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Introduction

The importance of anti-discrimination law

Earlier editions of this book were entirely concerned with the law on sex equality, an area in which, from the beginning of its existence, the European Economic Community[1] possessed rules forbidding discrimination. The right to equality of opportunity irrespective of sex is fundamental to a civilized society since, without it, the individual's talents cannot be exploited to the full, human dignity is compromised, and the person concerned cannot make the most of what life has to offer: inequality on the ground of sex is simply unfair. The community at large suffers too since valuable resources go untapped and potential gifts remain unrealized. The law and the apparatus by which it is administered, of course, play a vital part in sustaining the notion of equality as between the sexes; the law cannot do the whole job, since the political, social, and economic contexts, together with peoples' attitudes and cultural values, will always overlay it; however, it can prove highly instrumental in shaping behaviour and expectations.

As will be seen later in this chapter, economic and political forces combined to produce the first European Community anti-discrimination legislation in the fields of sex and nationality. It was not until the dawn of the third millennium that similar laws came into existence to forbid discrimination on the grounds of race, religion, disability, age, and sexual orientation. In addition, it will be seen that other expressions of the equality principle have found their way into EU law. It is undeniable that this later generation of anti-discrimination law is every bit as significant as its predecessors in human, moral, political, and economic terms. The aspirations which

[1] A brief account of the development of the three original European Communities, and their subsequent metamorphosis into the European Union, is given below.

[2] See further Byre, 'Applying Community Standards on Equality', in Buckley and Anderson (eds), *Women, Equality and Europe* (Macmillan, London, 1988); Mancini and O'Leary, 'The New Frontiers of Sex Equality Law in the European Union' (1999) 24 ELRev 331; Osborne and Shuttleworth (eds), *Fair Employment in Northern Ireland: a generation on* (Blackstaff Press and the Equality Commission for Northern Ireland, Belfast, 2004); and Gijzen, *Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch Law* (Intersentia, Antwerp and Oxford, 2006). For an expression of the view that EU law is not committed to the principle of real sex equality, see Fenwick and Hervey, 'Sex Equality in the Single Market: New Directions for the European Court of Justice' (1995) 32 CMLRev 443. Similarly, see Fredman, 'European Community Discrimination Law: A Critique' (1992) 21 ILJ 119, where powerful arguments are marshalled to demonstrate that EU law fails to address the underlying structural obstacles to progress for women.

lie behind it are justice and an improved quality of life for literally millions of people within the European Union.[3] The present volume therefore attempts to examine the scope and coverage of EU law on all the grounds (bar one) upon which it currently forbids discrimination and seeks to promote equality between people; the law forbidding discrimination on the ground of nationality is not covered in depth (though occasional reference is made to it where the context requires) for reasons of space and also because its rationale is very different from that of the other grounds, rooted as it is in the importance of the free movement of persons to the achievement of a single economic market; in addition, its scope is somewhat different from that of the other categories of discrimination and, furthermore, the whole area of nationality discrimination is being subsumed today into the wider notion of citizenship of the Union.[4]

Non-discrimination and equality

Despite the length of time which it took the EU to outlaw discrimination on this portfolio of grounds, it is not actually difficult for most people today to embrace the broad notion that at least some types of discrimination are unacceptable and should be forbidden by law. Of course, the word 'discriminate' is capable of two distinct connotations, the first of which expresses the usually laudable activity of making those kinds of choices which everyday life presents to human beings; thus, we speak, for example, of being 'discriminating' consumers of food or art, meaning that we make informed and critical judgements about these matters. This is not, however, the sense which legal systems attach to the word 'discriminate'; the law is concerned with discrimination only when it is in some generally recognized way unacceptable. As Feldman has explained, discrimination becomes 'morally unacceptable' when it takes the form of treating a person less favourably than others on account of a consideration which is 'morally irrelevant'.[5] The critical question which then has to be decided by the legal system is when a consideration is to be considered morally irrelevant.[6] If taken to extremes, this principle could effectively stultify decision-making by requiring the positive justification of every matter taken into consideration by the decision-maker. Legal systems frequently, therefore,

[3] Henceforth EU.

[4] See in particular Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzekzyk v Centre Public d'Aide Sociale* [2001] ECR I-6193; and Case C-34/09 *Zambrano v ONEM* [2011] ECR I-000. See also Spaventa, 'From *Gebhard to Carpenter:* Towards a (Non-) Economic European Constitution' (2004) 41 CMLRev 743. Non-discrimination and citizenship of the Union are today governed by Part Two (Arts 18–25) of the Treaty on the Functioning of the European Union; the free movement of persons without discrimination on the ground of nationality, the right of establishment and freedom to provide services are regulated by Part Three, Title IV, Free movement of persons, services and capital (Arts 45–62); and sex equality is regulated by Art 157 which is contained in Part Three, Title X, Social Policy.

[5] Feldman, *Civil Liberties and Human Rights in England and Wales,* 2nd edn (Oxford University Press, Oxford, 2002), 135–9.

[6] See Case C-217/08 *Matiano v INAIL* [2009] ECR I-35★.

attempt to classify or to enumerate those matters which are morally irrelevant in specified contexts. Thus, there is some consensus today that many matters which fall outside the control of an individual, such as sex, race, and disability, are generally speaking morally irrelevant bases on which to disfavour people in fields such as the workplace and education. Control is not, however, the invariable key to deciding this matter. Age, for example, although outside control, may often be considered to be morally relevant to the doing of a job: a five-year-old may not be the best person to pilot a jumbo jet! Even more doubt surrounds those issues over which, arguably, people have some control, such as their choice of religion or (more controversially) sexual orientation.

A legal system which outlaws discrimination also has to be acutely aware of the many different ways in which discrimination manifests itself. The law cannot restrict its prohibition to conscious or deliberate acts founded on prejudice, since these are certainly not the only ways in which disadvantage grounded upon discrimination arises. Much discrimination results from the traditional, unquestioning ways in which society is ordered and the ways in which it functions in practice. For example, the ineffectual and haphazard pursuit by the London Metropolitan Police Service of the murderers of the black teenager Stephen Lawrence constituted institutional discrimination, irrespective of the wrongdoing of individual officers. In very important words, which should serve as a reminder to all legislators in this area, Sir William Macpherson's Inquiry into the matter defined the concept of 'institutional racism' as:

> The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.
>
> It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease.[7]

In addition to difficulties surrounding the identification and definition of discrimination, it has become abundantly clear from the practical operation of systems of anti-discrimination law that it is not enough to focus simply on the negative concept of non-discrimination. If the moral basis on which the law forbids discrimination is that there is a fundamental human right to be treated in the same way as other human beings,[8] the aim must logically be to produce substantive equality.[9] This is a much more positive and value-laden concept than non-discrimination, although courts

[7] *The Stephen Lawrence Inquiry*, Cm 4262–1 (HMSO, London, 1999), para 6.34.

[8] In addition to this goal of neutrality as between different groups of people, Fredman has argued that the non-discrimination principle also furthers individualism and personal autonomy: see Fredman, 'Equality: A New Generation?' (2001) 30 ILJ 145.

[9] Cf Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68 MLR 175.

not infrequently conflate the two ideas.[10] In particular, it involves taking an active attitude to dismantling the obstacles which stand in the way of equality (however 'equality' is to be defined).[11] Thus, for example, it is not sufficient for the achievement of equality simply to require the same conditions for all people, whether male or female, black or white; this is because in practice some sections of the community have been historically so disadvantaged as to be unable to compete in the race in the first place. Although most people would probably agree at a relatively rarefied plane of abstraction that equality is a proper goal, there is scope for a great deal of debate over the lengths to which it is proper for the law to go in order to provide such a level playing-field.[12] In addition, there is the even more difficult problem of deciding to what extent equality embraces respect for minority practices and requires the recognition of diversity, as distinct from identity of treatment.[13]

There are many different ways in which the concept of equality can be expressed and in which it can be attempted to be realized in practical terms.[14] It has been described by one commentator as 'one of that genre of words…which have both a vague conceptual meaning and a rich emotive meaning—with the conceptual meaning being subject to constant redefinition'.[15] The same author draws attention to three main (though not exclusive) expressions of the principle of equality, namely 'formal' equality (consistency of treatment), equality of opportunity, and equality of results.

In addition, although many different models of equality can be articulated and described, legal systems often adopt their own individualized views of these various

[10] For example, in Case T-45/00 *Speybrouck v Parliament* [1992] ECR II-33, the Court of First Instance stated that 'the principle of equal treatment for men and women in matters of employment and, at the same time, the principle of the prohibition of any direct or indirect discrimination on grounds of sex form part of the fundamental rights the observance of which the Court of Justice and the Court of First Instance must ensure' (at 46).

[11] For a compelling critique of Europe's existing race discrimination laws from this perspective, see Hepple, 'Race and Law in Fortress Europe' (2004) 67 MLR 1. See also O'Brien's plea for a new concept of economic utility in 'Equality's false summits: new varieties of disability discrimination, "excessive" equal treatment and economically constricted horizons' (2011) 36 ELRev 26.

[12] For a seminal, though now in part historical, analysis of the causes of inequality and the panoply of responses to it which are open to society, see McCrudden, 'Institutional Discrimination' (1982) 2 OJLS 303.

[13] See Barmes with Ashtiany, 'The Diversity Approach to Achieving Equality: Potential and Pitfalls' (2003) 32 ILJ 274; Barmes, 'Equality Law and Experimentation: the Positive Action Challenge' (2009) 68 CLJ 623; and Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (2011) 31 Legal Studies 135, especially at 147–55. The rejected Constitution (discussed below) in Art 1–8, rather engagingly adopted a 'motto' for the EU, which was to be 'united in diversity'.

[14] See McCrudden, 'Equality and Non-Discrimination', in Feldman (ed), *English Public Law*, 2nd edn (Oxford University Press, Oxford, 2009), ch 11; Barnard, 'The Principle of Equality in The Community Context: *P, Grant, Kalanke and Marschall:* Four Uneasy Bedfellows?' (1998) 57 CLJ 352; Fredman, A Critical Review of the Concept of Equality in UK Anti-Discrimination Legislation', Working Paper No 3 (Cambridge Centre for Public Law and the Judge Institute of Management Studies, 1999); and Fredman, *Discrimination Law*, 2nd edn (Oxford University Press, Oxford, 2011).

[15] Barrett, 'Re-examining the Concept and Principle of Equality in EC Law' (2003) 22 YEL 117, at 120.

models. Current EU law, as will be seen throughout this book,[16] espouses differing approaches to the concept,[17] and is indeed subject to competing influences in this regard.[18] There are, in short, no absolutes in this area in practice, although absolute positions can be defined in theory.

The picture can perhaps best be viewed in terms of a continuum. At one end lies what is often called 'formal' equality; this is the minimal, Aristotelian postulate that like cases should be treated alike and that different cases should be treated differently, unless there is an objective reason not to do so. Thus, for example, two people with identical qualifications and experience should be paid the same wage, irrespective of any dissimilarities which they may possess. This is also frequently referred to as the 'merit' principle: individuals ought to be rewarded according to their merit and not according to stereotypical assumptions made about them on account of the group to which they belong. However, such a principle is of course deceptively simple, for how is it to be judged, for example, that the qualifications and experience of two individuals are identical?[19] And to precisely which situations and decisions is the principle to be applied?[20] In addition, this analysis does nothing to improve the condition of an under-class, since it is satisfied where two individuals are treated equally badly, as well as where they are treated equally beneficially. If one of the prime rationales of equality law is the improvement of the lot of human beings, this simply will not do.

These sorts of difficulties lead some legal systems to focus on factual scenarios which can be shown empirically to produce specially severe or marked injustice and hardship ('suspect classifications' in American terminology), and then to enact quite specific laws which attempt to remedy the situation. For example, it is often perceived that, as a result of stereotyping, women and people from ethnic minorities are treated unequally in the workplace by comparison with men and the prevailing ethnic majority. A frequent legislative response is therefore to enact legislation

[16] But see ch 4 in particular.

[17] See Fenwick, 'From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex Equality Law' (1998) 4 EPL 507; Barnard and Hepple, 'Substantive Equality' (2000) 59 CLJ 562; Bell and Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 28 ELRev 349.

[18] See Flynn, 'Equality Between Men and Women in the Court of Justice' (1998) 18 YEL 259, and McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in Fredman (ed), *Discrimination and Human Rights* (Oxford University Press, Oxford, 2001).

[19] See further McCrudden, 'Merit Principles' (1998) 18 OJLS 543.

[20] This sort of problem manifested itself in Joined Cases C–122 & 125/99P *D and Sweden v Council* [2001] ECR I-4319, which concerned the alleged entitlement of a Community employee, who had a registered same-sex partnership under Swedish law, to identical treatment to that accorded to a married employee. The CJEU found that the then existing laws of the Member States showed great diversity in approach to same-sex partnerships and that they did not generally assimilate them to marriage; it held that the employee's situation was therefore not comparable with that of a married employee. On same-sex partnerships, see further Wintemute and Andenas (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart Publishing, Oxford, 2001). In the UK, the Civil Partnership Act 2004 grants legal recognition to same-sex partnerships and places civil partners in the same position as married people as regards discrimination on the ground of their status. As will be seen in later chapters, the position of same-sex partners is today generally treated as close to that of married partners.

making it unlawful to discriminate on the grounds of sex and ethnic origin in the context of employment.

