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Taking the Next Step Towards More Equality

Equality goes to the heart of the law. It is a prescript that has to be observed in order to reach a level of justice that citizens indeed perceive as justice.

Many perceive non-discrimination as a 'soft', social value: discrimination is its hard-core restriction. It therefore does not come as a surprise that equality grew into a core element of EU law in general and of the decisions of the European Court of Justice in particular.

Conscious creatures like human beings[1] have a perfect intuition for equality – which goes with an intuition for discrimination. As long as they perceive a relevant difference, they accept differences in treatment. Such treatment is not perceived as being unequal. As soon as the relevance of a difference fades, the acceptance of differences in treatment equally fades. The situation becomes instable. It's the end of peaceful coexistence.

The story of equality discussed in this contribution anchors with Chapters 4 and 5.II of the Casebook. Besides, it shows the structure of the other chapters and ways to make use of their content.

The casebook presents what national judges manage to construct with the building blocks provided for by the Treaty on the Functioning of the European Union, the case law of the Court of Justice, the General Principles of EU law, the Charter, the directives, national private law, the arguments of the private parties involved and their own well-informed common sense. Case law is reported in terms of facts, the legal relationship concerned, the techniques and mechanisms of EU law and national law, the substance of rules of EU law and national law and the substantive implications for the horizontal relationships, including the available remedies.

As equality directly relates to the intuition of citizens, judges receive much help from the private parties involved. As an example, in EU law, free movement is perceived as fundamental. The awakening of freedom of movement provisions in the sphere of private law directly relates to private parties being discriminated against by other private parties.

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1 Having an intuition for equality is not confined to human beings as is shown in the experiments designed by prof. Frans de Waal. See for example <https://www.youtube.com/watch?v=meiU6TxysCghttps://www.youtube.com/watch?v=meiU6TxysCg@> and <http://www.hpdetijd.nl/2014-09-22/onderzoek-dit-is-waarom-mensen-eerlijk-zijn/>.

Regarding the free movement of workers being an essential part of EU law in general, Angonese and Köbler did not care a straw. Angonese grew angry for not being equally acknowledged as a person who was fluent in German,[2] and the Austrian citizen Köbler could not stand that his teaching experience acquired at a German university was not of similar value as the teaching experience his colleagues had acquired in Austrian universities.[3] The intuition of private parties for equality has always been a powerful motor for the development of EU private law.

I Article 18 TFEU

One of the findings presented in the Casebook is that Article 18 TFEU has practical relevance. Judges apply Article 18 TFEU, the general prohibition to discriminate on grounds of nationality, independently from provisions on free movement. They do so more often than expected. Moreover, we found that judges employ the direct horizontal effect produced by Articles 18 and 157 TFEU. In the hands of individuals and judges, these provisions serve as an excellent crowbar.

Regarding Article 18 TFEU, a basketball player from Greece came to Belgium and concluded a contract with a Belgian basketball club. Under this contract, the player was obliged to play basketball. Besides however, the regulations of the Belgian basketball federation formed part of the contract. One of its provisions excluded non-Belgian basketball players from national and provincial basketball divisions. Nevertheless, the Greek basketball player wanted to perform his contractual obligations. He managed to rely on his right provided for by Article 18 TFEU. The Belgian court applied Article 18 TFEU directly to the horizontal relationship between the Greek player and the Belgian club, as well as to the horizontal relationship between the Greek player and the Belgian federation.

The discriminatory contractual clause (flowing from the regulations of the federation) between the player and the club was set aside, so the basketball player could perform his obligations. Moreover the judge stressed the importance of the prescripts of Article 18 TFEU by granting an injunction against the Belgian basketball federation. Granting this injunction meant that the federation would act unlawfully if it maintained the provision in its regulation concerning non-Belgian citizens.[4]

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[2] Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139.

[3] Case C-224/01 *Köbler v Republik Österreich* [2003] ECR I-10239.

[4] See Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon), Case 4.6 (BE).

II Article 157 TFEU

It is well known that, disregarding the literary text of Article 157 TFEU, private parties can directly rely on Article 157 TFEU and invoke the right to be equally paid. They can enforce that right before the national judge in a dispute with another private party, their employer.

Men may equally be protected as women. If the collective agreement concluded between an employer and an employee contains a provision granting single mothers a nursery allowance, Article 157 TFEU gives a single father the right to the same nursery allowance. That such ab allowance goes against the text of the provision in the collective agreement means that this clause is violating Article 157 TFEU. The French national court, applying general private law, declared the provision null and void for that reason. The next step was to fill the gap created by the nullity. The national court substituted the invalid provision by operation of law, so that in similar situations male employees are paid the same allowance as enjoyed by female employees.[5]

III The Principle of Non-discrimination

The next observation is to be found in the field of the principle of non-discrimination as a general principle of EU law. The CJEU devised, in its *Mangold and Kücücdeveci* decisions, a way that avoids problems encountered in the event that a relationship between private parties is governed by a provision of national law while this provision is not in conformity with a directive. The CJEU consistently held that in a relationship between individuals, the national judge is not allowed to review the provision of national law against the directive. This implies that private parties in a dispute with other private parties may rely on their national law – whether it is in conformity with the directive or not. Their expectations based on current national law are protected. The other side of the coin is that they lack the protection granted by the directive.

