Editorial comments: The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare

Articles

G. Cornelisse, What’s wrong with Schengen? Border disputes and the nature of integration in the area without internal borders

H. Micklitz and N. Reich, The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)

A. Kornezov, Res judicata of national judgments incompatible with EU law: Time for a major rethink?

F. Ferretti, Data protection and the legitimate interest of data controllers: Much ado about nothing or the winter of rights?

C. Eckes, EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions

Case law

A. Court of Justice

(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: AMS, N. Lazzerini

Integration without membership and the dynamic development of EU law: United Kingdom v. Council (EEA), N. Rennuy and P. van Elsuwege

Unfair terms in mortgage loans and protection of housing in times of economic crisis: Aziz v. Catalunyacaixa, S. Iglesias Sánchez

Price reduction as a consumer sales remedy and the powers of national courts: Duarte Hueros, S. Jansen

The new rules of procedure on the review procedure and the application of general principles in EU civil service law and litigation: Strack, X. Tracol

Book reviews
Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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From the title, it is already clear that this book addresses two important issues. First, the fact that the field of non-discrimination law, as many other areas of law, nowadays has to function in a world of multilevel jurisdictions. Second, that in today’s multicultural societies, judges who need to implement non-discrimination or equality standards are confronted with differential norms and values that exist in various cultural and religious communities. The author addresses two jurisdictions in the non-discrimination field that play a major role in Europe: the Council of Europe (CoE) and the EU. She examines in what way their approaches to equality and non-discrimination differ and what the consequences of these differences may be, in particular when applying their respective legal systems to one specific issue: that of the prohibition to wear an Islamic headscarf while performing a job in the public sphere – an issue that may be seen as exemplary for the conflicts that can arise in our multicultural world.

The book, based on a PhD dissertation defended at the University of Utrecht in 2012, offers a thorough examination of equality and non-discrimination law, as adopted and implemented by the CoE and the EU. The main legal provisions on each side are described in detail, including putting the relevant legal instruments (Art. 14 ECHR and the 12th Protocol to the ECHR for CoE; several Treaty provisions, the EU Charter of Human Rights and three main EU Directives for the EU) into their historical and political context. This, in itself, makes it a valuable contribution to the field of European non-discrimination law, because most often the two systems are described separately from each other by specialists in either one or the other field. The author presents her materials, derived from the case law of the Strasbourg and the Luxembourg courts involved in interpreting and applying these norms and from academic literature, in a clear and structured way. This contributes to making this complicated area of law
more accessible. Part of the complexity, in fact, is caused by the existence of separate legal systems and separate courts. Providing an analysis of the similarities and differences of these two systems helps clarify the complexity, and thus may contribute to enhancing more synergy between relevant legal systems, hence to a more effective non-discrimination law.

Haverkort-Speekenbrink started her research project from the (hypothetical) case of a woman who claims that she has been discriminated against because she cannot wear her Islamic headscarf at work, as in the European country where she lives there is a general prohibition to wear conspicuous symbols in the workplace that show a personal conviction, such as religious and political convictions. In such a case, three discrimination grounds may (indirectly) be invoked, separately or in conjunction with each other: religion, sex and ethnicity. Besides non-discrimination or equal treatment law, in a situation where her case would come before the ECtHR, also the right to religious freedom (Art. 9 ECHR) may be invoked. On the basis of her choice for this particular case study, the general description and analysis of possible relevant EU and CoE norms is restricted to this field (public employment), to these norms (the prohibitions of direct and indirect discrimination and the right to religious freedom) and to these three grounds (religion, sex and ethnicity). Other fields (e.g. private employment or education), other forms of discrimination (e.g. harassment, hate speech or instructions to discriminate), and other grounds (e.g. disability or sexual orientation) are not discussed. However, this does not mean that the analysis of the relevant norms and of the ways in which they are interpreted and applied by the different Courts, is not relevant for these other areas, other forms of discrimination or other non-discrimination grounds. In particular, the ways in which the courts decide whether they consider something direct or indirect discrimination, the ways in which they deal with the comparability issue, the ways in which they establish the existence of a disadvantage, or the ways in which they test whether there may be an objective justification for the difference in treatment, and – last but not least – the margin of discretion or of appreciation they leave to the Member States are very similar for other forms of discrimination. Therefore, the study may prove useful in a much wider field.

