# THE CONCEPT OF EQUALITY IN EUROPEAN UNION. SOME REMARKS ON RECENT LEGAL FRAMEWORK AND JUDICIAL DECISIONS

Dr **Iwona Wróblewska**
The Faculty of Law and Administration
Nicolaus Copernicus University
Toruń in Poland

*The principle of equality is a multi-faceted category. Within the EU, it may be, for instance, considered in formal or material dimension, as the equality of Member States and the equality of citizens and the institutions of the Member States. This paper focuses on the latter aspect.*

*Keywords: principle of equality, Discrimination, Court of Justice, dignity, freedom and solidarity.*

There are three sources of the European principle of equality: the provisions of the Treaty, the Directives and the case law of the Court of Justice of the EU. The Charter of Fundamental Rights is of special importance. The principle of equality is recognized as a general principle, which binds both the EU institutions and the Member States in scope of the implementation of the Union law. EU law recognizes the principle of equality above all as the prohibition of discrimination. In legal doctrine the principles of equality and non-discrimination are most often treated as two forms of the same principle. The prohibition of discrimination, in fact, supports equality, the implementation of which means eliminating discrimination.

Discrimination is a violation of the principle of equality due to the differentiation criterion, which is forbidden (principle of equality vs. non-discrimination, differences, court judgments, p. 159). The concepts of "equality" and "non-discrimination" will be applied flexibly. CJEU itself does not pay special attention to their theoretical distinction in their judgments (similarly to the European Court of Human Rights).

The aim of the article is not a detailed analysis of EU regulations concerning the category mentioned in the title, but rather to look at the concept of equality in the EU, which emerges from the legislation and judgments of the Court of Justice. Therefore, the question arises whether it is possible to talk about for a comprehensive, thoroughly thought over concept of the equality in the EU. Contemporary philosophy of law and political philosophy say a lot about two aspects of equality: the equality of democratic citizenship and equality of conditions[1]. The former, as a political and legal equality, is to be expressed in modern constitutions. The latter, seen as social equality, is expressed by the rules of distributive justice. Both of these perspectives can be applied to describe the functioning of the European category of equality.

Just as in the constitutions, in modern constitutionalism of states the principle of equality in the EU is regarded as one of the fundamental general principles in addition to

[1] R. J. Arneson, "Równość", Przewodnik po współczesnej filozofii politycznej, red. R. E. Goodin, Ph. Pettit, Warszawa 1993.

such values as dignity, freedom and solidarity. It is crucial for the whole EU axiological system. An entire chapter III of the Charter of Fundamental Rights deals with it. The comparison of its content to the first Community rugulations on equality shows a characteristic revolution involving the extension of objective and subjective scope of anti-discrimination legislation. This is of course related to the extension of the powers of the Community and entering the stage of political integration. The prohibition of discrimination was originally just an economic instrument used in the field of employment and social rights. At the beginning it refered to gender, race,national or ethnic origin, and religion. Currently Chapter III of the Charter of Fundamental Rights includes equality before the law, any discrimination based on any grounds such as race, sex, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority,
property, birth, disability, age or sexual orientation, respect for cultural, religious and linguistic diversity, equality between men and women in all areas, including employment, work and pay. The phrase "including" means that this catalogue is open.

As for the status of the prohibition of discrimination, it is a general principle of EU law[2]. The literature refers to three categories of these principles: principles derived from international law, rules specific to Community law, and the principles common to the legal systems of the Member States. There is also a separate category of fundamental rights whose source lies either in international law or in the constitutional traditions of the Member States. The principle of non-discrimination is regarded as belonging to the second group, the Court's rules derived primarily from the provisions of treaties taking into consideration their objectives. The prohibition mentioned aboved was derived from the Article 12 of the EC Treaty (prohibition on discrimination on grounds of nationality), Article 4 (prohibition on discrimination on grounds of the agricultural policy), and Article 141 (prohibition on discrimination based on sex). The content and wording of the Charter of Fundamental Rights, however, indicate that the principle of equality is a fundamental right.

Earlier the art. 6 of the Treaty on European Union implied it indirectly. Such a simple assignment of the principle of equality within the EU, raises reservations about the classification quoted (made on the grounds of principle's origin).
The principle of equality from the national and international perspective is undoubtedly a fundamental right; however, in the EU its negative approach in the form of prohibition of discrimination seems to be of prime importance, so from EU perspective its character as a fundamental right would be described rather as a formal (or *prima facie*).

When it comes to the Charter, it is the most important act of the recently adopted by EU so extensively affecting the problem of equality (non-discrimination). The declarations and documents concerning the Charter conclude that its purpose was to consolidate into one document the rights and principles scattered in the Treaty on European Union and the Treaty establishing the European Community. For a few decades Directives have been the major instrument to combat discrimination in the EU. Basic ones include:
(based on Article 13 of the Treaty establishing the European Community)
- 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
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

[2] Case C-283/83, A. Racke v. Hauptzollamt Mainz; C-15/95 EARL de Kerlast v. UNICOPA; C- 292/97 Karlsson.