Regarding the prohibition to discriminate on the grounds of age however, the CJEU created the possibility to review the national provision against this general principle of EU law. If the national provision is at variance with the general principle of non-discrimination on the grounds of age, the national provision has to be set aside. The first question is how national judges manage to apply the remaining provisions and to reach a result that is in conformity with the prescripts of equality. They appear to manage beautifully by applying subtle private law doctrines as partial nullity, *geltungserhaltende Reduktion,* substitution and reasonableness and fairness. I refer to the casebook for details.[6]

The second question is how they deal with protecting the legitimate expectations of the private party that faces duties under the new legal situation – for example the duty of

[5] See Hartkamp, Sieburgh, Devroe (n 4) Case 4.18 (FR).
[6] See Hartkamp, Sieburgh, Devroe (n 4), Cases in Chapter 5 II.

the employer to employ an employee five years longer than expected. National judges take the legitimate expectations into consideration but this interest outweighed the interest of upholding non-discrimination in none of the reported cases. To justify this result, judges refer to the majority in legal doctrine. Legal scholarship explained, during the national legislative process, why the designed national provision was obviously violating the principle of non-discrimination on grounds of age. Employers are therefore expected to be aware of the legal literature. Even more importantly, they are expected to anticipate national law not being in conformity with EU law and to observe EU law while entering into a horizontal relationship, for example a labour contract.[7]

IV Making Use of the Sources

There are many more interesting, enticing and amusing results to report. In almost all cases it has been a difficult job to collect them, and in many cases it was even harder to construe them. The editors and authors of the Casebook explored new ground. My final observation elaborates on the question of who may make use of the treasures hidden in this book. My answer is anyone: private parties, lawyers, judges, legislators, legal scholars and students who are interested in or obliged to deal with EU law and private law or who are looking for innovative arguments. The book presents cases followed by analyses and general observations in the fields of competition, free movement, non-discrimination, general principles of EU law and *ex officio* application. Who is looking for new arguments may start from the general observations to find steppingstones in the related cases and to apply insights in the case at hand.

V Example: Ways to Avoid Discrimination of Nationals of Other Member States

I give an example. Questions that in practice have arisen rather frequently are how to deal with national law that results in treating nationals of the own Member State more favourably than nationals of other Member States, and, the other way around, how to deal with EU law that results in treating nationals of other Member States more favourably compared to nationals of the judges' own Member State.

National law that treats its own nationals more favourably than nationals of other Member States clearly infringes EU law. That is a fact. But do national systems adjust? And, if so, how do they?

They do. The German judge, for example, was not afraid to broaden the application of Article 19 of the German Constitution, granting 'domestic legal persons' basic rights (in this

[7] See Hartkamp, Sieburgh, Devroe (n 4), Case 5.9 (GERM).

case the right of ownership). The judge relied on the technique of 'extended application' to have an Italian company protected by this provision. The concept of 'domestic legal person' in Germany thus covers legal persons from other Member States.[8] The Belgian judge faced comparable problems in relation to the term 'foreigner'. If he were to apply the provisions of national law to all foreigners then he would treat citizens of other Member States less favourably than Belgian citizens. The judge therefore excluded nationals of other Member States from the definition of 'foreigner'.[9]

Both judges explicitly referred to the requirements set by EU law and neither of them considered the EU law-friendly extended application or exclusion to be *contra legem.* Parties and lawyers may bring such findings to the attention of judges from other Member States. Judges may feel reassured if they themselves try to mould the law as it stands in conformity with the requirements set by EU law.

VI Example: Ways to Avoid Reverse Discrimination

I want to pay attention to one other possibility for national law to be developed by all legal actors on the basis of findings in this casebook. EU law does not prevent nationals of a Member State from being treated under their national laws less favourably than nationals of other Member States under EU law and national law. The problem of reverse discrimination is a matter of internal law of each Member State. In Austria, Belgium and Italy, nationals are protected against reverse discrimination by the national constitution or by the case law of the constitutional court.[10] The effect is that a private party may enjoy similar protection under national law as nationals of other Member States would derive from EU law.

These practices may be a mirror for other Member States that, until now, have kept on applying less favourable rules to purely internal situations. Readers of the *Ius Commune* Casebook on EU law and Private Law – students, individuals, practitioners and scholars – can rely on such findings to invite national legal systems to take the next step towards more equality.

[8] Hartkamp, Sieburgh, Devroe (n 4), Case 4.12 (GERM).
[9] Hartkamp, Sieburgh, Devroe (n 4), Case 4.10 (BE).
[10] Hartkamp, Sieburgh, Devroe (n 4), Case 4.14 (IT).