

# Reconceptualising European Equality Law

A Comparative Institutional Analysis

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# 1

## *Introduction*

The Union is founded on the values of respect for human dignity, freedom, democracy, **equality**, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, **non-discrimination**, tolerance, justice, solidarity and **equality between women and men** prevail.

Article 2 TEU<sup>1</sup>

[A]nti-discrimination law is normatively deficient.

The neoliberal predicament exposes the truth about anti-discrimination law. As a medium of social policy, it is powerless.

A Somek, *Engineering Equality*<sup>2</sup>

**T**HE CONCEPT OF equality appears front and centre in accounts of European law. One would consider any textbook on Union law that aims at providing a comprehensive depiction of the field insufficient, in the event that it fails to engage with the topic of eradicating discrimination. Its relevance is highlighted throughout both primary and secondary law: there is the principle of non-discrimination in the area of free movement, the provision on equal pay for men and women in Article 157 of the Treaty on the Functioning of the European Union (TFEU)<sup>3</sup> and the series of directives passed in the context of the equality agenda of the Union. Moreover, the Treaty on European Union (TEU) mentions equality as one of the fundamental values upon which the Union is built. The significance of the concept for EU law finds its most recent expression in the fact that the Charter of Fundamental Rights of the European Union (CFEU)<sup>4</sup> dedicates an entire chapter to ‘equality’. Given these multiple references, it is safe to assume that the framers of the Treaties as well as other actors involved in European law-making have in the past, up to and including the present, attached great importance to the concept of equality.

<sup>1</sup> Art 2 Consolidated Version of the Treaty on the European Union [2012] OJ C326/13 (emphasis added).

<sup>2</sup> A Somek, *Engineering Equality. An Essay on European Anti-Discrimination Law* (Oxford, Oxford University Press, 2011) 12 and 177.

<sup>3</sup> Art 157 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

<sup>4</sup> Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

## 2 Introduction

Yet, the simple fact that we may agree that equality takes up a prominent place in European law tells us little about its functioning or how we should evaluate its application. Neither can we infer from it what kind of equality—a formal or a more material reading—is pursued within the European legal system. As the quote by Somek shows, the approach taken by European actors to anti-discrimination law is deeply disputed. He maintains the opinion that EU equality law is applied in such a way as to favour persons who already perform well in a competitive market place environment. Under the fig-leaf of equality law, sympathy for the weaker parts of society and mutual consideration are being replaced by a neoliberal paradigm.<sup>5</sup> On the other side of the spectrum, certain commentators consider EU equality law as going too far, as transgressing the boundaries of individual responsibility and leading to forced conformity.<sup>6</sup> In addition, European equality law is commonly criticised for its incoherence and perceived unpredictability.<sup>7</sup> The argument goes that EU equality law is difficult to comprehend due to its diversification. Many themes in EU law are dealt with under the catchphrase of equality, from import quotas<sup>8</sup> through the prohibition of discrimination on grounds of nationality<sup>9</sup> to the treatment of pregnant women at the workplace.<sup>10</sup> In this context, it has become a rather tedious exercise to reconcile the different strands of case law by the European Court of Justice.

### I. EQUALITY: A FUNDAMENTAL PRINCIPLE BASED ON NOT SO STABLE FUNDAMENTS

Considering that the three elements highlighted above—the fundamental status given to equality, the ideological dispute surrounding it and its (at least assumed)

<sup>5</sup> Somek (n 2) 15.

<sup>6</sup> This view is especially prominent with regard to the equality directives; see the discussion on the implementation of the equality directives in German law, eg E Picker, 'Antidiskriminierungsgesetz—Der Anfang vom Ende der Privatautonomie?' (2002) 57 *Juristische Zeitung* 880.

<sup>7</sup> See S Besson, 'Gender Discrimination under EU and ECHR Law: *Never Shall the Twain Meet?*' (2008) 8 *Human Rights Law Review* 647, 657; T Kingreen, 'Gleichheitsgrundrechte und soziale Rechte' in D Ehlers (ed), *Europäische Grundrechte und Grundfreiheiten* 2nd edn (Berlin, De Gruyter, 2005) § 18 marginal no 14; U Kischel, 'Zur Dogmatik des Gleichheitssatzes in der Europäischen Union' (1997) 24 *Europäische Grundrechtezeitschrift* 1; K Odendahl, 'Gleichheit vor dem Gesetz' in S Heselhaus and D König (eds), *Handbuch der europäischen Grundrechte* (Munich, Beck, 2006) § 43 marginal nos 26, 30–32; A Sattler, 'Allgemeiner Gleichheitssatz und spezielle Gleichheitssätze in der Rechtsprechung des Europäischen Gerichtshofes' in J Ipsen and E Schmidt-Jortzig (eds), *Recht—Staat—Gemeinwohl: Festschrift für Dietrich Rauschning* (Cologne, Carl Heymanns, 2001) 251, 267; H-J Schütz, T Bruha and D König, *Casebook Europarecht* (Munich, Beck, 2004) 839; similar H Jarass, *EU-Grundrechte* (Munich, Beck, 2005) 290 f. Less critically, D Schiek points out in 'From European Union Non-discrimination Law Towards Multidimensional Equality Law for Europe' in D Schiek and V Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon, Routledge-Cavendish, 2009) 3, 5 that European non-discrimination law is very fragmented.

