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ARTICLE

THE CONSTITUTIONALIZATION OF EQUALITY WITHIN THE EU LEGAL ORDER: SEXUAL ORIENTATION AS A TESTING GROUND

Colm O'Cinneide[*]

[*] *Reader in Law, UCL.*

Abstract

The principle of equal treatment has become constitutionalized within the framework of the EU legal order. However, its scope and substance remain uncertain, its impact is confined to the restricted horizons of EU law, and its normative foundations are contested. This paper explores these issues by focusing on a number of judgments by the Court of Justice of the European Union (CJEU) in cases involving claims of discrimination based on the ground of sexual orientation. These judgments illustrate both the positive impact and also the uncertain scope and substance of the principle of equal treatment as constitutionalized within EU law. It concludes by highlighting the need for the CJEU's equality jurisprudence to engage to a greater degree with human dignity and other values, in order to give greater definition and clarity to the concept of equal treatment.

Keywords: Discrimination; Equal Treatment; Sexual Orientation

§1. Introduction

The principle of equal treatment has become constitutionalized within the framework of the European Union (EU) legal order. This has given great potency to the individual right to non-discrimination, respect for which has become a fundamental value of EU law. However, the parameters of this constitutionalization process remain unclear, as a result of the uncertain scope of the principle of equal treatment, the contested borders of EU competency in this regard, and the ambiguity inherent in the idea of equality itself. As a result, this area of law is

characterized by a degree of normative uncertainty, which limits its effectiveness as a tool of social change.

This paper explores these issues by focusing in particular on a number of cases by the Court of Justice of the European Union (CJEU) involving claims of discrimination based on the ground of sexual orientation, which illustrate the scope and limits of the process of constitutionalizing equality within the framework of EU law. Section 2 outlines the development of EU equality law and the manner in which the principle of equal treatment has become a fundamental norm of the EU legal order. Section 3 describes the uncertain scope and content of this norm, and the constraints this imposes on its transformative potential. Finally, Section 4 analyses the key judgments of the CJEU relating to sexual orientation. This includes recent decisions of the CJEU relating to Member State bans on gay and bisexual men donating blood (*Léger)*[1] and the handling of asylum claims made on the basis of a persecution risk relating to sexual orientation (*X & Y* and *A, B & C).*[2] It uses this case law to illustrate both the positive impact and the limited reach of the principle of equal treatment as constitutionalized within EU law. It concludes by highlighting the need for the CJEU's equality jurisprudence to engage to a greater degree with human dignity and other values, to flesh out the uncertain contours of the principle of equal treatment.

§2. The Constitutionalization of Equality Within EU Law

A. The Emergence and Evolution of EU Equality Law

As is common knowledge, the development of EU equality law began in the field of equal pay, with the provisions of the original Article 119 of the Treaty of Rome, now Article 157(1) TFEU, requiring Member States to give effect to the principle of equal pay for male and female workers for work of equal value. The Court subsequently ruled in *Defrenne v. Sabena (No. 2*)[3] that this principle was capable of having horizontal direct effect in the context of horizontal relationships between private parties. This opened the way for an impressive edifice of gender equality law to be constructed on these initial, limited foundations. Subsequent Treaty amendments have given the EU institutions the authority to adopt measures giving effect to the 'principle of equal opportunities and equal treatment of men

[1] Case C-528/13 *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du sang*, EU:C:2015:288.
[2] Joined Cases C-199/12, C-200/12, C-201/12 *X, Y and Z v. Minister voorImmigratie en Asiel*, EU:C:2013:720; Joined Cases C-148/13, C-149/13 and C-150/13 *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, EU:C:2014:2406.
[3] Case C-43/75 *Defrenne v. Sabena (No. 2*). EU:C:1976:56.

and women'.[4] The gender equality directives adopted on this legal basis have laid down a comprehensive floor of legal rights protecting individuals against sex discrimination in employment and occupation, access to goods and services and a range of other areas of daily life. In this context, Directive 2004/113/EC (the 'Recast Gender Equality Directive) and Directive 2006/54/EC (the 'Goods and Services Directive') are the key legal instruments.[5] Furthermore, EU equality law has been extended well beyond the context of gender. The inclusion of Article 13 TEC (now Article 19 TFEU) into the EC Treaty by the Treaty of Amsterdam in 1999 conferred competency upon the EU institutions to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. This provided the legal basis for Directive 2000/43/EC (the 'Race Equality Directive')[6] which has prohibited race discrimination in employment and occupation, access to goods and services, education, 'social advantages' and 'social protection', and Directive 2000/78/EC (the 'Framework Equality Directive')[7] which has prohibited discrimination on the basis of age, disability, sexual orientation and religion or belief in the field of employment and occupation.[8]

The Council and Commission have also issued a number of communications, recommendations and framework decisions, which encourage Member States to adopt a comprehensive approach to combating discrimination.[9] Member States are required to establish national equality bodies (NEBs) under the provisions of both the Race and Recast Gender Equality Directives.[10] These soft law measures have contributed to the development of a 'new governance' regime that sits alongside the 'hard law' provisions of the equality

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[4] See Articles 19 and 157(3) TFEU.

[5] Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373/37; 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 (recast), [2006] OJ L 204/23, which replaced amongst others Directive 75/117/EEC (the 'Equal Pay Directive'), [1975] OJ L 45/19 and Directive 76/207/EEC (the 'Equal Treatment Directive'), [1976] OJ L 39/40. See also Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (the 'Self Employed Workers Directive'), [2010] OJ L 180/1.

[6] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22.

[7] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16

[8] See in general M. Bell and L. Waddington, 'More Equal than Others: Distinguishing European Union Equality Directives?', 38 *Common Market Law Review* (2001), p. 587-611.

[9] For a useful overview of these initiatives relating to the Article 19 TFEU grounds, see the Website of DG Justice, http://ec.europa.eu/justice/discrimination/index_en.htm; and in the field of gender equality, the Website of DG Justice, http://ec.europa.eu/justice/gender-equality/law/index_en.htm.

[10] Article 13 of Directive 2000/43/EC; Article 20 of Directive 2006/54/EC.

directives and links together key actors such as state governments, the EU institutions, the Fundamental Rights Agency (FRA), NGOs and NEBs.[11]

EU equality law thus gives individuals strong legal protection against discrimination, while also providing the impetus for the development of different types of legal and political activism which have propelled equality up the policy-making agenda in Europe. It has had a major impact on national legal systems, in particular in the sphere of employment and social security law – and with every passing year, its influence on the law and policies of EU Member States appears to be growing. In particular, the equality directives have come to exert a significant 'destabilizing' effect on structural forms of inequality hitherto accepted as 'normal' at national level, by opening up new legal avenues for individuals, NGOs, trade unions and other organizations to challenge discriminatory practices.[12]

B. The 'Constutionalization' of Equality Within the EU Legal Order

However, the impact of EU equality law is not just confined to its 'external' influence over developments at the level of Member States. It has also an 'internal' dimension, in the sense that it has come to play a key role in the evolution of the legal order of the EU itself. The provisions of the equality directives have been viewed by the CJEU as giving expression to fundamental norms of EU law, to which other EU secondary legislation along with national implementing measures are expected to conform. This has given a 'constitutional' dimension to equality, which now enjoys superior hierarchical status within the framework of EU law.[13] This constitutional aspect of EU equality law has several different dimensions. To start with, the elimination of discrimination and promotion of equality are recognized to be core social objectives of the EU. This was first confirmed by the Court in *Defrenne (No. 2)*,[14] and finds textual endorsement in various provisions of the EU Treaty framework.[15] The constitutional status of EU equality law justifies EU action in this field, and reinforces its legitimacy: it affirms that combating discrimination is EU business, so to speak, and is not just a peripheral add-on to its core competencies. However, respect for equality is not just an objective of the EU: it also constitutes a general principle of the EU legal order, that is, an

[11] G. de Búrca, 'Stumbling into Experimentalism?: The EU Anti-Discrimination Regime', in C. Sabel and J. Zeitlin (eds.), *Experimentalist Governance in the EU: Towards a New Architecture* (OUP, 2009), p. 215-35.
[12] C. O'Cinneide, 'Completing the Picture – The Complex Relationship between EU Anti-discrimination Law and "Social Europe"', in N. Countouris and M. Freedland (eds.), *Resocialising Europe* (OUP, 2013), p. 118-137.
[13] See M. Bell, 'Constitutionalization and EU Employment Law', in H. Micklitz (ed.), *The Constitutionalization of European Private Law* (OUP, 2014), p. 137-169.
[14] Case C-43/75 *Defrenne v. Sabena*, para. 10-12.
[15] See Articles 2 and 3 TEU; Articles 8 and 10 TFEU.

objective norm to which other elements of EU law must conform.[16] This principle is the main vector through which equality has been 'constitutionalized' in European law.

