

REFGOV

Reflexive Governance in the Public Interest

Fundamental Rights

**The Contribution of Anti-Discrimination Law
to European Integration:
The Added Value of the EU Level**

By Catherine Barnard, Trinity College, Cambridge.

Working paper series : REFGOV-FR-10

The Contribution of Anti-Discrimination Law to European Integration: The Added Value of the EU Level

Catherine Barnard, Trinity College, Cambridge

A. Introduction

The quest for equality – and in particular sex equality - has been the central and most highly developed pillar of the European Union's social policy. It lies at the core of the European social model and it has served as a catalyst for change in the Member States.¹ The pursuit of sex equality has been in the Community's sight since the signing of the Treaty of Rome in 1957. The pursuit of equality on other grounds – in particular race, ethnic origin, sexual orientation, religion, belief, age and disability – is of much more recent vintage. Indeed, it took concrete form only in the Treaty of Amsterdam in 1997, four decades later, which included Article 13 as a legal basis for legislation to prohibit discrimination on these grounds.

It is not entirely clear why sex equality² has maintained such a unique hold on the attentions of EC legislators and litigators for so long.³ It is true that women represent more than a third of the workforce, are more likely to occupy 'atypical' jobs, especially part-time jobs, and are particularly affected by long term unemployment. Perhaps, as Ellis suggests, the attainment of sex equality served political and economic goals: on an economic level, it was important to prevent competitive distortions in a now quite highly integrated market; and on a political level, sex equality provided a relatively innocuous, even high sounding platform, by which the Community could demonstrate its commitment to social progress.⁴ Less cynically, it could be argued that sex equality has provided the EU with a readily accessible human face.⁵

The aim of this paper is to consider the added value that the EU has made to Member State laws and policies on anti-discrimination, that it continues to make, and that it could make in the future. First, I shall give a brief overview of the development of anti-discrimination law at EU level to provide the context in which to consider this paper.

¹ White Paper on Social Policy COM(94)333, 41.

² For a comprehensive discussion of this subject, see Ellis, EU Anti-discrimination Law (OUP, Oxford, 2005) and Bell, Anti-discrimination Law and the European Union (OUP, Oxford, 2002). For a general, positive review, see Prechal, 'Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes' (2004) 41 CMLRev. 533.

³ See Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in Sciarra (ed), Labour Law in the Courts: National Judges and the ECJ (Hart, Oxford, 2001).

⁴ Ellis, above n.1, 22.

⁵ Kilpatrick, 'Emancipation through law or the Emasculation of Law? The Nation State, the EU, and Gender Equality at Work' in Conaghan et al. Labour Law in an Era of Globalization (OUP, Oxford, 2002).

B. Development of EC law on Equality

1. *The Development of EU Law and Policy on Sex Equality*

1.1 *Legislation*

(a) *Hard law*

Following the inclusion of the original Article 119 into the EEC Treaty of 1957, little happened in the field of sex equality until the Social Action Programme 1974 which followed the Paris Communiqué in 1972.⁶ This said that the Community aspired to create 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'.⁷ Three important Directives were adopted as a result:

- Directive 75/117/EEC⁸ on equal pay for male and female workers, enshrining the principle of 'equal pay for equal work' laid down in Article 141, and introducing the concept of 'equal pay for work of equal value'. This has been supplemented by two codes of practice intended to give practical advice on measures to ensure the effective implementation of equal pay;⁹
- Directive 76/207/EEC¹⁰ on equal treatment with regard to access to employment, vocational training, promotion and working conditions, aimed at eliminating all discrimination, both direct and indirect, in the world of work and providing an opportunity for positive measures. This Directive has now been amended by Directive 2002/73.¹¹
- Directive 79/7/EEC¹² on the progressive implementation of equal treatment with regard to statutory social security schemes.

There followed five Action Programmes targeted specifically at equal opportunities for men and women.¹³

In the 1980s, at a time of stagnation in Community social policy, two specific Directives were adopted on sex equality:

- Directive 86/378/EEC¹⁴ on the implementation of equal treatment in occupational schemes of social security. The Directive was amended by Directive 96/97/EC¹⁵ in the light of the Barber¹⁶ judgment;

⁶ For a fuller discussion, see Barnard, EC Employment Law (OUP, Oxford, 2006), 3rd ed, ch. 6 on which this section draws.

⁷ See Council Resolution of 21 Jan. 1974 concerning a Social Action Programme [1974] OJ L14/10.

⁸ OJ [1975] L45/19.

⁹ COM(94)6; COM(96)336 final.

¹⁰ Council Directive 76/207/EEC [1976] OJ L39/40. The Directive was based on Art. 235 [new Art. 308]. Member States had 30 months to implement the Directive from the date of notification. In addition, they had four years to revise discriminatory laws designed to protect one group whose justification is no longer well founded (Art. 9(1)). An amendment has now been proposed COM(2000)334 final.

¹¹ [2002] OJ L269/15.

¹² [1979] OJ L6/24.

¹³ Action Programme 1982–5 [1982] OJ C186/3, EC Bull. 5-1982, point 2.1.48 and EC Bull. 7/8-1982, point 2.1.67; Equal Opportunities for Women Medium-term Community Programme 1986–1990, EC Bull. Supp. 3/86 and EC Bull. 6-1986, point 2.1.116; Third Medium-term Action Programme COM(90)449 final; Fourth Medium Term Action Programme (1996–2000) Council Decision 95/593/EC [1995] OJ L335/37; Fifth Action Programme (2001–2006) Council Dec., 2001/95 ([2001] OJ L17/22).

¹⁴ [1986] OJ L225/40.

- Directive 86/613/EEC¹⁷ on equal treatment for men and women carrying out a self-employed activity, including agriculture.

The 1989 Social Action Programme,¹⁸ implementing the Community Social Charter 1989, led to the enactment, of Directive 92/85/EC¹⁹ improving the health and safety of workers who are pregnant or have recently given birth. This Directive was based on the recently adopted Article 118a EC (new Article 137) which required qualified majority voting.

Two further Directives were adopted under the Social Policy Agreement (SPA) annexed to the Treaty on European Union from which the UK initially secured an opt-out:

- Directive 96/34/EC on reconciling family and working life (parental leave).²⁰ This was the first Directive adopted as a result of an agreement concluded by the Social Partners.²¹
- Directive 97/80/EC²² on the burden of proof in cases of discrimination based on sex.

When the UK signed up to the Social Chapter in 1997 these two measures were readopted under Article 94 EC and were applied to the UK.²³ In addition, two other Directives adopted in this period, the Part Time Work Directive 97/81²⁴ and the Fixed Term Work Directive 99/70,²⁵ although not specifically part of the equality agenda, modeled themselves on the equality Directives, and inevitably helped women, who dominate the part time and (to a lesser extent) the fixed term workforce.