<sup>8</sup> eg Case 245/81 *Edeka Zentrale AG v Federal Republic of Germany* [1982] ECR 2745.

<sup>9</sup> eg Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613.

<sup>10</sup> eg Case C-179/88 *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR I-3979; Case C-394/96 *Mary Brown v Rentokil Ltd* [1998] ECR I-4185;

incoherence—overlap, we encounter difficulties when trying to provide a single coherent explanation for the concept. Drawing a clearer picture of how the general principle of equality functions in EU law is the purpose of this book.

A starting point for approaching the issue is to look at the reasons for the fundamental status of equality. We attach such importance to the principle of equality, because we consider it to be one of the fundamental values people throughout Europe can agree upon. Not only do Member States' national constitutions stipulate guarantees of equal treatment, but a longstanding tradition of egalitarian discourse can be found on the old continent. The first evidence of 'equality' appearing on the philosophical and political agenda can be found in writings originating in the Greek city-states.<sup>11</sup> In the modern age, the French Revolution with its battle cry for '*liberté, égalité et fraternité*', moved the demand for equal treatment to the forefront of the European conscience.<sup>12</sup> Moreover, already the Rome Treaty of 1957,<sup>13</sup> otherwise very reserved in its treatment of fundamental rights and principles, included equality provisions. Its free movement provisions prohibited discrimination against goods on grounds of their origin and against economically active persons on the basis of their nationality. Further, Article 119 of the Treaty establishing the European Economic Community entrenched the principle of equal pay for men and women in European primary law.<sup>14</sup> In this sense, the general principle of equality and its fundamental status within Union law contains an attractive integrative power. People throughout Europe share the sentiment that the European Union safeguards equality. Such an understanding, experienced as a consensus, furthers the general feeling of being able to relate to each other. As a consequence, European equality law opens up a space in which European citizens feel included in the broader integration project.

Case C-191/03 *North Western Health Board v Margaret McKenna* [2005] ECR I-7631; Case C-460/06 *Nadine Paquay v Société d'architectes Hoet + Minne SPRL* [2007] ECR I-8511 and Case C-232/09 *Dita Danosa v LKB Lizings SA* [2010] ECR I-11405.

<sup>11</sup> H. Haller, *Die Verrechnung von Vor- und Nachteilen im Rahmen von Art 3 Abs 1 GG Eine Untersuchung zur Kompensation von Grundrechtseingriffen* (Berlin, Duncker und Humblot, 2007) 181, with reference to O. Dann, 'Gleichheit' in O. Brunner, W. Conze and R. Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol 2 (Stuttgart, Klett-Cotta, 1975) 997, 1000.

<sup>12</sup> See Haller (n 11) 190 ff.

<sup>13</sup> Treaty Establishing the European Economic Community (EEC).

<sup>14</sup> Art 119 EEC reads:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.

However the fundamental status that is commonly attached to the principle of equality in EU law is not built on stable ground. Only at a superficial level can we agree on the importance of equality and what to associate with it. It seems as if our agreement on its fundamental status rests on an ‘incompletely theorised agreement’.<sup>15</sup> Three points reveal this incompleteness: first, just because national constitutions evoke the same principles does not mean that they share the same conception. Depending on the constitutional culture from which they emanate, they are filled with differing content.<sup>16</sup> Second, one should not forget that the first discourses on equality in the history of Europe were found in societies characterised by extreme exclusion. When Aristotle was framing his principle of equality,<sup>17</sup> it certainly did not include equal treatment of those so unfortunate to be born as women, slaves or denizens. Third and with reference to the equality provisions introduced in the European Treaties, a correct account ought to point out that they had an instrumental function. While today we conceive of the principle of equality within EU law as a fundamental value and like to think that this has been the case since the creation of the Community, such a depiction would distort the facts. Equal treatment of nationals and non-nationals coming from other Member States acted as a tool to bring about economic harmonisation.<sup>18</sup>

The main reason for designing the fundamental freedoms as norms of non-discrimination was to create a common market. In other words, considerations as to their human rights implications were remote. The TFEU’s article on equal pay for men and women is an even more striking example of this instrumentalist rationale. It was because French national legislation required equal pay for the sexes that this principle made its way into the text of its early predecessor, the Treaty establishing the European Economic Community. Fearing competitive distortion and the movement of labour to countries in which women worked for lower salaries,<sup>19</sup> the French government insisted that equal pay be a requirement that other Member States would also have to implement. The introduction into the Treaty of the principle of gender equality was therefore not based on the idea of women’s emancipation at a scale that cut across national boundaries. Instead, its genesis was owed to an economic mind-set aimed at the creation of an economic community for economic purposes.

<sup>15</sup> See generally C Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108 *Harvard Law Review* 1733, who cites the principle of equality as proof of his argument.

<sup>16</sup> eg P Häberle, *Europäische Verfassungslehre* (Baden-Baden, Nomos, 2011) 10.

<sup>17</sup> For a more thorough presentation, see ch 2 s II.A.

<sup>18</sup> See generally (for other grounds of differentiation) Besson (n 7) 656; C O’Brien, ‘Equality’s False Summits: New Varieties of Disability Discrimination, “Excessive” Equal Treatment and Economically Constricted Horizons’ (2011) 36 *EL Rev* 26, 28.