The Principle of Equal Treatment

This 'general principle of equal treatment' is generally understood to reflect the entitlement of all individuals to be treated as equals in status and dignity,[17] as well as the concept associated with the idea of the rule of law that decision-makers should avoid distinguishing between individuals on an arbitrary or irrational basis. Within EU law, this general principle has two distinct but interlinked aspects, which find particular expression in Articles 20, 21 and 23 of the EU Charter respectively.

The first aspect of this principle is based around the idea of 'formal equality' or 'equality as rationality', that is, it requires that like cases should be treated in a like manner and unlike cases in an unlike manner, to ensure that 'everyone is equal before the law' (Article 20 of the Charter).[18] The second aspect of the principle reflects the existence in international human rights law (including Article 14 ECHR) and the constitutional law of EU Member States of an individual right to equality and non-discrimination, which prohibits differential treatment which is (i) based on protected characteristics such as gender, race, disability and other 'suspect' grounds; and (ii) cannot be shown to be objectively justified. This aspect of the equality principle is reflected in the provisions of Articles 21 and 23 of the Charter, which set out a general right to equality and non-discrimination and a more focused guarantee of equality between men and women respectively. It is this second, individual rights-focused aspect of the equal treatment principle which has played a key role in the 'internal' development of EU equality law.

C. The Establishment of Equality as a Fundamental Norm of EU Law

The existence of a general principle of equal treatment was first affirmed in the context of gender equality - initially by the EU legislator rather than by the Court. Article 1 of Directive 1976/207/EEC (the 'Equal Treatment Directive') provided that the purpose of this Directive was 'to put into effect in the Member States the principle of equal treatment for men and women' – which was understood to constitute an extension of the 'principle of equal pay' set out in the original Article 119 of the Treaty of Rome. In *Defrenne v. Sabena (No. 3)*, the Court linked this principle to the protection of fundamental rights, concluding that 'respect for

[16] See in general K. Lenaerts and J. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', 47 *CMLR* (2010), p. 1629–1669.

[17] For a comprehensive philosophical analysis of this idea, see R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000), especially Chapters 2 and 4.

[18] See e.g. Case 283/83 *Firma A. Racke v. Hauptzollamt Mainz*, EU:C:1984:344; Case C-292/97 *Karlsson*, EU:C:2000:202.

fundamental personal human rights is one of the general principles of community law, the observance of which it has a duty to ensure', and that 'there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights'.[19] In subsequent sex discrimination judgments, the Court affirmed that the provisions of the gender equality directives gave specific expression to this principle of equal treatment between men and women, and should be interpreted in a purposive manner in order to ensure effective protection of the right to non-discrimination on grounds of sex.[20] For example, in *P and S v. Cornwall* the Court stated that the provisions of the Equal Treatment Directive were 'simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law', and proceeded to interpret the scope of the Directive by reference to 'its purpose and the nature of the rights which it seeks to safeguard'.[21]

Subsequently, the Court established in its judgment in *Mangold*[22] that the age discrimination provisions of the Framework Equality Directive also gave specific expression to the general principle of equal treatment, whose scope extended beyond gender to cover the other non-discrimination grounds protected by the 2000 Directives. In its judgment, the Court concluded that the non-discrimination provisions of Directive 2000/78/EC set out a 'general framework' of rules. These gave specific expression to this general principle that constituted a separate, free-standing and 'active principle' of the Community legal order in its own right, and whose 'source' was to be found in the non-discrimination provisions of international human rights law and the constitutional traditions common to the Member States.[23]

The Court also concluded in *Mangold* that it was the 'responsibility of national courts to guarantee the full effectiveness of the general principle of non-discrimination' by setting aside national laws that were incompatible with this fundamental norm of the European legal order.[24] This finding also appeared to break new ground. The case law of the Court had previously established that EU secondary legislation and national legal measures implementing EU law had to be set aside if they failed to comply with the general principles of the European legal order.[25] However, for the first time the Court in *Mangold* applied this

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[19] Case C-149/77 *Defrenne v. Sabena (No. 3)*, EU:C:1978:130, para. 26-27.
[20] See e.g. Joined Cases 75/82 and 117/82, *Razzouk and Beydoun v. Commission*, EU:C:1984:116, para. 16.
[21] Case C-13/94 *P v. S and Cornwall County Council*, EU:C:1996:170, para. 18-20. See also the essays collected in A. Dashwood and S. O'Leary (eds.), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, 1997).
[22] Case C-144/04 *Mangold v. Helm*, EU:C:2005:709.
[23] Ibid., para. 74.
[24] For a comprehensive analysis of Case C-144/04 *Mangold*, see D. Schiek, 'The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation', 35 *Industrial Law Journal* (2006), p. 329-341.
[25] See in general T. Tridimas, *The General Principles of EU Law* (2nd edition, OUP, 2006).

requirement in the context of a horizontal relationship between two private parties, namely the private employer and employee involved in this case.

The *Mangold* judgment attracted some sharp criticism. Some commentators argued that the principle of equal treatment lacked clear content and was insufficiently precise to serve as a basis for setting aside national laws, especially in the context of a horizontal legal dispute between private parties.[26] Others claimed that there was no clear legal basis in the EU treaties for the existence of a general principle of equal treatment that extended far enough to cover the non-discrimination grounds set out in the Framework Equality Directive, and in particular the age ground.[27] The Court was accused of being too quick to 'constitutionalize' the sphere of discrimination and of exceeding the appropriate limits of its authority.[28]

However, in the subsequent age discrimination cases *Bartsch*[29] and *Kücükdeveci*,[30] the Court decisively reaffirmed the approach it adopted in *Mangold* - albeit with some clarification of the scope of application. In *Bartsch*, the Court confirmed that the age discrimination provisions of Directive 2000/78/EC gave specific expression to the cross-ground general principle of equality, implicitly rejecting criticisms that it had over-reached in linking these norms in *Mangold*.[31] However, it made it clear that the obligation on national courts to set aside domestic laws that conflict with the general principle of equal treatment applied only to national laws implementing EU legislation or to situations where a 'specific substantive rule of EC law is applicable'[32] at the relevant date in question. Subsequently, in *Kücükdeveci*, the Court confirmed that this obligation to set aside conflicting national laws applied in the context of horizontal relationships between private parties, but only in