Seven of the sex equality Directives (the Equal Pay Directive 75/117, the Equal Treatment Directive 76/207 as amended by Directive 2002/73, the Burden of Proof Directive 97/80 as amended by Directive 98/52 and Directive 86/378/EEC on equal treatment in occupational schemes of social security as amended by Directive 96/97/EC) were recast into a single consolidated Directive 2006/54 which repeals the earlier directives from 15 August 2009, albeit that the Directive itself must be implemented a year earlier.²⁶

The common feature of all of the hard law Directives outlined above is that they are based on the 'human rights' model.²⁷ Fredman explains this model in the following terms. She says that since the function of human rights is to protect the individual against interference by the state, the rights are vested in the individual who must bring a claim before the courts (which are seen as the primary means of enforcing rights) and remedies are available only if the individual victim can prove the

¹⁵ [1997] OJ L46/20.

¹⁶ Case 262/88 Barber v. Guardian Royal Exchange [1990] ECR I-1889.

¹⁷ [1997] OJ L359/56.

¹⁸ COM(89)568.

¹⁹ [1992] OJ L245/23.

²⁰ [1996] OJ L145/4, amended by Directive 97/75/EC [1998] OJ L10/24, consolidated [1998] OJ L10/11.

²¹ See also the Directives on Part-Time Work 97/81/EC [1998] OJ L14/9, as amended by Directive 97/81/EC [1998] OJ L131/10, consolidated in [1998] OJ L131/13 and Fixed-Term Work 99/70/EC [1999] OJ L175/43.

²² [1998] OJ L14/6, amended by Directive 98/52/EC [1998] OJ L205/66.

²³ The Social Partners were also consulted with regard to combating sexual harassment at work: COM(96)373 (first round consultation) and SEC(97) 373 (second round consultation). UNICE pulled out of their negotiations in September 1997.

²⁴ [1998] OJ L14/9, as amended by Dir. 97/81/EC [1998] OJ L131/10.

²⁵ [1999] OJ L175/43.

²⁶ OJ [2006] L204/23.

²⁷ 'Changing the Norm: positive Duties in Equal treatment Legislation' (2005) 12 MJ 369, 370.

right has been breached. Remedies are retrospective, individual and based on proof of breach, or 'fault'. She adds 'Corresponding to this paradigm is also a particular view of equality as a negative duty, restraining the state or private individuals from discriminating against individuals'.

While this model offers a number of benefits – the language of fundamental rights has symbolic value, it provides litigants with an avenue of recourse, and it helps shape employer behaviour and establish a culture of compliance – the disadvantages are also well known. Litigation is stressful for those involved, particularly if the employment relationship is ongoing, it is expensive and it depends on the courts understanding, and being responsive to, the issues involved. It also overlooks the fact that, particularly with gender, breaches of rights operate in a 'collective and institutional way'.²⁸ As Fredman points out, the human rights approach fails to see that gender inequality is often not individualized; it 'affects individuals as a result of their group membership and inequality is frequently a consequence of institutional arrangements for which no single actor is 'to blame'. When viewed through this lens, it is clear that the courts do not have the competence to intervene to seek to resolve wider social issues; and that the responsibility more often lies with the state. Yet, as Fredman argues, the human rights model assumes that the State is a potential threat to liberty, rather than a potential force for enhancing freedom through the provision of social goods. She therefore advocates a 'proactive model' where the initiative lies with policy makers, implementers and employers to identify and address the institutional and structural causes for inequality.²⁹ It is in this context that some of the other Community developments are worth examining.

(b) *Soft Law and the Open method of Coordination (OMC)*

From the mid-1980s the Community started adopting a variety of soft law measures covering a range of areas³⁰ including the integration of equal opportunities into the Structural Funds,³¹ balanced participation by men and women in decision-making³² and in family and working life,³³ women in vocational training in general³⁴ and science in particular,³⁵ and equal participation by women in an employment intensive growth strategy in the EU.³⁶ Although these texts are not legally binding they form part of the 'softening up process' paving the way for the Commission's preferred course of action should a 'policy window' open up³⁷ and, more importantly, they steer the

²⁸ Ibid, 371.

²⁹ Ibid, 373.

³⁰ See e.g. Council Resolution on the promotion of equal opportunities for women [1986] OJ L203/2.

³¹ 94/C231/01 [1994] OJ C231/1. See also Council Res. Of 2 December 1996 on mainstreaming equal opportunities for men and women into the structural funds (OJ [1996] C386/1).

³² Council Resolution of 27 Mar. 1995 [1995] OJ L168/3 and Council Recommendation 96/694/EC [1996] OJ L319/11.

³³ OJ [2000] C218/5.

³⁴ Commission Rec. of 24 November 1987 on vocational training for women (OJ [1987] L342/35). More recently see, e.g., Council Res. On Social and Human Capital Building in the knowledge society: learning, work, social cohesion and gender (OJ [2003] C175/3) and Council Res. On Equal Access to and Participation of Women and men in the knowledge society for growth and innovation (OJ [2003] C317/6).

³⁵ Council Resolution of 20 May 1999 [1999] OJ C201/1.

³⁶ 94/C368/02.

³⁷ Cram, Policy Making in the EU: Conceptual Lenses and the Integration Process (Routledge, London, 1997).

Community institutions and the Member States to take positive steps to address inequality through policy, and not just legal, means. They also provide an opportunity for decision-makers to see a problem in the round rather than through the prism of legal categorization. Thus, policy is more responsive to the problems experienced by those facing multiple levels of discrimination such as an ethnic minority, single mother.³⁸ Funding for some of these policy initiatives has been made available through the European Social Fund, especially its EQUAL programme.³⁹

The Commission has now brought some of these soft- law initiatives under the broader umbrella of 'mainstreaming'.⁴⁰ As the Commission explains:

Gender mainstreaming is the integration of the gender perspective into every stage of policy processes – design, implementation, monitoring and evaluation – with a view to promoting equality between women and men. It means assessing how policies impact on the life and position of both women and men – and taking responsibility to re-address them if necessary.

The mainstreaming agenda spans issues as diverse as gender balance in decision making,⁴¹ women and science,⁴² development cooperation,⁴³ and gender based violence and trafficking in women.⁴⁴

The importance of mainstreaming was emphasized in the Commission's Framework Strategy on Gender Equality (2001-2005)⁴⁵ As the Commission explained, this integrated approach marks an important change from the previous Community action, mainly based on compartmental activities and programmes funded under different specific budget headings. The Framework Strategy aims at 'coordinating all the different initiatives and programmes under a single umbrella built around clear assessment criteria, monitoring tools, the setting of benchmarks, gender proofing and evaluation'.⁴⁶ Thus, OMC techniques are now being applied to gender

³⁸ Schiek, 'Broadening the Scope and the Norms of EU Gender Equality law: Towards a Multi-Dimensional Conception of Equality Law' (2005) 12 *MJ* 427.

³⁹ http://ec.europa.eu/comm/employment_social/equal/index_en.cfm

⁴⁰ http://ec.europa.eu/comm/employment_social/gender_equality/gender_mainstreaming/general_overview_en.html

⁴¹ According to the Commission, the number of EU countries where women have reached the highest political office can be counted on a single hand. Across Europe, just one in five government ministers is a woman, while the ratio is only slightly better among members of national parliaments. In business, women represent only 3 % of presidents of boards in top companies:

http://europa.eu.int/comm/employment_social/gender_equality/gender_mainstreaming/balanced_participation/balanced_participation_en.html. See, e.g., Commission Dec. relating to Gender Balance within the Committees and Expert groups (OJ [2000] L154/34)

⁴² Council Resolution of 27 November 2003 on equal access to and participation of women and men in the knowledge society for growth and innovation (OJ [2003] C317/6.

