

## BOOK REVIEW

*Equality Law in an Enlarged European Union. Understanding the Article 13 Directives*, edited by Helen Meenan (Cambridge, Cambridge University Press, 2007, 370 pp., \$125 (U.S.))

*reviewed by Petra Foubert*<sup>†</sup>

Unlike other treaties, the EC-Treaty contains no general prohibition of discrimination. That is not surprising as the EC was originally solely concerned with the aim of creating of a common market. Against that background, human rights protection was of marginal importance. Nevertheless, two specific instances of discrimination have been forbidden ever since the Community's foundation: discrimination on grounds of nationality and wage discrimination between men and women workers. These provisions have been inserted in the EC-Treaty based on purely economic rationales. The principle of non-discrimination on the basis of nationality is a central tenet of the EC-Treaty. As the original aim of the EC was to create a common market out of separate national markets, discrimination of nationals of other Member States could seriously endanger the free movement of persons, a fundamental aspect of the common market. The rule that men and women should get equal pay for equal work was also included in the Treaty for economic purposes. At the time of the Community's establishment, any social benefit was merely an advantageous consequence of the desire to avoid the distortion of competition. There were important differences in the scope and the content of the social legislation in force in the candidate Member States. France, in particular, had a number of rules favoring workers, including legislation on equal pay for men and women. As a consequence, France had one of the smallest differentials between the salaries of male and female employees. This raised concern that the additional cost borne by French industry would make French goods uncompetitive in the common market.

Although both of the above mentioned provisions did not arise out of a human rights struggle, the approach to equality and non-discrimination evolved over the years and the Community eventually opted for a human

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rights vision. The role of the Court of Justice in this respect has been invaluable.

The incorporation in 1997 of Article 13 into the EC-Treaty can be seen as a confirmation in the Community's founding treaties of this choice for the human rights approach. Article 13(1) EC-Treaty empowers the Council to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." It is clear that this provision in itself does not grant any right to equal treatment. It only provides a legal basis allowing the Council to introduce new prohibitions of discrimination. Thus far, three directives have been adopted on the basis of this article, including the Race Directive, the Employment Equality Directive, and the Equal Treatment Directive between men and women in access to and supply of goods and services.<sup>1</sup> Although a substantive body of literature already exists with respect to Article 13 EC-Treaty and its directives, the authors of the volume reviewed here certainly reached their aim of adding a fresh approach and new insights.

The first part of the book contains an introductory chapter by the editor outlining the historical evolution of equality and non-discrimination law in the EC, and setting the goals of the book. The main goal is to provide an expert essay on each discrimination ground contained in Article 13. However, this book is different from other collections to the extent that the experts were instructed to take the following broad issues into account in the assessment of their subject: the 2004 enlargement of the Community, human rights aspects, inter-sectionality (the idea of intersecting grounds of discrimination) and multiple discrimination, gender and age dimensions, access to justice and particular strategies required to combat discrimination and promote equality. According to the editor, the overarching aim is simple: "to see what insights can be drawn from a collective and contextual assessment of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation within this framework, at this important juncture following transposition" (page 6). The book also attempts to move away from the equality hierarchy as the preeminent means of understanding the current state of equality law in the EU.

In order to prepare the reader for the intended collective and contextual approach, the first part of the book contains a chapter by Robin Allen QC on the evolution and current contexts of Article 13, including the author's

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1. Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L* 180, 19 July 2000, 22; Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ, L* 303, 2 December 2000, 16; Council 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, *OJ L* 373, 12 December 2004, 37.

keynote speech to the Vienna Conference, organized by the European Commission on December 3–4, 1998, in which the possibilities for action under Article 13 were explored. Another chapter, by Christopher McCrudden and Haris Kountouros, develops on the human rights and equality contexts within which the EC's equality and non-discrimination law was developed and continues to operate. A very interesting chapter is the one by Israel Doron. This author develops on the demographic context within which the discussion on equality and non-discrimination in the European Union takes place. He highlights that "a dramatic change in the last decade has led to unprecedented ageing in the population of Europe and other developed countries" (page 117). This change is ascribed to the fact that developments in science and technology have prevented that factors such as, for example, disease, famine, and complications during childbirth, sweep away many people before they reach old age. Notwithstanding the quite general title of this chapter ("Demographic, social change and equality"), the author limits his discussion to the ageing of the population. It seems not unlikely, however, that interesting trends can also be discerned with respect to other demographic variables showing relevance to the discussion on equality and non-discrimination in the European Union, "disability" to name probably the most important one.