A more fluid version of this principle is also encountered. This acknowledges specific instances of discrimination in practice but then tries to generalize and to cater for similar, but not yet classified, examples of discrimination. Such a model typically covers a broad range of situations in which discrimination is rendered unlawful and contains a *eiusdem generis* provision allowing the prohibition to develop organically to deal with fresh situations as they manifest themselves. McCrudden characterizes this model as prevalent in relation to the 'protection of particularly prized "public goods", including human rights'. He goes on to explain that the focus here is on the distribution of the public goods, rather than on the characteristics of the recipient, except for the purpose of justifying different treatment.[21]

These models, however, share a common shortcoming which is often analysed in terms of symmetry. In the example taken here, the rules apply identically to men and women, and to people from all ethnic backgrounds; indeed, this is at the heart of their philosophy since they are usually predicated on a principle of fundamental human rights and the dignity which should be accorded to all human beings. However, the underlying injustice which they actually seek to counter applies predominantly to women and to people from ethnic minorities. In seeking to treat everyone alike, the law in effect forces a male, ethnic majority paradigm on all. This, it is argued, may appear to produce equality but it is in reality only a formal, superficial kind of equality which reinforces the pre-existing hegemony.[22] In addition, as Fredman has pointed out, these types of model also ignore the fact that cumulative disadvantage makes it difficult for members of the disadvantaged group ever to attain the threshold of equal qualification or merit with the dominant group.[23] Furthermore, these models usually rely heavily upon individual action, normally through litigation, to vindicate the rights protected. They do not provide either the support or the subsequent legal protection offered by a collectivist or group-based remedy. In addition, they may never actually achieve legal redress, since there may never emerge a particular 'wrong-doer' whose actions can be challenged; many manifestations of disadvantage result from an agglomeration of factors and circumstances for which no one person or body may be legally responsible.[24]

[21] McCrudden, 'Equality and Non-Discrimination', in Feldman (ed), *English Public Law*, 2nd edn (Oxford University Press, Oxford, 2009), para 11.05.

[22] MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge, Mass/London, 1987); Fredman, 'European Community Discrimination Law: A Critique' (1992) 21 ILJ 119; Lacey, 'From Individual to Group', in Hepple and Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell, London, 1992).

[23] Fredman, 'The Future of Equality in Britain', Working Paper Series No 5 (EOC, 2002). See also Fredman, *Women and the Law* (Clarendon Press, Oxford, 1997).

[24] But see the CJEU's decision in Case C-54/07 *Centrum v Firma Feryn NV* [2008] ECR I-5187, discussed in ch 4.

Some systems and some bodies of law therefore approach equality from a different angle.[25] Rather than attempting to be blind to differences, they actually focus on differences, especially those which produce disadvantage in practice, and in doing so they clearly come into headlong conflict with the basic non-discrimination principle. They characteristically aim for equality of results, but the extent to which they intervene in the activities of people and organizations varies considerably. In some, there is little more than an obligation to be aware of differences and to endeavour to offer equal participation to all. Others expressly require public authorities actively to promote equality of opportunity.[26] And some are openly re-distributive, for example allocating jobs and other opportunities on the specific basis of membership of an under-privileged group.[27] Such models are clearly, though to varying extents, in tension with the liberal, non-collectivist view of equality which sees it as an individual human right.[28]

It must be emphasized that these models are often much less distinct from one another in practice than these descriptions might suggest. Legal systems frequently blur the distinctions concerned, in particular by combining the principle of non-discrimination with requirements to promote equality of opportunity and to celebrate diversity and pluralism.[29] Such blurring is sometimes also a consequence of the fact that a court may be required to enforce law from several different sources simultaneously. In addition, it should be acknowledged that different times and political climates require different and increasingly sophisticated responses, and that this is an area where one must therefore expect a constantly shifting legislative, as well as judicial,[30] response to society's demands. The title of the present work reflects the fact that the substance of most of the existing EU law in this area refers primarily to the principle of non-discrimination; however, it is not to be taken to

[25] See further O'Cinneide, 'Extending Positive Duties Across the Equality Grounds' (2003) 120 EOR 12.

[26] Notable examples of this approach in the UK are the Northern Ireland Act 1998, s 75, and the Equality Act 2010, ss 1 and 149.

[27] The clearest example of this approach in the UK is to be found in the Police (Northern Ireland) Act 2000; pursuant to the so-called 'Patten' reforms to the Northern Ireland police service, a 50:50 split between Catholics and Protestants was, on a temporary basis, required for recruits to that force.

[28] For a thought-provoking attempt to resolve this tension, see Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16; the author asserts that 'deviations from equal treatment are required in order to achieve the distributive aim of social inclusion. This aim requires preference or priority to members of a particular group, if the group can be classified as socially excluded. The preferential measures required are those that will contribute to the reduction of social exclusion' (at 40).

[29] See Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8 ELJ 290; and Fredman, 'Making Equality Effective: Proactive Measures and Substantive Equality for Men and Women in the EU' European Gender Equality Law Review No 2/2010, 7.

[30] See, eg, Lord Lester's account of attitudes to discrimination expressed in the past by UK courts and judges in 'Equality and United Kingdom Law: Past, Present and Future' [2001] Public Law 77. See also the analysis of the EU case law on sex discrimination by Pager in 'Strictness v Discretion: The European Court of Justice's Variable Vision of Gender Equality' (2003) 51 American Journal of Comparative Law 553; the author there argues that the EU's judiciary adapts the level of scrutiny which it applies according to the nature of the provision under review.

preclude discussion of the concept of equality, which is (as will be seen) also often referred to both in the legislation and in judicial decisions.[31]

Finally, by way of introduction, it must be stressed again that too much should not be expected of non-discrimination and equality law. Of course justice in individual cases is a vital component of a civilized society and the legal system has its obvious part to play in achieving this. The academic commentator's job is to provide a constructive critique of the way in which this role is being discharged and the directions which it ought to pursue. However, little short of a political, social, and economic revolution is still also required to eradicate the deprivation and exclusion experienced by many of today's victims of discrimination.

The dynamism inherent in EU law

EU law has proved an ideal vehicle for upholding the principle of sex equality, in part at least because of the EU's undoubted potential for growth. That growth has taken place, and continues to occur, in a number of different ways. With the expansion of the Union's concerns to cover other grounds of discrimination, it would appear well-nigh inevitable that what has been true in the past for sex equality will also hold good for other fields of equality law.

When the European Coal and Steel Community (ECSC) Treaty was concluded in 1951, and the Treaties establishing the European Economic Community (EEC) and European Atomic Energy Community (Euratom) were concluded in 1957, their chief instigators intended their immediate end to be economic welfare but their long-term goal to be political integration amongst the States of Europe.[32] The architects of the three European Communities had personally witnessed the destructive forces of nationalism; many had seen their countries overwhelmed and occupied during the Second World War. They were increasingly aware of the rise of the then 'Super Powers' and of the threat of Communism in the East. The Schuman Declaration of 9 May 1950, which preceded the formation of the ECSC, made very clear its author's ultimate political aspirations. Robert Schuman, the French Minister for Foreign Affairs, proposed that the whole of the French and German coal and steel production industries be placed under a common 'high authority', within the framework of an organization open to participation by the other countries of Europe. He went on to explain:

> The pooling of coal and steel production will immediately provide for the setting up of common bases for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture

[31] For discussion of the way in which the draft EU Constitution reflected notions of formal and substantive equality, negative and positive duties, and diversity, see Bell, 'Equality and the European Union Constitution' (2004) 33 ILJ 242.

[32] See in particular Ionescu, *The New Politics of European Integration* (Macmillan, London, 1972) and Kitzinger, *The Politics and Economics of European Integration* (Greenwood Press, Westport, Conn, 1963).

of munitions of war, of which they have been the most constant victims. The solidarity in production thus established will make it plain that any war between France and Germany becomes, not merely unthinkable, but materially impossible.

His overall plan was to build a united Europe 'through concrete achievements, which first create a *de facto* solidarity'. The Coal and Steel Community was to be just a first step in an ever-tightening web of economic, and thus political, integration. It was believed that the integration of the coal and steel industries would create common spheres of interest as between the French and the (then West) Germans, which would encourage greater political friendship between those nations; further common economic and social issues would then begin to present themselves and a political framework would have to be established to deal with them. Gradually, the process would gather momentum. This scheme for 'rolling interdependence' between the States of Europe is now, and was from the start, clearly echoed in the founding Treaties. It was taken a stage further when the Member States pledged themselves in the Single European Act of 1986 to make greatly increased use of majority voting in the Council, thereby relinquishing a significant portion of their national sovereignty in favour of the Community. Furthermore, despite the antagonism of many, in particular the British Government, to the use of the word 'federal' in the Treaty on European Union of 1993,[33] it is clear that that Treaty nevertheless continued the progress towards tightening the web; its Preamble proclaimed the Member States:

> Resolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,
>
> …[And] Resolved to continue the process of creating an ever closer union among the peoples of Europe …

It also transformed the nature of the enterprise so as to create the 'European Union'. Founded upon the European Community[34] which was still governed by its own Treaty,[35] the EU was also to direct its attention (albeit in a looser and less supranational fashion) to the wider issues of a Common Foreign and Security Policy and Justice and Home Affairs; it became the pediment (essentially a single institutional framework) over-arching three so-called 'pillars': (i) the Economic Community and Euratom, (ii) the Common Foreign and Security Policy, and (iii) Police and Judicial Cooperation in Criminal Matters. The TEU also paved the way for economic and monetary union. The Amsterdam Treaty of 1997, concluded after the holding of an Intergovernmental Conference (IGC) mandated by the TEU,[36] made numerous technical changes intended to reinforce the economic, social, political, and other links between the Member States.[37] The Member States, however, made clear their

[33] Henceforth referred to in the present work as the TEU. This Treaty was also known colloquially for a number of years as the Maastricht Treaty.

[34] The original title 'European Economic Community' was abbreviated to the 'European Community' by the TEU.

[35] Henceforth normally referred to in the present work as the TEC.

[36] See the original TEU, Art N(2).

[37] Art 12 and the Annex to the Treaty of Amsterdam renumbered the articles of both the TEU and the TEC.

unease with the existing constitutional arrangements surrounding the EU in a Declaration on the Future of the Union which was issued in Nice in 2000, and they therefore decided to convene a new IGC, intended to agree the necessary Treaty amendments. A further Declaration made at Laeken in the following year established a Convention under the chairmanship of ex-President Giscard d'Estaing of France, charged with providing a discussion document for the IGC. This Convention produced a draft Constitution for the Union in 2003, an amended text of which was signed by the Heads of State or Government of all the Member States (but subject to ratification by all of them in accordance with their respective constitutional requirements) on 29 October 2004. The Constitution was an amalgam of legal provisions, both articulating the most fundamental of principles on which the Union was based and also containing a mass of detailed rules, substantive and institutional. It turned out to be widely considered to be too overtly federal in tone and therefore politically unacceptable and was rejected by referendums in France and the Netherlands in 2005. However, a modified version was agreed by the Member States in 2007 and this became the Lisbon Treaty; its legal effect was delayed by a no-vote in Ireland in a referendum of 2008 but this was reversed in a second referendum of 2009. The Lisbon Treaty entered into force on 1 December 2009. It amends and systematizes the earlier Treaties. The pillar structure has been removed and the Union is now simply founded on two Treaties: a consolidated version of the TEU and a new Treaty on the Functioning of the European Union[38] which replaces the TEC. The TFEU 'organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences'.[39] The TEU and the TFEU are renumbered[40] and are expressed to have the same legal value.[41] The Union replaces and succeeds the European Community so that it is now legally accurate to refer to the EU in relation to all aspects of its activities. It is evident that, although public relish for formal federalization has perceptibly waned over recent years, the process of European integration is thus set to continue, probably bringing in its wake yet further legislation supporting closer economic and political ties which are well-nigh certain to touch on the spheres of equality and non-discrimination.

The process of European integration has not, however, been restricted to the deepening of ties between the States of Europe. It has also been significant because it has hugely broadened the geographical scope of the enterprise. The Treaties, of course, provide for the accession of new Member States[42] and, although only six States joined in the wake of the original Schuman Declaration,[43] the EU today consists of 27 Member States and spans most of Western and Central Europe.[44]

[38] Referred to in the present work as the TFEU. All references to Treaty articles henceforth are to the TFEU, unless otherwise stated.

[39] Art 1(1).

[40] The article numbers used in the present work are those given by the Treaty of Lisbon, unless the context requires otherwise.

[41] Art 1(2).

[42] See now TEU, Art 49.

[43] France, West Germany, Italy, Belgium, The Netherlands, and Luxembourg.

[44] The UK, Ireland, and Denmark became members of the Communities from 1 January 1973; Greece acceded as of 1 January 1981, Spain and Portugal as of 1 January 1986, and Austria, Finland and

A third way in which the development of modern Europe has provided important support for the principle of equality is through its enhanced emphasis in recent times on the protection of human rights.[45] The Treaty of Amsterdam first amended the TEU so as to articulate this emphasis. The Union's fundamental values are today proclaimed in Article 2 of the TEU:

> 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.