⁴³ See, in particular, Co. Reg., (EC) No 2836/98 on integrating gender issues in development cooperation (OJ [1998] L354/5) and EP and Co. Reg. 806/2004 on promoting gender equality in development cooperation (OJ [2004] L143/40) together with the Commission's Communication (COM(2001) 295).

⁴⁴ See, e.g., Council Res. on initiatives to combat trafficking in human beings, in particular women (OJ [2003] C260/4) and Council Framework Dec. 2002/629/JHA (OJ [2002] L203/1) on combating trafficking in human beings.

⁴⁵ COM(2000)335 implemented by Council Dec. 2001/51 (OJ [2001] L17/22). The Council Decision envisages intervention in five areas: economic life, equal participation and representation, social rights, civil life, and gender roles and stereotypes. Funding can be applied for by a range of national and subnational bodies and NGOs involved in promoting gender equality. Under three strands (awareness raising, analysis and evaluation and strengthening capacity). This is to be extended: COM(2004) 551.

⁴⁶ COM(2000) 335, para. 2.1.

equality.⁴⁷ The Framework Strategy has been followed up by the Roadmap for Equality (2006-2010) between women and men⁴⁸ which identified six priority areas for action:

- Achieving equal economic independence for women and men
- Enhancing reconciliation of work, private and family life;
- Promoting equal participation of men and women in decision making
- Eradicating gender-based violence and trafficking
- Eliminating gender stereotypes in society
- Promoting gender equality outside the EU.

One particular strand of the mainstreaming agenda concerns raising the employment rate for women which currently stands at 55.1% (compared to 70.9% for men) to 60% by 2010 in line with the Lisbon strategy. In this respect the mainstreaming agenda dovetails with the European Employment Strategy (EES). The promotion of equal opportunities formed one of the four key pillars of the EES initiated in Luxembourg in November 1997. Initially, the guidelines under the equal opportunities pillar focused on specific measures to strengthen gender equality such as the need to tackle gender gaps, especially in respect of unemployment rates and, according to the 1999 guidelines, pay inequalities. Other measures included helping to reconcile work and family life, particularly through policies on career breaks, parental leave and part time work and adequate provision of good quality childcare, facilitating return to work after a period of absence and promoting the integration of people with disabilities into working life.⁴⁹ Subsequently, the 2001 guidelines⁵⁰ placed emphasis on a gender mainstreaming approach in implementing the Guidelines across all four pillars by developing and reinforcing consultative systems with gender equality bodies, applying procedures for gender impact assessment under each guidelines; and developing indicators to measure progress in gender equality in relation to each guideline.

Gender equality and promoting the integration of and combating discrimination against people at a disadvantage in the labour market were identified as specific guidelines in the revised Guidelines of 2003⁵¹ which were set for three years (although in fact revised in 2005). Combating discrimination, both on the grounds of sex and on other grounds, expressly formed part of the quality agenda according to which 'Quality at work can help increase labour productivity and the synergies between both should be fully exploited.'⁵² The 2005-8 Guidelines⁵³ emphasise that 'equal opportunities and combating discrimination are essential for progress' and that 'Gender mainstreaming and the promotion of gender equality should be ensured in all action taken'.⁵⁴

While the pro-active model has much to commend it, it is of course dependent on the Community institutions and the Member States actually being pro-active rather than merely talking about being pro-active. As Pollack and Hafner-Burton show,⁵⁵ the

⁴⁷ See e.g., The Annual reports from the Commission on equality between women and men such as COM(2006) 71.

⁴⁸ COM(2006) 92.

⁴⁹ See, e.g., the original (1998) Employment Guidelines [1998] OJ C30/1.

⁵⁰ Council Dec. 2001/63 (OJ [2001] L22/18). Gender mainstreaming had in fact been a feature of the Employment Guidelines since 1999 (OJ [1999] C69/2).

⁵¹ Council Dec. 2003/578/EC (OJ [2003] L197/13).

⁵² The second 'overarching and interrelated objective' on p.17.

⁵³ Council Dec. 2005/600 (OJ [2005] L205/21).

⁵⁴ P.23.

⁵⁵ 'Mainstreaming Gender in the European Union' (2000) 7 JEP. 432.

success of gender mainstreaming in the EU has depended very much on the commitment of the various actors to its aims. Sanctions are therefore necessary to ensure that in the absence of voluntary compliance, remedies are available in default.

Hervey points out that 'where we seek to resolve complex social problems, such as inequality of women and men, a notion of 'mixture' or 'hybridity' of old governance [hard law equality Directives] and new governance [soft law resolutions and OMC techniques such as indicators and benchmarking] probably holds the key to the realization of our goals'.⁵⁶

1.2 Treaty of Amsterdam

The Treaty of Amsterdam explicitly introduced equality between men and women as one of the tasks of the Community (Article 2) and one of its activities (Article 3). In addition, it introduced a new article, Article 13⁵⁷ allowing the Council, to take action on various grounds including sex. The Amsterdam Treaty also amended the equal pay provision, Article 141, for the first time. Article 141(1) extended the principle of equal pay for equal work to include 'work of equal value', thereby bringing the Treaty into line with the Court's case law.⁵⁸ The new Article 141(3) finally provided an express legal basis for the Council to adopt measures, in accordance with the Article 251 co-decision procedure, 'to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value'. Finally, a new Article 141(4) allows Member States to adopt or maintain positive-action measures for the underrepresented sex in respect of professional careers.

The first measure adopted under Article 141(3) was the Equal Treatment Directive 2002/73⁵⁹ amending the Equal Treatment Directive 76/207.⁶⁰ This Directive was introduced to ensure coherence of key principles with the Article 13 Directives (see below) and to incorporate some of the decisions of the European Court of Justice. Most significantly, in its proposal for the 2002 Directive, the Commission noted that the 'provision for equal opportunities in the framework of the Treaty has been greatly enhanced since the entry into force of the Treaty of Amsterdam'.⁶¹ The Commission continued:

Originally regarded as a means of preventing distortion of competition, equal treatment between men and women is now an explicit objective of the Community enshrined in Article 2 of the Treaty. ... These Treaty developments constitute an explicit embodiment of the Court's statement that the elimination of discrimination based on sex forms part of fundamental rights.

⁵⁶ 'Thirty Years of EU Sex Equality law: Looking Backwards, Looking Forwards' (2005) 12 *MJ*, 307, 322.

⁵⁷ Ex Article 6a. Art. III-124 of the Constitution.

⁵⁸ Art. 1 of Directive 75/117/EEC already made provision for this. In Case 96/80 *Jenkins v. Kingsgate* [1981] ECR 911 the Court said that Art. 1 'is principally designed to facilitate the practical application of the principle of equal pay outlined in Article 1[141] of the Treaty [and] in no way alters the content or scope of that principle as defined in the Treaty'.

