

The Principle of Equality in EU Law

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Editors

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 Springer

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Preface and Acknowledgments

This book discusses what are currently the most challenging implications and dimensions of the principle of equality in the European Union (EU). In all democratic systems the principle of equality forms the basis of every contemporary social contract and is also a cornerstone of the European integration process.¹ In the EU's legal order, the principle applies both to relations between the Union and its Member States and to relations between the EU and individuals. It is a multifaceted principle, having several corollaries and different dimensions. In relations between the Union and Member States its formal dimension means equality before the EU Treaties and is bound up with the principle of loyal cooperation, while its substantive meaning is tied to other principles, such as solidarity, *effet utile*, and territorial and social cohesion. In relations among individuals it applies to the wide and consequential domain of fundamental rights, finding significant support in the EU Charter of Fundamental Rights, in the Treaties, and in the case-law of the Court of Justice of the European Union (ECJ).

Although the EU principle of equality has in the past been an object of important theoretical studies and analyses in the legal literature,² not all its implications and relations to other principles have so far been explored. Moreover, recent developments on the European stage—notably the economic and financial crisis of 2008 and the EU's response, the Brexit referendum and the related disentanglement process, the 'refugee crisis' and its handling—suggest a pressing need to reassess the role that equality plays (or should play) in the EU's current 'existential crisis'.³

The analysis carried out in this book has been structured in three complementary parts: 'Equality and States: Are Some States More 'Equal' than Others?' (Part I),

¹See Tridimas (2006), p. 60.

²Among the works offering an overview of the EU principle of equality, see Croon-Gestefeld (2017), Besson and Levrat (2014), Ellis and Watson (2012), Biagioni and Castangia (2011), Potvin-Solis (2010), Favilli (2008), and Bell (2002).

³See Juncker (2016), p. 6.

‘The Structural Aspects of the Principle of Equality in the EU’ (Part II), and ‘Equality in Specific Policy Domains of the EU’ (Part III).

Part I (Chaps. 1–3) addresses a peculiar aspect of EU equality that is mostly overlooked in the investigations devoted to this topic, namely, equality among *States*. This part analyses how the principle is applied in the relations between the EU and its Member States (Rossi and Wouters & Schmitt), as well as in the contractual obligations the Union has initialled with third countries (Casolari). The first two contributions point out an opportunity to fill a gap in the relevant legal scholarship and commentary, shedding light on the close intertwinement that exists between the two dimensions of EU equality, namely, the inter-individual dimension and the inter-State one. The affirmation and enforcement of equality among Member States has indeed proved to be an important tool for preventing discrimination against individuals, thus leading to a more effective implementation of the inter-individual dimension of equality. The third contribution focuses on obligations the Union owes to non-EU countries, illustrating the progressive differentiation in the effectiveness of these obligations acknowledged at internal level, a trend that in turn is leading to an illogical differentiation among contractual partners and, most importantly, to the general risk of undermining the equality principle on the international scene.

More to the point, Chap. 1 (Rossi) reconstructs the evolution of the principle of equality among EU Member States, highlighting its supranational nature and its interaction with other general principles of the Union. According to Rossi the differentiation that can develop between Member States under EU law may come up against limitations deriving from the need to respect the principles of equality and non-discrimination. Also evincing the close interplay between the inter-individual and inter-State dimensions is Article 4(2) TEU, specifically as reworded through the innovations introduced with the Lisbon Treaty. In fact, this provision—the very first recognition in primary law of the equality that holds among Member States—says that the ‘Union shall respect the equality of Member States before the Treaties [...]’, thus clearly echoing the language of the formal equality clause incorporated into Article 20 of the EU Charter of Fundamental Rights, namely, ‘Everyone is equal before the law’.

Chapter 2 (Wouters and Schmitt) examines the impact the principle of equality among EU Member States has on the differentiation mechanisms used in the European integration process, which mechanisms have become particularly relevant in the response to the latest economic and financial crisis, and which seem to be destined to play a significant role in relaunching the European integration process. The analysis highlights a ‘multiplayer game’ that includes Member States (in their capacity as the EU’s *pouvoir constituant*, as authorities implementing EU law, or simply as sovereign States), their national (constitutional) courts, the EU courts, and other international courts and bodies. Although this ‘multilayer’ and ‘multiplayer’ setup may be a source of uncertainty for differentiation mechanisms, it also helps to ensure respect for the principle of equality.

