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## International Journal of Discrimination and the Law - Special Issue

### *“Taking Stock of Twenty Years of EU Equality Law and Policymaking and Looking Ahead”*

Guest editors: Sara Benedi Lahuerta and Ania Zbyszewska

#### **Guest Editorial**

The development of equality legislation at the European Union (EU) level is one of the major achievements of the European integration project, and its role in driving advances in equality law and policy in many EU member states is undeniable. Year 2019 will mark two decades since the entry into force of the Treaty of Amsterdam in 1999. The latter introduced former Article 13 EC (current Article 19 TFEU), thereby expanding the legal base for adopting EU legislation to six new anti-discrimination grounds, namely: race or ethnic origin, religion or belief, disability, age and sexual orientation. This anniversary provides an auspicious moment for not only taking stock of accomplishments and critically reflecting on the past, but also for moving forward. Indeed, the recent adoption of the European Pillar of Social Rights (‘the Pillar’) suggests that EU equality law and policy could now be at a pivotal point. Accordingly, the contributions in this special issue engage not only with the evolution with EU equality law since its inception but also with this new context, and point to what might be a possible way ahead for this key area of EU *acquis*.

The papers that follow originate from the ESRC-funded project entitled *Rethinking EU Equality Law: Towards a More Coherent and Sustainable Regime*. The initiative emerged from previous collaboration between the two guest editors within the context of *Future Directions in EU Labour Law*, a 2015 project coordinated by Jeremias Prassl (University of Oxford). While focused on different areas, our respective work in the context of that latter project coalesced on the problem of (in)coherence within EU equality law and related policy. Concerns about lack of coherence within this very field have been subject of scholarly debate for some time. Namely, whereas the *internal* incoherence of EU equality law framework has been long located in the existence of a ‘hierarchy of rights’ due to uneven scope of protection offered to various grounds on the basis of which discrimination is prohibited, the misalignment between EU and international approaches to equality has been said to contribute to the former’s *external* incoherence. Specifically, EU equality law lags behind recent developments in international equality law conventions and recommendations, and, in some instances, it may not be fully in line with the jurisprudence of the European Court of Human Rights (ECtHR).

What has attracted less attention, especially in legal scholarship, is the question of how EU equality law articulates with other areas of EU social and economic policy that fall outside of the former’s jurisdictional boundaries, but which are ultimately necessary to meeting equality objectives in practice. While less often invoked in equality law debates, this broader *systemic* incoherence, in our view, also poses a significant problem from the perspective of substantive equality. Crucially, as in the cases of internal and external incoherence, we do not see this systemic incoherence problem as one that is caused by issues of normativity alone. Rather,

these inconsistencies result from the patchy nature of the EU equality law and from the piecemeal manner in which it has developed over time. This development, in turn, has depended on a range of structural and political factors, which have shaped the EU's legal competences and institutional architecture, including the pool of actors capable of influencing decisions on particular legal and policy developments. Similarly, it is often historical particularities and contingencies of policymaking, rather than purely normative grounds that have contributed to the manner in which the EU equality law framework articulates, at times uneasily and incompletely, with other EU legal and policy fields.

In considering the issue of (in)coherence from a critical perspective, we are not necessarily suggesting that the pursuit of coherence is valuable simply for the sake of coherence alone. We recognize that fragmentation and inconsistency, diversity and plurality, are a part of life and thus part of law and policy, especially one that is to speak to a diverse set of member states and national models. Nonetheless, we maintain that lack of coherence in the context of EU equality law, and between equality law and other related regulatory and policy fields, reveals and reflects the often instrumental use of policy and law, and the discrepancies between the aspirational policy discourse and the possibilities of action that the legal framework actually enables. It is against this background that we deem a more consistent and articulated approach that addresses the various forms of incoherence we identified above as essential to developing and improving the EU equality framework, and, crucially, better matching aspirations and concrete (or at least possible) substantive outcomes.

To explore some of these themes, within the *EU Equality Law: Towards a More Coherent and Sustainable Regime* project, we organised a seminar ('Setting the Scene') at the Institute of Advanced Legal Studies at the University of London in May 2017. This was the first of two seminars, which sought to broaden the conversation on the future of EU equality law beyond the academe to include policymakers and third sector organisations, and to reflect on the sources of the above-mentioned inconsistencies and discuss ways to overcome them. Accordingly, this special issue examines historic and contemporary sources of incoherence by taking a broad notion of equality law as a starting point, and analyzes different possibilities for developing an equality-related legal and policy framework at the EU level that is more congruent

To set the scene, the first paper provides an overview of the evolution of EU equality law, particularly as regards the six new grounds introduced with the Treaty of Amsterdam reforms. Erica Howard helpfully reminds us how the Court of Justice of the EU (CJEU) has contributed to shaping the interpretation of the 2000 Equality Directives, often with an expansive approach, but not without inconsistencies, as evidenced by her analysis of three recent cases: *Parris*, *Achbita* and *Bougnaoui*. As Howard observes, the Court's fairly narrow and restrictive interpretation in these recent cases vis-à-vis its more generous and expansive approach in jurisprudence on racial and ethnic origin and disability has tended to reinforce the existing hierarchy of rights, or internal incoherence of the EU equality law framework. While she recognizes the politically sensitive nature of the issues at stake in all three decisions, and the lack of national consensus on issues of religious expression, she also points out that the *Achbita* and *Bougnaoui* judgments might in fact conflict with the EU's broader objectives of supporting employment, inclusion, and integration of religious minorities, especially women.