⁵⁹ OJ [2002] L269/15.

⁶⁰ The Consolidated Dir. was also adopted under this legal basis.

⁶¹ Para. 7.

In 2004 the Council adopted, under Article 13, Directive 2004/113 which following the pattern of the Race Directive 2000/43 extends the principle of equal treatment between men and women to access to and supply of goods and services.⁶²

1.3 Institutional Support

Institutional support for the realisation of equality has also been provided: there are special committees concerned with women's issues in the European Parliament, including the Committee on Women's Rights and Equal Opportunities, an 'Equality between men and women' Unit within DGEmp of the European Commission,⁶³ assisted by a Group of Experts on Gender, Social Inclusion and Employment, and an Advisory Committee on Equal Opportunities for men and women.⁶⁴ In addition, the Fundamental Rights, Anti-Discrimination and Equal Opportunities Working Party of Members of the Commission, set up in 1995, examines and monitors the integration of the gender dimension into all relevant policies and programmes. Its work is supported by the Inter-Service Group on Gender Equality which brings together representatives of all Commission services to develop gender mainstreaming activities. In addition, the High level group on gender mainstreaming is an informal group of high level representatives responsible for gender mainstreaming at national level in the Member States which meets to exchange information on best practices and experience 'to support and improve the synergy among national policies on gender equality and strategies for mainstreaming at national level'.⁶⁵ At its instigation the Commission adopted a communication on incorporating equal opportunities for women and men into all Community policies and activities.⁶⁶ However, perhaps the most visible demonstration of institutional commitment to sex equality is the establishment of a European Institute for Gender Equality whose tasks will be reviewing all existing EU gender equality law, increasing awareness of gender inequality and ensuring that gender equality is considered in all policies.⁶⁷

⁶² OJ [2004] L373/37.

⁶³ On a more independent basis the Centre for Research on Women (CREW) has been established, as has the European Network of Women (ENOW) and the Women's Lobby. See further Szyszczak, 'L'Espace Social Européen, Reality, Dreams or Nightmare' [1990] German Yearbook of International Law, 284, 298.

⁶⁴ Established by Commission Decision 82/43/EEC [1982] OJ L20/35, as amended by Decision 95/420/EEC [1995] OJ 249/43.

⁶⁵ http://europa.eu.int/comm/employment_social/gender_equality/gender_mainstreaming/gender/high_level_group_en.html.

⁶⁶ COM(96)67 and the Commission's Progress Report COM(98)122. See also the Commission's Guide to 'Gender Impact Assessment', http://europa.eu.int/comm/dg05/equ-opp/index_en.htm. The Commission has also begun to put its own house in order: Commission Decision 2000/407/EC [2000] OJ L154/34 relating to gender balance within the committees and expert groups established by it.

⁶⁷ IP/06/263 and COM(2005)81.

2. Equality in Other Fields

2.1 Race

The European Council⁶⁸ and Council, Commission⁶⁹ and Parliament⁷⁰ had long been concerned about racism and xenophobia but, prior to the introduction of Article 13 into the EC Treaty at Amsterdam in 1997, doubted the Community's competence to act. The Community institutions therefore limited their activities to issuing non legally binding declarations and resolutions.⁷¹ For example, the Council Resolution on the Fight Against Racism and Xenophobia of 29 May 1990,⁷² encouraged Member States to take action, including ratifying international conventions on racism, enacting national laws restraining discriminatory acts, providing recourse to the legal system, and developing an effective policy of education⁷³ and information. The 1995 Resolution on the fight against racism and xenophobia in the fields of employment and social affairs produced by the Council and the representatives of the Member States' governments⁷⁴ condemned racism, xenophobia and anti-semitism, flagrant breaches of individual rights, and religious intolerance, particularly in the fields of employment and social affairs. It also recognised the great importance of implementing, in the field of social policy, policies based on the principles of non-discrimination and equal opportunities at Union and Member State level.⁷⁵ As a result, a European Union Monitoring Centre on Racism and Xenophobia (EUMC) was set up.⁷⁶

Thus, unlike gender equality where hard law preceded soft, in the context of race, much soft law work had been done, preparing the ground prior to the adoption of the (hard law) Directive 2000/43⁷⁷ under Article 13.⁷⁸ Yet, as the Commission

⁶⁸ See e.g. Conclusions of Meetings of the European Council in Cannes in June 1995, Madrid in Dec. 1995, Florence in June 1996 and Dublin in Dec. 1996.

⁶⁹ See also COM(94) 333, 52, and COM(98) 183 An Action Plan against Racism.

⁷⁰ See also the Parliament's resolutions of 27 Oct. 1994 [1995] OJ C126/75 and 27 Apr. 1995 [1995] OJ C126/75.

⁷¹ For a full list see Annex II of the Commission's Communication on certain Community measures to combat discrimination (COM(99) 564). See also Gearty, 'The Internal and External "Other" in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe, in The EU and Human Rights, ed. Alston (OUP, Oxford, 1999) and Hervey, 'Putting Europe's House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam', in Legal Issues of the Amsterdam Treaty, eds. O'Keefe and Twomey (Hart, Oxford, 1999). Some anti-racist provisions have been included in legally binding instruments. For example, Art. 12 of Directive 89/552 [1989] OJ L2/98, 23 provides that television advertising must not include any discrimination on grounds of race, sex or nationality nor offend any religious or political beliefs and Art. 22 provides that Member States shall ensure that broadcasts do not contain any incitement to racial hatred on the grounds of race, sex, religion or nationality. See also the Commission's Communication on racism, xenophobia and anti-semitism (COM(95) 653 final) where the Commission promised to propose the insertion of anti-discrimination clauses in new legislation.

⁷² [1990] OJ C157/4.

⁷³ See also the Resolution of the Council and the representatives of Member States' governments of 23 Oct. 1995 on the response of educational systems to the problems of racism and xenophobia [1995] OJ C312/1.

⁷⁴ Resolution 95/110 of 5 Oct. 1995 [1995] OJ C296/13.

⁷⁵ See also third pillar measures such as Joint Action 96/443/JHA [1996] OJ L185/5 concerning action to combat racism and xenophobia.

⁷⁶ Council Regulation 1035/97 [1997] OJ L151/2. This agency is due to become a general human rights agency.

⁷⁷ COM(99)566. Now Council Dir. 2000/43/EC [2000] OJ L180/22.

⁷⁸ The Tampere European Council (Oct. 1999) urged the Commission to bring forward proposals for a Race Dir. under Article 13, in part due to concern about the rise of the far right in countries such

noted in its explanatory memorandum,⁷⁹ 'at the end of the century, racial discrimination is still not eradicated from everyday life in Europe'. It continued

It is widely acknowledged that legal measures are of paramount importance for combating racism and intolerance. The law not only protects victims and gives them a remedy, but also demonstrates society's firm opposition to racism and the genuine commitment of the authorities to curb discrimination. The enforcement of anti-racist laws can have a significant effect on the shaping of attitudes.