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[26] See the discussion in J. Jans, 'The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law', 34 *Legal Issues of Economic Integration* (2007), p. 53–66; A. Masson and C. Micheau, 'The Werner Mangold Case: An Example of Legal Militancy', 13 *European Public Law* (2007), p. 587-593.
[27] See in particular the criticisms expressed by Advocates General Geelhoed and Mazak in subsequent cases relating to the interpretation of Directive 2000/78/EC: Opinion of Advocate General Geelhoed in Case C-13/05 *Chacón Navas*, EU:C:2006:184, para. 54; Opinion of Advocate General Mazák in Case C-411/05 *Félix Palacios de la Villa v. Cortefiel Servicios SA*, EU:C:2007:106, para. 86.
[28] In Germany, an unsuccessful attempt was made to convince the German Constitutional Court in the *Honeywell* case that the CJEU's judgment in *Mangold* was ultra vires and should be disregarded by national courts, *Bundesverfassungsgericht* [2010], BVerfGE 126, 286.
[29] Case C-427/06 *Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, EU:C:2008:517.
[30] Case C-555/07 *Kücükdeveci v. Swedex GmbH & Co KG*, EU:C:2010:21.
[31] In her Opinion in *Bartsch*, Advocate General Sharpston argued that the age discrimination provisions of Directive 2000/78/EC constituted 'detailed legislative intervention' which was intended to give expression to a new and more developed understanding of the general principle of equal treatment'. Opinion of Advocate General Sharpston in Case C-427/06 *Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, EU:C:2008:297, para. 58.
[32] Opinion of Advocate General Sharpston in Case C-427/06 *Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, para. 60.

situations which came within the scope of EU law in line with its judgment in *Bartsch*.[33] It also confirmed that the general principle of equal treatment should form the 'basis' for any interpretation of the age discrimination provisions of Directive 2000/78/EC, thereby affirming that the Directive should be read as giving expression to a fundamental norm of the EU legal order.[34]

D. *Test-Achats*: The Charter Come to the Fore

The Court in *Kücükdeveci* also took the additional step of linking the provisions of Directive 2000/78/EC to the non-discrimination provisions of Article 21 of the EU Charter. There had been no reference to Article 21 in the operative part of the judgment in *Mangold*. However, in *Kücükdeveci*, the Court confirmed that the age discrimination provisions of Directive 2000/78/EC should be interpreted as giving expression to both the general principle of equal treatment and the right to non-discrimination as set out in Article 21(1).[35]

Subsequently, in the gender equality case of *Test-Achats*,[36] the Court confirmed that the principle of equal treatment was 'enshrined' in the provisions of Articles 21 and 23 of the Charter.[37] In its judgment, the Court disapplied the provisions of Article 5(2) of Directive 2004/113/EC (the 'Goods and Services Directive'): they had allowed Member States to suspend - for an open-ended period of time - the application of the general prohibition on sex discrimination to the use of sex as a determining factor in actuarial calculations relating to the fixing of insurance premiums and benefits. In reaching this decision, the Court ruled that the provisions of an equality directive such as Directive 2004/113/EC must, in giving effect to the principle of equal treatment, conform with the requirements of Articles 21 and 23 of the Charter. Further, the Court ruled that the provisions of an equality directive must 'contribute, in a coherent manner, to the achievement of the intended objective', namely the 'progressive achievement of equality'. It concluded that the suspension of the prohibition on sex discrimination at issue in this case – described as a 'derogation from the principle of equal treatment' - could continue indefinitely, and this was incompatible with the objectives of the Directive and the requirements of Articles 21 and 23 of the Charter.

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[33] Case C-555/07 *Kücükdeveci v. Swedex GmbH & Co KG*, para. 23. In so doing, the Court affirmed that national laws that were incompatible with the *general principle* of equal treatment had to be set aside, while reaffirming the general rule that *directives* as such do not have horizontal direct effect. However, in determining whether national laws complied with the general principle, the Court essentially applied the provisions of the Framework Equality Directive, thus blurring this distinction. For further analysis, see A. Wiesbrock, 'Case Note – Case C-555/07, *Kücükdeveci v. Swedex*, Judgment of the Court (Grand Chamber) of 19 January 2010', 11 *German L.J.* (2010), p. 539-549; K. Lenaerts and J. Gutiérrez-Fons, 47 *CMLR* (2010), p. 1629–1669, 1646-1647.

[34] Case C-555/07, *Kücükdeveci v. Swedex*, para. 27. See also Case C-147/80 *Römer v. Freie und Hansestadt Hamburg*, EU:C:2011:286, para. 59-60 (the general principle extends to cover the ground of sexual orientation).

[35] Case C-555/07, *Kücükdeveci v. Swedex*, para. 21-22.

[36] Case C-236/09 *Association Belge des Consommateurs Test-Achats*, EU:C:2011:100.

[37] Ibid., para. 30.

The judgment in *Test-Achats* thus makes it clear that the principle of equal treatment is reflected in the non-discrimination provisions of Articles 21 and 23 of the Charter. It also highlights the obligation imposed upon the EU legislator to ensure that EU secondary legislation conforms to the requirements of the general principle of equality taken together with Articles 21 and 23 of the Charter. Just as *Mangold* and *Kücükdeveci* confirmed that national laws which do not conform with the principle of equal treatment must be set aside insofar as they relate to matters subject to regulation by EU law, *Test-Achats* demonstrates that EU laws must also comply with the requirements of this principle as reflected in the non-discrimination provisions of the Charter.[38]

E. The Equality Principle as an Embedded Constitutional Norm

To summarize, the CJEU has made it clear that the EU equality directives have to be interpreted and applied with reference to the general principle of equal treatment, which is 'given expression' by their provisions but nevertheless constitutes a free-standing, 'active' norm of the EU legal order in its own right. This principle is derived from and gives effect to the individual right to equality and non-discrimination that is embedded in international human rights law and the constitutional traditions of the Member States, and now is also protected by the non-discrimination provisions of the EU Charter.[39] The provisions of the equality directives and other elements of EU secondary legislation will be interpreted by reference to this equality principle,[40] while EU legislation and national law affecting matters subject to EU law must respect its requirements. The principle may also exceptionally be given direct effect in horizontal relationships: national laws which conflict with the principle must be set aside, even if this affects the legal rights of private parties.

Significantly, this conformity requirement has particular force, which extends above and beyond the requirement to respect certain other rights and principles set out in the EU Charter. In the case of *AMS*, the CJEU concluded that Article 27 of the Charter, which

[38] Dagmer Schiek has suggested that Articles 21 and 23 of the Charter should be seen as separate and distinct provisions, with Article 21 giving expression to the negative prohibition on sex discrimination that constitutes an aspect of the general principle of equal treatment while Article 23 gives expression to the positive requirement to achieve substantive equality between the sexes: D. Schiek, 'Article 23 – Equality between Men and Women', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), p. 633-660, especially 637-638. However, the substance of both articles inevitably overlaps, as combating discrimination on the basis of any 'suspect' ground must in general involve the adoption of positive measures to supplement the negative prohibition on unequal treatment: see in general O. De Schutter, 'Three Models of Equality and European Anti-Discrimination Law', 57 *Northern Ireland Legal Quarterly* (2006), p. 1-56.

[39] In Case C-391/09 *Runevič-Vardyn v. Vilniaus miesto savivaldybės administracija*, EU:C:2011:291, para. 43, the Court subsequently confirmed that the same logic applied in respect of the provisions of the Race Equality Directive.

[40] See e.g. Case C-303/06 *Coleman v. Attridge Law*, EU:C:2008:415, where the Court expressly rejected arguments put forward by the UK and other states that the provisions of the Framework Equality Directive should be given a narrow interpretation.

guarantees the right of workers to information and consultation, could not be invoked in a horizontal dispute between private entities so as to disapply a piece of national legislation which was alleged to breach this right, on the basis that it had not been given 'more specific expression' in EU law.[41] In contrast, the Court affirmed that the 'principle of non-discrimination (…) is sufficient in itself to confer on individuals an individual right which they may invoke as such'.[42] This confirms that the equality principle occupies a particularly important and well-established place within the framework of EU law, even when compared with the legal effect of other rights and principles set out in the EU Charter such as the right of workers to information and consultation at issue in *AMS*.