Chapter 3 (Casolari) is focused on the most recent practice of EU political institutions relating to the EU’s signing and conclusion of major international

agreements. This practice leads to an express denial of the direct effect of such agreements, marking a significant shift away from the previous trend, which has so far been one of self-restraint as concerns the agreements' internal legal effects, thereby introducing a differentiating factor in the Union's contractual relations. At the same time, the direct effect of contractual provisions is acknowledged to be closely interdependent with the need to ensure respect for legal equality, and so that new trend risks fragmenting the implementation of EU agreements, as well as the role played by equality and non-discrimination in the Union's external action.

In Part II (Chaps. 4–6) the focus shifts to the inter-individual dimension of equality. Here the emphasis falls on some major developments that contribute to (re)shaping the global framework of EU anti-discrimination law. In this discussion, the same understanding of the principles of equality and non-discrimination is assumed as the one stated in the ECJ's case-law. As the Court has held, these 'are simply two labels for a single general principle of [...] EU law, which prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment'.⁴

Chapter 4 (de Witte and Muir) illustrates a general institutional trend that seems to characterize the current phase of EU anti-discrimination law, requiring Member States to adopt a procedural and institutional framework to facilitate the effective implementation of the relative substantive EU rules. The emphasis is twofold, falling on the one hand on a series of requirements aimed at making it easier for victims of discrimination to actually access justice, and on the other hand on the creation of nonjudicial equality bodies designed to promote a culture of equality.

Unlike de Witte and Muir's contribution, Chaps. 5 and 6 (Benoît-Rohmer and Zaccaroni) offer a global survey of the judicial implementation of the key substantive norms of EU anti-discrimination law. In particular, Benoît-Rohmer's chapter outlines the main arguments the ECJ has developed in the various anti-discrimination areas involved in the cases brought before it, suggesting that through the resulting case-law, significant social progress has been made in protecting victims of discrimination. Zaccaroni's chapter stresses the common threads running through the ECJ's case-law dealing with the different grounds of discrimination covered by EU law, looking to determine whether the same case-law can fill the gaps left by the absence of horizontal legislation.

In light of the general framework outlined in Part II, Part III (Chaps. 7–10) undertakes a more practical investigation devoted to the substantive strands of EU anti-discrimination law, to this end looking at four different case studies. Although the analysis carried out here certainly does not exhaust the area of investigation, the selection of topics does take into account some of the most significant developments that have recently emerged in the matter at issue.

Chapter 7 (McDonnell) is focused on the implementation of equality among EU citizens. The analysis illustrates several shortcomings in the way EU law ensures

⁴ECJ, Case C-422/02 P *Europe Chemi-Con (Deutschland) GmbH v Council and Commission* EU: C:2005:56, para 33.

the equality of citizens. In part, these shortcomings derive from both the fragmented nature of the relevant legal framework and its personal scope of application. In part, they stem from the recent crises the Union has been facing (especially the economic and financial crisis and Brexit), exerting pressures that have undermined the Union's ability to ensure a solid and coherent scheme for its citizenship law. Although not new and largely unfounded, the criticisms directed at free-movement rights linked to EU citizenship have rapidly regained momentum in the current public debate on the European integration process, and several EU countries have begun to advocate—and apply—a narrower conception of such rights, introducing national mechanisms for dealing with free-movement abuses. Most importantly, some EU institutions (including the ECJ) have decided to respond to these criticisms by reinterpreting the benefits of EU citizenship—once more narrowing their scope.

Chapter 8 (Di Federico) addresses the protection against discriminatory practices in another fundamental domain covered by EU law, namely, healthcare. Even in this area, despite the strategic importance of ensuring equal access to emergency and primary healthcare throughout the Union, the relevant practice reveals the fragmentation and ineffectiveness of EU anti-discrimination law. Combating single and multiple discriminations is pivotal not only for the protection of fundamental rights but also for upholding the founding values of the Union. However, legislative inertia impedes the adoption of the Commission's proposal for a directive covering all grounds mentioned in Article 19 TFEU, and applicable to all areas covered by the Racial Equality Directive, including healthcare. Even so, alternative options for securing equality exist, especially after the EU Charter of Fundamental Rights has acquired binding legal force.

Chapter 9 (Ambrosini) turns to the crucial issue of reverse discrimination. This contribution assesses the relevant case-law by looking at the techniques the ECJ has so far evolved to limit the side effects of reverse discrimination. While there is reason to look favourably on the Court's most recent decisions in this area, for they are helping to strengthen the protections afforded to European citizens, more concerning, by comparison, is its previous case-law, which clearly shows that the Court lacks a coherent approach to EU anti-discrimination law, a shortcoming that in turn risks undermining the very rationale of such law.

