1. Introduction

1. PRESENTATION OF THE BOOK

This book plans to answer a fundamental question: can we consider equality and non-discrimination as fundamental elements of EU legal order? To answer this question, I will analyse the three dimensions of equality in the EU acquis: ‘equality as a value’, ‘equality as a principle’ and ‘equality as a right’. Marking a clear difference with the majority of publications on equality and anti-discrimination law, this volume aims, throughout the analysis of the three dimensions, to justify the fundamental importance of equality and non-discrimination within European law. The majority of scholarly works concentrate on the negative or positive elements of equality, without clarifying (1) the place and importance of the different dimensions of equality within EU law, or (2) the interaction between the three dimensions, and in particular the interaction between ‘equality as a principle’ and ‘equality as a right’. This work aims to fill this persistent gap in the scholarship. The book will conclude that the importance of equality is linked to its role in acting as a bridge between the ‘economic’ and the ‘social’ elements of European legal integration.

There are several challenges to be addressed in pursuing this aim. In the first place, the analysis of the dimension of value (Chapter 2) is undertaken with reference to the concept of equality in traditional legal theory. Chapter 2 continues by analysing equality as a value within EU law, underlining the role played by the EU institutions. The dimension of principle (Chapter 3), on the other side, departs from the concept of general principles under international law and continues with the description of the case law of the CJEU on the principle of equality, in its various denominations (as equal treatment or non-discrimination), focusing in particular on the direct effect of the principle. One of the main characteristics of European Union law is to overcome the boundaries between sectors within legal scholarship. In this book, the reader will find many elements of interdisciplinary legal research. This emerges in particular in Chapter 4, where the analysis of the dimension of equality as a right via the study of secondary EU legislation and of the Charter borrows elements from constitutional law, procedural law and legal theory (with particular reference to the distinction between rights and principles in the Charter). The last chapter of the book (Chapter 5) presents the Conclusion,
where the fundamental place of equality and non-discrimination is outlined as the synthesis between ‘economic’ and ‘social’ Europe. Keeping together the many different tenets of legal scholarship within the same project was an ambitious task: the reader will judge if this attempt has served faithfully the aim of the book.

2. STRUCTURE OF THE BOOK

The book addresses the role played by equality and non-discrimination in the EU legal order. It is essential to begin by clarifying the use of words ‘equality’ and ‘non-discrimination’, a highly debated issue in scholarship. Here, I depart from the assumption that, in the EU legal order, the words equality and non-discrimination, albeit having different and definite meanings in the scholarship, are mostly used interchangeably both by the EU Court of Justice as well as by the EU institutions. As is known, the two words imply, in principle, positive (equality) and negative (non-discrimination) obligations; however, from negative as well as from positive obligations, the various players of the EU legal order seem to draw similar conclusions in terms of rights granted and enforcement. Equality, in its various forms, pervades the whole EU legal order, from economic law to citizenship, from economic governance to the relationship between the EU and national constitutional judges.

At the same time, the role played by equality and non-discrimination is analysed with reference to the EU legal order understood as a constitutional legal order. The fact that the EU legal order should be understood as constitutional should not be taken for granted. It is known that the ECJ has declared, since Les Verts, that the Treaties are the basic constitutional charter of the EU.1 In Kadi, the ECJ restated the concept with even more conviction.2 There are few doubts, though, that the ECJ considers the EU as a constitutional legal order. This concept, however, generated a considerable debate in scholarship, especially before and after the failure of the Constitutional Treaty, which perished also because of its ‘constitutional’ nature.3 In this book, I adopt a functional approach. The EU is to be regarded as a constitutional legal order as it has ‘constituted’, of course, thanks to the delegation of powers and competences by the EU Member States, a complex system of institutions that can adopt and

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3 Lucia Serena Rossi (ed), Il progetto di Trattato-Costituzione Verso una nuova architettura dell’Unione europea (Giuffrè, 2004).
enforce legislation within the areas of competences. There are of course limits, that are carefully designed by the Treaties. Yet, we can dispute the nature of the EU as a purely constitutional legal order, but we cannot reduce it to an international organisation fully dependent on its Member States.\(^4\)

The structure of the book is thus presented as follows: after this introduction, in Chapter 2, I analyse equality as one of the values, inscribed in Art. 2 TEU, that guide the activity of the EU institutions and represents a benchmark for the membership of the EU Member States. However, in a different fashion from political science and sociology, where reasoning on values allows the definition of the political and social orders, values are, for legal scholars, an important setback, but they are not legally binding. This means that they cannot – as such – be enforced, and thus mainly guide the activity of law-makers and policy-makers, as well as the interpretative work of national and European Courts (above all, the Court of Justice of the European Union).

The second dimension of equality – ‘equality as a principle’ – is analysed in Chapter 3. General principles of law are sources of international law\(^5\) and find their place in the EU legal order in Art. 6 TEU, where it is said that ‘fundamental rights [...] shall constitute general principles of the Union’s law’. General principles are, according to international and European legal scholarship, traditionally regarded as principles of interpretation. This is only partially true for the EU legal order. The case law of the Court of Justice, for instance, explained well before it became explicit in the letter of the Treaties that the fundamental rights protected by the European Convention of Human Rights, and as they result from the constitutional traditions common to the Member States, are general principles of EU law. However, the lack of clarity over the application of general principles has in concrete terms led to several mismatches and different interpretations within the EU legal order, and equality, as a general principle, did not represent an exception.

In Chapter 4, I account for the last dimension of equality, represented by ‘equality as a right’. If values have the role of guiding the activity of law and policy-makers, and principles can be sources of rights, albeit in particular circumstances, rights are, by their nature, enforceable in front of courts. The right to equal treatment finds its sources, apart from in the above-mentioned discourse on principles, in a variety of legal instruments which are scattered among the various legal instruments and policies of the EU, including the key role played by the Charter of Fundamental Rights of the EU. In

\(^4\) See, in this sense, the concept of the EU as a quasi-constitutional legal order. Lucia Serena Rossi, ‘A New Revision of the EU Treaties After Lisbon?’ in Lucia Serena Rossi and Federico Casolari (eds), The EU after Lisbon: Amending or Coping with the Existing Treaties? (Springer, 2014) 6.

\(^5\) Art. 38 of the Statute of the International Court of Justice.
Chapter 5, I outline the conclusions of the book, explaining why equality and non-discrimination are fundamental elements of the EU legal order: equality is the synthesis between ‘economic’ and ‘social’ Europe.

This book is up to date as of July 2020.