In general, the principle of equal treatment is now acknowledged to be a fundamental norm of the European legal order, and occupies an elevated status in the EU hierarchy of values.[43] Supplemented by the slowly evolving non-discrimination case law of the ECtHR and the provisions of the UN Convention on the Rights of Person with Disabilities (which the EU has signed and ratified - meaning that EU secondary legislation should be interpreted in a manner consistent with its provisions),[44] it opens the way for non-discrimination norms to exert a similar 'destabilizing effect' within EU law in relation to structural and embedded forms of discrimination as they have exerted in the law of Member States.

§3. The Scope and Limits of Equality as a Constitutional Norm in the EU Legal Order

A. The Uncertain Scope of the Equality Principle

Some uncertainty remains about the scope and substance of the principle of equal treatment, notwithstanding its 'constitutional' status. The development of EU law is an open-ended, perpetually ongoing project – and the parameters of the equality principle have yet to be defined with precision.

To start with, the scope of the principle of equal treatment is unclear. Article 21 of the Charter prohibits discrimination based on an open-ended list of grounds - which, in addition to the six grounds listed in Article 19 TFEU and covered by the equality directives, are stated to also include colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth. However, it is unclear whether the 'constitutionalized' dimension of the principle of equal treatment also extends this far. There is still uncertainty as to whether the CJEU will apply a similar approach as it adopted in *Test-*

[41] Case C-176/12 *Association de mediation sociale v. Union locale des syndicats CGT,* EU:C:2014:2, para. 45.
[42] Ibid., para. 47.
[43] See M. Bell, in H. Micklitz (ed.), *The Constitutionalization of European Private Law*.
[44] See Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge*, EU:C:2013:222, para. 28-32.

Achats, *Mangold* and *Kücükdeveci* to the grounds of discrimination not listed in Article 19 TFEU but included within the scope of Article 21, or even to discrimination based on the Article 19 grounds which nevertheless fall outside of the scope of the equality directives.[45] It remains to be seen how the CJEU will apply a balancing analysis in deciding whether differences of treatment based on 'suspect' or other grounds are objectively justified, especially in situations where the provisions of the equality directives provide little or no guidance in this regard. (However, see the discussion of the *Léger* case below.)

The relationship between the equality principle and other principles of EU law – in particular the principle of non-discrimination on grounds of nationality - is also unclear.[46] For example, it is not entirely clear whether the approach adopted by the CJEU when applying a proportionality analysis in the context of nationality discrimination cases will be carried across to other non-discrimination grounds, or whether the Court will take the view that different legal logics are in play. The extent to which the equality principle permits positive action measures is also uncertain, along with the question of the exact nature of the relationship between the directives and the equality principle to which they 'give expression'. For example, it remains to be seen how the CJEU might set about assessing whether any future EU secondary legislation requiring states to take positive action measures is compatible with the principle of equal treatment,[47] and whether the Court might be prepared take a different view of what constituted 'acceptable' positive action than the EU legislator in such a context.

B. The Limits of the Equality Principle

Structural limits also exist on the constitutional impact of the equality principle. As Mark Bell has noted, the principle – as with the rights protected in the EU Charter – does not extend or alter EU legislative competency.[48] It takes effect within the field of application of existing EU law, but does not confer new authority on the European institutions to combat discrimination that falls outside of the scope of existing legislation, or requires states to refrain from discriminating in areas that fall outside the regulatory reach of established Union law. Its constitutional status is thus confined to the restricted horizons of the EU legal order.

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[45] Particular issues in this regard arise in relation to direct effect: see e.g. E. Muir, 'Of Ages In - and Edges of - EU Law', 48 *Common Market Law Review* (2011), p. 39-62; K. Lenaerts and J. Gutiérrez-Fons, 47 *CMLR* (2010), p. 1629–1669, 1646-1649.

[46] See in general C. Kilpatrick, 'Article 21', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), p. 579-603.

[47] Such as, e.g., the directive proposed by the European Commission on improving gender balance on company boards - see European Commission, Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614 final.

[48] M. Bell, 'Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law', 60 *American Journal of Comparative Law* (2012), p. 127-146.

Moreover, the development by the CJEU of its equality jurisprudence, and the destabilizing impact in general of EU equality law on both the EU and national legal systems, has attracted criticism. The controversy that surrounded the *Mangold* judgment has already been discussed. More generally, EU equality law has been attacked for interfering too much with national law and policy. Some commentators have accused it of being an exercise in social engineering, which attempts to impose a uniform social model on diverse national cultures and socio-economic contexts.[49] EU equality law has also been accused of being ineffective, and of helping to generate a 'hermeneutics of suspicion (…) as a result of which the assessment of employment relations lapses into a state marred by the frenzy of indignation and resentment'.[50] Some commentators have also claimed that EU equality law generates 'explosive dynamics of group conflict', which runs the risk of encouraging different disadvantaged groups to compete against each other to maximize the extent to which they benefit from the proliferation of discrimination grounds.[51] Others have highlighted the leading role played in the development of EU law in this context by the CJEU, and expressed concerns about excessive 'judicialisation'.[52]

Many of these criticisms are over-stated – or at least fail to give due recognition to the positive achievements of EU equality law, and its potential to make a modest but nevertheless invaluable contribution towards the creation of a more just 'social Europe'.[53] However, they demonstrate that legitimacy of the development of EU law in this context is contested, as also graphically illustrated by the reaction to the *Mangold* judgment. As a consequence, the CJEU - in interpreting and applying EU equality law, including the principle of equal treatment and Articles 21 and 23 of the Charter - must invariably be aware of its limits set by EU competency in this regard and the need to maintain the delicate ecosystem of separation of powers between EU and national institutions. This invariably imposes some constraint on the transformative potential of the equality principle within EU law: issues of legitimacy and the limits to EU competence cast a long shadow in this context.

C. The Ambiguous Concept of Equality

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[49] See e.g. J. Cornides, 'Three Case Studies on "Anti-discrimination"', 23 *European Journal of International Law* (2012), p. 517–542.

[50] A. Somek, 'Antidiscrimination and Decommodification', *SSRN* (2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=651441. For a more detailed elaboration of Somek's important critique of EU anti-discrimination law, see A. Somek, *Engineering Equality: An Essay on European Anti-discrimination Law* (OUP, 2011).

[51] E. Holzleithner, 'Mainstreaming Equality: Dis/entangling Grounds of Discrimination', 14 *Transnational Law & Contemporary Problems* (2005), p. 927-957.

[52] See e.g. D. Mabbett, 'Age Discrimination in Law and Policy: How the Equal Treatment Directive Affects National Welfare States', in M. Ross and Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union* (OUP, 2010).

[53] See further C. O'Cinneide, 'Completing the Picture – The Complex Relationship between EU Anti-discrimination Law and "Social Europe"', in N. Countouris and M. Freedland (eds.), *Resocialising Europe* (OUP, 2013), p. 118-137.

The transformative potential of the constitutionalization of the principle of equal treatment within the EU legal order is also intrinsically limited by the ambiguity that surrounds the concept of 'equality' itself. As is well known, different views exist as to the meaning of equality and what respect for the right to non-discrimination entails. Broadly speaking, 'formal equality' approaches emphasize the importance of treating similarly situated groups in a similar manner and avoiding the use of classifications based on grounds such as race, gender, disability and so on, while 'substantive equality' approaches emphasize the need to eliminate the barriers which impede the capacity of underrepresented social groups to participate in social, economic and cultural life.[54] Elements of both these different approaches can be detected in the jurisprudence of the CJEU and the provisions of the equality directives, and academic debate persists as to their relative merits.

However, what unifies these different concepts of equality is a focus on comparative disadvantage, that is, on combating less favourable treatment of one social group as compared to another. This 'comparative' focus is hardwired into the DNA of EU equality law, but it does not in itself establish when different social groups should be treated as being similarly situated, or as deserving of equal treatment. Nor does it define the 'floor' of rights protection that all individuals are entitled to enjoy – other concepts such as human dignity play a role in this regard, but have not been constitutionalized within EU equality law to the level or degree of precision, depth and substance as has equality.