<sup>19</sup> eg A Arnall, *The European Union and its Court of Justice* 2nd edn (Oxford, Oxford University Press, 2006) 535; E Ellis and P Watson, *EU Anti-Discrimination Law* 2nd edn (Oxford, Oxford University Press, 2012) 23; E Sharpston, ‘The Shock Troops Arrive in Force: Horizontal Direct Effect of a Treaty Provision and Temporal Limitation of Judgments Join the Armoury of EC Law’ in M Maduro and L Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing, 2010) 251, 256.

However, the economic origins of the fundamental principle of equality in EU law no longer appear first and foremost in its accounts. Rather, the EU principle of equality has evolved into a more comprehensive concept. We may not be entirely sure about its roots, but now it is there. For one, a fair number of secondary legislative acts are dedicated to promoting equality, lending support to the idea that it is of particular significance to EU law.<sup>20</sup> Additionally, we should recognise that the ‘spill-over’ effect placed alongside the functionalist approach represents an integral part of the tool kit of European law and helps explain the importance attached to equality in Union law. The non-discrimination provisions in the area of free movement and on equal pay have developed into rules that derive their justification independent of the economic reasons for which they were once implemented, and at this stage they have an impact on areas of law that go beyond purely economic regulation. Moreover, they are considered to give expression to the ideal of equality, without having to make the detour of functionalist reasoning. It is fair to say that judicial activists contributed to this development.<sup>21</sup> Scholars, lawyers and national judges working with the European Treaties realised the potential of the texts to foster the ideal of equal treatment. Although the provisions were not designed to promote the value of equality, social action shaped them into their present form through discourse.<sup>22</sup> Another part of the explanation can be found in the wider transformation of Europe and European law. The transition from a purely economic community to a community of values and rights has led to an increase in the significance of the principle of equality. Advancements such as the introduction of equality as a founding principle of the Union or the insertion of the chapter on equality in the Charter are more than mere lip-service to egalitarian ideals.

This evolution of the general principle of equality in EU law leaves us with the following picture: on the one hand, equality has become a concept in its own right

<sup>20</sup> eg Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40, 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 L180/22; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L269/15; 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 [2004] OJ L373/37 and 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 [2006] OJ L204/23.

<sup>21</sup> See generally on the influence of law activists on the evolution of EU gender equality law, C Kilpatrick, ‘Gender Equality: A Fundamental Dialogue’ in S Sciarra (ed), *Labour Law in the Courts. National Judges and the European Court of Justice* (Oxford, Hart Publishing, 2001) 31, especially 50 ff.

<sup>22</sup> As AP van der Mei points out, European equality law ‘has both functional and foundational or existential value’ in ‘The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look Through the Lens of Union Citizenship’ (2011) 18 in *Maastricht Journal* 62, 63.

and is applicable in a multitude of areas.<sup>23</sup> On the other hand and as the preceding paragraphs tried to depict, the principle has not been informed by a single coherent theory and suffers from this incomplete theorisation. Consequently, a lack of comprehensibility has come to haunt EU equality law. What can justify Member States' differential treatment of their own nationals and EU citizens coming from other countries? Can we argue for a quota for women in the workplace even if the guarantee of equality strictly prohibits discrimination on grounds of sex? Can a practice of reverse discrimination<sup>24</sup> be reconciled with the idea of a Union of equal citizens? And how can answers to such diverse questions be reconciled in a single concept?

## II. THE NEED FOR RECONCEPTUALISING EQUALITY LAW OR THE RATIONALIST HUMAN RIGHTS PARADIGM

As if these questions were not challenging enough the problems surrounding the general principle of equality in EU law ought to be considered in the broader context of European human rights adjudication. Some readers may have noticed that the discussion has so far been phrased in terms of 'traditional legalism', meaning that fundamental rights need only be interpreted to find the correct meaning of constitutional texts.<sup>25</sup> However, given that many actors at different levels are involved in the creation and implementation of European law, I am of the opinion that it is insufficient to focus exclusively on an interpretive account in order to analyse European equality law.<sup>26</sup> We may be well advised to not only look at the written legal argumentation, but also at the actors making the decisions and the reasoning behind the grounds of their decisions. Consequently, this analysis needs to address the broader issue of how far a purely interpretive framework is capable or adequate to offer coherent accounts of fundamental principles, particularly in the context of the European Union, and by which conceptual frameworks it ought to be complemented.

In his seminal piece *The Transformation of Europe*,<sup>27</sup> Weiler argued that developments in Union law cannot be adequately understood without examining

<sup>23</sup> Besson (n 7) 656 ('principle of non-discrimination [as] a social and even a human right'); S Prechal, 'Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes' (2004) 41 *CML Rev* 533, 534 ('concept of non-discrimination [as] a fundamental principle of social policy with constitutional aspirations').

<sup>24</sup> Reverse discrimination describes situations in which people, whose situation is not governed by EU law, are treated less favourably than persons able to establish a connecting factor to EU law. In greater detail, see ch 5.

<sup>25</sup> In this sense, see M Kumm, 'Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm' in M Maduro and L Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing, 2010) 106.

<sup>26</sup> Similar P Caro de Sousa, *The European Fundamental Freedoms: A Contextual Approach* (Oxford, Oxford University Press, 2015) 4, 34 ff.

