlying social causes of gender inequality.

In terms of the concept of *gender*, it has been highlighted that the European Union lacks a clear legal definition. Some studies even describe gender at the European level as an “empty” concept. EU primary law focuses on *sexes*, but the Union’s recent accession to the Istanbul Convention seems to strengthen the legal—not just political—recognition of gender as a socially constructed, non-neutral category. Legally, the concept of gender in EU law remains strictly linked to the binary understanding of sex. In this context, the push towards a more inclusive concept of gender (such as one recognising gender identity), while presenting certain challenges, seems to find support not through a redefinition of the term, but rather through the evolution of policy. Tools like *gender mainstreaming* are now applied with an intersectional approach, addressing various forms of diversity beyond just sexual difference.

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