As a consequence, equality remains a fluid, ambiguous concept within EU law, just as it does in other legal systems. It is first necessary to define when individuals and groups are in comparable situations before the protection afforded by the equality principle kicks in. At times, this will be a straightforward task, in particular when the individuals and groups in question are self-evidently in an analogous or similar situation. However, in other circumstances, the legal position will be less clear-cut – and the CJEU, along with national courts applying EU equality norms, may be forced to make difficult choices as to whether individuals and groups are in a comparable situation.

Furthermore, EU equality law has not engaged to any real degree (outside of the specific context of harassment) with forms of group disadvantage which are not so easily framed in terms of comparative disadvantage – such as a failure to take action to redress specific disadvantages faced by a particular social group, or to redress status harms and other dignitarian concerns which may have a disproportionate impact on certain groups. In general, EU equality law has a limited vocabulary – it is focused on remedying particular types of harm, as when one group is subject to a clearly defined material disadvantage when

[54] See in general S. Fredman, *Discrimination Law* (2nd edition, OUP, 2011).

compared to another, but can struggle to identify and remedy less tangible forms of harm linked to the specific vulnerabilities of particular social groups.[55]

Similar problems can arise in relation to the application of the objective justification test. The test is used within the scope of the equality directives to assess whether a particular group has been subject to indirect discrimination (or direct discrimination in employment and occupation, in the case of age), and also to determine whether a difference of treatment complies with the requirements of Articles 21 and 23 of the Charter. The balancing exercise that forms an inherent part of this test involves weighing the justifications offered by employers, service providers and public authorities for their actions against the importance attached to the equality principle. This inevitably involves value choices about what qualifies as a 'good' justification. Also, the level of scrutiny applied by courts may vary according to the 'suspect' ground at issue and the nature of the activity in question. This again may require awkward normative choices to be made as to which non-discrimination grounds should attract stricter or looser degrees of scrutiny, and the margin of discretion that employers and others should enjoy in relation to different aspects of social, economic and cultural life.[56]

D. The Constrained Transformative Potential of the Equality Principle.

All of these factors – namely the uncertain scope of the equality principle, the limits of EU competency in this regard, and the ambiguity inherent in the idea of equality itself - cast a shadow over the development of EU equality law. They ensure that the CJEU and national courts applying EU law must often operate in an uncertain and contested normative landscape, in particular where they are called upon to adjudicate cases that do not fit the profile of a 'standard' discrimination claim or where the provisions of the equality directives do not provide clear guidance. This imposes constraints on the transformative potential of the principle of equal treatment – that is, its ability to serve as a tool to break down embedded forms of structural discrimination.

The situation might change if a consensus emerged that EU law should reflect and give effect to a strongly substantive concept of equality. This concept would focus on eliminating the subordination of disadvantaged social groups in European society, be informed by a

[55] See e.g. the discussion of the *Léger* case later in this paper (Section 4.D.). The problem of multiple and overlapping forms of 'intersectional' discrimination should also be noted here: see A. Lawson and D. Schiek (eds.) *Intersectionality and EU Non-Discrimination Law - Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate, 2011).

[56] C. O'Cinneide, 'The Uncertain Foundations of Contemporary Anti-discrimination Law', 11 *International Journal of Discrimination and the Law* (2011), p. 7-28.

strong commitment to human dignity and based on a developed understanding of the lived experience of discrimination and the ways in which structural forms of inequality can become embedded into social frameworks.[57] However, until such a consensus emerges, the constitutionalization of equality within the framework of EU law is likely to have more of an incremental than a transformative impact. This is not to downplay its importance: the requirement that EU secondary legislation and national law relating to matters regulated by EU law must comply with the equality principle, and be interpreted by reference to its substance, is highly significant. However, it does not in itself open the way for the CJEU to play a wide-ranging transformative role in this context.

§4. The Sexual Orientation Case Law of the Cjeu: A Testing Ground for the Constitutionalization of Equality within EU Law

A. Sexual Orientation – A Litmus Test for the Equality Principle

The consequences of the constitutionalization of the equality principle within EU law can be demonstrated by a selection of cases relating to differences of treatment on the grounds of sexual orientation. These illustrate both the positive impact and the limited reach of this principle, as well as some of the uncertainties that remain unresolved in the case law of the CJEU.

Sexual orientation is a particularly apt ground to use in this context, because LGBT persons in general have historically been viewed as the 'other' within European societies. Less favourable treatment of homosexuals has traditionally been viewed as justified on the basis that their orientation marked them out as being 'different', 'lesser' and even 'deformed' when compared to the heterosexual majority - and this distinction has been used to deny LGBT persons the right to participate equally in many facets of public and private life.[58]

Attitudes are now changing, and EU equality law has played an important role in this regard. The case law of the CJEU demonstrates a clear commitment to eliminating discrimination on the grounds of sexual orientation, in accordance with the requirement of the principle of equality as reflected in Article 21 of the Charter and the prohibition on discrimination on the grounds of sexual orientation in employment and occupation set out in the Framework Equality Directive. The Court has applied these standards rigorously in situations which

[57] Ibid. Such an approach would arguably be linked to and overlap with the concept of 'vulnerable groups' as usefully outlined by Peroni and Timmer: see L. Peroni and A. Timmer, 'Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law', 11 *International Journal of Constitutional Law* (2013), p. 1056-1085.

[58] See in general L. Trappolin, A. Gasparini and R. Wintemute (eds.), *Confronting Homophobia in Europe: Social and Legal Perspectives* (Hart, 2011).

clearly come within the scope of the Framework Equality Directive, and where the inherent logic of its established case law pointed towards a clear conclusion.[59]

However, concerns about competency, legitimacy and the ambiguous normative substance of the equality principle have loomed large in the context of the Court's sexual orientation case law, and have imposed substantive limits on the reach of EU equality law – as illustrated by several key judgments of the CJEU.

B. *Grant* – Limits to Competency

The first case that reached the Luxembourg Court relating to LGBT rights was *P and S v. Cornwall*,[60] where it ruled that discrimination based on transsexual status came within the scope of the general prohibition on sex discrimination set out in the Equal Treatment Directive. In its reasoning, the Court stated that '[t]o tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard'.[61] In other words, the Court adopted an expansive interpretation of the provisions of the Equal Treatment Directive on the basis that it protected the fundamental rights of individuals, in line with the requirements of the general principle of equal treatment.

This judgment remains a prime example of the constitutionalization of equal treatment within the EU legal order serving to justify a generous interpretation of the scope of the equality directives. However, it stands in interesting contrast to the Court's subsequent judgment in *Grant v. South-West Trains Ltd.*[62] In *Grant,* South-West Trains granted travel concessions to spouses of employees, and also to opposite-sex unmarried partners who had been in a 'meaningful relationship' for over two years. Ms Grant claimed that her same-sex long-term partner should also be entitled to receive this concession. When this was refused, she brought a legal claim alleging that she had been subject to less favourable treatment based on her sexual orientation, and by analogy with the outcome in *P and S v. Cornwall* argued that the scope of the Equal Treatment Directive should be read as covering discrimination based on this ground. However, the Court concluded that the prohibition on sex discrimination did not extend to differential treatment on the basis of sexual orientation.

In arriving at this conclusion, the Court acknowledged the fundamental status of the principle of equal treatment, but concluded the principle could not extend to Community competence:

[59] See e.g. the analysis of the *Maruko* judgment below (Section 4.C.).
[60] Case C-13/94 *P v. S and Cornwall County Council*.
[61] Ibid., para. 22.
[62] Case C-249/96 *Grant v. South-West Trains Ltd.*, EU:C:1998:63.