Significant shortcomings are also highlighted in Chap. 10 (Borraccetti) with regard to the EU legal framework applicable to migration crises. Specifically, Borraccetti keys in on the use of EU legislation designed to fight human trafficking, showing how such legislation, in its essential features, is in significant respects inconsistent with the principle of unconditional access to assistance, as well as with that of equal access to the rights of victims, thus urging a global reconsideration of the Union's response to this phenomenon.

This book is the outcome of a feasibility study on the principles of equality and non-discrimination in European Union law. The study was supported by *Alma Mater Studiorum* – University of Bologna (UNIBO),⁵ and under the editor's

⁵Ref. FFBO124051.

supervision it was carried out by a team of researchers at the International Research Centre on European Law (CIRDE, on the Web at <http://www.cirde.unibo.it/en/>). Two events were organized during the study's lifecycle, so as to enable the CIRDE researchers to present and discuss their findings with leading scholars who have worked extensively on the topic. The first of these events was an international conference held in Bologna on 18–19 May 2015 in cooperation with the Real Colegio de España; the second was a seminar held in Bertinoro on 6–7 July 2016 as part of the 16th edition of the Summer School on the Protection of Fundamental Rights in Europe. The contributions to this book trace their origins to these two events and further develop the scholarly dialogue established under the project, leading to a broader reflection on the current state of equality in EU law.

The editors express their gratitude to all those who have contributed to this study and to all the chairs and speakers who, while not appearing in this volume, took part in the events that have made it possible.⁶ Many thanks also go to the Real Colegio de España for its support in making possible the conference held at the University of Bologna, to Oriana Mazzola for her kindness and organizational assistance, and to Filippo Valente for copyediting the manuscript.

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⁶These are in particular Marco Balboni, Yolanda Gomez, Vlasta Kunová, Takis Tridimas, and Alessandra Zanolotti.

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Abbreviations

AA	Association Agreement
ACN	Active Citizenship Network
ACP	African, Caribbean and Pacific Group of States
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General of the European Court of Justice
BENELUX	Belgium, the Netherlands and Luxembourg
BVerfGE	<i>Bundesverfassungsgericht</i> (German Federal Constitutional Court)
CARIFORUM	Caribbean Forum of African, Caribbean and Pacific States
CEHR	UK Commission for Equality and Human Rights
CESCR	Committee on Economic, Social and Cultural Rights
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CETS	Council of Europe Treaty Series
CFI	Court of First Instance (now General Court)
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CSDH	Commission on Social Determinants of Health, World Health Organization
DK	Denmark
DSB	Dispute Settlement Body, WTO
EAW	European Arrest Warrant
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEA	European Economic Area
EFMS	European Forum for Migration Studies
EHIC	European Health Insurance Card

EMU	Economic and Monetary Union
EP	European Parliament
EPA	Economic Partnership Agreement
EQUINET	European Network of Equality Bodies
ESCB	European System of Central Banks
ESM	European Stability Mechanism
EU	European Union
EUR	Euro
EUROPOL	European Police Office
EUROSTAT	Statistical Office of the European Union
EUROSUR	European Border Surveillance System
FTA	Free Trade Agreement
FTT	Financial Transaction Tax
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GG	<i>Grund Gesetz</i> (Basic Law for the Federal Republic of Germany)
HALDE	Haute Autorité de Lutte contre les Discriminations et pour l'Egalité (French High Authority Against Discrimination and for Equality)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IHRL	International Human Rights Law
IRL	Ireland
ISDS	Investor-State Dispute Settlement
JHA	Justice and Home Affairs
LGBT	Lesbian, Gay, Bisexual and Transgender
MEP	Member of the European Parliament
MS	Member State (of the European Union)
NGO	Non-governmental Organization
NHRI	National Human Rights Institutions
ODIHR	Office for Democratic Institutions and Human Rights, OSCE
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union (former Official Journal of the European Communities)
OMT	Outright Monetary Transactions
OOPEC	Office for Official Publications of the European Communities
OSCE	Organization for Security and Co-operation in Europe
PCA	Partnership and Cooperation Agreement
PSC	Political and Security Committee
SADC	Southern African Development Cooperation
TCN	Third Country National
TEC	Treaty establishing the European Community
TEEC	Treaty establishing the European Economic Community
TESM	Treaty establishing the European Stability Mechanism

TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
THB	Trafficking in Human Beings
TTIP	EU-USA Transatlantic and Investment Partnership
UEMOA	West African Economic and Monetary Union
UK	The United Kingdom
UN	United Nations
UNEP	United Nations Environment Programme
UNODC	United Nations Office on Drugs and Crime
US	United States of America
VAT	Value Added Tax
WTO	World Trade Organization