DIALOGUES
EU EQUALITY LAW

ON CONSTITUTIONAL RIGHTS AND POLITICAL CHOICES

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ABSTRACT: The influence of the Court of Justice in the evolution of equality law has been enormous. Interpreting rights provided in EU legislation as mere expressions of pre-existing constitutional rights, as the Court of Justice did in *Mangold* (judgment of 22 November 2005, case C-144/04 [GC]) and *Kučukdeveci* (judgment of 19 January 2010, case C-555/07 [GC]), poses challenges to majoritarianism and carries the risk of ossification. Although such mirroring of legislative and constitutional rights has recently been extended beyond the right to equal treatment, whether EU law is over-constitutionalised remains an open question. EU law is remarkably malleable and constitutionalisation coexists with indeterminacy and deference to the legislature.

KEYWORDS: equality – fundamental rights – legislation – constitutional adjudication – Court of Justice – EU.

I. INTRODUCTION

Muir's exploration of equality makes for a thoughtful, rich, and original contribution to bibliography providing a critique not only on equality but also, more broadly, on rights discourse and the separation of powers in the EU.[1] The book traces the development of equality from a fundamental right to a fully-fledged EU policy through the adoption of extensive legislation at EU level. The book posits, among others, the following: equality is distinct among fundamental rights in that it forms not only a negative right but a self-standing, albeit not autonomous, policy; the Court of Justice has been enormously influential in shaping it; activist case law has fused the legislative expression of equality with the underlying constitutional right thus granting constitutional status to legislative outcomes; the distinction between constitutional and legislative rights should be preserved, otherwise there is a risk of ossification and lip service being paid to majoritarian

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[1] E. MUIR, *EU Equality Law: The First Fundamental Rights Policy of the EU*, Oxford: Oxford University Press, 2018.

processes. The analysis is lucid, reflective and, ultimately, persuasive, making this a first class contribution to EU constitutional law.

II. From rights to policies and the interplay between legislation and case law

In some respects, it may be seen as odd that the EU has developed an equality policy. As Muir points out, the issues that equality law seeks to address are not inherently transnational.[2] There is nothing intrinsically distinct in the EU interest in equality, except in relation to the prohibition of discrimination on grounds of nationality. For other forms of equality, one might have thought that national law is the natural home for developing a normative framework. Yet, for historical and political reasons, especially since the Amsterdam Treaty, equality has been propelled to the forefront of the EU political agenda. In contrast to other fundamental rights, it is not simply a limitation on state power but an aim *per se*, leading to a corpus of law which has its own legal bases, substantive rules, and processes.[3] Equality is a principle that goes to the heart of EU identity. The core reason for this may lie in its seemingly strong legitimating power. Few, if any, principles of justice attract as much societal consensus as equality. Understood in the abstract as meaning that persons in similar situations must be treated in the same way, it carries a persuasive force that disables objection. At EU level, commitment to it encourages a sense of demos and marks the transition from a purely economic to a more balanced, socially-oriented integration paradigm. Equality operates at different levels. It is a core principle that lies at the heart of the EU project as a value (Art. 2 TEU) and a general principle of law (Arts 20 and 21 of the Charter of Fundamental Rights of the EU, hereinafter the Charter); it is a commitment to equal respect of all sovereigns (Art. 4, para. 2, TEU); it is a principle of economic law that underlies the internal market; it is a social principle; and it is a principle of good governance in that it requires decision makers to reason their choices. Muir correctly points out that the EU directives on equality have a transformative aspiration in that they seek to change the mentality of European society.[4] She may however be overrating the distinctiveness of equality policy *vis-à-vis* social policy at least in relation to the commonality of their objectives. As the book acknowledges, equality legislation is a powerful contributor to the EU social model.[5] It is the social rather than the economic aspect of integration that equality poli-

[2] *Ibid.*, pp. 16 and 54.

[3] *Ibid.*, p. 15. As Muir points out, the fundamental right that comes closest to equality in that it has given rise to a detailed EU policy is the right to data protection provided by Art. 16 TFEU, Art. 8 of the Charter, and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[4] E. Muir, *EU Equality Law*, cit., pp. 2 and 6-7.

[5] *Ibid.*, p. 20.

cy seeks to advance. Muir is correct in acknowledging that the rationale for EU intervention in this area is inherently political. An EU equality policy is a vehicle for legitimizing and bettering the EU as a system of governance.