> although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community.[63]

In other words, the Court concluded that the equality principle could not be invoked to stretch Community competency into the field of sexual orientation discrimination, notwithstanding the extension of protection in *P and S* to cover discrimination based on gender reassignment. This conclusion was the subject of much academic criticism, with the Court being accused of excessive timidity.[64] However, it clearly demonstrates how concerns about legitimacy and competency impose constraints on the reach of the equality principle. Had the Court decided otherwise, it would have left itself open to accusations of judicial law making – which in this context it might have struggled to rebut.

The Court also rejected Grant's argument that she had been discriminated against on the basis of sex *simpliciter*, on the basis that a male co-worker with a female partner would have been entitled to the concession: the Court concluded that the appropriate comparator was a male co-worker in a same-sex relationship who would not have been treated differently than Ms Grant – and thus no difference in treatment on the basis of sex had taken place. The Court justified its assumption that same-sex partners were not in a comparable situation to opposite sex partners on the basis that 'in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex.'[65] Again, some commentators have criticized this conclusion as being unduly formalistic and deferential,[66] but it highlighted how the choice of comparator can be a fluid and uncertain process, which inevitably will be influenced by concerns about legitimacy and competency. The Court's decision in this case to opt for the choice of a comparator that left the status quo intact reflects the normative uncertainty that surrounded the principle of equality at the time. This uncertainty continues to exist today even if the specific legal situation at issue in *Grant* has been altered with the prohibition of discrimination based on sexual orientation in employment and occupation introduced by the Framework Equality Directive in 2000.[67]

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[63] Ibid., para. 45.

[64] For a recent analysis of these arguments, see M. Bell, 60 *American Journal of Comparative Law* (2012).

[65] Case C-249/96 *Grant*, para. 35. See also Joined Cases C-122/99 P and C-125/99 P *D. and Kingdom of Sweden v. Council of the European Union*, EU:C:2001:304.

[66] See e.g. M. Bell, 60 *American Journal of Comparative Law* (2012).

[67] Notably the Court in *Grant* referred to the fact that the Treaty of Amsterdam, which had recently been signed at the time the judgment was handed down, conferred competency upon the Council to take action against discrimination on the grounds of sexual orientation: see Case C-249/96 *Grant*, para. 48.

C. *Maruko, Römer and Hay* – The Potential and Limits of the Comparative Approach

Following the entry into force of the Framework Equality Directive, the first case to reach the Court involving this specific non-discrimination ground was *Maruko*.[68] The complainant in this case had entered into a legally recognized life partnership (*eingetragene Lebenspartnerschaftsgesetz*) with his same-sex partner, a theatrical costume designer. The collective agreement governing the compulsory occupational pension scheme of which Mr Maruko's partner was a member provided that a widower's pension could only be paid out to married spouses of the deceased, not to life partners. Mr Maruko alleged that this constituted discrimination on the basis of sexual orientation contrary to the provisions of Directive 2000/78/EC, on the basis that same-sex life partners were prevented from receiving such benefits in contrast to opposite-sex married couples.

In its judgment, the Court also affirmed that states retained full competency to determine marital status, as acknowledged by Recital 22 to the Directive which provides that its provisions were 'without prejudice to national laws on marital status and the benefits dependent thereon'. However, the Court also concluded that Member States had to exercise this competency in a manner that was compatible with their obligation not to discriminate.[69] As such, the Court concluded that the survivor's benefit in question came within the scope of the Framework Equality Directive. It went on to hold that the prohibition of direct discrimination on the grounds of sexual orientation set out in the Framework Equality Directive precluded national laws from preventing same-sex life partners from obtaining a benefit that was available to spouses, if (i) surviving life partners were in a comparable situation as spouses as regards the purpose and function of the benefit at issue and (ii) marriage was reserved for opposite sex couples: in such situations, same-sex life partners were being subject to less favorable treatment which was directly linked to their sexual orientation, because as homosexuals they were unable to marry and thus become eligible to receive the benefits in question.

It applied similar logic in the subsequent case of *Römer*.[70] In this judgment, the Court reaffirmed that the definition of marriage remained within the competence of Member States. Further, as in *Maruko*, the Court concluded that it would constitute direct discrimination on the grounds of sexual orientation if employment-related benefits were payable to married couples but not to a registered same-sex life partner of an employee who was in a legal and factual situation comparable to that of a married person as regards the purpose and function

[68] Case C-267/06 *Maruko v. Versorgungsanstalt der deutschen Bühnen*, EU:C:2008:179.
[69] It should be noted that Directive 2000/78/EC contains no substantive provision exempting national rules governing marital status from its general non-discrimination requirements.
[70] Case C-147/80 *Römer v. Freie und Hansestadt Hamburg*.

of that specific benefit. However, the Court went further than in *Maruko* in providing guidance as to when same-sex life partners should be deemed to be in a similar situation as opposite-sex married couples.[71] Subsequently, in *Hay*,[72] the CJEU bit the bullet and concluded that it would constitute direct discrimination contrary to the provisions of the Framework Equality Directive for same-sex partners who had entered into a civil solidarity pact within the framework of French law not to receive particular types of benefits, namely special leave days and a salary bonus, which were available to married couples.

These judgments are very significant since the Court has made it clear that non-payment of family-related benefits to same-sex partners in a legally recognized relationship that is broadly equivalent to marriage will constitute direct discrimination if these benefits are paid to married couples in a situation where marriage is reserved for opposite sex partners. This is even the case when, as with the civil solidarity pacts at issue in *Hay*, the rights and obligations of registered partners are not as extensive as those of married couples. This conclusion is based on an expansive interpretation of the Framework Equality Directive – or, to be more precise, a refusal to adopt an unduly narrow reading of its provisions. In *Römer*, the Court specifically invoked the principle of equal treatment to support its conclusion,[73] again indicating how important the constitutionalization of this principle has been in shaping the expansive interpretative approach of the Court to the equality directives.

These judgments have limited the extent to which states can discriminate against same-sex couples and thus have enhanced protection for what Kees Waaldijk has described as the 'right to relate' – that is, the right of everyone to form nurturing, loving relationships without being subject to discriminatory treatment.[74] They highlight the destabilizing impact of EU equality law, and the manner in which the constitutionalization of the equality principle can enhance its scope and impact.[75]

However, it is also necessary to recognize the limits of these judgments. The protection they offer against discrimination is limited to same-sex partners who have entered into a registered partnership that national law treats as being broadly equivalent to marriage.

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[71] In particular, the Court emphasized that in assessing whether same-sex life partners were in a comparable situation as opposite-sex married partners it was necessary to engage in a 'specific and concrete' analysis of the 'rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions (…) taking account of the purpose and the conditions for granting the benefit at issue'. Case C-267/06 *Maruko v. Versorgungsanstalt der deutschen Bühnen*, para. 42-43.

[72] Case C-267/12 *Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, EU:C:2013:823.

[73] Case C-147/80 *Römer v. Freie und Hansestadt Hamburg*, para. 59-60.

[74] K. Waaldijk, 'The Right To Relate: A Lecture on the Importance of "Orientation" in Comparative Sexual Orientation Law', 24 *Duke Journal of Comparative and International Law* (2013), p. 161-199.

[75] The CJEU in this regard has taken a much more rights-protective position than the European Court of Human Rights: contrast *Maruko, Römer* and *Hay* with the approach adopted by the Strasbourg Court in ECtHR, *Manenc v. France*, Application no. 66686/09, Admissibility Decision of 21 September 2010.