The Directive lays down 'broad objectives to ensure that discrimination is prohibited and that the victims of discrimination enjoy a basic minimum entitlement to redress'. In so doing the Directive aims to reinforce the 'fundamental values on which the Union is founded—liberty, democracy, the respect for human rights and fundamental freedoms and the rule of law—and contribute to the development of the Union as an area of freedom, security and justice. And it will help to strengthen economic and social cohesion'.⁸⁰

The Race Directive was the first measure adopted under the new powers given to the Community by the Amsterdam Treaty. Article 13 allows the Council, acting unanimously on a proposal from the Commission, to take action to combat discrimination based not only on sex but also racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁸¹ At much the same time the Community also adopted the 'horizontal' or 'framework' labour market Directive 2000/78⁸² prohibiting discrimination on all the other grounds listed in Article 13 except sex; a Communication on certain Community measures to combat discrimination;⁸³ and an Action Plan to combat discrimination 2001–2006 (which became Decision 2000/750).⁸⁴

2.2 *The Framework Directive*

The Framework Directive prohibited discrimination on wide grounds (sexual orientation, religion or belief, disability and age) but in narrow circumstances (matters relating to employment and vocational training). By contrast the race Directive prohibited discrimination on narrow grounds (race and ethnic origin but not colour or nationality) but broad circumstances (employment, vocational training as well as social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services which are available to the public including housing). However, both Directives share, with the sex equality directives, a symmetrical approach to equality. Thus homosexuals must be treated in the same way as heterosexuals and vice versa. This means that more favourable treatment of the disadvantaged group will always breach the principle of equality. The exception to the rule of symmetry is disability: disabled persons can demand equal treatment with non-disabled but not vice versa and, in this way, the non-disabled

as Austria (Douglas-Scott, *Constitutional Law of the European Union* (Longman, Chelmsford, 2002), 435 and in part because of concerns about levels of discrimination in some of the Accession states, especially in respect of the Roma.

⁷⁹ COM(99)566, 2.

⁸⁰ COM(99)566, 4.

⁸¹ Article 13 was amended at Nice to allow for incentive measures to be adopted under qualified majority voting but excluding any harmonization of the Member States' legislation.

⁸² COM(99)565. Now Council Dir. 2000/78/EC [2000] OJ L303/16.

⁸³ COM(99)564.

⁸⁴ COM(99)567. Now Council Dec. 2000/750/EC (OJ [2000] L303/23).

cannot complain of more favourable treatment of the disabled. As Ellis puts it,⁸⁵ this formulation can be seen ‘to reflect a different underlying philosophy for the disability provisions from the rest of anti-discrimination legislation; they are more clearly directed to relieving the disadvantage experienced by the disabled section of society than to protecting a fundamental human right possessed by everyone’.

2.3 A Common Approach

The two Article 13 Directives, like the sex equality directives, broadly adopt the classic, human rights model to combating discrimination: individual and rights based.⁸⁶ However, as with sex discrimination, the legislative approach is complemented by an action plan⁸⁷ to prevent and combat discrimination which also envisages action under three strands: analysis and evaluation, capacity building and awareness raising.⁸⁸ In addition, the weight of the EES is being deployed to combat discrimination.⁸⁹ Thus, those who are socially excluded, especially the disabled, older workers and ethnic minorities, can become included through employment because ‘employment is the best guarantee against social exclusion’,⁹⁰ and the Article 13 Directives provide those excluded with a vehicle to challenge that exclusion. The link between social exclusion and employment policy was expressly noted in the Preambles to the Article 13 Directives. The Race Directive refers to the 2000 Employment Guidelines which ‘stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities’⁹¹ while the Framework Directive adds that ‘Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential’.⁹²

2.4 Institutional Support

Institutional support for the elimination of discrimination is provided at a number of levels. For example, the Race Directive (but not the horizontal Directive) requires Member States to designate a body or bodies for the promotion of equal treatment.⁹³ At Community level there is an anti-discrimination unit in DGEmp which has regular contact with civil society and the NGOs.⁹⁴ In particular, under the Community Action Programme to combat discrimination, the European Commission itself funds four European umbrella NGO networks representing and defending the rights of people exposed to discrimination – one per ground of discrimination: AGE (The European Older People’s Platform); ILGA Europe (International Lesbian and Gay Association – Europe); ENAR (European Network Against Racism); and EDF (European Disability

⁸⁵ Above, n.1, 91.

⁸⁶ This is recognised by the Commission, ‘Equality and non-discrimination in an enlarged European Union’ (COM(2004)379, 6. See also McInerney, ‘Bases for Action against Race Discrimination in EU Law’ (2002) 27 *ELRev.* 72.

⁸⁷ Co. Dec. 2000/750 (OJ [2000] L303/23). See de Búrca, ‘EU Race Discrimination Law: a Hybrid Model’ in de Búrca and Scott (eds) *Law and New Governance in the EU and US* (Hart, Oxford, 2006).

⁸⁸ On the future of this approach, see Commission, Green Paper, *Equality and Non-discrimination in an enlarged European Union*, COM(2004) 379.

⁸⁹ Bell, *Combating Racial Discrimination through the Employment Strategy*’ (2003-4) 6 *CYELS*. x

⁹⁰ Barcelona European Council, presidency Conclusions, Bull. EU 3-2001, para. 22.

⁹¹ 8th Preamble para. of Directive 2000/43. See also the 8th Preamble para of Dir. 2000/78.

⁹² 9th Preamble para.

⁹³ Art. 13.

⁹⁴ http://ec.europa.eu/comm/employment_social/fundamental_rights/civil/civ_en.htm.

Forum). The European Parliament has a committee on Civil liberties, justice and home affairs which deals with all issues of discrimination on grounds other than sex. The Union's work will be buttressed by the establishment of an EU Agency for Fundamental Rights.⁹⁵

3. *Equality under the Constitutional Treaty*

From its lowly days as a one-Article provision in the European Economic Community Treaty in 1957, equality has become, by the time the Constitutional Treaty was agreed in 2004, a significant constitutional principle. The Constitutional Treaty – which will not enter into force until ratified by all 25 Member States – places much emphasis on the principle of equality. Non-discrimination and equality between men and women are identified as Union values in Article I-2 and as Union objectives in Article I-3.⁹⁶ It also contains mainstreaming provisions: Article I-45 requires the Union, in all its activities to observe the 'principle of the equality of its citizens'. Article III-116 adds that in all the activities referred to in Part II, 'the Union shall aim to eliminate inequalities, and to promote equality, between women and men'. Article III-118 goes further and contains the important horizontal statement on mainstreaming. This provides that:

In defining and implementing the policies and activities referred to in this part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

Equality also forms one of the Titles of the Charter of Fundamental Rights found in Part II of the Constitution which, according to Article I-9(1), the Union must recognize. Title II opens with the classic assertion that 'Everyone is equal before the law'.⁹⁷ Article II-81(1) (Article 21 of the Charter) then contains a specific, but non-exhaustive, list of the grounds of discrimination which are prohibited 'sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'. This list differs in certain key respects from the (shorter) list of prohibited grounds in Article 13. However, while Article 13 provides the legal power for the Community to act, Article II-81(1) addresses discrimination by the institutions and bodies of the Union themselves, and by Member States when they are implementing Union law.⁹⁸ Article II-83(1) (Article 23(1) of the Charter) requires equality between men and women in 'all areas, including employment, work and pay'. Article II-83(2) (Article 23(2) of the Charter) contains the positive action provision. It specifies that the principle of equality 'shall not prevent the maintenance or adoption

⁹⁵ Proposal for a Council Reg. establishing a European Union Agency for Fundamental Rights COM(2005) 280. See also the Commission's Communication on a Fundamental Rights Agency COM(2004) 693.