<sup>27</sup> JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

developments in its overall legal system in unison with the developments of the Union's and the Member States' political processes. Describing the methodology underlying the article, he stated:

It is perhaps ironic, but my synthesis and analysis are truly in the tradition of the 'pure theory of law' with the riders that 'law' encompasses a discourse that is much wider than doctrine and norms and that the very dichotomy of law and politics is questionable.<sup>28</sup>

In other words, Weiler dismissed as too limited a point of view that looks upon law as simply a set of norms subject to interpretation according to legal doctrine. Instead, he argued that law needs to be looked at along with the powers that create and shape it.

Regarding the field of European fundamental rights more specifically, the explanatory strength of 'traditional legalism' can further be called into question for the following reason: fundamental rights protection in the European Union is characterised by its broadly defined 'scope of interests protected as a right'.<sup>29</sup> Instead of having a narrowly tailored set of rights that enjoy almost unlimited protection, one opted for a framework that safeguards the most diverse (and at times banal) individual interests in such a way that they constantly have to be reconciled with each other. Due to the wide scope of European fundamental rights protection, its central theme is no longer deciding which interests deserve a priori protection, but the process of balancing the competing interests.<sup>30</sup> Consequently, if balancing is an essential element of rights protection, the actors performing balancing are of particular importance. In so doing, another feature of European fundamental rights law becomes significant: within the European framework many diverse actors are responsible for ensuring rights protection. Not only are there safeguards at the Union as well as at the Member State level,<sup>31</sup> but at both levels different actors, such as courts and legislators, are involved. In other words, decision making power is distributed amongst different institutions on a horizontal and a vertical level.

<sup>28</sup> *ibid*, 2409.

<sup>29</sup> M Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 *European Journal of Legal Studies* 153, 162.

<sup>30</sup> Kumm (n 25) 108 (with reference to Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1161 and Case 4/73 *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491) and 110.

<sup>31</sup> It should not be left unmentioned that the European Court of Human Rights also exists as an additional actor in the area of fundamental rights protection in Europe. On the current relationship between the European Court of Human Rights and the European Union see Case *Bosphorus Hava Yollari Turizm v Ireland* A no 45036/98 (2006) 42 EHRR 1. As far as the plans for accession of the European Union to the European Convention on Human Rights are concerned, it appears that after the European Court of Justice's Opinion 2/13, ECLI:EU:2014:2454 the chances of their realisation in the near future have significantly decreased. On this, see S Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice', [www.verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/#.VQAgGMkXksw](http://www.verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/#.VQAgGMkXksw).

Focusing on the aspects of '[a]n expansive scope of rights'<sup>32</sup> and balancing,<sup>33</sup> Kumm argues that '[t]he traditional legalist paradigm of human and constitutional rights is effectively replaced by a rationalist human rights paradigm.'<sup>34</sup> He states that one will not be able to give an adequate depiction of how the law functions or understand its workings by only looking at legal texts. On the contrary, the interplay of these two factors leads to a situation, in which fundamental rights texts are of little guidance in deciding cases and that 'a closer analysis of what courts are actually doing in many jurisdictions is likely to reveal that constitutional texts are less important than is conventionally believed.'<sup>35</sup> Kumm infers from this that fundamental rights balancing, especially in the form of proportionality analysis needs to be performed in ways that legitimises its outcomes. Courts can only be equipped with legitimate authority to review political decisions, if their judicial reasoning is conceivable as a '*collective judgment of reason* about what justice and good policy requires'.<sup>36</sup>

My analysis builds on these findings, but modifies Kumm's method of conceptualising European fundamental rights law under a new paradigm. I argue that the move to justificatory balancing as the focal point of rights protection in conjunction with the variety of actors performing such balancing requires an approach that focuses on the institutions involved. Under these circumstances, the question deserving greater attention is who gets to decide on the protection. So if we want to understand why a case was decided in a certain manner, we need to concentrate more on the institution making the decision, instead of attempting to explain a given outcome with the help of legal texts only. Therefore, I suggest thinking about the topic of European fundamental rights protection—and for the purposes of this study in particular about European equal rights protection—from an institutional choice perspective. In this sense, I argue for an institutionally enriched version of rationalist equality analysis<sup>37</sup> anchored in the tradition of comparative institutional analysis.<sup>38</sup>

### III. EU LAW AS THE LABORATORY OF CONSTITUTIONAL THEORY

The selection of the general principle of equality in European law remains to be explained. After all, national constitutions also usually provide for vaguely paraphrased equality guarantees with different actors, namely constitutional courts and national parliaments, competing for the prerogative of interpretation. Yet, an

<sup>32</sup> Kumm (n 25) 110.

<sup>33</sup> *ibid*, 110.

<sup>34</sup> *ibid*, 106.

<sup>35</sup> *ibid*, 114.

<sup>36</sup> Kumm (n 29) 175 (emphasis added).

<sup>37</sup> Thanks to M Kumm for expressing it in these concise terms.

<sup>38</sup> For this, see ch 3.

examination of the European principle of equality under an institutional paradigm is particularly interesting for two reasons.

First, within the European Union, the vertical component is added to the distribution of decision making power. Institutions both at the national and the supra-national level are potentially in a position to rule on a measure's fairness, so that the demarcation of who gets to define the meaning of equality in a given situation is a central theme. One may object to this argument by saying that there are established rules, according to which competences are distributed amongst the European Union and the Member States. In response to this, I maintain that even defined rules are subject to ongoing interpretation and development. For example and as will be explained in detail in the following, if the European Court of Justice perceives an increased risk of misrepresentation of a particular interest in Member State decision making processes, it is more likely to step in to scrutinise national law pursuant to European standards.<sup>39</sup> Further, the relation between national and European law is in continuous flux. As for instance the discussion of the *Ruiz Zambrano* judgment<sup>40</sup> in chapter 5 will show, even rules which are thought to be firmly established in European law, such as the purely internal rule, can be subject to change.