The influence of the Court of Justice in articulating equality rights has been enormous. This is aptly borne by different generations of cases that can be traced through the rulings in *Defrenne*,[6] *Barber*,[7] *Mangold*,[8] and *Test Achat*.[9] All of them illustrate that the constitutional anchors of equality are firm and that the development of the right owes perhaps more to constitutional adjudication than legislative elaboration. At the very least, the Court of Justice assumes the role of co-driver of the policy and not merely of traffic police. From the cases mentioned above, *Barber* and *Test Achat* are perhaps distinct. In both of them the legislature had spoken but the legislative outcome was placed in Luxembourg's procrustean bed and tailored to the underpinning constitutional right. In *Barber*, a broad interpretation of pay neutralized the exception from equal treatment granted to Member States by Art. 9, let. a), of Directive 86/378[10] in relation to the determination of pensionable age. In *Test Achat*, the Court retained in the statute book Directive 2004/113[11] minus the extensive derogation provided for in Art. 5, para. 2, therein. Another case that would fit Muir's analysis is *Sturgeon*.[12] The Court interpreted Regulation 261/2004[13] on air travel as meaning that passengers are entitled to compensation not only where a flight is cancelled, which is expressly provided in Art. 5 of that regulation, but also where a flight is delayed despite the absence of an express provision to that effect. The Court of Justice pointed out that the dispositions of the regulation led to unequal and inconsistent treatment since delayed passengers were not entitled to compensation even though they could suffer the same or greater loss of time as passengers whose flights were cancelled. *Sturgeon* like *Test Achat* suggests that the articulation of a policy is the result of a cooperative exercise where both the legislature

[6] Court of Justice, judgment of 8 April 1976, case 43/75, *Defrenne v. Sabena*.

[7] Court of Justice, judgment of 17 May 1990, case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group*.

[8] Court of Justice, judgment of 22 November 2005, case C-144/04, *Mangold* [GC].

[9] Court of Justice, judgment of 1 March 2011, case C-236/09, *Association Belge des Consommateurs Test-Achats and Others* [GC].

[10] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

[11] 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.

[12] Court of Justice, judgment of 19 November 2009, joined cases C-402/07 and C-432/07, *Sturgeon and Others*.

[13] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

and the Court play a strong role.[14] Depending on one's perspective, they can provide illustrations of the Court of Justice paying lip service to the legislative process or strong process review. The Court essentially objects to what it sees as an inconsistency between legislative objectives and legislative outcomes perceiving its intervention as a corrective rationalization process. But it is far from being a value neutral one.

III. Ordinary *versus* constitutional legislation

A key issue discussed in the book is the interaction between constitutional and legislative rights. In *Mangold* and *Kücükdeveci*,[15] the Court of Justice viewed the prohibition of discrimination on grounds of age provided in the Framework Directive[16] as a mere illustration of a pre-existing general principle of constitutional status applicable to private relations. *Mangold* represents judicial activism at its strongest. The Court made a series of important pronouncements. First, it held that the prohibition of discrimination on grounds of age is a general principle of law which stems from the national constitutional traditions and international conventions; secondly, it held that it has horizontal effect; thirdly, it found that the German derogation from the principle fell short of the requirements of proportionality. The first pronouncement was supported by shaky foundations. In fact, at the time of the judgment, there was little evidence to suggest that the right to equal treatment on grounds of age was steeped into the constitutional traditions of the Member States. By contrast, until well into the end of the twentieth century, national laws often differentiated on grounds of age in many areas of social and professional life. The second pronouncement, equally bold, was not supported by any specific reasons. The third finding is often forgotten in scholarly discourse, which tends to concentrate on the equality aspects of the case, but is pivotal in that it marks the transition from a principle to an outcome through the lens of strict judicial scrutiny.

The most perplexing element of *Mangold* is the fusion of the constitutional right of equality irrespective of age with its corresponding statutory right provided by the Framework Directive. If the right derives from a directly effective constitutional principle of EU law, what was the function of the Directive in the Court's reasoning? The Court declared that "above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation".[17] What, then, are its legal effects? Its adoption expresses a political choice and therefore bears legitimizing force

[14] For a critique, see T. Tridimas, *Reflections on Equality: Substantive Values and Policy Outcomes*, in I. Govaere, D. Hanf (eds), *Scrutinizing Internal and External Dimensions of European Law, Liber Amicorum Paul Demaret*, Brussels: Peter Lang, 2013, p. 457 *et seq*.

[15] *Mangold* [GC], cit.; Court of Justice, judgment of 19 January 2010, case C-555/07, *Kücükdeveci* [GC].

[16] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Directive).

[17] *Mangold* [GC], para. 74.

but does not explain the outcome reached by the Court. To suggest that the adoption of the directive somehow triggers the direct application of the general principle of equality, which until then lay dormant, is not persuasive.