The Treaty of Lisbon gives legal force to the Charter of Fundamental Rights of 7 December 2000, as adapted at Strasbourg on 12 December 2007;[46] it is expressed to have the same legal value as the Treaties but cannot in any way extend the competences of the Union as defined in the Treaties.[47] It is also provided that the Union 'shall accede' to the European Convention for the Protection of Human Rights and Fundamental Freedoms[48] although such accession is not to affect the Union's competences as defined in the Treaty.[49] Provisional agreement was reached on accession in 2011. Fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are to constitute general principles of EU law.[50] A procedure is set out for dealing with a 'clear risk of a serious breach' by a Member State of the values referred to in Article 2 of the TEU; in the event of such a breach being established, certain of the defaulting Member State's Treaty rights, including the right to vote in the Council, may be suspended.[51]

These aspects of the development of the EU are vital to an understanding of its equality laws. The Treaties and their present provisions are in no sense intended to be an end in themselves but rather a staging-post in an ultimate design. The social provisions, especially those protecting fundamental human rights, are growing and developing as the linkage between the Member States becomes closer. Furthermore, the Union's geographical extension brings its jurisdiction to bear over a vastly expanded population. What this means in practical terms is that a continuously developing body of equality law now reaches a very large, and ever-

Sweden as of 1 January 1995. The largest wave of accessions took place on 1 May 2004 and brought into membership of the Union Hungary, Poland, the Czech Republic, Slovakia, Slovenia, Malta, Cyprus, Estonia, Latvia, and Lithuania. Bulgaria and Romania acceded in 2007. At the time of writing, Croatia, the former Yugoslav Republic of Macedonia, Turkey, and Iceland are candidates for admission.

[45] See further Ellis, 'The impact of the Lisbon Treaty on gender equality' [2010] No 1 European Gender Equality Law Review 7. Cf the highly sceptical view of the EU's approach to human rights expressed in Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press, Oxford, 2004).

[46] The Charter was originally included as Part II of the proposed Constitution.

[47] TEU, Art 6(1).

[48] ETS No 5, 1950. Henceforth referred to in the present work as the ECHR.

[49] TEU, Art 6(2).

[50] TEU, Art 6(3).

[51] TEU, Art 7.

expanding, group of people. An element of dynamism is contained within this formula which is almost always lacking in any wholly domestic context.

Sources of EU anti-discrimination law

Crucial to the concept of federation is the existence of a distinct legal system, belonging exclusively to the federation itself. This means that a federation must be able both to create its own laws and to enforce them effectively through its own system of courts or tribunals. The drafters of the European Community Treaties, eager as they were to create the germ from which a federation would grow, were aware of these needs and therefore provided for a system of Community law, together with appropriate law-making powers, enforceable through the medium of what is today called the Court of Justice of the European Union (the CJEU)[52] and the local courts. Essentially, they made provision for both primary and secondary tiers of Community law. The original Treaties stopped short of using the actual word 'legislation' in describing the legal system which they created, presumably for the political and psychological reasons that this might have proved unacceptable to national parliaments at the time of their accession to the European Communities. As will be seen below, however, the Lisbon Treaty bites the bullet and refers to the power to legislate and to legislative acts.[53]

The Lisbon Treaty also contains a number of important references to the principles of equality and non-discrimination in various fields. Article 2 of the TEU has been referred to above. In addition, the second recital of the Preamble to the TEU now proclaims that the Member States draw 'inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'. Article 3 of the TEU is concerned with the re-vamped aims of the Union, namely to promote peace, the Union's values and the well-being of its peoples; in the second indent of paragraph 3 the Article pledges the Union to 'combat social exclusion and discrimination' and to 'promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child'.[54] The importance of equality in the broad sense is also affirmed in

[52] The CJEU's sister court was created in 1988 and was originally named the 'Court of First Instance'. It is today called the 'General Court' by the TEU, Art 19, which also creates new 'specialized' courts for the Union. The specialized courts have jurisdiction over certain classes of action or proceedings brought in specific areas; see further TFEU, Art 257.

[53] TFEU, Art 289(3) provides: 'Legal acts adopted by legislative procedure shall constitute legislative acts'. But see discussion in Dashwood, Dougan, Rodger, Spaventa and Wyatt (eds), *Wyatt and Dashwood's European Union Law*, 6th edn (Hart Publishing, Oxford, 2011), ch 4, for the complex distinction between legislative and non-legislative acts in modern EU law.

[54] Note also the Declaration made by the Member States on TEU, Art 3: 'The Conference agrees that, in its general efforts to eliminate inequalities between women and men, the Union will aim in its

specific contexts; in particular, Article 9 of the TEU which is concerned with democratic principles states that: 'In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies'.[55] Also noteworthy is Article 21 of the TEU, at the start of Title V on external action and the Common Foreign and Security Policy; it provides in paragraph 1 that: 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.

(i) The TFEU

The main primary source of EU law is the founding Treaties, as they have been amended over the years. The Lisbon amendments to the TEU emphasizing the importance attributed today to the principles of equality and non-discrimination were noted in the preceding section. The TFEU also contains a number of provisions which are relevant in this field. Such provisions are of three types, namely, statements of principle or intent, provisions which convey substantive rights, and those which confer enabling authority on the institutions of the EU to make secondary legislation.

Taking first the statements of principle or intent, the significance to the Union of outlawing sex discrimination is indicated by Article 8 which promises that: 'In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women'.[56] Article 10 further spells out that: 'In defining and implementing its policies and activities, the Union shall[57] aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Article 21(1) of the Charter expands on this by providing that 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability,[58] age[59] or sexual orientation shall be prohibited';[60] and Article 22 of the Charter promises that the Union will respect

different policies to combat all kinds of domestic violence. The Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims'.

[55] See also the Protocol on Services of General Interest which is annexed to the founding Treaties and commits the Member States to respecting the principle of equality in respect of services of general economic interest.

[56] Formerly, TEC, Art 3(2).

[57] The imperative tone of both this and Art 8 is noteworthy.

[58] See also Art 26 of the Charter.

[59] See also Art 25 of the Charter.

[60] As discussed in ch 5, Art 21 of the Charter was relied upon by the CJEU in Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL* [2010] ECR I-000 in order to invalidate a sex-

cultural, religious, and linguistic diversity. Article 17 of the TFEU pledges respect by the Union for churches, religious associations or communities, and philosophical and non-confessional organizations.

Article 157[61] specifically enunciates the principle of equal pay for equal work irrespective of sex. As the Treaty was originally drafted, this was the only explicit mention anywhere in it of the principle of sex equality,[62] and so it provided the inspirational springboard for the subsequent developments in this area. As it is currently drafted, the Article also protects the wider principles of equality of opportunity and equal treatment in the world of work. It is echoed by Article 23 of the Charter which states that sex equality must be ensured 'in all areas, including employment, work and pay'.[63]

The third type of Treaty provision relevant in the present context is that which provides the legal authorization for further, secondary legislation. Title I of the TFEU sets out the respective spheres of competence of the Union and the Member States. In the areas enumerated in Article 3, the Union enjoys exclusive competence to legislate, whilst in those referred to in Article 4(2) it shares competence with the Member States; such shared competence relates in particular to '(b) social policy, for the aspects defined in this Treaty'. Article 2(2) explains that, where there is shared competence:

> [T]he Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

The institutions are empowered by Article 288 to enact measures of secondary legislation in order to 'exercise the Union's competences'. What is today Article 157 itself conferred no secondary law-making power until its amendment by the Amsterdam Treaty. Now, however, paragraph (3) provides:

> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure,[64] and after consulting the Economic and Social Committee,[65] shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of

discriminatory exception contained in a directive, which permitted the continued use of gender-specific actuarial calculations by the insurance industry.

[61] Before the Lisbon renumbering of the Treaty, this provision was contained in Art 141. Under the pre-Amsterdam numbering, the substance of what today are the first two paragraphs of Art 157 were contained in Art 119 and many of the older cases cited in the text therefore refer to Art 119.

[62] A number of references to sex equality were added by the Amsterdam Treaty, as will be discussed.

[63] This provision was also relied upon by the CJEU in Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL* [2011] ECR I-000.

[64] The ordinary legislative procedure is defined in Arts 289 and 294 and involves the joint adoption of an act by the European Parliament and the Council on a proposal from the Commission.

[65] The Economic and Social Committee 'shall consist of representatives of organizations of employers, of the employed, and of other parties representative of civil society, notably in socio-economic, civic, professional and cultural areas': Art 300(2).

men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

The breadth of this enabling provision is noteworthy; it permits measures in general and is not limited to any one form of legislative instrument.[66] It is expressed to extend to measures ensuring equality of opportunity and is not restricted to those simply outlawing discrimination.[67] Furthermore, it encompasses not merely pay equality but also other aspects of equal treatment. The important issue of how far it will be permitted to extend to equal treatment outside the traditional world of paid work will depend on the policy adopted by the CJEU in relation to the interpretation of the word 'occupation'.

Also of prime significance is Article 19(1), which states:[68]

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union,[69] the Council, acting unanimously in accordance with a special legislative procedure[70] and after obtaining the consent of the European Parliament,[71] may take appropriate action to combat discrimination[72] based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[73]

It is noteworthy that this Article is to be found in Part Two of the TFEU, headed 'Non-Discrimination and Citizenship of the Union'; this will arguably enable the

[66] See discussion at p 19 et seq. of the different legislative instruments available in EU law.

[67] See discussion at p 2 et seq.

[68] The forerunner of Art 19 was Art 13 which was created by the Treaty of Amsterdam. As to its genesis, see Flynn, 'The Implications of Article 13 EC—After Amsterdam, Will Some Forms of Discrimination be More Equal Than Others?' (1999) 36 CMLRev 1127.

[69] Note the subtly different opening words of Art 18 on nationality discrimination: 'Within the *scope of application of the Treaties* and without prejudice to any *special* conditions contained therein' (emphasis added). It remains to be seen whether any significance will be ascribed by the CJEU to these verbal differences.

[70] Art 289 explains that, '[i]n the specific cases provided for by the Treaties, the adoption [of a legislative act]…by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure'.

[71] The old Art 13 gave a more marginal role to the European Parliament, requiring only its consultation. This seemed ironic, given that this area touches the very heart of social policy. The difference between the Parliament's role under Art 13 and that under the old Art 141(3) led to differences in the texts of the instruments adopted pursuant to these respective provisions. Note: Art 19(1) does not involve the full co-decision procedure and, although increasing the Parliament's powers in this area from its old ones, somewhat limits its input to the debate over new measures. Note also: Art 19(2) permits the adoption by qualified majority of incentive measures, excluding harmonization measures, to support action taken by the Member States against discrimination on the grounds listed in para (1).

[72] As will be seen below, the CJEU and the EU legislature interpret the expression 'to combat discrimination' as embracing the pursuit of substantive, as well as merely of formal, equality.

[73] Considerable disagreement between the Member States preceded the adoption of this Article. Whilst most agreed on the need to include sex, race, and religion, there was much less commitment to the other grounds. The UK, under Conservative administrations, was opposed to any EU instrument on discrimination; this attitude changed only with the election of a Labour Government in 1997, whose support made possible the unanimous agreement necessary for the adoption of the new Article. The Irish Presidency of the Council in the second half of 1996 is widely credited with the eventual text of Art 13. Ireland's enthusiasm for such legislation was also manifested shortly afterwards by the adoption of its own wide-ranging national Employment Equality Act 1998.

CJEU, if it is so inclined, to emphasize the constitutional importance of the instruments adopted pursuant to Article 19. The opening phrase of the Article indicates that it is not to be used where other, more specific, enabling authority exists, and Article 157(3) will thus usually be the appropriate provision for legislation dealing exclusively with sex discrimination;[74] however, Article 19 could be used for the enactment of a composite measure which addressed discrimination based on sex as well as the other prohibited classifications. Like Article 157(3), Article 19 authorizes all types of legislative or other instrument,[75] but it should be noted that its ambit is restricted to the prohibition of discrimination and that it does not extend to measures to promote equality of opportunity on the wider scale.[76]

Before the creation by the Amsterdam Treaty of enabling provisions dealing expressly with sex equality, more general enabling provisions had to be utilized for the enactment of secondary legislation in this area. The most obvious candidates were what are today Articles 115 and 352. Article 115 permits the Council, acting unanimously (in accordance today with a special legislative procedure) and after consulting the European Parliament and the Economic and Social Committee, to make directives[77] 'for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market'. This is often called 'harmonization' legislation. Article 352 is generally a little wider in its scope and provides:

> If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament,[78] shall adopt the appropriate measures.

Some further bases for harmonization legislation were provided by the Single European Act of 1986, in particular what was then Article 118a. This was used to mandate Council directives for improving the health and safety of workers.[79] The

[74] This provision was used as the authority for the Recast Directive, Directive 2006/54, OJ [2006] L204/23, discussed further below, and for the Directive on Equal Treatment between men and women engaged in an Activity in a Self-employed Capacity, Directive 2010/41, OJ [2010] L180/1, discussed in ch 6.

[75] See Waddington, 'Testing the Limits of the EC Treaty Article on Non-discrimination' (1999) 28 ILJ 133.

[76] It was given a strict interpretation in Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467. In Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Mazak AG observed that the Article is simply an enabling provision and cannot have direct effect (at para 36); for discussion of the concept of direct effect, see ch 2.

[77] For the definition and characteristics of a directive, see below.

[78] The predecessor Art 308 of the TEC gave only a right to be consulted to the European Parliament.