Both the ECHR and the EU provisions and case law in the area of non-discrimination law and the right to religious freedom have already frequently been analysed and compared in-depth, so there is a certain amount of déjà vu. But in the end, it is positive that the description and analysis of these two systems have been brought together in one book and have been compared in-depth in relation to this one specific issue. Can a legal prohibition as described above (to wear any conspicuous religious or symbols) indeed amount to unlawful discrimination under either or both of the legal systems investigated in this research project? This question is important, because there is a wide divergence between European States as regards how the national authorities deal with this issue. Some countries are very strict in prohibiting any form of religious expression while working in the public service (e.g. France, where the laïcité principle reigns), others leave a lot of room for doing so (e.g. the UK, where policemen may wear a turban or headscarf). Still other countries (e.g. the Netherlands) seek a middle way, making a distinction between functions in which the public servant has contacts with the general public and more or less represent the (neutral) State, and functions in which no such contacts are involved. Is this a matter to be left to the discretion of the different States? Or can or should there be a process of further harmonization of the legal systems in Europe under the guidance of relevant courts? Although some guidance as to what is the current “state of the law” may be derived from earlier case law of the ECtHR, in particular in Article 9 cases, the ECJ has not yet given any judgments concerning religious discrimination on the basis of the Framework Equality Directive (2000/78/EC). Therefore, it is unclear whether all public servants in Europe enjoy the same level of protection against discrimination. This may lead to legal uncertainty of the citizens of Europe. From the perspective of the EU, this question also has urgency in terms of one of the most basic EU principles, namely free movement of workers. If the woman in the hypothetical case wanted to move from e.g. the UK to France, she would certainly be deterred from doing so if France is indeed allowed to have a general prohibition on wearing the headscarf by public servants. However, from the several possible motives to harmonize EU and CoE law in this respect, this one is lacking in the introduction to the book.
The ECHR and the EU legal norms and case law in the area of equality and non-discrimination have a different background, as is explained in the beginning of the book. While the first is part of a human rights framework, the second has evolved from economic regulation law. Although the author does recognize this is the case, she does not really investigate whether this difference in perspective may still influence the way these norms are interpreted and applied by the two respective courts. Is the economic paradigm still a determinant factor in the ECJ’s approach? I think that there may be indications that the Luxembourg court will indeed have a more open eye for the social and economic consequences of discrimination in terms of functioning of Europe’s labour market.

The findings of the comparative study of the two systems are applied to the fictional case. Since the list of differences between the two systems of non-discrimination law is rather long, it was to be expected that the possible outcome of that case would also be quite different. However, this appears not to be so. “At first sight, one might assume that these differences lead to conflicts. A closer look, however, shows that the end-result of the judgements may not be so different after all.” (at p. 329.) By way of example, the author discusses the issue of the differentiation between suspect and non-suspect grounds, which plays an important role in the ECHR system, but is non-existent in the ECJ’s case law. However, application of the doctrine in EU law that in a case of direct discrimination there are hardly any exceptions possible (the closed system of justification), may have a similar result as applying a strict scrutiny test. At this point, I think the author’s conclusion is not very well founded, since – as was shown during the case study – in particular the ECJ would most probably evaluate this situation as a case of indirect discrimination. In that case, the closed system does not apply, and objective justifications are possible.

A remarkable point, and attracting criticism, is that possible consequences of the fact that the EU in the near future may become a signatory of the ECHR are hardly discussed in the book. The author does not present this important development in the Introduction as one of the reasons to do this research, but only mentions it incidentally in her Introduction and in her Concluding Chapter (at p. 7 and p. 329). For example, in the Introduction (at p. 7), while quoting Kuijer, she states that the accession of the EU to the ECHR would “minimize the risk of the two courts arriving at diverging interpretations of human rights standards.” (Kuijer, “The Accession of the European Union to the ECHR: A Gift for the ECHR’s 60th Anniversary or an Unwelcome Intruder at the Party?”, Amsterdam Law Forum 2011.) However, if this is true, why then still put all this energy and time in investigating the issue of the diverging norms as they now stand? The problem would then be solved automatically after accession has taken place. And is this presumption of Kuijer indeed based on any real evidence, or is it merely wishful thinking? The book does not contain a systematic analysis of case law in which in particular the ECJ already integrates aspects of case law of the ECHR in its judgement. Could there indeed be a similar development in the area of non-discrimination law or is this area different from those in which the ECJ already integrates human rights standards in its evaluation of the cases that are brought to its attention? Also, Haverkort-Speekenbrink, in her conclusions (at pp. 116–117) about how the Court would assess the fictional case that she presents in the book, does not seem to take into account that the ECJ nowadays tends to interpret the relevant Directives in the light of, in particular, the EU Charter of Fundamental Rights.

Nevertheless, as stated at the beginning of this review: a systematic comparative analysis of two main legal systems that are aimed at combating discrimination in Europe, in the context of the growing ethnic and religious diversity of Europe’s population, is a valuable contribution, both for lawyers and judges who have to deal with possible conflicts that arise from this diversity, and for the academics who analyse and systematize this field of law.

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Leiden
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