The constitutional narrative of *Mangold* has a powerful resonance but creates more problems than it resolves. If it is possible to read the legislative version of a right as a mere expression of a constitutional command, how can one distinguish between ordinary and constitutional rights? Muir navigates us skillfully through some troubled waters. To start with, the case law appeared to restrict the *Mangold – Kücükdeveci* approach to the right against discrimination[18] and refused to extend it to social rights. In *Dominguez*[19] the Court of Justice examined the claim entirely by reference to the right to annual leave as provided by Art. 7, para. 1, of the Working Time Directive[20] without reference to Art. 31, para. 2, of the Charter. In *Fenoll*,[21] which concerned the same right, the Court of Justice rejected the relevance of Art. 31, para. 2, on the ground that the claim related to a period before the Charter became binding. In both cases, the inquiry centred on the legislative right without venturing in its constitutional underpinnings, although in *Dominguez* the Advocate General explored and rejected the horizontal effect of Art. 31, para. 2. In *Association de médiation sociale*,[22] the Court was concerned with Art. 27 of the Charter which provides for workers' rights to consultation and information[23] and the exercise of which is governed by Directive 2002/14.[24] It rejected the relevance of Art. 27 on the ground that it lacked sufficient specificity to be directly effective. It had to be given more specific expression by national law and was therefore by itself a *lex imperfecta*.

Muir argues against a liberal reading of directives as incorporating constitutional rights. She submits that three conditions must be met for the fusion of the legislative and the underlying constitutional right to occur: first, there must be a fundamental right which is protected by EU constitutional law, be it the Treaties, the Charter, or a general principle of law; secondly, the legislation must concretise that right; and, thirdly, there must be an

[18] In the light of *Mangold*, not only age equality but all forms of status equality referred to in Art. 19 TFEU should be seen as directly effective constitutional principles. This is strongly supported by Art. 21, para. 1, of the Charter and also by the Court of Justice, judgment of 10 May 2011, case C-147/08, *Römer* [GC], para. 59, and has now been confirmed by Court of Justice: judgment of 17 April 2018, case C-414/16, *Egenberger* [GC], and judgment of 22 January 2019, case C-193/17, *Cresco Investigation* [GC].

[19] Court of Justice, judgment of 24 January 2012, case C-282/10, *Dominguez* [GC].

[20] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (Working Time Directive).

[21] Court of Justice, judgment of 6 March 2015, case C-316-13, *Fenoll*.

[22] Court of Justice, judgment of 15 January 2014, case C-176/12, *Association de médiation sociale* [GC].

[23] Art. 27 of the Charter states as follows: "Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices".

[24] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation.

"organic relationship" between the legislation and the constitutional right.[25] The first condition requires the existence of a sufficiently concrete constitutional right which is capable of being invoked by itself. The right must, in other words, be directly effective. The second condition requires that the legislation must give effect to the corresponding constitutional right. The third condition means that the overlap between the two rights must be a deliberate legislative choice which may be attested either by the legal bases of the legislation or objective evidence that the legislation is intended to implement and give concrete expression to a specific primary right. The EU legislature must have made "a conscious choice to shape the corresponding fundamental right".[26] In this context, Muir notes that the Working Time Directive and Directive 2002/14 in issue in *Association de médiation sociale* were adopted on the basis of Art. 137, para. 2, TEC (now Art. 153, para. 2, TFEU) which lacks a clear and specific fundamental rights tone and a strong EU competence.[27] Still, as *Bauer*[28] was later to prove, this is not a barrier to recognizing fusion between the legislative and the constitutional version of a right.

The conditions proposed by Muir are sound. However they do not, nor do they purport to, make up for the fundamental conundrum in the Court's reasoning. The *Mangold – Kücükdeveci* construct suggests that, where a constitutional right recognised by EU primary law is sufficiently specific as to its content, its concretization by a directive lends to the concretised right thus provided the enhanced remedial attributes of its constitutional brethren so that it is no longer a prisoner to the prohibition of horizontal effect. In this model, the adoption of the directive acts as a legitimizing force since the Court only applies an outcome endorsed by the legislature. The right that is applied is no different in content than that recognised by people through their elected representatives. The additional element pertains solely to legal effects. Since the legislature has decided to embody the constitutional right in legislation, the legal effects of that legislation are the same as those of the underlying constitutional right.