Critical assessment of the *Parris*, *Achbita* and *Bougnaoui* cases is also the core of Dagmar Schiek's contribution, which uses these decisions to reflect on the lack of consideration of

intersectional discrimination in the EU legal framework and case law. As her deft analysis shows, in all three cases, the CJEU refused to recognize combined discrimination and overlooked the synergistic interaction of various characteristics, be it age and sexual orientation or (ascribed) race, gender, and religious belief. Schiek draws on the concept of equality nodes, which she had elaborated in earlier work, to suggest an alternative approach to translating intersectionality into current non-discrimination law, in a way that also enhances the latter's viability. According to Schiek, three main nodes – race, gender, and religion – emerge around the key rationales for ascription of difference, and capture overlapping forms of disadvantage. Applying this approach to analysis of the three abovementioned cases, Schiek demonstrates how a purposive interpretation of EU equality law makes possible the recognition of intersectional discrimination despite the limitations inherent in the legislative framework.

Schiek's is one of three articles in this special issue, which focus on specific concerns that have arisen in the application of EU equality law. The other two focus on the importance of work-life balance policies for gender equality (Nicole Busby) and on the increasing need to accommodate workers' diverse needs in the workplace (Mark Bell). Despite the omnipresence of work-family reconciliation in EU policy instruments, Busby argues that it has not (yet) become a goal for EU law or policy in its own right. Instead, the approach to work-family reconciliation has emerged out of what she sees as 'two parallel but...incoherent movements'; namely, the codification of the jurisprudence of the CJEU on sex discrimination in relation to pregnancy and maternity on the one hand, and, the - often instrumental - use of work-family objectives in relation to those of employment activation and active inclusion. While Busby attributes the failure of work-family reconciliation policies to effectively resolve the conflict between paid work and unpaid care to this patchy development, she is nonetheless positive about the potential of the European Commission's recent 'New Start' initiative and the Pillar (including the accompanying legislative proposal for a Directive on work-life balance).

Similarly, Bell's contribution strikes a positive tone in relation to opportunities for legal reform in relation to accommodation of employees' diverse needs, including those related to provision of care. Broadly conceived, such accommodation, he notes, has been justified by a range of rationales, including health and safety, contractual duties, the pursuit of equality, as well as meeting of policy concerns related to labour market regulation. While the pursuit of equality has been the most prominent driver of reforms in relation to accommodation, Bell urges, however, that developing an effective approach to accommodation requires more complex actions than simply extending the existing duty to accommodate (disability) to other non-discrimination grounds. To illustrate the complexity of the existing framework, and thus the need for nuance in relation to future reforms, he identifies a range of EU law instruments, in equality law and otherwise, that already impose on employers some obligations and protective, substantive and procedural duties in relation to diversity at the workplace. In this take, more coherence can be achieved not necessarily by expanding equality law alone, but by tackling the issue on multiple fronts.

One of the key novelties of the 2000 Equality Directives was the introduction of a duty to set up equality bodies at national level to promote the effective enforcement of equality legislation. However, this requirement introduced yet another inconsistency in the legal

framework, namely, the fact that equality bodies are only required for the grounds of race or ethnic origin and sex. Nevertheless, a large number of European countries have gone beyond the EU law requirements by setting up equality bodies covering a large number of discrimination grounds in a wide variety of fields of life. The article by Tamás Kádár, from Equinet, provides an insider overview of the origin and evolution of equality bodies in Europe. It also unpacks the role that equality bodies play in the implementation and monitoring of EU equal treatment legislation, as well as in the further development and clarification of this legislation by contributing to relevant case law in front of the CJEU. Unfortunately, these institutions also face many challenges to effectively perform their functions. Kádár's analysis of these challenges suggests that developing EU-level standards for independence and effectiveness would help to ensure that equality bodies can fulfil their role and European citizens have better access to assistance. He concludes with a proposal for a European best practice.

The special issue closes with our own article, which discusses the evolution of EU legislation and policymaking methods during the last ten years (since 2008): a period which, given the post-crisis context, has been characterized by politics of stimulus, austerity and recovery. We consider how this context influenced the developments in the equality law field, and we show that the progressive softening or hybridization of equality law over this period has gone hand in hand with stronger articulation of equality objectives in terms of a business case. While this approach appears to have enabled proliferation of policy and legal instruments and expanded the reach of equality law into previously untapped territories, the predominance of instrumental economic goals for action at expense of human rights or social rationales is concerning. As we show, this longer-term tendency is also present in the recently adopted Pillar of Social Rights, and the accompanying policy documentation. While, like a number of contributors to this special issue, we hold out some hope for the possibilities the Pillar carries, its largely soft and economically oriented thrust tends to limit its transformative potential for infusing more coherence, and also rebalancing the social and economic rationales that the EU integration project has unevenly promoted over the years. Ultimately, however, time will tell how the Pillar's potential might be realized.

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