[79] In this form it provided the authorization for the Pregnancy Directive (Directive 92/85, OJ [1992] L348/1), discussed in ch 7.

Amsterdam Treaty generalized the provision[80] and today its successor, Article 153, provides that the Union will support and complement the activities of the Member States in a number of fields including:

(a) improvement in particular of the working environment to protect workers' health and safety;
(b) working conditions;
(c) social security and social protection of workers;
…
(h) the integration of persons excluded from the labour market;
…
(i) equality between men and women with regard to labour market opportunities and treatment at work.

To these ends, the European Parliament and the Council are authorized to adopt directives setting 'minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States'.[81] Such directives must not, however, impose administrative, financial, and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.[82] The European Parliament and the Council are also permitted to adopt measures:

designed to encourage co-operation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States.[83]

Such action is to be in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions.[84] Exceptionally, however, in order to take action *inter alia* in the fields of social security and social protection, the Council has to act unanimously in accordance with a special legislative procedure, after consulting the European Parliament, the Economic and Social Committee, and the Committee of the Regions.[85]

Until its repeal by the Amsterdam Treaty, the Protocol on Social Policy annexed at Maastricht to the TEC provided a vehicle for a special kind of secondary legislation.[86] The Protocol contained an Agreement on Social Policy, acquiesced to by all the Member States apart from the UK, which refused whilst under the Conservative administration to be involved in any further extension of the powers

[80] It absorbed into the body of the TEC the provisions which had formerly been contained in the Agreement on Social Policy, discussed below. [81] Art 153(2)(b).
[82] Art 153(2)(b). [83] Art 153(2)(a). [84] Established by Art 300(3). [85] Art 153(2).
[86] The then Art 311 provided that Protocols annexed to the TEC were to form 'an integral part thereof'.

of the Community in the field of social policy.[87] Legislative action[88] pursuant to the Agreement took place according to the usual EC institutional procedures, but without the participation of the UK in the relevant Council meetings since such legislation did not bind the UK.[89] It could supplement but could not detract from the pre-existing *acquis communautaire*.[90]

Several instruments were concluded under the aegis of the Protocol and Agreement, the first being the Directive on Works Councils.[91] This was followed by a European-level collective agreement on parental leave signed on 14 December 1995. The agreement was subsequently enacted in the form of a directive in June 1996.[92] A directive on parental leave had been proposed as long ago as 1984, but was consistently opposed by the UK Government on financial grounds. The proposal was resurrected after the Social Policy Agreement came into force. Another measure which had remained stalled for a long time because of the intransigence of the UK Government of the day was a proposed directive on the burden of proof in sex discrimination cases and on the definition of indirect discrimination; the social

[87] It was suggested by some writers that the UK's social policy opt-out could be contrary to a 'higher principle' of Community law (ie, superior in legal force to the written rules of the Treaty), such as that of the uniform application of EC law or the principle of legal certainty, and that it was therefore invalid. See Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 LQR 95; Whiteford, 'Social Policy After Maastricht' (1993) 18 ELRev 202; and Curtin, 'The Constitutional Structure of the European Union: a Europe of Bits and Pieces' (1993) 30 CMLRev 17.

[88] Art 2(2) permitted the Council to adopt directives in accordance with the procedure referred to in the former Art 252, after consulting the Economic and Social Committee. Art 2(3) permitted unspecified action to be taken by the Council unanimously on a proposal of the Commission, after consulting the European Parliament and the Economic and Social Committee, in areas which included social security and the protection of workers. Art 4 envisaged Community level collective agreements which could, in certain circumstances, be implemented by a Council decision on a proposal from the Commission. See further Fitzpatrick, 'Community Social Law After Maastricht' (1992) 21 ILJ 199 and Watson, 'Social Policy After Maastricht' (1993) 30 CMLRev 481.

[89] Thus the Agreement created for the first time the potential for a 'two speed Europe'. For the view that the Protocol created a real danger of 'social dumping', in other words, 'investment by companies in the United Kingdom where labour costs are lower than in other Member States, which will result in workers in those other Member States being forced to accept lower standards in order to avoid unemployment', see Watson, 'Social Policy After Maastricht' (1993) 30 CMLRev 481.

[90] See the opening recital to the Protocol. Curtin, in 'The Constitutional Structure of the European Union: a Europe of Bits and Pieces' (1993) 30 CMLRev 17, questioned the legal status of such 'legislation', pointing out that the wording adopted by the Protocol authorized the participating States to adopt acts 'among themselves' and arguing that the products of such agreements could not constitute EC law with the qualities set out in the then Art 249. The Commission, however, asserted that 'the Community nature of measures taken under the Agreement is beyond doubt, which means that the Court of Justice will be empowered to rule on the legality of directives adopted by the Eleven and to interpret them' (Communication concerning the application of the agreement on social policy presented by the Commission to the Council and to the European Parliament COM(93) 600 final). To the same effect, see also Bercusson, 'The Dynamic of European Labour Law After Maastricht' (1994) 23 ILJ 1.

[91] Directive 94/45, OJ [1994] L254/64, as to which see also Burrows and Mair, *European Social Law* (Wiley, Chichester, 1996), ch 14. At a lecture in the University of Birmingham in 1995, Prof Giorgio Gaja pointed out that the adoption of the usual EC system for the numbering of such directives was deceptive because it implied that they were ordinary instruments of EC law; furthermore, he asserted that this confused the legislative system.

[92] Directive 96/34, OJ [1996] L145/4, discussed in ch 7.

partners decided that they did not wish to negotiate an agreement on this matter, but progress was made towards the enactment of legislation when unanimous political agreement[93] was reached on a common position at a Council meeting in the Summer of 1997.[94] In addition, an agreement between the social partners was reached in June 1997 on discrimination against part-time workers, subsequently transposed into a directive in the summer of 1997.[95] A framework agreement on fixed-term work was concluded on the same basis and later transposed into a directive.[96] After its election in May 1997, the new Labour Government of the UK announced its intention to commit itself to all the instruments hitherto agreed by the other Member States under the Social Policy Agreement.[97]

(ii) Secondary legislation

Secondary EU law is of three types: regulations, directives, and decisions. Article 288 of the TFEU defines the basic attributes of each. Regulations are stated to have 'general application', which means that they create binding legal obligations for every person within the Union. This is not to say that they necessarily in fact impinge on the legal situation of each and every legal person within the Community, since they are frequently of a highly specialized nature and regulate only specific activities or industries. They do, however, create general law and thus have the potential actually to affect the legal position of any legal person within the Community. Their nearest equivalent in domestic legal terms is Parliamentary legislation. Article 288 goes on to provide that regulations are binding in their entirety and 'directly applicable in all Member States'. The meaning of this latter phrase is not at once self-evident, but it is clear from comparison with what Article 288 goes on to say about the effects of directives that it is intended to indicate that regulations have automatic legal force and require no implementing measures to be taken by the legislative or other authorities in the Member States. The CJEU has also confirmed this interpretation.[98] It follows that regulations are the appropriate instrument for achieving uniformity or identity of legal provision throughout the Community.

Directives, unlike regulations, are expressed by Article 288 to be addressed to States rather than being of 'general application'. A directive is binding 'as to the

[93] Including that of the UK. [94] COM (96) 340 final.

[95] Directive 97/81, OJ [1998] L14/9, discussed in ch 6.

[96] Directive 1999/70, OJ [1999] L175/43, also discussed in ch 6.

[97] The existing instruments were re-enacted with the agreement of the UK; as Usher observed in *EC Institutions and Legislation* (Longmans, London, 1998), this suggests that the matters covered by the Agreement on Social Policy fell within the mainstream of Community law all along.

[98] In Case 93/71 *Leonesio v Italian Ministry of Agriculture and Fisheries* [1972] ECR 287, the CJEU said (at 293): 'Therefore, because of its nature and its purpose within the system of sources of Community law it has direct effect and is, as such, capable of creating individual rights which national courts must protect. Since they are pecuniary rights against the State these rights arise when the conditions set out in the regulation are complied with and it is not possible at a national level to render the exercise of them subject to implementing provisions other than those which might be required by the regulation itself.'

result to be achieved' on each Member State to which it is addressed, but it leaves to the national authorities 'the choice of form and methods'. Directives thus do not take effect within the legal systems of the Member States as they stand. Rather, they require the Member States to legislate to achieve a particular end-product. They require transposition into national law[99] and always contain a time-limit by which such transposition must have been carried out. They are chiefly of use when mutually compatible, or harmonized, laws are needed amongst all the Member States, as distinct from where identical provisions are required.

In practice, all the secondary legislation to date in the fields covered by the present work has taken the form of directives, so that their nature and effects are particularly significant in the present context. The directives thus far enacted have been clustered around three broad themes, namely, sex equality, non-discrimination on the ground of race, and non-discrimination on the remaining grounds set out in Article 19. The major instruments concerned are: the 'Recast' Directive[100] which supplements Article 157 of the Treaty and proscribes sex discrimination in the world of work;[101] the Race Directive,[102] which implements the principle of equal treatment irrespective of racial or ethnic origin; the 'Framework' Directive,[103] the purpose of which is to combat discrimination on the grounds of religion or belief, disability, age, or sexual orientation; and the Goods and Services Directive which implements the principle of equal treatment between men and women in the access to and supply of goods and services.[104]

A decision, according to Article 288, is 'binding in its entirety'. However, if it specifies those to whom it is addressed, it is only binding on those persons.[105]

All three instruments of secondary legislation are required to state the reasons on which they are based and must refer to any proposals or opinions which the Treaty required to be obtained.[106] Legislative acts are required to be published in

[99] A national measure can transpose a directive without referring to it, even in a case where the relevant directive expressly requires the implementing law to make reference to it: Case C-444/09 *Gavieiro v Conselleria de Educación* [2010] ECR I-14031.

[100] On the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Directive 2006/54, OJ [2006] L204/23, discussed by Burrows and Robison, in 'An Assessment of the Recast Community Equality Laws' (2007) 13 European Law Journal 186.

[101] But note that there are a number of other directives which also support the principle of sex equality and are discussed elsewhere in the present work.

[102] Directive 2000/43, OJ [2000] L180/22.

[103] Directive 2000/78, OJ [2000] L303/16. Like the Race Directive, the Framework Directive was adopted pursuant to the old Art 13. For the argument that Art 13 was not the appropriate Treaty base, and the suggestion that reasons of pragmatism and political expediency influenced the choice, see Bell and Whittle, 'Between Social Policy and Union Citizenship: the Framework Directive on Equal Treatment in Employment' (2002) 27 ELRev 677. However, Geelhoed AG stated in Case C-13/5 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467 (at para 45 of the Opinion) that the choice of Art 13 as the sole legal basis for a general prohibition of discrimination on the ground of disability was correct.

[104] Directive 2004/113, OJ [2003] L373/37.

[105] The wording of Art 288 in relation to decisions differs slightly from its predecessor Art 249 of the TEC.

[106] TFEU, Art 296.

the Official Journal of the European Union.[107] They enter into force on the date specified in them or, if no such date is specified, on the twentieth day following their publication.[108]

The relevant enabling article in the founding Treaties has to be examined in order to discover what type of secondary law is permitted in any given instance. Where the enabling article does not specify the type of act to be adopted, Article 296 of the TFEU requires the institutions to 'select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality'.[109]

(iii) Decisions of the CJEU and the General Court

As will become evident in the rest of this book, judicial decisions have played, and continue to play, an extremely important role in shaping EU law in the area of equality and non-discrimination. Many vital concepts, words, and phrases have either been left undefined in the relevant legislation, or have been defined only broadly; their articulation and effect are therefore in the hands of the CJEU. Although the Court does not adopt a formal system of precedent, and remains free to change its mind in subsequent decisions, in practice it establishes core areas of jurisprudence which act as sources of law.

The exclusive jurisdiction enjoyed by the CJEU over the preliminary rulings procedure[110] has meant that in practice the CJEU's jurisprudence has so far been vastly more influential in this area than that of the General Court, since preliminary rulings have provided the vehicle for most of the anti-discrimination litigation.

(iv) Instruments for the protection of fundamental human rights

As seen above, the Charter of Fundamental Rights today has the same legal value in EU law as the founding Treaties.[111] In addition, the ECHR is expressed to be a direct source of general principles of EU law.[112]

However, a number of other internationally agreed instruments which seek to protect fundamental human rights exert at least an indirect influence on the content of EU law. Their relevance in the specific field of equality and anti-discrimination law will be discussed further in chapter 3. Of particular importance in this

[107] TFEU, Art 297(1).

[108] TFEU, Art 297(1). Directives which are addressed only to some Member States, and decisions which specify to whom they are addressed, must be notified to their addressees and take effect upon such notification: TFEU, Art 297(2).

[109] TEU, Art 5(4) provides: 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.

[110] This is a procedure which enables national courts to seek the help of the CJEU in interpreting and applying EU law; see ch 2.

[111] TEU, Art 6(1).

[112] TEU, Art 6(3).

context are the European Social Charter of 1961, revised in 1996, the Community Social Charter of 1989, both referred to in the Preamble to the TEU,[113] and the UN Convention on the Rights of Persons with Disabilities.[114]

(v) Other indirect sources

Since the European judicature has a wide measure of discretion in interpreting and applying anti-discrimination and equality law, it is inevitably thrown back on a number of other sources when deciding what policy consideration should guide it.

