EQUAL IS NOT ENOUGH
Discriminatierecht in theorie en praktijk / Discrimination law in theory and practice

Editors
Stefan Sottiaux en Jogchum Vrielink
EQUAL IS NOT ENOUGH

Edited by
Daniel Cuypers
Jogchum Vrielink

intersentia
Cambridge – Antwerp – Portland
CONTENTS

Introduction
Daniel Cuypers and Jogchum Vrielink .................................................. 1
1. From Conference to Proceedings ..................................................... 2
2. Overview ...................................................................................... 2

The Importance of Equality Law and Human Rights in Addressing Socio-Economic Inequality
David Barrett ..................................................................................... 5
1. Introduction .................................................................................. 5
2. Socio-Economic Inequality ............................................................... 6
   2.1. Economic Inequality ................................................................. 6
   2.2. Class ..................................................................................... 7
   2.3. Poverty ................................................................................. 8
3. Current Mechanisms to Address Socio-Economic Inequality .............. 9
   3.1. The Child Poverty Act 2010 .................................................... 9
   3.2. Government Policies ............................................................... 11
   3.3. Current Equality Law ............................................................. 13
   3.4. Open Method of Coordination ................................................. 16
4. Alternate Mechanisms to Address Socio-Economic Inequality ............ 18
   4.1. Socio-Economic Rights ......................................................... 18
   4.2. Extending Equality Law to Cover Social Condition/Disadvantage .. 22
5. Conclusion .................................................................................... 26

Housing Rights and the Inclusion of Roma and Travellers. Towards Positive Action Measures from the Rulings of the European Court of Human Rights?
Roberta Medda-Windischer ................................................................. 27
1. Introduction .................................................................................. 27
2. State Obligations in the Strasbourg System: Limits and Strengths of Positive Obligations ................................................................. 28
3. Positive Action and Social Policy Prescriptions in the European Legal System ................................................................. 31
4. Housing Rights and Social and Economic Rights within the Strasbourg System .................................................. 35
5. The ECtHR Case Law on Housing and Roma/Travellers’ Traditional Way of Life .................................................. 36
   6.1. Adequacy of Housing Solutions: Sedentary vs. Nomadic Lifestyle .................................................. 40
   6.2. Unlawful Settlements and Disadvantaged Position Entailing Special Assistance .................................. 41
   6.3. An Emerging Right to Alternative Accommodation in Case of Forced Eviction? .......................... 44
7. Concluding Remarks ................................................................. 47

The Right to Work of People with Disabilities. The Obligation to Accommodate as an Emanation of the Contemporary Approach to Disability

Sébastien van Damme ................................................................. 51
1. Introduction ........................................................................... 51
2. Contemporary Approach to Disability .................................................. 53
   2.1. Modern Discrimination Law .................................................. 53
   2.2. Concept of Disability .......................................................... 55
       2.2.1. From a Medical to a Social Model of Disability .......... 55
       2.2.2. To a Broad Definition of Disability .......................... 56
3. Right to Reasonable Accommodation .......................................................... 60
   3.1. Origin ........................................................................... 60
   3.2. Principles ........................................................................ 61
       3.2.1. What is an Accommodation? ..................................... 62
       3.2.2. What is a ‘Reasonable’ Accommodation? ................ 64
3.3. Procedure for Granting Accommodations .................................................. 68
3.4. Sanction for Not Granting Accommodations .................................................. 69
4. Conclusion ........................................................................... 71

Indirect Discrimination, Reasonable Accommodation and Religion

Erica Howard ................................................................. 73
1. Introduction ........................................................................... 73
2. Existing Duties of Reasonable Accommodation .................................................. 73
3. Existing Duties of Accommodation Require a Balancing of Interests .......................... 75
4. Indirect Discrimination in EU Law .................................................. 77
5. Case Law ........................................................................... 79
6. Group Disadvantage ...................................................................... 81
7. European Court of Human Rights .................................................. 84
8. Conclusion ........................................................................... 90
# Reconsidering Civic Integration Policies for Migrants through the Lens of Socio-Economic Status. Examples of Belgian and Dutch Legal Orders

Sarah Ganty

1. Socio-Economic Status and Civic Integration Policies: Dutch and Belgian Legal Orders
   1.1. Dutch Pre-entry and Inland Tests as a Condition for the Acquisition of a Non-Permanent Residence Permit
       1.1.1. OECD Nationals, TCN Migrant Workers and their Family Members
       1.1.2. Burden of the Dutch Integration Tests
   1.2. Flemish Inburgering
       1.2.1. TCN Migrant Workers and their Families
       1.2.2. Burden of the Inburgering Process
   1.3. The Impact of the Socio-Economic Situation of Migrants within Civic Integration Policies

   2.1. EU Migration Law and Discrimination Law
       2.1.1. EU Migration Law: a Sufficient Protection?
       2.1.2. Discrimination Law: as a Complementary Protection Tool?
   2.2. Addressing the Usefulness of the Ground of Social Condition to Question Civic Integration Policies
       2.2.1. Social Origin, Social Condition and Related Grounds
       2.2.2. *Chapti, Ali & Bibi* case
       2.2.3. The Status Ground of Social Condition as Part of Multiple Discrimination
       2.2.4. Social Condition: a Useful Tool to Tackle Civic Integration Policies

3. Conclusion

# Does Equality Law Make a Difference? Social Science Research on the Effect of Discrimination Law on (Potential) Victims