This construction however is pregnable to several objections. First, it does not overcome the conundrum of right creation. If the provision of primary law which establishes the right is directly effective, which is a condition for the *Mangold – Kücükdeveci* approach, this assumes that the constitutional norm itself has a minimum ascertainable content in which case the corresponding legislative right has no additional normative force but simply political legitimating value. Secondly, the separation between the content and the effects of the right outlined above eschews the choice of measure by which a constitutional right is concretised. Regulations and directives have different effects by design. If the legislature recognises a right by directive it must be presumed to intend to

[25] E. Muir, *EU Equality Law*, cit., pp. 111 and 117.
[26] *Ibid.*, p. 118.
[27] *Ibid.*
[28] Court of Justice, judgment of 6 November 2018, joined cases C-569/16 and C-570/16, *Bauer* [GC].

attribute to it the effects of directives and not the effects of regulations. In some cases, the adoption of a directive may be the only choice permitted by the Treaty article which serves as legal basis,[29] in which case, remedial enhancement by the judiciary may be seen as going beyond what the Treaty allows. Thirdly, it is still necessary to decide which aspects of the legislative right can be considered simply to mirror the underlying constitutional right rather than be additional ones going beyond the constitutional minimum. One would presume that it is only the former that can have constitutional status and thus enjoy enhanced remedial value.

The bottom line is that the case law does not provide clear criteria for distinguishing between ordinary and constitutional legislation. It would be more persuasive to assert that, where a constitutional right is sufficiently specific, there is a core element that cannot be touched by the legislature and can be invoked irrespective of the existence of legislation. This links with the concept of the essence of the right, now formally acknowledged in Art. 52, para. 1, of the Charter. The Court of Justice came closer to that approach in *Bauer*[30] where, in sharp contrast to *Dominguez* and *Fenoll*, it asserted the autonomous content of Art. 31, para. 2, of the Charter extending to social rights the rights fusion approach of *Mangold – Kücükdeveci*.

Art. 7, para. 2, of Directive 2003/88 requires Member States to grant workers the right of a minimum annual leave[31] and provides that, exceptionally, that right may be replaced by a monetary payment only where the employment relationship is terminated. The issue in *Bauer* was whether the right to payment could be claimed by the heirs of a worker where the employment relationship was terminated upon the worker's death. German law provided that the right to annual leave lapsed upon death and thus did not form part of the estate of the deceased. This was found to be incompatible with Art. 7, para. 2, of the Directive which imposed a clear, precise and unconditional obligation but German law was unambiguous and it was not possible to interpret it so as to comply with EU law. Nonetheless, the Court held that reliance could be placed directly on Art. 31, para. 2, of the Charter against the worker's private employer. The Court held that the right to paid annual leave constitutes an essential principle of EU social law,[32] which is mainly derived from instruments drawn up by the Member States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers and international instruments on which the Member States have cooperated or to which they are party. Art. 7 of Directive 2003/88 (and its predecessor, Art. 7 of Directive 93/104) did not, therefore, themselves establish the right to paid annual leave.[33] The Court further held that, in contrast with Art. 27 of the Charter in issue in *Association de médiation so-*

[29] See e.g. Art. 153, para. 2, let. b), TFEU.
[30] *Bauer* [GC], cit.
[31] Directive 2003/88/EC, cit.
[32] *Bauer* [GC], cit., para. 80.
[33] *Ibid.*, paras 81-82.

ciale, Art. 31, para. 2, of the Charter uses mandatory terms without making the right to annual leave conditional on any further action. It follows that the right to a period of paid annual leave provided for in Art. 31, para. 2, is, as regards its very existence, both mandatory and unconditional in nature, and sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer.[34]

Bauer brings down AG Mengozzi's *dictum* in *Fenoll* that Art. 31 of the Charter "may only serve, if appropriate, as a basis of interpretation".[35] It is also the first case where the Court of Justice extends the *Mangold – Kücükdeveci* approach beyond the right to non discrimination. Its constitutionalisation effect is mitigated by the fact that the right to annual leave had already been introduced by directives before the Charter came into effect. The EU legislature had already spoken so that the effect of the Charter was to elevate the strength of the right rather than expand its content. *Bauer* does not, however, resolve the problems identified above in relation to the *Mangold – Kücükdeveci* approach. The judgment brings to the fore Muir's call for caution and against reading constitutional rights into legislative ones. It does not however necessarily cast doubt on Muir's three conditions that must be met for legislation to be read as mirroring constitutional rights.