In the second part of the book a chapter is dedicated to each Article 13 anti-discrimination ground: sex (Ann Numhauser-Henning), racial or ethnic origin (Mark Bell), religion or belief (Gwyneth Pitt), disability (Gerard Quinn), age (Helen Meenan), and sexual orientation (Barry Fitzpatrick).

The sex equality chapter focuses on the developments in legislation and case law since the Amsterdam Treaty. The author winds up her contribution warning that:

There is, in my opinion, a considerable risk that an ever-growing number of groups to be protected against discrimination will incline the notion of discrimination even closer to the Aristotelian concept of formal equal treatment at the least common denominator than hitherto. The Article 13 Directives here build on weaker ground than gender equality due to the new provisions after the Amsterdam Treaty, which in the area of gender equality thus demand a positive and proactive approach. (page 175)

In his contribution, Mark Bell provides an overview of the principal poles around which EU anti-racism policy has been organized. He identifies three main fields: legislative instruments, mainstreaming, and institutional commitment. His conclusion is that the rapid progress made on the level of anti-discrimination legislation is not matched on other areas such as mainstreaming. As a consequence, the author advances that, as

opposed to earlier times, there is no vision for a coherent, comprehensive, and multi-faceted European anti-racism policy.

After having provided some interesting (historical) data on religion in the current Member States of the European Union, Gwyneth Pitt embarks on an exploration of the question whether the classification of religion alongside belief in the scheme of EU equality law is appropriate or whether the problem of exclusion would be better addressed through an expanded notion of race and ethnicity. She concludes:

If . . . it is argued that there should indeed be protection from discrimination on grounds of religion or belief . . . then the important question of the basis for selecting the grounds to be protected by Article 13 is raised. Bell notes a move in EC law from a market integration model of social policy . . . to one of social citizenship . . . . The latter could be regarded as a rationale for the inclusion of a wide conceptualisation of religion and belief within the anti-discrimination regime. If so, however, it is illogical to confine protection to the employment field . . . and it is also not obvious why the protection should be confined to the grounds mentioned in Article 13 of the EC Treaty rather than the grounds identified in Article 14 of the European Convention on Human Rights. (page 229)

In his chapter, Gerard Quinn assesses the significance and future potential of the Employment Equality Directive in the specific context of disability. He welcomes the European Commission's dual approach—human rights together with market rationality—to the interpretation and application of the Employment Equality Directive's disability ground and states that, when they diverge, the human rights provenance should be dispositive. In that perspective, the author describes the European Court of Justice's decision in the Chacon Navas case as very regrettable.

Another chapter of part 2 is dedicated to age discrimination. Helen Meenan first explores age as a human characteristic and looks at how it influences life and work. Second, she examines the age strand within the Employment Equality Directive. Meenan pleads for careful reliance on Article 6.1. of the Directive (justification of differences of treatment on grounds of age on the basis of a legitimate aim, including legitimate employment policy, labor market and vocational training objectives) as it “shrink[s] the material scope for different age groups substantially” (page 295). The overarching message of the chapter is that “condoning any lesser treatment for age risks hurting those who find themselves at the intersection of age and at least one other ground” (page 311).

There also is the chapter by Barry Fitzpatrick, who wrote on “The ‘mainstreaming’ of sexual orientation into European Equality law.” Among other things, he directs attention toward the fact that there are particular issues surrounding the privacy and vulnerability of lesbians, gays, and

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bisexuals that provide particular challenges to the European and national legal systems. He finalizes his contribution on a positive note, mentioning that he sees ample opportunity to exploit the potential of the Employment Equality Directive, and the more general system of EC law principles, to pursue sexual orientation discrimination rights across the EU.

In her concluding chapter of part 2, editor Helen Meenan sets out a number of themes that emerged from the specific “guided” approach imposed on all contributors. Reference can be made, for example, to “the absence of any definition in the Directives for the Article 13 grounds and the consensus that a definition may have been helpful to at least some of the grounds” (page 347) and the absence of a legal framework for tackling multiple or inter-sectional discrimination.