Second, examining the principle of equality in its European environment has particular appeal because Union law serves as a laboratory for prevailing issues of constitutional theory. Constitutional topics, which have been subject to long-standing discourses in national liberal democracies, resurface in new clothes. They now need to be dealt with in a novel theoretical framework; a framework that is informed by diverse constitutional cultures and traditions shaped over a long period of time throughout the continent. As a consequence, settled understandings of the law and conventional perceptions of constitutional principles are called into question. Finding convincing explanations of the functioning of European Union law and how its principles should duly be interpreted is not a mere repetition of constitutional discussions at the national stage. Instead, it requires further development and deepening of our analyses. In this sense, European law serves as a catalyst for us to think anew about (ostensibly) accepted truths of constitutional law. I would like to just mention two examples, where European Union law has already forced us to reconsider our understanding of constitutional law: the notion of federalism and the role of the proportionality analysis.

Starting with federalism, Schütze draws attention to the fact that different movements have given differing definitions of the concept, some of which have fallen into disuse over the course of time. He suggests that the evolution of the European Union challenges us to go back to these neglected conceptions in order to explain the existing structure.<sup>41</sup> He writes that 'three federal traditions emerge[d]

<sup>39</sup> See M Maduro, *We, the Court* (Oxford, Hart Publishing, 1998). His theory is presented in detail in ch 4.

<sup>40</sup> Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-1177.

<sup>41</sup> R Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford, Oxford University Press, 2009).

in the modern era<sup>42</sup> (roughly commencing in the eighteenth century). Whereas the first perceived federal entities as international (con)federations agreed upon by sovereign states,<sup>43</sup> the second came into being through the second American Union and saw federalism as a form of governance somewhere ‘in between ... an international and a national structure’.<sup>44</sup> According to this second tradition, a federal Union derives its legitimacy ‘from the supreme authority in each State, the authority of the people themselves’.<sup>45</sup> Third, a tradition was born in continental Europe, which linked the idea of federalism inherently to the concept of the nation state.<sup>46</sup> ‘Within this European tradition, federalism came to refer to the *constitutional* devolution of power within a sovereign nation.’<sup>47</sup> This third way of defining federalism became the prevalent account under which European integration was analysed and created a discourse that understood divisibility of sovereignty as an aberration instead of an integral part of federalism.<sup>48</sup> By tracing the origins as well as the history of these three diverse traditions, Schütze highlights that one can understand the concept of federalism to be completely in line, instead of in tension, with a system of governance whereby sovereignty is distributed amongst different levels and power cooperatively exercised. Therefore, developments in European Union law served as a catalyst for rethinking federalism and gave rise to a disquisition on the reinterpretation of a (supposedly) familiar concept. Since the common account of federalism could not explain the new European modes of governance, Schütze explored alternative conceptions and applied them to the changed conditions.

We can detect a similar procedure in the case of proportionality analysis. Proportionality analysis has its roots in German administrative law<sup>49</sup> where it was originally developed to review the necessity and appropriateness of policing measures ‘in relation to the objective being pursued’.<sup>50</sup> In a series of early rulings by the Federal Constitutional Court,<sup>51</sup> it found its way into German constitutional law.

<sup>42</sup> *ibid.*, 15.

<sup>43</sup> *ibid.*, 16 ff.

<sup>44</sup> *ibid.*, 23.

<sup>45</sup> J Madison, ‘Federalist Paper No 39’ in A Hamilton, J Madison and J Jay, *Die Federalist Papers*, Barbara Zehnpeffnig tr (Darmstadt, Wissenschaftliche Buchgesellschaft, 1993) 244, 247.

<sup>46</sup> Schütze (n 41) 30.

<sup>47</sup> *ibid.*, 31, with reference to D Elazar, *Constitutionalizing Globalization. The Postmodern Revival of Confederal Arrangements* (Oxford, Rowman and Littlefield, 1998) 39.

<sup>48</sup> Schütze (n 41) 31 f.

<sup>49</sup> P Craig, *EU Administrative Law* 2nd edn (Oxford, Oxford University Press, 2006) 591; T von Danwitz, ‘Der Grundsatz der Verhältnismäßigkeit im Gemeinschaftsrecht’ (2003) 14 *Europäisches Wirtschafts- und Steuerrecht* 393 with further references.

<sup>50</sup> Craig, *ibid.* 591; See also J Schwarze, *EU Administrative Law* revised 1st edn (London, Sweet and Maxwell, 2006) 685 ff.

<sup>51</sup> First mention of it is in *BVerfGE* 3, 383. Further early rulings *BVerfGE* 7, 377; 8, 71; 10, 354 and 13, 97. On the origins of proportionality analysis in German constitutional law, see E Grabitz, ‘Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts’ (1973) 98 *Archiv des öffentlichen Rechts* 568, 569 f or L Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Göttingen, Otto Schwartz und Co, 1981) 1 and 16 ff.