⁹⁶ The objectives must be taken into account in respect of the policies and activities referred to in Part III: Art. III-115. For a full discussion, see Bell, 'Equality and the European Union Constitution' (2004) 33 *ILJ* 242.

⁹⁷ Art. II-80 (Art. 20 of the Charter). The numbering in the original Charter, adopted at Nice in 2000, is different. There are also minor textual differences between the original version of the Charter and the version incorporated into the Constitutional Treaty. Since the discussion of the Charter occurs within the section on the Constitutional Treaty, the Constitution's numbers will be used.

⁹⁸ Art. II-111. See also the Praesidium explanation accompanying the article which must be given 'due regard by the Courts of the Union and of the Member States' (Art. II-112(7)).

of measures providing for specific advantages in favour of the under-represented sex'.⁹⁹

Having sketched the Community's (hard and soft) rules on equality I should now like to consider the function and value these rules serve. I shall argue that while their origins were economic and thus essentially defensive, increasingly, the EU has been seen as a 'market leader', requiring Member States both to broaden and deepen their rights protection. In the final section I will suggest how Community law could go yet further forward.

⁹⁹ For a full discussion, see Costello 'Gender Equalities and the Charter of Fundamental Rights of the European Union' in Hervey and Kenner (eds), Economic and Social Rights under the EU Charter of Fundamental Rights (Hart, Oxford, 2003).

C. The Defensive Use of Community Anti-Discrimination Law

1. *The Economic origins of Article 141*

Article 119 EC (now Article 141) established the principle that men and women should receive equal pay for equal work. As is now well known, Article 119 was introduced into the Treaty of Rome largely to serve the economic purpose of 'correcting or eliminating the effect of specific distortions which advantage or disadvantage certain branches of activity'.¹⁰⁰ France insisted on the inclusion of Article 119 because it feared that, in the absence of Community regulation, its worker protection legislation, including its laws on equal pay, would put it at a competitive disadvantage in a common market due to the additional costs borne by French industry.¹⁰¹ The French were particularly concerned about discriminatory pay rates resulting from collective agreements in Italy. At that time France had one of the smallest differentials between the salaries of male and female employees (7% compared to 20-40% in the Netherlands and in Italy).¹⁰² This risked placing those parts of French industry employing a very large female workforce, such as textiles and electrical construction, in a weaker competitive position than identical or similar industries in other Member States employing a largely female workforce at much lower salaries.¹⁰³

Consequently, Article 119 (new Article 141) was included in the Treaty to impose parity of costs on the Member States and to prevent such destructive competition. This point was noted, albeit somewhat obliquely, by the French

¹⁰⁰ The Spaak Report, 61 (author's translation). Comité Intergouvernemental Créé par la conférence de Messine, Rapport des Chefs de Délégations aux Ministères des Affaires Etrangères of 21 Apr. 1956. The Committee, comprising of the heads of delegations, was established at the Messina conference in June 1955 under the chairmanship of M Paul Henri Spaak, then Belgian foreign minister. See generally Barnard, 'EC Sex Equality Law: A Balance Sheet', in The EU and Human Rights, ed. Alston (OUP, Oxford, 1999) on which this section draws.

¹⁰¹ See Kahn-Freund, 'Labour Law and Social Security', in American Enterprise in the European Common Market: A Legal Profile, eds. Stein and Nicholson (University of Michigan Press, Ann Arbor, Mich., 1960), 300, discussed in Barnard, 'The Economic Objectives of Article 119', in Sex Equality Law in the European Union, eds. Hervey and O'Keeffe (Wiley, Chichester, 1996); More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right', in The Evolution of EU Law, eds. Craig and De Búrca (OUP, Oxford, 1999). See also the influence of ILO Convention 100: Hoskyns, Integrating Gender (Verso, London, 1996), Ch. 4.

¹⁰² Budiner, Le Droit de la femme a l'Egalité de salaire et la Convention No. 100 de l'organisation internationale du travail (Librairie Générale de Droit et de Jurisprudence, Paris, 1975), citing Sullerot, L'emploi des femmes et ses problèmes dans les Etats Membres de la Communauté Européenne (CEC, 1972), 177. See generally Barnard, above, n. X.

¹⁰³ Budiner, above, n. X, citing Jean-Jacques Ribas, 'L'Egalité des salaires féminins et masculins dans la Communauté Economique européenne' (novembre 1966), Droit Social, para. 1, and Clair, 'L'article 119 du Traité de Rome. Le Principe de l'Egalisation des salaires masculins et féminins dans la CEE' (mars 1968), Droit Social, 150. In addition, France had ratified ILO Convention No. 100 by Law No. 52-1309 of 10 December 1952 (Journal Officiel, 11 décembre 1952). By 1957 the Convention had also been ratified by Belgium, France, Germany and Italy, but not by Luxembourg and the Netherlands. (Luxembourg ratified the Convention in 1967 and the Netherlands in 1971. All fifteen states of the European Union have now ratified the Convention.)

Advocate General Dutheillet de Lamothe in Defrenne (No. 1),¹⁰⁴ the first case to consider the application of Article 141. Advancing the market-making thesis, he said that although Article 141 had a social objective it also had an economic objective

for in creating an obstacle to any attempt at 'social dumping' by means of the use of female labour less well paid than male labour, it helped to achieve one of the fundamental objectives of the common market, the establishment of a system ensuring that 'competition is not distorted.

He continued that 'This explains why Article [141] of the Treaty is of a different character from the articles which precede it in the chapter of the Treaty devoted to social provisions'. It would therefore seem that the social provisions of the Treaty 'respond above all to the fear that unless employment costs are harmonised, economic integration will lead to competition to the detriment of countries whose social legislation is more advanced'.¹⁰⁵

2. *From Economic Right to Fundamental Human Right*

Thus, Article 119 was included in the Treaty to defend a national system from the potentially deregulatory effects of a common market. Yet, this defensive use of Community law seems relatively shortlived. The adoption of the 1970s Directives was not dependent on a market making rationale and the Court itself offered a rather different perspective. Pursuing, in Streeck's words, its own 'distinctive integrationist agenda',¹⁰⁶ it recognised the market correcting, as well as market making, dimension of the 'social' provisions. In the landmark judgment in Defrenne (No. 2),¹⁰⁷ a case brought against the backdrop of serious industrial unrest by women in Belgium about the absence of equal pay,¹⁰⁸ it famously observed:

Article [141] pursues a double aim. First, . . . the aim of Article [141] 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 competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay. Second, 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 living and working conditions of their peoples . . . 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 .