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- 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 (recast) (based on art. 141(3) of the Treaty establishing the European Community)

As one can see they regulate particular fields (traditionally the issues of employment). The prohibition of discrimination included in EU directives on non-discrimination applies to three areas: employment, social protection and goods and services. Protection in the area of employment works due to all protected characteristics in the directives. Protection in the area of social protection concerns racial or ethnic origin (a wide range of social protection), gender (a wider range of " social security", boundaries of the area are not clear).

Protection against discrimination in the access to goods and services (including accommodation) applies to race and gender (not applicable to public and private education). The directives have defined key notions for the problem of discrimination, such as (illustrated by Article 2(1) of Directive 2000/78) :

- "the principle of equal treatment" - mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1
- "direct discrimination" shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1
- "indirect discrimination" shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons (…)"
- "harassment" shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment."

Trying to determine (or at least) describe what kind of concept of equality arises from Union legislation one must look at the Directives, as acts of specific, detailed nature. Formal equality (called also equal treatment) is based on the idea, that every person has the right to be treated in an equal way to any other person the same situation[3]. Starting point are here the formulas created by Plato and Aristotle. This conception does not take into account imbalances that have been created by past discrimination. The answer should be substantive equality, that is meant to compensate for the social disadvantages suffered by some groups. It stays in disagreement with formal equality, since it mean, that in order to ensure equality unequal treatment can be required. In this approach law should be sensitive to practical results of equal treatment. Within this formula of equality can be distinguished, among others, equality of opportunity or outcomes. Both of these assume application of positive action for groups previously disadvantaged. The second goes further, taking into account quotas and targets.

Formal equality seems to be the starting point in UE. In discussions that predated the adoption of the Directives based on art. 13 of Treaty establishing the European Com-

[3] E. Howard, The European Year of Equal Opportunities for All-2007: Is the EE Moving Away From a Formal Idea of Equality?, *European Law Journal, Vol. 14, No 2, March 2008*, p. 169.

munity not much time was devoted to the question about the concept of equality. The European Commission wanted to establish common, minimal standard of protection from discrimination. In EU anti-discrimination regulations can we find a number of examples of application of formal equality. Good exemplification are definitions of direct discrimination contained in above-mentioned Directives. For example art. 2 a) 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 constitutes that direct discrimination occurs where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation. Others Directives sounds within this scope very similar. But the definition of indirect discrimination is claimed to be a way out towards more substantial understood equality. According to above-mentioned Directive this type of discrimination takes place when: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex (art. 2 b). And the explicit articulation of substantial equality are provisions that allow, so called, positive action, according to them: "(…) the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex" (art. 6). So, Directives do not obliged but only permit undertaking of such action. They also neither indicate particular types of positive actions nor tell how far can they go. It`s difficult to prejudge for which conception of substantial equality correspond foregoing measures. One can meet statement, that they differ in degree. Also the attitude of Tribunal isn`t uniform: for example taking into consideration the 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) CJUE stated that, the result pursued by the Directive is substantive, not formal, equality[4]. In the same time he excluded the possibility of application of automatic programs of preferential treatment by employing and indicated that positive measures should be assumed to be limited to the period necessary to overcome the disadvantage[5]. That above, in opinions of some academics, means that CJUE opted for the equality of opportunity.

To recapitulate this excerpt, should be claimed, that the UE antidiscrimination legislation is based on formal equality, but in the same time it contains a number of measures that correspond with substantial equity. It seems that that the EU legislation may involve exactly in this direction, although the Commission is not planning now to come out with further legislative propositions based on art. 19 Treaty on the Functioning of UE. It is to remember, that the direction mentioned above correspond with European legal culture, in that the prohibition of discrimination is connected with the obligation of the state to undertake positive actions[6] . In literature are expressed hopes that the CJUE will decide for such a interpretation that will allow broader application of positive action. In the same time a number of arguments that demonstrate the weakness of substantial equality (especially equality of results) arises. In regard to art. 20 of the Chapter of Fundamental Rights can be claim, that it refers to formal equality[7]. However in its further provisions is spoken about

[4] Case C-136/95, Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault.

[5] Case C-450/93, Eckhard Kalanke v Freie Hansestadt Bremen.

[6] Wróbel, s. 756

[7] The explanations by the Convention relating to the art. 20 of the Charter: *This Article corresponds to a principle which is included in all European constitutions and has also been recognised by the Court of Justice as a*

„the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex" (art. 21 ust. 2).

The next issue to raise is the problem of the relationship between the general principles and the Charter (since the entry into force of the Treaty of Lisbon). From the moment the Charter obtained legal status a change in stance of the Court of Justice on the relationship between the general principles and the Charter can be noticed. Previously the Court often referred to the Charter as having an auxiliary role in relation to the general principles, eg confirming the rights already recognized[8]. Currently the Court reversed its previous stance, because the Charter is treated exclusively or primarily (in the first place) as a source of regulations to protect human rights.