The analysis' application in the constitutional setting was followed by a broader debate on its capacity to rationalise, as well as systematise human rights discourse.<sup>52</sup> However, by now, these initially fiercely led debates on the effects of balancing competing rights on the substance of those rights and the analysis' legitimacy have given way to widespread accepted consensus amongst German constitutional scholars that proportionality analysis is an integral part of fundamental rights control.<sup>53</sup> Only in the wake of the introduction of proportionality analysis in the case law of the European Court of Justice has the debate on its adequateness experienced a revival.<sup>54</sup> Questions, such as how procedure affects substance in fundamental rights law, are back on the table.<sup>55</sup> In the peculiar context of European law, old issues are not only reconsidered, but also complemented by new ones. For example, the debate on proportionality analysis in EU law has taken on the theme of demonstrating understanding for differing national values.<sup>56</sup> In addition, investigations now examine the role of national courts in preliminary reference procedures that comprise an element of proportionality analysis.<sup>57</sup> Even more, the insights gained through those examinations feed back on our comprehension of the judiciary's role in purely national proportionality analyses.

Yet, the power of Union law to challenge settled understandings does not stop at formal or methodological concepts. It makes us question substantive notions as well. One of these notions—the one I am particularly interested in—is the general principle of equality. Here, European law markedly displays its ability to work as a catalyst for rethinking common conceptions and the elements of European

<sup>52</sup> See eg Hirschberg (n 51); P Lerche, *Übermass und Verfassungsrecht* (Cologne, Carl Heymanns, 1961). For an exchange on the rationality versus irrationality of fundamental rights balancing, see R Alexy, *Theorie der Grundrechte* (Baden-Baden, Suhrkamp, 1994) 143 ff (the argument essentialised in *ibid*, 'The Construction of Constitutional Rights' (2010) 4 *Law & Ethics of Human Rights* 20) and J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Massachusetts Institute of Technology Press, 1996); B Schlink, 'Der Grundsatz der Verhältnismäßigkeit' in P Badura and H Dreier (eds), *Festschrift 50 Jahre Bundesverfassungsgericht* 2nd vol (Tübingen, Mohr Siebeck, 2001) 445.

<sup>53</sup> In this sense, see von Danwitz (n 49) 393, although the author is also critical of some of the excess of judicial control according to proportionality standards by German courts, see *ibid*, 402. For example, A Heusch, *Der Grundsatz der Verhältnismäßigkeit im Staatsorganisationsrecht* (Berlin, Duncker und Humblot, 2003).

<sup>54</sup> See amongst others Craig (n 49) 590; N Hös, 'The Principle of Proportionality in the *Viking* and *Laval* Cases: An Appropriate Standard of Review?' (2009) EUI Working Paper, 2009/06, <http://cadmus.eui.eu/handle/1814/11259>. See generally T-I Harbo, 'The Function of Proportionality Analysis in European Law' (DPhil thesis, European University Institute 2006) 136 ff.

<sup>55</sup> On the point Harbo (n 54) 270 writes:

If ... PA [proportionality analysis] is not of a substantial but merely of a procedural or methodological nature—a way in which courts structure their reasoning—one could assume that it is *prima facie* value neutral in this regard. However, although PA may be free of substance in the meaning that it does not advance or limit fundamental rights, PA may nevertheless be value infected since a particular way of structuring legal reasoning may also have substantial implications.

<sup>56</sup> See Craig (n 49) 633 f.

<sup>57</sup> *ibid*, 636 ff.

equality law characterising the field contribute to this. But let me explain this thought in greater detail. As was previously pointed out, the beginnings of EU equality law show an interlinkage between equality guarantees and economic considerations. Therefore, the question arises as to whether equal treatment is an end in itself or whether other aims should be pursued with its help. Furthermore, the concept of indirect discrimination found its way into Union law long before most of its Member States adopted it in the context of their national jurisdictions. In this sense, Union law showed new ways to conceptualise a notion with a long history and with this move contributed to an extension of equality protection in Europe. Finally, Europe challenges our perceptions of the ‘proper’ scope of equality provisions. If most legal philosophers worked on the assumption that such guarantees are only valid within a discrete society, now we are faced with establishing how far our obligation to equal treatment actually extends in a supranational setting.<sup>58</sup>

These deliberations converge in the same question: which notion of equality do we want to espouse? Or, since this thesis is not so much concerned with legal philosophy but with legal practice, to reframe the question in terms of the rationalist human rights paradigm: who should decide on the ‘right’ notion of equality in European law?

#### IV. THE INSTITUTIONAL CHOICE APPROACH TO EU EQUALITY LAW

This thesis develops the argument that comparative institutional analysis<sup>59</sup> is an advantageous tool to examine the functioning of the general principle of equality in European law. It argues that the European Court of Justice as well as national constitutional courts are often guided by more or less hidden institutional considerations when deciding equality cases.

Looking at European equality law from an interpretive point of view the subject matter admittedly conveys a picture of such diversity that it borders on inconsistency. Yet, as the following chapters will depict, it is the limitations of the traditional interpretive paradigm that make us place an emphasis on incoherence in this area of law. Instead of remaining at the level of critiquing the case law within the interpretive framework—an exercise which is no doubt of great importance for assessing legal outcomes—I suggest that it is beneficial to widen our viewpoint. If one is willing to approach EU equality law from a different perspective, more particularly that of comparative institutional choice, the subject loses much of

<sup>58</sup> Further A Sangiovanni, ‘Solidarity in the European Union’ (2013) *Oxford Journal of Legal Studies* 1; particularly on EU citizenship D Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’ (2015) 52 *CML Rev* 17. One could, of course, approach this subject also from a different angle and ask for the proper definition of a society in the European context.