Shortly afterwards, in Defrenne (No. 3)¹⁰⁹ the Court took the social dimension of equality one stage further and elevated the principle to the status of a fundamental right. It said 'respect for fundamental personal human rights is one of the general

¹⁰⁴ Case 80/70 [1971] ECR 445. In Case 69/80 Worringham and Humphreys v. Lloyd's Bank [1981] ECR 767 Advocate General Warner again referred back to Advocate General Dutheillet de Lamothe's statement in Defrenne (No. 1) that the first purpose of Art. 119 was to 'avoid a situation in which undertakings established in Member States with advanced legislation on the equal treatment of men and women suffer a competitive disadvantage as compared with undertakings established in Member States that have not eliminated discrimination against female workers as regards pay'.

¹⁰⁵ Author's translation of Valticos, Droit international du travail, para. 180, cited in Budiner, above, n. X, 3.

¹⁰⁶ Streeck, above, n. X, 39.

¹⁰⁷ Case 43/75 Defrenne (No. 2) v. SABENA [1976] ECR 455.

¹⁰⁸ Hoskyns, Integrating Gender (Verso, London, 1996), 65-75.

¹⁰⁹ Case 149/77 Defrenne (No. 3) v. SABENA [1978] ECR 1365, 1378.

principles of Community law . . . there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.’ Thus, the passage of twenty years saw a seismic shift from equality being viewed solely through the lens of a principle which stopped competition between states from being distorted to being viewed as a fundamental right and, I will argue, a nascent citizenship right. That said, despite statements such as those in Defrenne (No.3), the yoke of the economic justification for Community (sex) equality legislation has far from been cast-off. For example, in some of its earliest decisions on equal pay, the Court made clear that indirect discrimination could be objectively justified not only on personal but also on market forces grounds.¹¹⁰ These cases suggest that the Court viewed equal opportunities as acceptable so long as they did not interfere significantly with the operation of the Common/Single Market. Legally, this manifested itself in the formal approach to equality.

The late 1990s saw a shift in approach in the European employment strategy where the European Union saw discrimination laws as promoting efficiency by more rapidly eliminating discriminators, by inducing potential productivity and by reducing the inefficiencies associated with statistical discrimination.¹¹¹ In other words, equality – together with other social rights – came to be seen as inputs into growth.¹¹² The view that equality was socially and economically important was reinforced by the prominent position of equality both in the Charter of Fundamental Rights adopted at Nice in December 2000 and the Constitutional Treaty. This changing perspective fed into rulings of the Court of Justice. In Deutsche Post¹¹³ the Court said that in view of the case-law recognising that equality was a fundamental right:

... it must be concluded that the economic aim pursued by Article [141] of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.¹¹⁴

With equality now upgraded to a fundamental human right, I should like to consider the significance of such a statement for the EU and national systems.

¹¹⁰ See, e.g., Case 96/80 Jenkins [1981] ECR 911; Case C-170/84 Bilka-Kaufhaus [1984] ECR 1607.

¹¹¹ Donohue, ‘Prohibiting Sex Discrimination in the Workplace: An Economic Perspective’ (1989) 56 U.Chicago L.Rev. 1337.

¹¹² This was recognized at a relatively early stage by the European Commission in its White paper on Social Policy where it said that the ‘adaptability and creativity of women is a strength which should be harnessed to the drive for growth and competitiveness in the EU’ (COM(94)333, 41).

¹¹³ Joined Cases C-270/97 and C-271/97 Deutsche Post v. Sievers and Schrage [2000] ECR I-929, para. 57.

¹¹⁴ Emphasis added. See also Joined Cases C-234/96 and C-235/96 Deutsche Telekom AG v. Vick and Conze [2000] ECR I-799, para. 57.

D. The Present Value of the ‘Fundamental Right to Equality’

In this section I will argue that by recognizing equality as a fundamental right, this has symbolic and practical value at both national and European level. I will begin by considering the European level

1. EU Level

1.1 Introduction

We have already seen that, by the late 1970s, the ECJ was already describing equality as a fundamental rights. But what does equality mean? In this section, I will argue that, from the Community perspective equality is used in two contexts. In the first, equality is used as a general principle of law. In this context, the Court takes the view that equality requires consistent treatment (‘equality as consistency’).¹¹⁵ This is the more Constitutional use of the term and is most directly allied to Union citizenship. Equality in this context is shorn of the detailed elaboration of the principles of direct and indirect discrimination. This usage is found in the more programmatic field of non-discrimination law, which aims at overcoming specific inequalities between groups. This is the second usage of the principle of non-discrimination. We shall consider these in turn.

1.2 Equality as a General Principle of Law

(a) Introduction

As we have already seen, since Defrenne (No.3) the Court has recognized equality as a general principle of law.¹¹⁶ In developing general principles of law the Court has often drawn inspiration from the European Convention on Human Rights, especially Article 14. Equality as a general principle of law is used in four ways:

- To challenge the validity of Community measures
- As a vehicle for interpretation of Community acts
- To challenge the validity of Member State measures
- As a free standing right.

We shall briefly examine each use.

(b) The use of the Principle of Equality to Challenge the Validity of Community Acts

General principles of law can be invoked to challenge the validity of Community measures on the ground that they breach the principle of equality. In this context, the principle of equal treatment requires that ‘comparable situations must not be treated

¹¹⁵ I am grateful to Dagmar Schiek for discussion on this point.

¹¹⁶ See also Case 152/84 Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching) (No. 1) [1986] ECR 723, para. 36; Case 151/84 Roberts v. Tate & Lyle Industries Ltd [1986] ECR 703, para. 35, and Case C-132/92 Birds Eye Walls Ltd v. Roberts [1993] ECR I-5579, para. 17; Case C-408/92 Smith v. Avdel Systems [1994] ECR I-4435, para. 25; and Case C-167/97 R v. Secretary of State for Employment, ex parte Seymour-Smith and Perez [1999] ECR I-623, para. 75; Joined Cases C-270/97 and C-271/97 Deutsche Post [2000] ECR I-929, para. 57; Case C-25/01 Rinke v. Ärztekammer Hamburg [2003] ECR I-8349, para. 25; Case C-256/01 Allonby v. Accrington & Rosendale College [2004] ECR I-000, para. 65. See also Docksey, ‘The Principle of Equality between Women and Men as a Fundamental Right Under Community Law’ (1991) 20 ILJ, 258 and Tridimas, The General Principles of EU Law (OUP, Oxford, 2006).

differently and that different situations must not be treated in the same way unless such treatment is objectively justified.¹¹⁷ Usually, the Court finds that the two situations are not comparable, or that the differences can be objectively justified. Therefore, in the Alliance case¹¹⁸ the Court found that the distinction drawn by the Directive between those substances requiring those substances which had already been approved when the Directive was adopted which were automatically added to the positive list but those which had not already been approved had to go through an onerous approval process did not breach the principle of equality because the two situations were not comparable.

