

# Contents

<b>Acknowledgements</b>	v
<b>Table of Contents</b>	vii
<b>Foreword</b>	xi
<b>Chapter 1 Introduction and Overview</b>	1
1. Introduction	1
2. Method	2
2.1 The Boundaries of the Law	3
2.2 An Examination of Caselaw	3
2.3 The Exclusion of Justification	4
2.4 The Legitimacy of Comparison	5
2.5 Form and Substance	6
3. Relationship to the Existing Literature	6
4. Footnotes and Quotations	7
<b>Chapter 2 Discrimination</b>	9
1. The Principle of Equality	9
2. Discrimination and Equality	10
3. Different Situations Differently	10
4. Direct and Indirect Discrimination	10
5. Discrimination and Justification	11
6. Balancing Justification and Effect	14
7. Definitions	15
8. Measuring Discrimination	16
9. Positive and Reverse Discrimination	19
10. Discrimination and Rules	20
<b>Chapter 3 Definitions of Discrimination in Free Movement Caselaw</b>	21
1. A Common Meaning	21
2. Direct Discrimination	22
3. Indirect Discrimination	28
3.1 Definitions in the Law on Workers	28
3.2 Measurement of Disparate Impact	32
3.3 Covert Intention?	32
3.4 Goods and Services	33
4. Justification and Proportionality	34
4.1 Proportionality	34
4.2. The Process of Justification	36
4.3 A Community Standard of Proportionality?	37
4.4 The Scope of Justifications	38

## TABLE OF CONTENTS

<b>Chapter 4</b>	<b>The Breadth of Indirect Discrimination</b>	41
1.	Structural Discrimination	41
2.	Active Remedies	41
3.	Disparate Impacts	43
4.	Adapting to Strangers	44
5.	The Criterion of Legitimate Relevance	47
6.	Negotiating Justification	49
7.	Remaking National Law	50
<b>Chapter 5</b>	<b>The Conceptual Scope of Free Movement Law: Beyond Discrimination?</b>	53
1.	Interpretations	53
1.1	Naïve Judgment	54
1.2	Economics	54
1.3	Formalism	55
1.4	Comparative/Discrimination-based	55
1.5	Individual Rights versus Integration	56
2.	The Language of the Court	56
3.	Prohibitions of Non-Discriminatory National Measures	59
3.1	Preliminary Comment: The Nationality of Non-Persons	60
3.2	Caselaw on Goods	60
3.3	Comments	65
3.4	The <i>Status Quo</i> Argument	69
3.5	Caselaw on Workers	70
3.6	Comments	73
3.7	Caselaw on Services, Capital, and Establishment	76
3.8	Comments	80
3.9	'Intrinsically Liable to Discriminate'	85
4.	Conclusions	87
5.	A Discrimination Test	89
<b>Chapter 6</b>	<b>Discrimination is Better than Market Access</b>	93
1.	Introduction	93
2.	The Attraction of the Market	94
2.1	Surfing the Zeitgeist	94
2.2	Why Free Movement is not like Competition Law	96
3.	The Justiciability of Market Access	98
3.1	Direct Restrictions	100
3.2	Substantial Restrictions	101
3.3	A General Test of Significance	101
3.4	An Individual Test of Significance	102
3.5	Retreat from Reality	103
3.6	Comparison as an Alternative	104
4.	Justifying Rules with Disparate Impacts	105

## TABLE OF CONTENTS

5. Extending the Law: Integration versus Economics	107
5.1 Competition between Products, Laws and Nations	107
5.2 Conflicts of Competition	110
6. The Regulator's View	112
7. Constitution Building	114
 <b>Chapter 7 The Wholly Internal Situation</b>	 117
1. Facts Within the Scope of Community Law	118
2. Reverse Discrimination	125
2.1 The First Response: The Idea of Equality	128
2.2 The Second Response: Reverse Discrimination Hardly Happens	130
2.3 The Third Response: Reverse Discrimination Makes No Sense	137
3. Hypothetical Questions	137
4. The Range of Purely Internal Situations	141
5. The Constitutional Question	143
6. Conclusion	144
 <b>Chapter 8 Restrictions upon Private Actors</b>	 145
1. Introduction to the Problem	145
2. The Human Rights Example	147
2.1 The European Convention on Human Rights	147
2.2 The European Convention on Human Rights	149
3. Transplanting to Free Movement	150
4. Defining 'Private': Semi-Public and Quasi-Public Bodies	152
5. Private (Employment) Legislators	155
6. Mere Individuals	155
6.1 Goods	158
6.2 Persons and Services	160
6.3 Capital	161
7. Indirect Control	161
7.1 <i>Commission v. France</i>	163
7.2 Actions for Damages by Individuals	163
7.3 Does State Liability Entail Private Liability?	164
7.4 State Liability for Actions Legal under National Law?	166
7.5 The State as Guarantor without Recourse	167
7.6 The 'Application to All Law' Model	168
8. Conclusions	168
 <b>Chapter 9 Free Movement of Welfare</b>	 171
1. Introduction	171
2. Geraets-Smits	172
2.1 Benefits-in-kind	173
2.2 Profit	174
2.3 The Obedient Patient	175
3. The Previous Healthcare Cases	175

## TABLE OF CONTENTS

4. The Education Cases	176
5. Payments from Public Bodies as Remuneration	178
5.1 The Payer-Recipient Link	178
5.2 An Identifiable Payment	179
5.3 Separate Institutions	179
5.4 The Potential for Choice	180
6. Conclusion	183
 <b>Chapter 10 The Impact of Citizenship on Economic Movement</b>	 187
1. The Function of Citizenship	187
2. The Rights of Citizens	187
3. Citizenship and Economic Free Movement	188
3.1 Personal and Material Scope	190
3.2 Discarding 'Economic'	195
4. Jurisdictional Spread	196
5. A Constitutional Catalyst	197
 <b>Chapter 11 Conclusions</b>	 199
 <b>Bibliography</b>	 203
<b>Table of Cases</b>	213
<b>Index</b>	223