In relation to direct effect, *Bauer* somewhat muddled the waters in the following respect. Whilst in relation to Art. 7, para. 1, of Directive 2003/88, the Court of Justice held that it satisfies the classic criteria of direct effect, namely unconditionality and sufficient precision, in relation to Art. 31, para. 2, of the Charter, it referred to its importance as an essential principle of EU social law, its mandatory terms and the lack of caveats such as those provided by Art. 27 in relation to the workers right to consultation. It is however highly unlikely that the Court intended to depart from the traditional conditions for the establishment of direct effect. These are the same in relation to provisions of the Charter and in relation to provisions of the Treaty or any other norm of EU law. Also, although *Bauer* stated that the loss of an acquired right to annual leave would undermine the very substance of the right, it is not clear that only the essence of a right can be horizontally effective. This is not what the Court stated nor would such a proposition necessarily flow from the nature of the right. As *Egenberger* shows, the application of proportionality or the need for balancing is not an *a priori* barrier to reliance on a right against a non-state actor.[36]

[34] *Ibid.*, para. 85. The findings made in *Bauer* in relation to Art. 31, para. 2, of the Charter were confirmed in Court of Justice, judgment of 6 November 2018, case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* [GC].

[35] See Opinion of AG Mengozzi deliveded on 12 June 2014, case C-316/13, *Fenoll*, para. 52.

[36] *Egenberger* [GC], cit., para 80.

IV. Is EU law over-constitutionalised?

Muir is correct in cautioning against the fusion between constitutional and legislative rights and the liberal extension of the *Mangold – Kücükdeveci* approach. Reading legislation as embodying pre-existing constitutional rights attaches to it higher normative status and forecloses political debate. Once a right is recognised to be constitutional, it cannot be changed by legislation. Thus, issues on which reasonable people may differ and where citizens' preferences may vary across time are removed from the political process. Yet these are precisely the issues where in a democracy citizens' voice must be heard. Too much constitutionalisation carries the risk of ossification and raises issues of legitimacy.[37]

Is it then correct to say that EU law is over-constitutionalised? It is correct that EU law has a constitutional bias. First, the principle of primacy establishes a system of hierarchy that constrains the development of national law. Secondly, the Court of Justice reasons as a constitutional court. Through its judicial lens, essentially any issue of EU law is concretised constitutional law. But is there over-constitutionalisation? There is here a set of consequential overlapping questions. How easy is it to achieve a treaty revision? How easy is it to amend EU legislation? How does the Court treat its own precedent and what are the chances of overruling? How strict or flexible is EU law in terms of confining Member State choices? So far, it may be said that EU law has displayed a remarkable degree of malleability. Constitutional indeterminacy reigns.[38] Silent constitutional amendments, policy ingenuity, asymmetrical integration, recourse to international law, and even pragmatic acquiescence have all been part of the Eurozone crisis, and more generally, the EMU experiment. New policy consensus emerges as political priorities change and economic imperatives cause convulsions. The malleability of EU has been assisted by the Court of Justice.[39] The Court's approach in *Mangold* and *Bauer* contrasts with the regression of social rights in the sphere of free movement.[40] In some areas, the case law appears to give too much credence to the EU legislature at the expense of rights. Thus, in *N.S.*[41] the Court of Justice only recognised a reticent exception from mutual recognition relying on the test of systemic deficiencies, a test that nowhere exists in human right law. Also, in most cases, the intervention of the Court of Justice in constitutional matters has a dialogic character. A Court's ruling signals an orientation prompting responses by various political actors which in turn lead to its refinement. An important pronouncement by the Court may go through corrective readjustments in

[37] E. Muir, *EU Equality Law*, cit., pp. 13, 31 and 86; and see further references given therein.

[38] See T. Tridimas, *Indeterminacy and Legal Uncertainty in EU Law*, in J. Mendes (ed.), *EU Executive Discretion and the Limits of Law*, Oxford: Oxford University Press, 2019, p. 40 *et seq*.

[39] See Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

[40] See Court of Justice: judgment of 11 November 2014, case C-333/13, *Dano* [GC]; judgment of 15 September 2015, case C-67/14, *Alimanovic* [GC].

[41] Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. and Others* [GC].

subsequent cases before an area of law reaches a stage of relative equilibrium. This is for example the case with the *Zambrano* ruling.[42] This is not to disagree with Muir that great caution should be exercised before fusing constitutional and legislative rights but to take forward and place in a wider perspective the theme of constitutionalisation of EU law. Muir correctly points that the "downloading" of fundamental rights, namely their concretisation through legislation, is a new development in EU law and wisely counsels against over-enthusiastic constitutional reading of legislative outcomes.

V. Conclusion

Muir's monograph provides an introspective analysis of equality as a contemporary EU policy and brings to the fore the interaction between the legislature and the judiciary in rights creation. It invites the reader to a journey of constitutional reflection in which the traveller will by no means be disappointed.

[42] Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC]. The dialogic character of sex equality case law is indeed aptly illustrated by Muir by reference to the *Barber* ruling and its aftermath.