Amongst such sources should be listed, no doubt *inter alia,* the constitutional provisions of the Member States,[115] international instruments, and non-binding instruments of EU law (so-called 'soft' law). The part they play is discussed more fully in chapters 2 and 3.

The grounds on which EU law forbids discrimination

The picture which emerges from a consideration of the numerous sources of EU equality and non-discrimination law is a complex one. There are a number of instruments to which a court must have regard in deciding an issue within this area, and the European judicature, in seeking to resolve ambiguities and unclear matters, must have recourse to many different instruments. Nevertheless, in the current state of the law, there is only a limited list of grounds on which EU law actually contains an outright prohibition on discrimination. These are nationality, sex, part-time and temporary employment, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.

(i) Nationality

A number of provisions of EU law forbid discrimination against persons on the ground of their possessing the nationality of one of the Member States. The most important are Article 18 of the TFEU, prohibiting such discrimination in general terms and authorizing the European Parliament and the Council to adopt rules designed for this purpose, and Articles 45–63, providing for the free movement of workers, the right of establishment, and the freedom to provide services within the Union. A substantial body of secondary law has also been enacted to support these rights. However, for reasons already set out, discrimination on the ground of nationality is not dealt with extensively in the present work.

[113] See Recital 5. [114] See further at p 40. [115] See TEU, Art 6(3).

(ii) Sex

That the improvement of the quality of life for the peoples of the Communities is an ideal underlying the EU is clear from the Preamble to the TFEU[116] and from the aspirations of the founders of the Communities discussed above. However, at the time the original TEC was being drafted, there were two radically opposed conceptions of the relationship between social policy and the establishment and functioning of the proposed Common Market. The French view was that the harmonization of the 'social costs' of production was necessary in order to make sure that businesses competed on a fair and equal basis once the barriers to the free movement of persons and capital were removed. At the time of the negotiations, there were important differences in the scope and content of the social legislation in force in the States concerned. France, in particular, had on her statute book a number of rules which protected workers and were consequently expensive for employers. For example, legislation of 1957 mandated equal pay for men and women. Workers in France also had longer paid holidays than workers in the other States, normally a minimum of 24 days. They were, in addition, entitled to overtime pay after fewer hours of work at basic rates than elsewhere. All this meant that the French feared that the indirect costs of production of goods in France would make French goods uncompetitive in the proposed Common Market and would damage French industry. They therefore sought to persuade the other negotiating States that social costs should be equalized throughout the Community. Germany, however, took a very different line, arguing that the harmonization of indirect or social costs would inevitably follow from the setting up of a Common Market. The Germans were also strongly committed to a minimum level of government interference in the area of wages and prices.

A compromise was ultimately reached and the two differing viewpoints were both reflected in the Treaty's social policy provisions.[117] In particular, the French delegation succeeded in persuading the others to accept two specific provisions, which would protect French industry from the kind of 'social dumping' of which it was afraid. These are what are today Article 157, on equal pay for men and women,[118] and Article 158, which provides that the Member States will 'endeavour to maintain the existing equivalence between paid holiday schemes'.

[116] See in particular recital 3: 'Affirming as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples.'

[117] That the debate between the two positions is not yet over has been shown in more recent times by the altercations between those who would seek to de-regulate employment and their opponents who advocate harmonized social policy legislation as the only route to real future progress in Europe. A more recent example of the practical issues involved can be seen in the decision of Hoover, a US company, to close its factory in Dijon and transfer production to Scotland, where the burden of social protection provisions was perceived to be less than that in France: see Editorial Comment, 'Are European Values Being Hoovered Away?' (1993) 30 CMLRev 445.

[118] See Forman, 'The Equal Pay Principle under Community Law' (1982) 1 LIEI 17. Note that despite its legislative history, the equal pay article makes no suggestion (and neither has the subsequent case law of the CJEU) that it protects only women and not men.

Despite this somewhat unedifying origin, there emerged a principle which both the Union and the CJEU were to regard as of fundamental importance, namely, the equal treatment of men and women. Social policy generally came to play an increasingly prominent role in practice because it provided a useful mechanism by which to emphasize the human face of the Community, against a background of criticism that it was exclusively economic, capitalist, and uncaring. Social policy legislation was also made more necessary as a result of economic recession and mass unemployment. So, by 1972, the communiqué issued by the Paris Summit Meeting stated that the Heads of State or Government attached 'as much importance to vigorous action in the social field as to the achievement of monetary and economic union'. A 'Social Action Programme' followed in 1973,[119] which was approved by the Council in January 1974.[120] The Social Action Programme had three main aims: the attainment of full and better employment; the improvement of living and working conditions; and the increased involvement of management and labour in the economic and social decisions of the Community, and of workers in the life of undertakings. Among other things its objectives included the bringing about of a 'situation in which equality between men and women obtains in the labour market throughout the Community, through the improvement of economic and psychological conditions, and of the social and educational infrastructure'.

Gradually, equality of opportunity as between the sexes took its place at the forefront of EU social policy.[121] In addition to the enactment of a series of directives on the subject, a number of 'Action Programmes' have been mounted by the Commission, most recently to cover 2010–15. These have sought to enforce the equality legislation on a practical level in numerous ways, a matter of the utmost importance if the kinds of structural disadvantages faced by women which have been discussed earlier in this chapter are to be dismantled. 'PROGRESS', a new integrated six-year programme for employment and social solidarity was launched by the Commission in 2006;[122] it contains five sections: employment, social protection and social inclusion, working conditions, anti-discrimination and diversity, and gender equality. A number of measures have similarly been initiated to promote the integration of the Roma people.[123] And, in 2010, the Commission adopted a five-year strategy for equality between women and men,[124] as well as a ten-year disability strategy.[125] An 'Advisory Committee on Equal Opportunities for Women and Men' was established in 1982 to help the Commission to formulate and implement policy on the advancement of women's employment and equal opportunities, and to arrange for the exchange of information between interested bodies in this field.[126] A group of governmental experts on discrimination was also set up in 2007.[127] In addition, the

[119] 24 October 1973, COM (73) 1600. [120] OJ [1974] C13/1.
[121] For an account of the processes at work to achieve this end, see Harlow, 'A Community of Interests? Making the Most of European Law' (1992) 55 MLR 331. [122] OJ [2006] L315/1.
[123] COM (2010) 133 final. [124] COM (2010) 491 final. [125] COM (2010) 636.
[126] Commission Decision 82/43/EEC of 9 December 1981, OJ [1982] L20.
[127] COM (2008) 3261 final.

Amsterdam Treaty gave a strong new emphasis to equality of opportunity irrespective of sex and this has been maintained in the Lisbon Treaty.

Quite why equality—especially sex equality—has been accorded this sort of priority by the Community is open to speculation. On an economic level, it is clearly important to prevent competitive distortions in a now quite highly integrated market. On the political level, perhaps it has been selected because it provides a relatively innocuous, even high-sounding, platform by means of which the Community can demonstrate its commitment to social progress. Barnard has also suggested that the promotion of the concept of equality by the CJEU has served, in times of uncertainty about the future of the EU, to legitimize the Union and to strengthen political integration.[128]

The part played by the European Parliament in the process will provide an interesting study for the historians of future generations. The Parliament, which has a higher proportion of women members than have the national parliaments,[129] has since 1984 possessed an influential Standing Committee on Women's Rights and has on several occasions provided the impetus for Community action in this field.[130] To some extent, it may be that to accede to demands made by the Parliament in the sphere of equal rights between the sexes has provided the Community's executive with a useful way out of heeding its advice in other fields.[131]

The CJEU has also made clear the importance which it attaches to the principle of sex equality. In its seminal decision in *Defrenne v Sabena*,[132] it held:

> The question of the direct effect[133] of Article 119 must be considered in the light of the nature of the principle of equal pay, the aim of this provision and its place in the scheme of the Treaty. Article 119 pursues a double aim. First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community

[128] Barnard, 'The Principle of Equality in The Community Context: *P, Grant, Kalanke and Marschall:* Four Uneasy Bedfellows' (1998) 57 CLJ 352.

[129] See Valance, 'Do Women Make a Difference? The Impact of Women MEPS on Community Equality Policy', in Buckley and Anderson (eds), *Women, Equality and Europe* (Macmillan, London, 1988) and CREW Reports (1990), Vol 10, No 5, 11. After the 1994 elections, women represented only 25.7% of the membership of the European Parliament. By 1996, this percentage had increased to 27.6. This is to be compared with the average percentage of women in the national parliaments of the Member States, which stood at 15 in 1996, notwithstanding the accessions of Sweden and Finland which then both had an exceptionally high number of women in parliament: see *Equal Opportunities for Women and Men in the European Union: Annual Report 1996* (Commission, Luxembourg, 1997). The percentage of women MEPS rose to 30% in 2000, 31% in 2004 and 35% in 2009.

[130] See, eg, its Resolution of 11 February 1981 on the Situation of Women in the EC (Bull EC 2-1981, point 2.3.7), which prompted the production of the first 'Action Programme'.

[131] See O' Donovan and Szyszczak, *Equality and Sex Discrimination Law* (Blackwell, Oxford, 1988), in particular ch 7.

[132] Case 43/75 [1976] ECR 455, the so-called *Second Defrenne* case, noted in [1976] Journal of Business Law 296. See also Wyatt, 'Article 119 EEC: Direct Applicability' (1975–76) 1 ELRev 418, and Crisham, 'Annotation on Case 43/75' (1977) 14 CMLRev 108.

[133] The meaning of 'direct effect' is discussed in ch 2.

competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay. Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty. This aim is accentuated by the insertion of Article 119 into the body of a Chapter devoted to social policy whose preliminary provision, Article 117, marks 'the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.' This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community. Furthermore, this explains why the Treaty has provided for the complete implementation of this principle by the end of the first stage of the transitional period.[134]

This passage explains two vital elements of the CJEU's reasoning in relation to the principle of equal pay for men and women. First, it sees equal pay as part, but only part, of the social objectives of the Community. This enabled it in later cases to develop an allied general principle of equality as between the sexes. It has also undoubtedly contributed to the Court's purposive reading of the secondary legislation on sex discrimination. France's 'foot-in-the-door' negotiating stance when the original TEC was being drafted therefore paid off in a way which could hardly have been anticipated in 1957. Secondly, because Article 157 is an important element in the development of Community social policy, it is not to be read narrowly or restrictively;[135] its meaning and effects must be understood in the light of its purposes, and this can lead to very much more extensive constructions of its terms, and those of the implementing directives, than would normally be expected.

It might be thought that the definition of 'sex' was a straightforward biological matter and that the only question marks which would be encountered in enforcing the principle of sex equality would concern its scope, rather than the ground itself. However, the CJEU has made it clear that the principle of non-discrimination on the ground of sex extends in two important ways beyond the obvious case of a comparable man and woman receiving different treatment. In arriving at these decisions, it has concentrated on 'gender' as well as 'sex', in other words, the social, psychological, and cultural constructs which accompany a person's membership of one or other sex, in addition to the biological difference of sex.

First, the principle of sex discrimination has been interpreted by the CJEU as providing automatic protection against discrimination based upon pregnancy.[136] In

[134] [1976] ECR 455, at 471-2. For discussion of the similar rationales for EU race discrimination law, see McInerney, 'Bases for Action against Race Discrimination in EU Law' (2002) 27 ELRev 72.

[135] See, eg, the comment of Darmon AG in Joined Cases C-399, 409 & 425/92, C-34, 50 and 78/93 *Stadt Lengerich v Helmig* [1994] ECR I-5727, at 5731. See also Case C-1/95 *Gerster v FreistaatBayern* [1997] ECR I-5253, in which the CJEU held that Art 141 applied to employment relationships in the public service.

[136] This matter is discussed in further detail in ch 7.

Dekker v Stichting Vormingscentrum Voor Jonge Volwassen Plus,[137] the Court held that the Equal Treatment Directive[138] forbade an employer to refuse to employ a pregnant woman, who was otherwise suitable for the job which she had been offered. The fact of her pregnancy was the most important reason for her non-employment and, since this is a condition which can apply only to members of the female sex, this meant that the employer's action necessarily constituted direct discrimination on the ground of sex. It followed the same line in *Mayr v Flöckner OHG*[139] where a woman was dismissed during the process of *in vitro* fertilization. In *Handels-OG Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Aldi Marked K/S)*,[140] the Court added that this principle holds good throughout the relevant period of maternity leave.[141]

Secondly, the principle of sex equality has been held to apply to discrimination based upon gender reassignment.[142] In *P v S and Cornwall County Council*,[143] the CJEU held that the Equal Treatment Directive prohibited the dismissal of an employee[144] where the true reason for the dismissal had been found by the referring court to be the employee's proposal to undergo gender reassignment.[145] The Court explained that the directive:

> …is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law. Moreover…the right not to be discriminated

[137] Case 177/88 [1990] ECR I-3941, noted by Asscher-Vonk in (1991) 20 ILJ 152. The meaning of 'direct' discrimination is discussed in ch 4.

[138] Directive 76/207, OJ [1976] L39/40, the predecessor of today's Recast Directive.

[139] Case C-506/06 [2008] ECR I-1017.

[140] Case 179/88 [1990] ECR I-3979; both *Dekker* and *Aldi* are noted by Nielsen in (1992) 29 CMLRev 160. See also More, 'Reflections on Pregnancy Discrimination under EC Law' [1992] JSWFL 48.