<sup>59</sup> As developed by N Komesar in *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago, University of Chicago Press, 1994) and *ibid*, *Law’s Limits* (Cambridge, Cambridge University Press, 2001).

its incoherence. Instead, patterns of reasoning become evident that often help to explain why the European Court of Justice decided cases in the way it did.

Given that the concrete conception of equality is such a disputed topic, those institutions called upon to interpret 'equality' ask themselves whether they are the most competent actors regarding the variables of interest representation, numbers and complexity to decide.<sup>60</sup> As a deconstruction of case law by the European Court of Justice will show, such comparative institutional assessment informs the Court's reasoning. Moreover, it has done so in such a pervasive manner that it has shaped interpretive discourse and standards of testing in equality law.

After explaining the philosophical origins of the concept of equality, the examination shows through four 'case studies' how institutional choice guides judges in their equality decisions: application of different standards of testing, assessment of Member States' preferential treatment of their own nationals compared to persons coming from other Member States, the treatment of reverse discrimination and the case of affirmative action for women in the EU. Building upon these findings, the thesis concludes that we would be well-advised to acknowledge the impact of institutional choice considerations on EU equality law and to make use of the institutional choice framework in our analyses of this field of law. As a consequence, the last chapter argues that equality jurisprudence should be adapted so as to offer room for directly addressing institutional considerations ancillary to interpretive deliberations. With this in mind, an alternative model of equality *Dogmatik* is presented that squares institutional and interpretive analyses.

Before I give a more detailed overview of the thesis' chapters, one caveat must be mentioned: the general principle of equality in European law is an extensive topic. It seems impossible to provide an analysis that encompasses the case law in its entirety. For this reason, the thesis follows the heuristic method, meaning that individual (often leading) cases are examined in order to verify or disprove more general points. Furthermore, the analysis deals only with the general principle of equality in the relationship between the 'state', namely the European Union or its Member States, and the individual. It only concerns its vertical application. The horizontal application of the principle of equality between private parties, which has been given expression through the set of equality directives passed since 2000,<sup>61</sup> lies beyond the scope of this project. However, reference to the directives will occasionally be made and the aim is to develop an account of European equality adjudication, which can also be applied to the principle's horizontal dimension.

The remainder of this introduction will provide a more detailed overview of the thesis, which is structured as follows.

<sup>60</sup> Komesar, *Law's Limits*, *ibid* especially 3–34.

<sup>61</sup> Starting with Council Dir 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2002] OJ L303/16. On this subject, see M Bell, *Anti-Discrimination Law and the European Union* (Oxford, Oxford University Press, 2002). For a depiction of the setting up of domestic equality institutions in wake of the directives scheme, see B de Witte, 'National Equality Institutions and the Domestication of EU Non-Discrimination Law' (2011) 11 *Maastricht Journal* 157.

Chapter 2 recounts the philosophical origins of the concept of equality and of non-discrimination law. As I will develop more thoroughly, although equality is generally considered a valid and socially important concept, agreement on its details cannot be reached. A result of this conceptual indeterminacy is that constitutional guarantees of non-discrimination can be interpreted in many—and more importantly very different—ways. A conclusion is reached that the essential characteristic of equality as a legal concept is its ability to depict the *relational* side of fundamental rights. In other words, the concept is of great value, as it helps us to assess how a person is treated in relation to others. In its pure form, it calls for comparison and stipulates that differential treatment shall only take place if differences amongst two compared groups justify the differential treatment. In addition to giving an overview on the concept's theoretical groundings, the chapter inquires as to whether there is a difference between the principle of non-discrimination and the principle of equality in EU law.

Chapter 3 explores the subject of different testing standards employed by the European Court of Justice in its equality adjudication. It argues that similar to the case law of the German Federal Constitutional Court three distinct testing standards are at play. As will be shown, the Luxembourg Court at times confines itself to a reasonableness test, at times engages in strict comparative review and at times performs means-ends balancing in a non-discrimination context. Following up on this depiction, the chapter introduces the framework of comparative institutional analysis and states that the specific mechanism of review in a given case should depend on the judges' assessment of their comparative aptitude to make a decision. Depending on how well or imperfectly the political process functions in an area of law under equality review, the European Court of Justice should (and often does) examine cases with different intensity.

Chapter 4 is dedicated to a study of the European Court of Justice's case law on the principle of discrimination on grounds of nationality. The chapter explicates that although the principle of non-discrimination states that no EU citizen may be discriminated against due to his or her nationality, this prohibition comes with inbuilt limitations. It looks more closely at the compatibility of national electoral laws as well as social benefit laws, which are reserved to a country's own citizens, with EU law. Though the differentiating lines of these laws run between a country's nationals and EU foreigners, they are nevertheless generally reckoned to be in accordance with EU law. Again, comparative institutional analysis is employed to explain that considerations about the relative ability of potential decision makers—in particular the national political processes versus the European judiciary—should influence the European Court of Justice's handling of such cases.