Since the Treaty of Lisbon came into force two decisions significantly affect the problem of the right to equality: *Kücükdeveci*[9] and *Bartsch*[10]. Judgment in *Kücükdeveci* case is considered to be a turning point because it was the first case in which the ECJ referred to the status of the Charter. However, in its justification the Court still referred mainly to the general principles of the EU as a source of regulations concerning human rights[11]. According to some researchers, the reasons for this may include: very recent entry into force of the Treaty of Lisbon, or maybe that – with regard to British Protocol notified to social rights by some countries – the CJUE wanted to avoid any question about the influence of the judgement in those countries[12]. The other explanation is that the CJUE was hesitant to apply relevant provisions, since – according to art. 51 of the Charter – it is addressed to institutions of the Union and to the Member States [13].

In a nutshell, in the analysed judgment the Court of Justice concluded that the principle of non-discrimination on the ground of age is a general principle of Community law. And the Directive 200/78 does not lay down the principle of equal treatment in employment and occupation, but only makes it more precise. (These theses are similar to justification in Mangold case). The Court also confirmed that the principle of equal treatment can be applied horizontally - even when the time for transposition of the directive formulating this principle has not expired.

The analysis of justifications in cases mentioned brings a number of important questions and leads to carefully thought-out formulation of some conclusions. The Court states that the principle of non-discrimination on the ground of age is a general principle of European Union law as it is a practical application of the principle of equal treatment. It also says about abiding the general principle of equal treatment, in particular on grounds of

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*basic principle of Community law (judgment of 13 November 1984, Case 283/83 Racke [1984] ECR 3791, judgment of 17 April 1997, Case 15/95 EARL [1997] ECR I–1961, and judgment of 13 April 2000, Case 292/97 Karlsson, not yet published).*

[8] E.g. in case C-303/05 Advocaten voor de Wereld v. Leden van de Ministerraad, para 46: *"It is common ground that those principles include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination, which are also reaffirmed respectively in Articles 49, 20 and 21 of the Charter of Fundamental Rights of the European Union"*. Look also at case C 341/05 Laval Mono Car Styling, C-12/08 and others.

[9] Case C-555/07 Seda Kücükdeveci v. Swedex GmbH & Co. KG.

[10] Case C-427/06 Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH.

[11] It must be recalled here that (…) Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment (see, to that effect, *Mangold*, paragraphs 74 to 76).

[12] S. Peers, The EU Charter of rights and the right to equality, *ERA Forum (2011) 11*, p. 582.

[13] Th. Papadopoulos, Criticising the horizontal direct effect of the EU general principle of equality, *European Human Rights Law Review 2011*, Issue 4, p. 445.

age. This type of formulation allows to expect that in the future the recognition by the Court of non-discrimination as a general principle due to other criteria cannot be ruled out. Moreover, it appears that there is not a convincing reason for limiting it only to that criterion. What is more, it would not require only protected characteristics expressed in the anti-discrimination directives, since they only "confirm" the existence of general rules (The directive seems to appear only in the background of the Court's arguments). On the other hand, the Court consistently stresses that the general principle can be applied only in a situation that is associated with the application of EU law (in practice, falls within the scope of EU law).

Another consequence of *Kücükdeveci* case is a formulation of obligation for national courts not to apply national legislation which is contradictory to the prohibition of discrimination on the ground of age (and in the future: using a functional approach to the Court's arguments also due to other criteria), as a general rule (specified in the Directive). This also applies to disputes between private parties.

Taking the cases above into consideration, the other issue that CJUE should relate to is the question about the relationship between the general principles and directives.

To the problem of the horizontal effect of general principles it is critically argued in the literature, that there is a conflict between this general principle of equality and the principle of legal certainty. Private parties can not relay only on their national law – they must take into account the abstract and unwritten general principles of EU law. Court of Justice should also indicate national courts when they are obliged to set aside national provisions[14]. On the other hand it isn`n excluded that there is possibility of horizontal effect of general principles[15]. "(…) restrict reliance on such rights to vertical situations risks creating the same (sometimes artificial) distinction between the public and private sector as is familiar in the case of directives. (...) Moreover the Court has on occasion recognised that the general principle of equal treatment can be applied horizontally when it is incorporated in a substantive Treaty article.[16]"

It is worth at the end to present the way of interpretation of art. 20 of the Charter, adopted so far in a sole judgement in Poland based on the 3rd Chapter of the Charter. Supreme Administrative Court (21.10.2012) determined that art. 20 of the Charter can not be the single basis of an appeal without indicating what specific provision concerning the equality issue is violated. Art. 20 and the right to equal treatment is (merely) an "principal interpretative direction" for the interpretation of others provisions of 3rd Chapter.

[14] Th. Papadopoulos, op. cit., p. 446-447.
[15] Advocate Sharpston in Bartsch case.
**[16]** Case 36-74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo or Case C-281/98 Roman Angonese v Cassa di Risparmio di Bolzano SpA.