[141] See further discussion of the Pregnancy Directive in ch 7.

[142] See also recital 3 of the Preamble to the Recast Directive.

[143] Case C-13/94 [1996] ECR I-2143. See Campbell and Lardy, 'Discrimination Against Transsexuals in Employment' (1996) 21 ELR 412, and Flynn's comments in (1997) 34 CMLRev 367.

[144] In *Goodwin and I v UK* (2002) EHRR 447, the European Court of Human Rights held that the UK's failure to accord legal recognition (specifically, through an amended birth certificate) to the reassigned gender of a post-operative transgender person violated the right to private life pursuant to Art 8 of the ECHR; furthermore, the State's refusal to recognize that reassigned gender for the purpose of marriage violated the right to marry under Art 12. The UK responded by enacting the Gender Recognition Act 2004, which permits an amended birth certificate to be issued to a transsexual person who registers pursuant to the Act. Since, as discussed above, the ECHR operates as a secondary source of EU law, *Goodwin* is likely to induce the CJEU to take an increasingly broad view of the protection granted by EU law to transsexuals.

[145] This conclusion was of particular significance in the UK where the Sex Discrimination Act 1975 had not been interpreted hitherto as extending to this situation on the basis that the treatment received by the applicant would have been no different whether the gender reassignment had been male to female or vice versa. See *White v British Sugar Corporation* [1977] IRLR 121. However, subsequently in *Chessington World of Adventures Ltd v Reed* [1997] IRLR 556, the Employment Appeal Tribunal held that the Sex Discrimination Act could be construed so as to cover unfavourable treatment on the ground of a declared intention to undergo gender reassignment. The Act was subsequently formally amended so as to preclude discrimination against transsexuals by the Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999 No 1102. See today the Equality Act 2010, ss 7 and 16.

against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure…

Accordingly, the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.[146]

Tesauro AG added:

I regard as obsolete the idea that the law should take into consideration, and protect, a woman who has suffered discrimination in comparison with a man, or *vice versa,* but denies that protection to those who are also *discriminated against,* again by reason of sex, merely because they fall outside the traditional man/ woman classification.[147]

The spirit of this decision was followed in *KB v National Health Service Pensions Agency.*[148] A female nurse employed by the National Health Service complained that the restriction of survivors' benefits in her pension scheme to widows and widowers infringed her right to equal pay pursuant to the then Article 141.[149] She was living in a stable relationship with R, a female-to-male transsexual, and UK law did not at the relevant time permit marriages other than between two people of the opposite biological sex; neither did it recognize the possibility of a legal change of sex.[150] The CJEU held that a decision to restrict benefits to married couples, excluding all unmarried couples, did not *per se* amount to sex

[146] [1996] ECR I-2143, at 2165. Tridimas has commented: 'The case provides a prime example of the way the Court views the principle of equality as a general principle of Community law transcending the provisions of Community legislation. In effect, the Court applied a general principle of unwritten human rights law, according to which discrimination on arbitrary criteria is prohibited, rather than the provisions of the Equal Treatment Directive, a literal interpretation of which does not support the Court's finding' (Tridimas, *The General Principles of EC Law* (Oxford University Press, Oxford, 1999), 70). See also Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585. For further discussion of the general principle of equality, see ch 3, of the present work.

[147] Ibid, at 2153. See Barnard, *'P v S:* Kite Flying or a New Constitutional Approach?', in Dashwood and O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, London, 1997). In *Chief Constable of West Yorkshire Police v A (No 2)* [2004] 2 WLR 1209, the House of Lords held that it followed from *P v S and Cornwall County Council* that, for the purpose of identifying unlawful discrimination, a transsexual person must be regarded as having the sexual identity of the gender to which he or she has been reassigned.

[148] Case C-117/01 [2004] 1 CMLR 28.

[149] The applicability of Art 157 to pension schemes, and in particular to survivors' benefits, is discussed in ch 5.

[150] But see now the Gender Recognition Act 2004.

discrimination since it applied to both sexes. However, the situation in question did involve an 'inequality of treatment' which, although it did not directly undermine the enjoyment of a right protected by Community law, affected one of the conditions for the grant of that right; in other words, the inequality did not relate to the award of the widower's pension but to a necessary precondition for the grant of such a pension, namely, the capacity to marry. The Court noted that the UK law prohibiting marriage between transsexuals and preventing the alteration of birth certificates had recently been held by the European Court of Human Rights to constitute a breach of Articles 8 and 12 of the ECHR.[151] This led it to conclude:

> Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as KB and R from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141.[152]

However, the Court went on to hold that it is for the Member States to determine the conditions under which they give legal recognition to gender reassignments; it was therefore for the national court in *KB* to determine whether KB could rely on Article 141 in order to gain recognition of her right to nominate R as the beneficiary of her survivor's pension.

The broad interpretation of the concept of 'sex' for the purposes of the directive given by the CJEU in *P v S and Cornwall County Council,* combined with the Court's references to the fundamental right to equality and to dignity and freedom, lent force to the view that the directive might also extend to discrimination on the ground of homosexuality.[153] Thus, for example, in *R v Secretary of State for Defence, ex parte Perkins*,[154] Lightman J commented in the High Court:

> After the decision in the *Cornwall* case, it is scarcely possible to limit the application of the Directive to gender discrimination, as was held in the *Smith* case,[155] and there must be a real prospect that the European Court will take the further courageous step to extend protection to those of homosexual orientation, if a courageous step is necessary to do so. I doubt,

[151] *Goodwin v UK* (2002) 35 EHRR 447, as to which see ch 7.

[152] [2004] 1 CMLR 28, at 34.

[153] Support could also be derived for the application of the Equal Treatment Directive to discrimination on account of homosexuality from the fact that Art 2(1) (even after its amendment) referred to discrimination on 'grounds' (plural) 'of sex'. In *R v Ministry of Defence, ex parte Smith* [1996] IRLR 100 (noted by Skidmore in 'Homosexuals Have Human Rights Too' (1996) 25 ILJ 63) and *Smith v Gardner Merchant Ltd* [1996] ICR 790, UK courts held that UK sex equality legislation did not protect homosexuals against discrimination on grounds of sexual orientation. For further discussion, see Wintermute, 'Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes' (1997) 60 MLR 334, and Waaldijk and Clapham (eds), *Homosexuality: A European Community Issue* (Martinus Nijhoff, Dordrecht, 1993).

[154] [1997] IRLR 297. The *Perkins* case challenged the Ministry of Defence's policy of dismissing all members of the armed services who had a homosexual orientation. The request for a preliminary ruling in this case was, however, withdrawn after the CJEU's decision in Case C-249/96 *Grant v South-West Trains Ltd* [1998] ECR I-621, discussed at p30.

[155] [1996] IRLR 100.

however, whether any courage is necessary, for all that may be required is working out and applying in a constructive manner the implications of the Advocate General's Opinion and the judgment in the *Cornwall* case.[156]

Furthermore, in *Grant v South-West Trains Ltd*,[157] which concerned travel concessions granted by an employer in respect of the common law opposite-sex spouse of an employee but refused to a lesbian employee who was living with a female partner, Elmer AG submitted that discrimination on the ground of sexual orientation was indeed forbidden by EU law. Although the *Cornwall* case technically concerned the Equal Treatment Directive, he argued that it had equal significance for the then Article 141, 'which sets out the basic principle prohibiting discrimination based on sex'. In order to give full effect to that principle, he reasoned that the Article must be construed so as to preclude forms of discrimination against employees based on gender, and he continued:

> The provision must, in order to be effective, be understood as prohibiting discrimination against employees not solely on the basis of the employee's own gender but also on the basis of the gender of the employee's child, parent, or other dependent. The provision must therefore also be regarded as precluding an employer from, for instance, denying a household allowance to an employee for sons under 18 living at home when such an allowance in otherwise equivalent circumstances was given for daughters living at home.[158]

His conclusion was that:

> [A] provision in an employer's pay regulations under which the employee is granted travel concessions for a cohabitee of the opposite sex to the employee but refused such concessions for a cohabitee of the same sex as the employee constitutes discrimination on the basis of gender which falls within the scope of [the Treaty] Article …[159]

Despite these robust assertions, in its decision in *Grant* the CJEU nonetheless ultimately rejected the view that the equal treatment principle contained in the Treaty Article extended to discrimination on the ground of homosexuality.[160] It did however note expressly that the Treaty of Amsterdam had introduced what is now Article 19 of the TFEU, and that this would enable future legislative action to outlaw discrimination on the ground of sexual orientation. As seen above, such action was taken shortly after *Grant* in the form of the Framework Directive.[161]

[156] [1997] IRLR 297, at 303.
[157] Case C-249/96 [1998] ECR I-621.
[158] [1998] ECR I-621, at 627.
[159] [1998] ECR I-621, at 629–30.
[160] For criticism of this decision, see Terrett, 'A Bridge too Far? Non-Discrimination and Homosexuality in European Community Law' (1998) 4 EPL 487; Bamforth, 'Sexual Orientation Discrimination after *Grant v South-West Trains*' (2000) 63 MLR 694; and the comment of McInnes in (1999) 36 CMLRev 1043. See also Joined Cases C-122 & 129/99P *D and Sweden v Council* [2001] ECR I-4319.
[161] See also Waaldijk and Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive* (Asser, The Hague, 2006).

(iii) Part-time and temporary employment

Two other grounds on which discrimination is today prohibited by EU law have also developed out of the law on sex discrimination. As will be seen in chapter 4, the concept of indirect discrimination enables the CJEU to treat as unlawful practices which, though apparently neutral, have a disadvantageous effect upon a protected class of persons. Thus, since the vast majority of part-time workers throughout the EU are female, practices which produce a negative impact for part-time workers have consistently been treated by the CJEU as contrary to the principle of sex equality. The same is true for practices which produce an adverse impact for workers employed on fixed-term contracts of employment. Today, however, it is not always necessary to resort to the concept of indirect discrimination in these situations since, as will be discussed in chapter 6, discrimination on the grounds of both part-time and temporary working is independently rendered unlawful by the Directive on Part-Time Work[162] and the Directive on Fixed Term Work.[163] This independent regulation has the consequence that male part-time and temporary workers also have legal protection against discrimination.[164]

(iv) Racial or ethnic origin

The Race Directive prohibits discrimination on the grounds of 'racial or ethnic origin'.[165] Its background was mounting international concern at the prevalence of racism, in particular because of the resurgence of Far Right activities and racist violence in parts of Europe.[166] 1997 was proclaimed the European Year against Racism,[167] and the same year witnessed the creation of the European Monitoring Centre on Racism and Xenophobia.[168] The European Council meeting in Tampere in October 1999 invited the Commission to come forward as soon as possible with proposals to implement what was then the new Article 13 in the field of race, an invitation which was accepted with alacrity.[169] The Commission was particularly concerned about discrimination in parts of Central and Eastern Europe, especially

[162] Directive 97/81, OJ [1998] L14/9. [163] Directive 99/70, OJ [1999] L175/43.

[164] See also the Directive on Temporary Agency Work, Directive 2008/104, OJ [2008] L327/9, discussed in ch 6. [165] See, in particular, Arts 1 and 2 of this Directive.

[166] See Gearty, 'The Internal and External "Other" in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe', in Alston (ed), with Bustelo and Heenan, *The EU and Human Rights* (Oxford University Press, Oxford, 1999). See also Brown, 'The Race Directive: Towards Equality for *All* the Peoples of Europe' (2002) 21 YEL 195. [167] OJ [1999] C237/1.

[168] See Regulation 1035/97, OJ [1997] L151/1.

[169] See also the account of the remarkable haste with which the Race Directive was ultimately adopted, given by the Select Committee on the European Union in 'The EU Framework Directive on Discrimination', HL Session 2000–01, 4th Report, HL Paper 13, para 7.

as regards the Roma[170] and persons with learning disabilities; it was therefore keen to send out a signal about the importance of respect for fundamental rights to the countries of Central and Eastern Europe which were at that time seeking accession to the EU. In addition, it wished to ensure that the new legislation formed part of the *acquis communautaire* to which those countries would be required to accede.[171] There is, nevertheless, undoubtedly also an economic basis for the Race Directive[172] (as indeed for its sister instrument, the Framework Directive).[173] Fredman has argued that discrimination helped to establish the Common Market by creating a pool of cheap labour, and it was only with the acceptance of a 'convergence between economic goals, and goals of justice and fairness that a generalised power to legislate in the discrimination field was enacted'.[174]

It is to be noted that the directive contains no definition of the elusive expression 'racial or ethnic origin',[175] although a few textual clues about its intended meaning can be garnered from the lengthy Preamble. In particular, recital 6 provides:

> The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.

Thus, the directive appears to be predicated on the basis that the human race itself, although a single generic entity, consists of different racial groups. The concept of racism is on several occasions[176] linked in the Preamble with 'xenophobia', defined in the *Shorter Oxford English Dictionary* as a 'morbid dread or dislike of foreigners'; this might perhaps indicate that the directive is primarily targeted at discrimination against racial groups (whatever they may be) whose origin is outside the EU.