Presumably, same-sex life partners in states without such registered partnership schemes will not be deemed to be in a comparable situation as opposite-sex married couples. These couples thus can be denied benefits that are available to the latter group even if in a *de facto* sense their relationship of support and mutual dependence is entirely analogous to that of opposite-sex married couples.[76]

Again, this highlights the limits of equality understood in a purely comparative sense, and the circumscribed reach of the equality principle. As with *Grant*, some commentators have criticized the Court for being too deferential to states who cling to a heteronormative concept of marriage and partnership rights, too slow to recognize the denial of equality of status inherent in a refusal to open up marriage or an equivalent legal status to same-sex partners.[77] Again, however, the uncertain and contested scope of the equality principle, taken together with its focus on comparison, seems ultimately to be at fault here – the 'vocabulary' of EU equality law as currently established is insufficient to engage properly with these issues.

D. *LÉGER* – THE MISSING DIGNITY DIMENSION

The recent judgment of the CJEU in the case of *Léger* also serves to highlight both the potency and the limitations of how equality has been constitutionalized within EU law.[78] This case is particularly interesting because it turns on the interpretation of the provisions of a 2004 Directive regulating the collection and storage of donated blood with reference to the principle of equal treatment as expressed by Article 21 of the Charter. This case did not involve the provisions of the equality directives, but it instead highlights how the equality principle is capable of taking effect as well as of its relevancy across the full spectrum of EU regulation.[79] The judgment of the Court makes it clear that national legislation implementing this Directive must comply with the requirements of Article 21 of the Charter, therefore demonstrating the reach of the equality principle: however, the Court's conclusions in this case again shed light on some of the limitations of existing EU equality law.

Léger concerned the prohibition in French law of men donating blood who have had sexual relations with another man. Such absolute bans were introduced in many countries in the wake of the HIV epidemic of the late 1970s and 1980s, and were intended to prevent the spread of infectious diseases via infected blood. Some states have recently done away with

[76] J. Mulder, 'Some More Equal Than Others? Matrimonial Benefits and the CJEU's Case Law on Discrimination on the Grounds of Sexual Orientation', 9 *Maastricht J. Eur. & Comp. L.* (2012), p. 505-523.
[77] Ibid; see also M. Bell, 60 *American Journal of Comparative Law* (2012).
[78] Case C-528/13 *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du sang*.
[79] For another example of this, relating to the disability ground of non-discrimination, see Case C-356/12 *Glatzel v. Freistaat Bayern*, EU:C:2014:350.

such absolute prohibitions on gay men donating blood, with the UK (excluding Northern Ireland) for example in 2013 permitting donation on completion of a 12 month waiting period after sex. Furthermore, the existence of such restrictions is very controversial: many LGBT campaigning organizations argue that this type of blood donation ban is unnecessary and based on demeaning stereotyping, as it is now possible to rigorously test donated blood for infection and to screen out high-risk categories of donor.[80] Medical associations have also supported a lifting of such bans, which are increasingly being challenged, revised and reformed at national level.[81]

This case involved a challenge to the retention of an absolute ban in French law, with EU law being engaged on the basis that the 2004 Directive regulates the collection and storage of blood and blood components across the EU and sets certain common standards as to quality and safety in this regard.[82] Following a challenge by Mr Léger against a decision not to allow him to donate blood, the Administrative Court of Strasbourg (*Tribunal adminstratif de Strasbourg*) referred the question to the CJEU whether this absolute ban was compatible with the 2004 Directive.

The CJEU first had to determine whether France could exclude donations from gay men under the provisions of point 2.1 of Annex III to the 2004 directive, which permits Member States to permanently exclude donations from 'persons whose sexual behaviour puts them at high risk of acquiring severe infectious diseases that can be transmitted by blood'. In this respect, the Court took note of some data relating to the epidemiological situation in France which, according to the French Government and the European Commission, had some very specific characteristics: namely, almost all HIV infections were due to sexual relations, half of those newly infected were men who have had sexual relations with other men, and such men were the population most affected by HIV, with a rate of infection which was 200 times greater than that for the heterosexual population in France and a prevalence of HIV that was the highest among all states in Europe and Central Asia. It went on to decide that it was for the French tribunal to determine whether this data was still relevant and reliable, and whether in turn this established that men having sexual relations with other men constituted a 'high risk' group.

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[80] See A. Caplan, 'Blood Stains - Why an Absurd Policy Banning Gay Men as Blood Donors has Not Been Changed', 10 *American Journal of Bioethics* (2010), p. 1-2; M. Fabricant, 'Equalising the Right To Donate Blood is the Next Frontier for UK Gay Rights', *The Guardian*, 14 August 2014, http://www.theguardian.com/commentisfree/2014/aug/14/right-to-donate-blood-uk-gay-rights-safe-sex.

[81] See the data overview set out in the report published by the UK Advisory Committee on the Safety of Blood, Tissue and Organs (SaBTO), *Donor Selection Criteria Review*, April 2011, https://www.gov.uk/government/publications/donor-selection-criteria-review.

[82] Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components, [2004] OJ L 91/25.

Secondly, the Court went on to consider whether - conditional upon determining if men who have had sexual relations with other men were deemed to constitute a 'high risk' group - the imposition of an absolute ban was consistent with the fundamental rights protected within the EU legal order. In particular, the Court had to consider the compatibility with the principle of non-discrimination on the basis of sexual orientation as given 'particular expression' via Article 21 of the Charter.

The Court took the view that the absolute ban constituted a limitation on this right, as it treated men who had sexual relations with other men differently from others - which therefore meant that it must be shown to be objectively justified. The Court accepted that the absolute ban furthered a legitimate objective, namely the protection of public health. However, it went on to note that 'a permanent deferral from blood donation for the whole group of men who have had sexual relations with other men is proportionate only if there are no less onerous methods of ensuring a high level of health protection for recipients'.[83] It also noted that it was possible that laboratory techniques existed which could provide effective screening of any donated blood, and also that alternative methods might also be used to identify individuals engaged in high risk sexual behaviour, such as the use of questionnaires and interviews with medical personnel. It therefore concluded that the national court should assess whether the absolute ban was proportionate and necessary given the existence of these alternative screening methods, and whether the use of such alternative methods in place of the absolute ban would be effective in ensuring a high level of health protection. The Court therefore assessed whether France's absolute ban was objectively justified, and identified potential grounds for concern that the ban was not proportionate – although it left it to the national court to carry out the detailed assessment of the sufficiency of other screening methods that is necessary in this context.

At first glance, this judgment is notable for its rigorous application of the objective justification test, and its insistence that the principle of equality must be respected even in the specific context of the regulation of blood donation. It illustrates the reach of EU law, and by extension the potential impact of the equality principle and the CJEU's role in enforcing compliance with its requirements.

However, it is instructive to compare the Court's judgment to the Opinion of Advocate General Mengozzi given in the same case.[84] Advocate General Mengozzi initially concluded that it would be a breach of the principle of equal treatment for all men who had sexual

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[83] Case C-528/13 *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du sang*, para. 65.

[84] Opinion of Advocate General Mengozzi in Case C-528/13 *Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du sang*.

relations with other men to be classified as persons whose sexual behaviour made them 'high risk'. In his view, the French law was excessively broad and wide-ranging in effectively classifying all gay and bisexual men as engaging in high risk behaviour, and therefore concluded that the absolute ban could not be brought within the exception set out in Annex III to the 2004 Directive. He went on to acknowledge that states could introduce more stringent protective measures than those laid down in the 2004 Directive, but such measures had to comply with the requirements of the principle of equal treatment and be shown to be objectively justified. Again, he identified potential issues as to the proportionality of the absolute ban, including the fact that the absolute ban was inconsistent in that it did not prevent heterosexual men who repeatedly engaged in high-risk unprotected sex from giving blood, or women whose partners might have had sexual relations with other men.