Chapter 5 turns to 'reverse discrimination', the phenomenon by which individuals able to rely on European norms enjoy greater freedoms than those in situations governed by national law only.<sup>62</sup> It looks at the issue from a European law

<sup>62</sup> See A Balthasar, "'Inländerdiskriminierung" in der EU nach dem EG-Vertrag und aus österreichischer Sicht' (1998) 53 *Zeitschrift für öffentliches Recht* 143, 146; S O'Leary, 'The Past, Present and

perspective and examines the European Court of Justice's approach on the topic.<sup>63</sup> Although the Court phrases its decisions touching upon reverse discrimination in terms of the applicability of Union law, there is a strong egalitarian element to the subject. At its core is the question whether the non-discrimination principle in EU law goes as far as to prohibit differential treatment of European citizens in purely internal situations and those in situations with a connection to Union law.<sup>64</sup> This thesis argues that the judges are guided by institutional considerations when delimiting the scope of application of EU law—the more they consider the national political processes to have malfunctioned in a case of reverse discrimination, the likelier they are to attend to the matter.

Chapter 6 examines the case law by the European Court of Justice on affirmative action for women, specifically on women's quotas. This field of European law has been criticised both for doing too much<sup>65</sup> and for doing too little<sup>66</sup> to facilitate equal treatment of the sexes. Given that this critique is connected to recognition that non-discrimination law can be used as a tool for social transformation, the thesis argues that comparative institutional analysis can help us also understand European affirmative action law. It establishes that the European Court of Justice is guided by the parameters of interest representation, scale and competence when deciding whether to substitute national quota schemes for its own conceptions of equal treatment. In this exercise, I draw on findings of the debate on the constitutionality of affirmative action in the United States to depict that comparative institutional analysis offers a framework to conceptualise not only the United States Supreme Court's, but also the European Court of Justice's, affirmative action adjudication. On this, I would like to add one further explicatory note: in the discussion of the American jurisprudence, the thesis also addresses the discrimination experienced by Blacks in the United States. Following works from the discipline of Critical Race Theory, I decided to use the term Black with an uppercase 'B' to denote the group of people, who are American citizens from African descent.<sup>67</sup> As Möschel explains in this context, the reason behind this choice in terminology is 'the idea that "Black" or "Blacks" does not simply denote the skin colour but

Future of the Purely Internal Rule in EU Law' in M Dougan, N Nic Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Oxford, Hart Publishing, 2012) 37, 38; C Ritter, 'Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234' (2006) 31 *EL Rev* 690, 691.

<sup>63</sup> For a discussion of reverse discrimination by national courts, especially German and Austrian courts, see J Croon-Gestefeld, 'Umgekehrte Diskriminierungen nach dem Unionsrecht—Unterschiedliche Konzepte im Umgang mit einem gemeinsamen Problem' (2016) 51 *Europarecht* 56.

<sup>64</sup> See Ruiz Zambrano (n 40) Opinion of AG Sharpston, para 123.

<sup>65</sup> See B Schubert, *Affirmative Action und Reverse Discrimination* (Baden-Baden, Nomos, 2003) 102 with reference to eg M Sachs, 'Anmerkungen zu Marschall' (1998) *Deutsches Verwaltungsblatt* 183, 185.

<sup>66</sup> eg S Fredman, 'After Kalanke and Marschall: Affirming Affirmative Action' (1998) 1 *Cambridge Yearbook of European Legal Studies* 199.

<sup>67</sup> See also M Möschel, *Law, Lawyers and Race: Critical Race Theory from the US to Europe* (New York, Routledge, 2014) 6.

constitutes a specific heritage, history, experience, and personal identity and as such requires the use of a noun.<sup>68</sup>

For my inquiry into the functioning of the general principle of equality in European law, I chose the four themes of (a) different testing standards, (b) discrimination on the basis of nationality, (c) reverse discrimination and (d) affirmative action as subjects of a more detailed analysis for the following reasons. As regards the topic of differing tests in equality review, it serves as the base for showing that European equality adjudication is diverse and follows different patterns depending on the specific context. Building on this insight, the examination turns to three of the issues I consider as belonging to the most controversial of European equality law. Discrimination on grounds of nationality is examined as the prohibition thereof is undoubtedly one of the central provisions in EU law. What this work explores specifically is under which conditions the European Court of Justice considers differential treatment on grounds of nationality to be nonetheless justified. Reverse discrimination is of specific interest to my work, because it features the odd facet of being labelled 'discriminatory' but is rarely discussed in terms of equality. Moreover, the subject is located at the border of European Union law and therefore also at the border of European Union equality law. Since problems with conceptual frameworks are often revealed in borderline cases, I believe that it is an interesting area for testing the explanatory strength of comparative institutional analysis. With respect to the examination of affirmative action adjudication, the topic was chosen as it touches upon many of the prevailing equality themes in a condensed manner, boiling down to the paradoxical question whether one shall discriminate against individuals for the sake of equality. This analysis seeks to show that the alternative framework of institutional choice can help to explain the European Court of Justice's dealing with the topic.

Coming back to the overall structure of the thesis, chapter 7 summarises the findings of the preceding chapters. It suggests that the *Dogmatik* of equality testing should be adapted so as to openly address those institutional considerations which already guide judges in their assessment, but usually do not surface in written decisions. Bridging the divide between first order interpretive and second order institutional questions, it argues that equality testing can be modified in such a way as to connect relative human rights assessment to the assessment of institutions' relative decision making powers.

<sup>68</sup> *ibid.*