The notion of ethnicity is arguably even more elusive than that of race. However, it may perhaps be hazarded that more cases will turn on the meaning of ethnic origins than of racial origins because, whilst 'racial' suggests physiological but generally unprovable distinctions between people, 'ethnic' primarily connotes sociological or cultural distinctions (albeit sometimes transient ones) with which the

[170] See further the Equinet opinion, *Making equality legislation work for Roma and Travellers* (Equinet, Brussels, 2010); and for the argument that stronger protection is still needed for the Roma, see Xanthaki, 'Hope Dies Last: an EU Directive on Roma Integration' (2005) 11 EPL 515.

[171] See Select Committee on the European Union, 'EU Proposals to Combat Discrimination', HLSession 1999–2000, 9th Report, HL Paper 68, para 36.

[172] See, eg, recital 9 of its Preamble.

[173] See recital 11 of the Preamble to the Framework Directive.

[174] Fredman, 'Equality: A New Generation?' (2001) 30 ILJ 145, at 149.

[175] Attempts to provide a scientific explanation for the attribution of race are, mercifully, generally discarded today. Thus, as Fredman has observed, race today is really 'a social construct, reflecting ideological attempts to legitimate domination, and heavily based on social and historical context…Racism is…not about objective characteristics, but about relationships of domination and subordination…' (Fredman, 'Combating Racism with Human Rights: The Right to Equality', in Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, Oxford, 2001). For further discussion of the meaning of race, see Howard, *The EU Race Directive: Developing the Protection against Racial Discrimination within the EU* (Routledge, London and New York, 2010).

[176] Recitals 7, 10, and 11.

judiciary is likely to feel more comfortable. Thus, for example, the *Shorter Oxford English Dictionary* definition suggests that 'ethnic' indicates the distinctive characteristics of different racial groups or peoples. Recital 8 of the Preamble refers to 'ethnic minorities', suggesting perhaps that it is minorities within a State's population who are uppermost in the mind of the legislature. Recital 10 refers to a Commission Communication on 'racism, xenophobia and anti-Semitism', the only hint given by the instrument that religion or religious heritage may play a part in defining ethnicity.

Recital 14 highlights the very important practical point that women from racial minorities frequently encounter discrimination on the grounds both of their race and of their sex:

> In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

The clear implication to be drawn from this provision is that the Court should recognize the concept of multiple discrimination[177] and should use its powers to outlaw it insofar as it is able to do so. A further deduction is that the relevant substantive provisions of EU law on racial and sexual equality should, as far as possible, be interpreted and applied consistently with one another.

On a more negative note, recital 13 explains that the directive applies to the nationals of third countries but 'does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation'.[178] It is immediately evident that this limitation will lead to some idiosyncratic distinctions; thus, for example, a white Zimbabwean whose antecedents were of European origin might be unable to complain of unlawful discrimination occurring in a Member State of the EU in circumstances where a black compatriot, of African descent, could do so. It is noteworthy that the primary British legislation outlawing race discrimination refers to colour, nationality, ethnic or national origins.[179] 'Colour' has not been included in the directive, though it seems probable that it will play an indirect role in establishing ethnicity; this is in many ways a strange omission, since much racial discrimination is in reality grounded upon the visible element of the colour of the victim's skin.[180] As seen above, colour is expressly mentioned as a prohibited ground of discrimination by Article 21 of the Charter of Fundamental Rights.

It is therefore clear that much discretion has been left in the hands of the CJEU as regards the definition of 'racial or ethnic origin'. As will be seen in chapter 2,

[177] Discussed in ch 4. [178] This exception is discussed in more detail in ch 9.

[179] Equality Act 2010, s 9.

[180] See discussion by Brennan in 'The Race Directive: Recycling Racial Inequality' (2002–03) 5 CYELS 311.

the CJEU's position is crucial, since any definition it formulates will create binding law in all the Member States. Even if it opts to delegate a measure of discretion over the meaning of 'racial or ethnic' in different national contexts to the courts of the Member States, the outer limits of any such discretion will be patrolled by the CJEU. Although experience in the field of sex discrimination suggests that confidence can be placed in the CJEU to articulate sensible and workable principles in this area, the disadvantage of the present arrangements is that the law will remain uncertain until such time as it does so.[181] This is undesirable for applicants and respondents alike.

British case law on racial discrimination is probably the most advanced of all the Member States of the EU. It is therefore likely to provide at least guidance to the CJEU in formulating its definition of 'racial or ethnic origin'. In practice, most of the litigation has concerned the meaning of 'ethnic', perhaps because the inclusion of 'colour' in the domestic definition has made it less necessary to concentrate on the meaning of 'race'. The leading decision is that of the House of Lords in *Mandla v Dowell Lee*.[182] A Sikh boy had been refused admission to a school because he refused to cut off his hair and remove his turban. Since Sikhs cannot be identified by reference to colour, race, nationality, or national origin, it was necessary to prove that they formed an ethnic group if they were to be protected by the Act. Lord Fraser set out two essential, and five other relevant, characteristics of an ethnic group; in practice, his test is routinely applied today by British courts and tribunals hearing discrimination cases. The *essential* characteristics are:

- a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive;
- a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

The *relevant* characteristics are:

- either a common sense of geographical origin, or descent from a small number of common ancestors;
- a common language, not necessarily peculiar to a group;[183]
- a common literature peculiar to the group;
- a common religion different from that of neighbouring groups or from the general community surrounding it;
- being a minority, or being an oppressed or dominant group within a larger community.

[181] In the first case presented to it pursuant to the Race Directive, Case C-328/04 *Criminal Proceedings Against Vajnai* [2005] ECR I-8577, the Court found that the dispute fell outside the scope of EU law. Similarly, in Case C-310/10 *Agafitei* [2011] ECR I-000, the Court held that discrimination on the grounds of socio-professional category and place of work (which apparently corresponded to social class) fell outwith the Race Directive.

[182] [1983] AC 548.

[183] A common language, on its own, is insufficient to establish a racial group under British law: *Gwynedd County Council v Jones* [1986] ICR 833.

Lord Fraser added that a group which included enough of these characteristics would be capable of including converts, such as people who marry into it. The House of Lords concluded that Sikhs did constitute an ethnic group. They were originally a religious community but are now no longer purely religious in character. However, they are a distinctive and self-conscious community, with a history going back to the fifteenth century. They have a written language, which a small proportion of Sikhs can read but which can be read by a much higher proportion of Sikhs than Hindus, and they were at one time politically supreme in the Punjab.

Applying Lord Fraser's test, Rastafarians were held not to constitute an ethnic group in *Crown Suppliers v Dawkins*,[184] since 60 years does not amount to a long shared or group history. Similarly, Muslims are not regarded by British courts as forming an ethnic group since they include people of many different nationalities and colours, who speak many different languages.[185] On the other hand, in *CRE v Dutton*,[186] members of the 'traveller' community (formerly known as 'gypsies') were found to be an ethnic group because they do have a long shared history and a common geographical origin (coming from Northern India via Persia in medieval times); they also have some customs of their own, especially as regards cooking, washing, dressing, and furnishings. They have a language or dialect of their own and, although without a common religion or literature, they have a repertoire of folk tales and music passed down the generations.[187]

In the first case referred to it complaining of discrimination on the ground of race or ethnic origin, the CJEU avoided dealing with the definition of race and ethnic origin by holding that the subject-matter of the domestic litigation fell outside the scope of EU law.[188] In *Feryn*, the Court answered questions about the nature and consequences of discrimination and merely assumed that discrimination on the ground of race or ethnic origin could be proved on the facts; the evidence was unclear but the Court referred to the defendant company rejecting 'immigrants' or people who were not indigenous Belgians. Maduro AG stated that the defendant had refused to recruit 'persons of Moroccan origin'.[189]

(v) Religion or belief

The grounds of religion or belief, disability, age, and sexual orientation are all contained in the Framework Directive. As was the case with the Race Directive, the Commission made it clear at the time of proposing the instrument that an important

[184] [1993] ICR 517.

[185] This assumption underlies the decision of the Employment Appeal Tribunal in *JH Walker Ltd v Hussain* [1996] IRLR 11. Cf the discussion below on discrimination on the ground of religion or belief.

[186] [1989] QB 783.

[187] In *Seide v Gillette Industries* Ltd [1980] IRLR 427, the Employment Appeal Tribunal held that Jewish people could be said to share a common ethnicity.

[188] Case C-328/04 *Criminal Proceedings against Vajnai* [2005] ECR I-8577.

[189] Case C-54/07 *Centrum v Firma Feryn NV* [2008] ECR I-5187, at para 3 of the Opinion.

part of its motivation was that this anti-discrimination legislation should form part of the *acquis communautaire* before the accession of the new Member States. The grouping of the four, seemingly somewhat disparate, grounds together was also part of the Commission's strategy; it believed that the Member States were more enthusiastic about some of the grounds than about others, and it wanted to exploit the political momentum to ensure that it achieved legislation on all the bases mandated by the Treaty.[190] Nevertheless, this approach involves the risk of false consistency, in other words, that the attempt to shoe-horn four different grounds into a single legislative instrument will produce a model which is not wholly appropriate to one or more of them.

As in the case of discrimination on the ground of racial or ethnic origin contrary to the Race Directive, the Framework Directive makes no attempt to define 'religion or belief',[191] so that similar problems of uncertainty occur here, as indeed also in relation to disability, age, and sexual orientation. In using the bare but alternative expression 'religion or belief', the directive presumably means to encapsulate both religious beliefs (however 'religion' is to be defined) and other philosophical beliefs on major issues such as life, death, and morality akin to, but not amounting to, religion; thus, a belief in a divine being or deity would appear to be unnecessary. So, for example, it seems likely that the intention is to cover, for example, Buddhism. However, much remains to be clarified by the CJEU, such as whether other typical facets of religious practice, for instance some form of communal or individual worship, will be required, or whether some parallel principle will be sought in philosophical belief cases; if there is such a requirement, this might rule out belief systems such as humanism and atheism. Doubts can also be anticipated in relation to how to protect differences of opinion within established religions, such as particular sects within Christianity, Orthodox parts of Judaism, or specific groups within Islam. What also of single-issue beliefs, such as pacifism or vegetarianism?[192] In addition, the Court will have to draw the difficult line between religion or belief on the one hand and political opinion on the other, a problem of heightened importance in a world in which religious fundamentalism often marches hand in hand with political ideology.

Further guidance will be available from the ECHR, Article 9 of which provides:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

[190] See Select Committee on the European Union, 'EU Proposals to Combat Discrimination', HL Session 1999–2000, 9th Report, HL Paper 68, para 40.

[191] The Commission reports that most of the Member States also do not define 'religion or belief' in their national legislation: see COM (2008) 225 final/2.

[192] In *Grainger plc v Nicholson* [2010] ICR 360, the UK EAT held that a belief in climate change and the need to cut carbon emissions could be protected under the domestic legislation. Whether or not the CJEU would accept such an interpretation of EU law awaits a ruling by it.

As already noted, the law flowing from the ECHR operates as a source of EU law and, therefore, the meaning attached by the European Court of Human Rights to the concept of religion is relevant to its interpretation by the CJEU. Whether the CJEU will be content to accept the reasoning of the Court of Human Rights in this respect *in toto* remains to be seen. It is however relevant to note that, although it has not decided many cases directly on the point, the European Court of Human Rights has taken an essentially broad view of Article 9,[193] not confining it to the major world religions[194] but extending it also to fringe religions[195] and to non-religious beliefs, including atheism and agnosticism.[196] Before its demise,[197] the European Commission on Human Rights also recognized as 'religions' some movements which might be referred to popularly as 'cults'.[198]

The Charter of Fundamental Rights, which as pointed out above now constitutes a formal source of EU law, repeats the wording of the ECHR on freedom of religion and adds, in its Article 10, that it recognizes the right to conscientious objection, in accordance with national law.

Can any guidance as to the meaning of religion or belief be gleaned from national law? UK law did not, before the enactment of the Framework Directive, define religion or belief for the purpose of anti-discrimination law; this was because no statute applying to mainland Britain prohibited religious discrimination *per se*[199] and, although the Fair Employment and Treatment (Northern Ireland) Order 1998[200] prohibits discrimination on the ground of 'religious belief or political opinion',[201] in the practical context of Northern Ireland it is clear that the Catholic and Protestant religions are those which were uppermost in the mind of the legislature.[202] The only former purpose for which UK law had to define religion was for the law of charities, since one of the permitted objects of a charity is the advancement of religion.[203] The UK courts, understandably, have never

[193] See also Bot AG in Joined Cases C-71/11 & C-99/11 *Y*, nyr.

[194] Although of course the major world religions are included. See, eg, *Cha'are Shalom Ve Tsedek v France,* App No 00027417/95, Reports of judgments and Decisions 2000-VII, which implicitly regards Orthodox Judaism as covered by Art 9.

[195] For example, the Jehovah's Witnesses: *Hoffmann v Austria* (1994) 17 EHRR 293 and *Thlimmenos v Greece* (2001) 31 EHRR 411; and the Pentecostal Church: *Larissis v Greece* (1999) 27 EHRR 329.

[196] *Kokkinakis v Greece* (1994) 17 EHRR 397.

[197] Protocol 11 to the ECHR, which came into force on 1 November 1998, replaced the Commission and the old Court with a new full-time Court of Human Rights.

[198] For example, Druidism *(Chappell v UK* (1987) 53 DR 241), Scientology *(X and Church of Scientology v Sweden* (1979) 16 DR 68), the Divine Light Zentrum (*Omkarananda and the Divine Light Zentrum v Switzerland* (1981) 25 DR 105), Pacificism (*Arrowsmith v UK* (1978) 19 DR 5), Veganism (*H v UK* (1993) 16 EHRR CD 44), and the Krisna consciousness movement (*Iskcon v UK* (1994) 76A DR 90).