In other words, Advocate General Mengozzi's Opinion demonstrated a much greater degree of awareness of how the ban could reinforce stereotypes and thus attack the dignity and status of gay men than did the ultimate judgment of the Court, which in contrast appeared to endorse the argument of the French government that gay and bisexual men had to be treated collectively as a 'high risk' group. In general, and in contrast to Mengozzi's Opinion, the Court adopted a quite formalistic and acontextual analysis, which placed little weight on the status harms associated with the absolute nature of the ban, and the manner in which it could be viewed as reflecting and reinforcing stereotypes about the behaviour of gay and bisexual men. As a consequence, the guidance it provided to the French courts on how to assess the proportionality of the absolute ban is lacking the dignitarian dimension present in Advocate General Mengozzi's Opinion – and is all the poorer for that.

E. The Asylum Cases – Dignity Enters the Picture?

Léger thus illustrates both the potency of the constitutionalized equality principle and the limited concept of equality underpinning it. Its potency is visible by the CJEU clarifying that the French law implementing the 2004 Directive has to comply with the equality principle and that the absolute ban on blood donations from men who had sexual relations with other men had to satisfy an exacting proportionality analysis. The judgment demonstrates how the principle can exert a destabilizing effect over areas of legal regulation far removed from the usual areas where EU equality law usually has an impact: however, it also highlights how equality tends to be viewed in constrained and narrow terms within the EU legal framework. However, EU law in this context remains a work in progress, and promising signs exist of the development of a more contextual, substantive approach to identifying and redressing the subordination of certain social groups, and in particular homosexuals. Interestingly, these positive developments are taking place in judgments of the CJEU which are not primarily focused on the application of the equality principle or Article 21 of the Charter. Instead, they

involve the interpretation of Directive 2004/83/EC which sets out minimum standards relating to the treatment of asylum seekers[85] in light of the fundamental rights protected by the EU Charter, in particular the right to integrity of the person protected by Article 3 of the Charter and the right to private life protected by Article 7 of the Charter.

In two recent judgments, the Court has been called upon to determine the standards that should apply in determining claims for refugee status made by third country nationals on the basis of a well-founded fear of persecution based on their sexual orientation. In both cases, the Court applied a contextual analysis rooted in respect for human dignity, which took account of the specific nature of the degrading and unequal treatment often faced by LGBT persons as well as of their entitlement to equal concern and respect within the functioning of national systems for determining refugee status.

In the first case, *X and Y*,[86] the CJEU established that the provisions of the 2004 Asylum Seekers Directive had to be interpreted in a manner consistent with the requirements of the Geneva Convention and other relevant international treaties, as well as with the rights recognized by the EU Charter.[87] This case involved a preliminary reference from the Council of State (*Raad van State*) in the Netherlands, who had sought guidance from the CJEU in respect of a number of different issues. Firstly, the CJEU was asked whether homosexual third country nationals of a state where homosexual conduct was criminalized could constitute a particular social group for the purposes of Article 10(1)(d) of the Asylum Seekers Directive, thus entitling individuals belonging to that group to an 'umbrella' of collective protection. The Court concluded that homosexuals could be regarded as forming a particular social group if they were targeted by criminal laws in the countries concerned: they could be treated as having a distinct shared identity because they were 'perceived by the surrounding society as being different'.[88] Secondly, the Court decided that the criminalization of homosexual acts *per se* in the relevant country of origin did not by itself amount to an act of persecution for the purposes of the Asylum Seekers Directive and the Geneva Convention. However, if terms of imprisonment were actually imposed on homosexuals in the state in question then this would constitute disproportionate and discriminatory punishment and thus qualify as persecution. Thirdly, the Court concluded that national authorities, when assessing an application for refugee status, could not reasonably expect the applicant for asylum to

[85] Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection.
[86] Joined Cases C-199/12, C-200/12, C-201/12, *X, Y and Z v. Minister voor Immigratie en Asiel*.
[87] Ibid., para. 40.
[88] Ibid., para. 47.

conceal his homosexuality in his country of origin to avoid persecution or to exercise reserve in the expression of his sexual orientation.

This judgment is significant for establishing that an active policy of criminalizing and imprisoning homosexuals in countries of origin will constitute grounds for a claim of refugee status, and also because the CJEU made it clear that homosexuals should not be expected to conceal or avoid expressing their sexual orientation in their countries of origin. In reaching this conclusion, the Court placed considerable emphasis on the rights of gay people to integrity, privacy and equality of treatment, in line with the requirements of Articles 3, 7 and 21 of the Charter. The Court affirmed that a ‘person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it’,[89] and should not be required to exercise ‘greater restraint than a heterosexual in expressing his sexual orientation’.[90]

A similar concern to protect personal autonomy and dignity is reflected in the Court’s judgment in the *A, B and C* case.[91] Here the CJEU concluded that state methods for verifying the sexual orientation of asylum applicants who were basing their claim on a fear of persecution in their country of origin on account of their homosexuality had to comply with the requirements of the EU Charter. In particular, the Court ruled that it was incompatible with the right to privacy set out in Article 7 of the Charter and the right to human dignity set out in Article 1 of the Charter for national authorities to carry out detailed and intrusive questioning as to the sexual practices of an applicant for asylum. The Court also concluded that Article 4 of Directive 2004/83 as interpreted by reference to these Charter rights precluded national authorities seeking and accepting evidence such as the performance by the applicant for asylum concerned of homosexual acts or his submission to ‘tests’ designed to establish his sexual orientation. The Court also held that national authorities were precluded from finding that an asylum seeker lacked credibility merely because he did not rely on his declared sexual orientation on making his initial claim for protection. The Court emphasized that national authorities could not rely on stereotyped notions about the ‘typical’ behaviour of homosexuals, and had to respect the sensitive nature of information relating to a person’s sexual orientation and the importance of respecting human dignity in this context. Again, this judgment is marked by an emphasis on the need to respect human dignity and avoid stereotyping, and is characterized by an awareness of context that is not so obvious in other judgments of the Court.

[89] Ibid., para. 46, 70.
[90] Ibid., para. 75.
[91] Joined Cases C-148/13, C-149/13 and C-150/13, *A, B and C v. Staatssecretaris van Veiligheid en Justitie*.

Neither of these judgments are free from criticism. Some commentators have suggested that the CJEU did not go far enough in extending protection against the criminalization of same-sex acts in *X and Y*, while others suggest that *A, B and C* fails to provide clear guidance as to how asylum seekers can prove their claim that they face persecution on the grounds of their sexual orientation.[92] However, taken together, they demonstrate a willingness on the part of the CJEU to address discriminatory and intrusive treatment of gay asylum seekers through the lens of human dignity. They add a new dimension to the Court's jurisprudence in respect of sexual orientation, which remains absent for now from much of its case law actually focused on the principle of equal treatment. They also demonstrate that the constitutionalization of equality within the EU legal order is not just being channeled through the principle of equal treatment and the non-discrimination provisions of Articles 21 and 23 of the Charter, but also is being slowly supplemented by the Court's emerging jurisprudence relating to human dignity and personal autonomy.

§5. Conclusion

The constitutionalization of the principle of equal treatment has given great potency to non-discrimination rights within the EU legal order. However, the scope and substance of this principle remains unclear, and it appears to give effect to an uncertain and limited concept of equality. This imposes constraints on its transformative potential, as illustrated by cases such as *Grant* and (to a lesser extent) *Maruko*. Furthermore, cases such as *Léger* highlight the need for the CJEU's equality jurisprudence to engage to a greater degree with the values of human dignity and personal autonomy – as the Court has arguably begun to do in its case law on asylum seekers claiming refugee status on the basis of their sexual orientation. The relatively thin concept of equal treatment that has been constitutionalized within EU law needs to be fleshed out and given a more substantive dimension – and the language of dignity may have something to add to the vocabulary of equality in this regard.

[92] See e.g. S. Chelvan, 'C-148/13, C-149/13 and C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*: Stop Filming and Start Listening - A judicial black list for gay asylum claims', *European Law Blog*, 12 December 2014, http://europeanlawblog.eu/?p=2622#sthash.OHHi3Gm1.dpuf.