Jogchum Vrielink

1. Grievances, Claiming and Litigating in Discrimination Law
   1.1. Perceived Injurious Experiences
       1.1.1. Underestimation
           1.1.1.1. Cognitive Factors
           1.1.1.2. Social and Motivational Factors
       1.1.2. Vigilance and Overestimation
   1.2. Claiming, Disputes, Filing and Trials
2. Effects and Impact .......................................................... 124
   2.1. Positive and Intended Effects .................................... 124
   2.2. Unintended Effects .................................................. 126
      2.2.1. Shifting Discrimination ...................................... 126
      2.2.2. Discrimination Law as Masking Discrimination .......... 128
         2.2.2.1. The ’Endogenisation’ of Discrimination Law .... 128
      2.2.2.2. Masking Morality ........................................... 130
      2.2.3. Harm ............................................................. 130
         2.2.3.1. Direct Harm ................................................ 131
         2.2.3.2. Indirect Harm: Increasing Bias? ...................... 131

3. Conclusion ................................................................. 133

From a ‘Relative’ to a ‘Relational’ Equality: Rethinking Comparability
in the Light of Relational Accounts of Social Justice
Päivi Johanna Neuvonen .................................................. 135
1. Introduction ............................................................. 135
2. Comparisons in the Light of the Case Law of the CJEU ......... 136
   2.1. The Causal Use of Comparability ................................. 138
   2.2. The Justificatory Use of Comparability ......................... 142
   2.3. The Use of a Hypothetical Comparator ......................... 145
3. A ‘Relational’ Critique of Comparability: the Discrimination
   Analysis in the Light of Relational Accounts of Egalitarian Social
   Justice ................................................................. 147
4. Towards a more Relational Test for Discrimination? ............ 150
5. Conclusion ................................................................. 153
ABOUT THE AUTHORS

David Barrett (PhD) is a lecturer in law at Nottingham Law School (Nottingham Trent University). He holds a PhD in law from the University of Bristol. His PhD thesis examined how equality and human rights law could be utilised to address socio-economic inequality in England, particularly in the context of education. This combined doctrinal, theoretical, historical, inter-disciplinary and empirical methods. His research interests are focused upon issues of socio-economic inequality, the enforcement of equality law and human rights (particularly via regulators), and schools as sites of research for the implementation of law.

Daniël Cuypers is full professor at the Law Faculty of the University of Antwerp, teaching labour law and European discrimination law. After several years as a practising lawyer, he served many years as the academic secretary, vice-dean, member of the Research Council and now as a member of the Educational Council of the University. He is member of several editorial boards of law reviews and has published nearly 200 books and articles. He was the supervisor and a board member (2002–2016) of the (Flemish) Policy Research Centre for Equal Opportunities. He was the convenor of several international conferences in Antwerp (e.g. Equal is not Enough II (2010) and III (2015)).

Sarah Ganty is a researcher (PhD candidate) in law at the Institute for European Studies and the Perelman Centre for Legal Philosophy (Faculty of Law) of the Université libre de Bruxelles, since October 2013. Previously, she was a lawyer at the bar of Brussels and teaching assistant at the Université catholique de Louvain. Her research deals with civic integration policies for migrants in Europe and is conducted in the framework of an interdisciplinary research project Action de recherche concertée. Her fields of interest are migrant law (refugee law, immigration law and integration law), discrimination law and fundamental and human rights law. Sarah is part of Belgian non-profit organisations for migrants’ rights and participates in the organisation of the Université libre de Bruxelles Equality Law Clinic. She is also affiliated with the research network ‘The Global Challenge of Human Rights Integration: Towards a Users’ Perspective’.

Erica Howard (PhD) is Associate Professor of Law at Middlesex University, London. She holds a PhD in European discrimination law. Her research areas include racial discrimination, religious discrimination, the right to freedom of religion and its intersection with other rights, including freedom of expression.
and the right not to be discriminated against on the ground of sexual orientation, and multiple discrimination. She has published two books and a number of articles on these subjects. Her website is: www.mdx.ac.uk/about-us/our-people/staff-directory/howard-erica.

Roberta Medda-Windischer (LLM, PhD), Senior Researcher and Group Leader for National Minorities, Migration and Cultural Diversity at the Institute for Minority Rights of the European Academy of Bolzano/Bozen, Italy (EURAC), is an international lawyer specialising in human rights and minority protection. Dr Medda-Windischer’s research focuses on the protection of minorities in international law and on new minorities stemming from migration, on which she has authored and edited monographs and multi-authored volumes, and published numerous articles and chapters in edited volumes both in Italy and abroad.

Päivi Johanna Neuvonen was a post-doctoral research fellow at the Policy Research Centre on Equality Policies at KU Leuven until December 2015. She is currently a visiting fellow at the Centre for European Law and Internationalisation at the University of Leicester. She completed her doctorate in EU Law at the University of Oxford in 2014 and her first monograph Equal Citizenship and Its Limits in EU Law: We the Burden? was published by Hart Publishing (2016). Her research interests include EU law, anti-discrimination law, and European human rights law.

Sébastien van Damme holds a master’s degree in law. Until recently, he worked as a PhD researcher and teaching assistant at the University of Antwerp (Research Group Social Competition and Law). He was also a member of the Policy Research Centre on Equality Policies. His research focuses on the intersection of European/international discrimination law and Belgian labour law, in particular the right to work of people with disabilities. Since October 2015 Sébastien van Damme has worked as a lawyer at the Antwerp Bar. He still publishes regularly in the field of labour law.

Jogchum Vrielink (PhD) is the coordinator of the Centre for Discrimination Law at the University of Leuven). He holds a PhD in law, and also studied public administration and anthropology. His PhD thesis concerned the topic of racist and anti-religious hate speech and Holocaust denial, and combined legal and socio-legal research. His research topics include discrimination law, fundamental and human rights (freedom of expression and freedom of religion in particular) and legal anthropology. Jogchum Vrielink has published widely in national and international journals and books on these issues. His website is: www.discriminationlaw.be