[199] However, as noted in the preceding section, religion plays a part in determining ethnicity within the provisions of the domestic race legislation.

[200] SI 1998 No 3162 (NI 21).

[201] For the purposes of the Order, references to a person's religious belief or political opinion include references to '(a) his supposed religious belief or political opinion; and (b) the absence or supposed absence of any, or any particular, religious belief or political opinion': reg 2(3).

[202] See, eg, reg 4 of the Fair Employment and Treatment (Northern Ireland) Order 1998.

[203] See generally Picarda, *The Law and Practice Relating to Charities,* 4th edn (Bloomsbury Professional, Haywards Heath, 2010).

sought to arbitrate between different religions, nor to decide on the veracity of their respective claims,[204] although in discrimination claims they of course demand proof that a religious belief is genuinely held. However, for charitable status, they traditionally insisted that a religion requires that its adherents believe in a god (in other words, is monotheistic)[205] and, furthermore, that they engage in some form of worship.[206] The former element gradually adapted to a changing social context and section 2(3)(a) of the Charities Act 2006 today provides that 'religion' includes systems involving a belief in more than one god and those not involving a belief in a god at all. The Charity Commission's Guidance adds that there should be a relationship between the believer and the supreme being 'by showing worship of, reverence for or veneration of the supreme being or entity'. Furthermore, in an attempt to exclude cult or fringe movements, the Guidance states that the belief system must have 'a degree of cogency, coherence, seriousness and importance'[207] and 'an identifiable positive, beneficial, moral or ethical framework'.[208]

In the UK, the prohibition on religious discrimination is implemented by the Equality Act 2010 which provides in section 10 that 'religion' means any religion, including a lack of religion, and that 'belief' means any religious or philosophical belief. The Explanatory Notes accompanying the Act state that a religion must have a clear structure and belief system and that denominations or sects within a religion can be considered to be a religion or belief, such as Protestants and Catholics within Christianity. The Notes add that the criteria for determining what is a 'philosophical belief' are that it must be genuinely held, be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others. So, for example, any cult involved in illegal activities would not satisfy these criteria. Beliefs such as humanism and atheism would be beliefs for the purposes of the Act but adherence to a particular football team would not be.[209]

At the time of writing, the CJEU had not yet been confronted with a case alleging discrimination on the ground of religion or belief pursuant to the Framework Directive.[210]

[204] *Neville Estates Ltd v Madden* [1962] Ch 832. [205] *Bowman v Secular Society* [1917] AC 406.

[206] See the Decision of the Charity Commissioners of 17 November 1999 to the effect that the Church of Scientology did not attract charitable status since, although members of the Church believed in a god, they did not engage in veneration of their god. See also *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697.

[207] These words were used by the European Court of Human Rights in *Campbell and Cosans v UK* (1982) 4 EHRR 293; the Court added 'and are worthy of respect in a democratic society and not incompatible with human dignity'.

[208] *The Advancement of religion* (Charity Commission, October 2011), para 3.

[209] See further discussion in Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (2011) 31 Legal Studies 135; and Elias, 'Religious and related discrimination' (2008) 175 EOR 14.

[210] But see the Court's earlier decision in Case 130/75 *Prais v Council* [1976] ECR 1589.

(vi) Disability

As with the other grounds specified in the Framework Directive, no definition is provided of the term 'disability'; the suggestion of the House of Lords Select Committee on the EU that some non-exhaustive examples might be given was not taken up.[211] The result is especially unsatisfactory in relation to such an extremely vague and open-ended term as disability.[212]

Once again, some guidance might be obtained from the UK's domestic legislation, in this case the Equality Act 2010. Section 6(1) defines disability for the purposes of the Act as 'a physical or mental impairment' which has 'a substantial and long-term adverse effect on [the]…ability to carry out normal day-to-day activities'. Schedule 1 supplements this provision by defining such things as the meaning of 'long-term', the relevance of medical treatment, and the correct approach to progressive conditions; in doing so, it well illustrates the difficulties inherent in this area and thus the current lacuna in EU law.

However, the UK's domestic legislation, focusing as it does on impairment, adopts a highly 'medical' view of disability; there is a competing and wider model of disability which sees it as a social construct, in other words, a result of the person's disadvantaged position in society. As one writer has put it, '[w]hilst the medical model sees disability as a functional impairment, the social model sees disability as a particular relationship between the impaired individual and society';[213] she goes on to argue that EU law takes an increasingly social view and that the UK's domestic law may therefore fall short of its demands.[214]

The CJEU reflected on the meaning of disability in *Chacón Navas v Eurest Colectividades SA*[215] and it opted for a distinctly medical approach to the issue.[216] It had been asked whether sickness might be regarded as a disability and whether discrimination on grounds of sickness fell within the scope of the Framework Directive. It held that the concept of disability must be given an autonomous and uniform application in EU law. Disability refers to 'a limitation which results in particular from physical, mental or psychological impairments

[211] See Select Committee on the European Union, 'EU Proposals to Combat Discrimination', HL Session 1999–2000, 9th Report, HL Paper 68, para 69.

[212] See further Hosking, 'Great expectations: protection from discrimination because of disability in Community law' (2006) 31 ELRev 667. For comprehensive treatment of the legal protection of disabled people, see Lawson and Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing, Oxford and Portland Oregon, 2005).

[213] Wells, 'The Impact of the Framework Employment Directive on UK Disability Discrimination Law' (2003) 32 ILJ 253. The fourth recital in the Preamble to Council Recommendation 86/379 on the employment of disabled people in the Community (OJ [1986] L225/43) states: '"disabled people" includes all people with serious disabilities which result from physical, mental or psychological impairments'.

[214] See also Whittle, 'The Framework Directive for Equal Treatment in Employment and Occupation: an Analysis from a Disability Rights Perspective' (2002) 27 ELRev 303.

[215] Case C-13/05 [2005] ECR I-6467. See also Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603.

[216] For criticism of this approach, see Hosking, 'A High Bar for EU Disability Rights' (2007) 36 ILJ 228.

and which hinders the participation of the person concerned in professional life'.[217] The Court continued:

> The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time.[218]

Geelhoed AG also pointed out that the concept of disability is undergoing a fairly rapid evolution at the moment and it cannot be excluded that 'certain physical or mental shortcomings are in the nature of "disability" in one social context, but not in another'.[219] As to sickness as such, no provision of the Treaty prohibits discrimination on this ground. In particular, what is today Article 19 of the TFEU does not mention sickness and the Court concluded that it cannot therefore constitute a legal basis for EU measures to combat such discrimination. The grounds enumerated in the Framework Directive are listed 'exhaustively'[220] and thus sickness alone (in other words, in circumstances where it does not result in disability) cannot be regarded as an additional ground. It is to be hoped that the Court's reluctance thus to expand the grounds on which EU law condemns discrimination does not presage a negative approach to the recognition of multi-dimensional discrimination.[221]

It is noteworthy that the Court's decision in *Chacón Navas* preceded the accession by the EU to the UN Convention on the Rights of Persons with Disabilities.[222] It is to be anticipated that the wording of the Convention will influence the CJEU in its interpretation of 'disability' for the purposes of EU law[223] and it is therefore significant that the Convention adopts a definition which embraces a more social perspective than that used by the Court in *Chacón Navas*. In its Preamble, the Convention recognizes that disability is:

> an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.[224]

[217] [2005] ECR I-6467, at para 43. As Waddington has observed, this formulation means that an individual has to prove that he or she is under a disability, which means proving first what he or she cannot do, in order to be able to argue later that he or she is in fact able to do the job in question and is thus the victim of discrimination: comment on *Chacón Navas* in (2007) 44 CMLRev 487.

[218] *Chacón Navas* [2005] ECR I-6467 at para 45.

[219] *Chacón Navas* [2005] ECR I-6467 at para 58 of the AG's Opinion.

[220] *Chacón Navas* [2005] ECR I-6467 at para 56.

[221] As to which, see ch 4.

[222] The Convention was adopted on 13 December 2006, entered into force on 3 May 2008, and was ratified by the EU on 23 December 2010. It is the first human rights treaty to be entered into by the EU.

[223] See further Waddington, 'Future Prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive' (2011) 36 ELRev 163.

[224] Recital (e) of the Preamble to the Convention.

Article 1(2) provides:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The distinction between the medical and social views of disability is clearly of profound political and philosophical importance to our understanding of the concept of human rights but it can also be important in a practical sense. For example, somebody with a severe facial scar might not be impaired in the medical sense, yet might nevertheless encounter serious obstacles as regards their social acceptability in the real world.[225]

(vii) Age

Age is, in common with the other protected classifications, left undefined by the Framework Directive. One conclusion which might be drawn from this is that the directive is intended to protect all age groups and not merely older people,[226] despite the demographic trend towards an increasingly elderly population in Europe.[227] As will be seen in chapter 9, the directive contains a widely drafted exception where age discrimination can be justified by reference to a legitimate aim; this has already generated a number of cases which have been referred to the CJEU. Most, but not all, of these cases have involved alleged discrimination against people at the older end of the age spectrum.

It is clear from the Court's jurisprudence that the fixing of a particular age for receiving disadvantageous treatment, for example compulsory retirement, falls within the scope of the directive.[228] It also seems likely that discrimination on the ground of relative age, for instance being more than 15 years younger than a

[225] Thanks are due to Professor Oddny Mjöll Arnadóttir for suggesting this example.

[226] Although it is to be noted that recital 6 of the Preamble to the Framework Directive refers expressly to the integration of 'elderly' people, and recital 8 speaks of supporting 'older workers'. In Case C-555/07 *Kücükdeveci v Swedex GmbH* [2010] ECR I-365 the CJEU expressly recognized the applicability of the Framework Directive to younger people.

[227] Eurostat data for 200I-06 showed that the number of people in the EU aged over 65 grew by 8.9% over this period, whilst the number of those between 0 and 14 decreased by 4.4%: see *Tackling Ageism and Discrimination*, Equinet, Brussels, 2011. Cf the American law on age discrimination: the Age Discrimination in Employment Act 1977 protects only workers who are aged 40 and over.

[228] See Case C-144/04 *Mangold v Helm* [2005] ECR I-9981; Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531; Case C-388/07 *Incorporated Trustees of the National Council on Ageing v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569; Case C-88/08 *Hütter v Technische Universität Graz* [2009] ECR I-5325; Case C-341/08 *Petersen v Berufungsausschuss* [2010] ECR I-47; Case C-45/09 *Rosenbladt v Oellerking* [2010] ECR I-9391; Joined Cases C-159 & 160/10 *Fuchs and Köhler v Land Hessen* [2011] ECR I-000; Joined Cases C-250 & 268/09 *Georgiev v Tehnicheski universitet* [2010] ECR I-11869; and Case C-447/09 *Prigge* et al *v Deutsche Lufthansa AG* [2011] ECR I-000, all discussed further in ch 9. See also Case C-229/08 *Wolf v Stadt Frankfurt am Main* [2010] ECR I-1, where the fixing of an upper age for recruitment was held by the CJEU to breach the Framework Directive.

deceased spouse, would be included.[229] However, there is no doubt that age discrimination presents—as of course do other prohibited grounds—special problems of its own, most obviously that it does not involve a 'binary' comparison; in other words, it does not involve a straight comparison such as that between male or female, black or white. The choice of a suitable comparator in age cases, as well as the correct analysis of causation, is therefore especially important and can be predicted to give rise to unique questions.

(viii) Sexual orientation

In common with the other grounds contained in the directives, the concept of 'sexual orientation' requires elaboration by the CJEU. Its most obvious intended application is to homosexuals and this was confirmed by the CJEU's decision in *Maruko v Versordungsanstalt der deutschen Bühnen*.[230] However, the prohibition in the directive appears also to extend to discrimination against heterosexual, and bisexual people.[231]

It is to be hoped that sexual orientation for this purpose includes those who merely incline towards homosexual, heterosexual or bisexual attraction without actively engaging in such sexual activity, since otherwise the practical application of the provision will be severely undermined; similarly, it will enhance the effectiveness of the directive if the proscription is held to extend to discrimination on the ground of a person's behaviour (for example, his or her manner of dressing), as well as on the ground of his or her underlying sexual preference.[232] It is not yet clear whether the Court will be prepared to apply the legislation, in addition, to those with minority sexual preferences such as, for example, sadomasochism.

[229] See the Opinion of Sharpston AG in Case C-427/06 *Bartsch v Bosch* [2008] ECR I-7245. The CJEU itself did not deal with the issue in this case.

[230] Case C-267/06 [2000] ECR I-1757. See also Case C-147/08 *Römer v Freie und Hansestadt Hamburg* [2011] ECR I-000. It was seen above that the CJEU had been reluctant to interpret 'sex' for the purposes of Art 157 so as to include discrimination against homosexuals and had clearly hinted in its jurisprudence that this was a matter for legislative, not judicial, decision-making.

[231] There is, however, a body of opinion which questions whether sexual identity can be separated into rigid categories; see Oliver, 'Sexual Orientation Discrimination: Perceptions, Definitions and Genuine Occupational Requirements' (2004) 33 ILJ 1, and the literature cited therein.

[232] See further discussion in ch 4.