The principle of equal treatment can also mean non-discrimination on a prohibited ground. In this context, employees of the Community institutions have used the principle to challenge discriminatory rules and practices, and they have enjoyed somewhat more success than other applicants wishing to challenge a Community measure for breaching the principle of equality more generally. For example, in Razzouk and Beydoun¹¹⁹ the Court found that the Community's staff regulations which distinguished between the treatment of widows and widowers for the purpose of a survivor's pension breached the principle of equal treatment on the grounds of sex.¹²⁰ By contrast, in Rinke¹²¹ the validity of two Directives on training for doctors was challenged on the grounds that the provision requiring part-time training in general medicine to include a certain number of full time training periods are indirectly discriminatory against women. The Court said that 'compliance with the prohibition of indirect discrimination on grounds of sex is a condition governing the legality of all measures adopted by the Community institutions'¹²² but on the facts found that the training requirements could be objectively justified.

In Prais,¹²³ another staff case, this time concerning a potential applicant, the Court appeared to recognise the right to freedom of religion under Article 9 ECHR but said that it was not absolute. This meant that while the Community institutions should avoid having recruitment tests on dates which might be unsuitable for religious reasons and seek to avoid fixing such dates for tests fundamental rights did not impose on the Community institutions a duty to avoid a conflict with a religious requirement of which they had not previously been informed.¹²⁴ The Court adopted a similarly cautious approach in D v. Council,¹²⁵ a case concerning the EU's refusal to pay a household allowance, which would have been payable to a married employee, to a homosexual employee who was in a stable partnership registered under Swedish law. While the Court appeared to recognize that the principle of

¹¹⁷ Joined Cases C-184/02 and C-223/02 Spain and Finland v. Parliament and Council [2004] ECR I-7789, para. 64.

¹¹⁸ Joined Cases C0154/04 and C-155/04 R v. Secretary of State for health, ex parte Alliance for Natural Health [2005] ECR I-000, para. 116.

¹¹⁹ Joined Cases 75 and 117/82 Razzouk and Beydoun v. Commission [1984] ECR 1509.

¹²⁰ Paras. 17-18. See also Case 2121/74 Airola v. Commission [1975] ECR 221. For a successful challenge to an indirectly discriminatory measure, see Case 20/71 Sabbatini v. European Parliament [1972] ECR 345.

¹²¹ Case C-25/01 Rinke v. Ärztekammer Hamburg [2003] ECR I-8349.

¹²² Para. 28.

¹²³ Case 30/75 Prais v. Council [1976] ECR 1589.

¹²⁴ Para. 18.

¹²⁵ Case C-125/99P [2001] ECR I-4319.

non-discrimination extended to sexual orientation¹²⁶ it found that the principle had not been breached on the facts of the case. The Court said that the principle of equal treatment could apply only to persons in comparable situations, and so it was necessary to consider whether the situation of an official who had registered a partnership between persons of the same sex was comparable to that of a married official.¹²⁷ The Court then noted that because there is a wide range of laws in the Member States on recognition of partnerships between persons of the same sex or of the opposite sex and because of the absence of any general assimilation of marriage and other forms of statutory union,¹²⁸ it concluded that the situation of an official who has registered a partnership in Sweden could not be held to be comparable, for the purposes of applying the Staff Regulations, to that of a married official.¹²⁹

These cases demonstrate that the European Court of Justice's approach to the principle of equality is still evolving. By contrast, the US Supreme Court has adopted a sophisticated framework for analysing such cases, with strict scrutiny requiring a compelling state interest to be shown for measures which discriminate on the grounds of race, alien status (citizenship), national origin and religion and political opinion, heightened scrutiny for discrimination on the grounds of sex and illegitimacy, and only rational basis review¹³⁰ for ordinary grounds of discrimination such as the distinction between the permitted activities of ophthalmologists and opticians.¹³¹

(c) *Equality as a Vehicle for Interpretation*

The Court of Justice has also used the general principles of law to interpret potentially ambiguous provisions of Community law. The significance of this can be seen in *P v. S*.¹³² The case concerned the dismissal of a male to female transsexual on the grounds of her gender reassignment. The question referred to the Court of Justice was whether the word 'sex' in the phrase there should be 'no discrimination whatsoever on the grounds of sex' in the Equal Treatment Directive 76/207 was broad enough to include 'change of sex'. Drawing on the general principle of equality, the Court said that the Equal Treatment Directive was 'simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law'.¹³³ This enabled the Court to conclude that the scope of the Directive could not be confined simply to discrimination based on the fact that a person is of one or other sex and so would also apply to discrimination

¹²⁶ At para. 47 the Court said 'as regards infringement of the principle of equal treatment of officials irrespective of their sexual orientation, it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner'.

¹²⁷ Para. 48.

¹²⁸ Para. 50.

¹²⁹ Para. 51.

¹³⁰ See *City of Cleburne, Texas v. Cleburne Living Center, Inc.* 473 US 432, 440 'The general rule is that legislation is presumed to be valid, and will be sustained if the classification drawn by the statute is rationaly related to a legitimate state interest. ... When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude'.

¹³¹ *Williamson v. Lee Optical of Oklahoma Inc* 348 US 483 (1955). The European Court of Human Rights has also adopted an approach which distinguishes between sensitive grounds such as sex, race, religion, nationality and sexual orientation where differences in treatment by the state must be for 'very weighty reasons' and ordinary grounds which are easier to justify: Ellis, above n, X, 321.

¹³² Case C-13/94 [1996] ECR I-2143.

¹³³ Para. 17.

based on gender reassignment.¹³⁴ A strong opinion on the part of the Advocate General was highly influential. He declared:

I am well aware that I am asking the Court to make a “courageous” decision. I am asking it to do so, however, in the profound conviction that what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: the irrelevance of a person’s sex with regard to the rules regulating relations in society. ... I consider that it would be a great pity to miss this opportunity of leaving a mark of undeniable civil substance, by taking a decision which is bold but fair and legally correct, inasmuch as it is undeniably based on and consonant with the great value of equality.¹³⁵

While no reference was made in the case to citizenship rights, it is no coincidence that the decision was adopted in the period after the Maastricht Treaty when increasing attention was being given to the need to give some flesh to the bare bones of the Citizenship provisions. In this respect social policy, and equality in particular, has been used to provide a social face to the internal market programme and in this respect to legitimize - and make more palatable - the Community’s integration agenda.

2.4 The Use of the Principle of Equality to Challenge the Acts of the Member States when acting in the Sphere of Community Law

So far we have concentrated on the Court of Justice’s approach to reviewing the validity of Community acts and interpreting of Community acts in the light of the principle of equality. In this respect, the legitimacy of the judicial developments are rarely challenged. More controversially, the Court has also said that when Member States are acting within the sphere of Community law (ie when they are implementing Community law¹³⁶ and when they are derogating from Community law¹³⁷), their actions must also be compatible with fundamental rights, including equality.

There is no equality case law to illustrate this use. What there is, however, is the remarkable decision in Mangold.¹³⁸ Mangold concerned the German law implementing the Fixed Term Work Directive 99/70.¹³⁹ According to this law, a fixed term employment contract could be concluded only where there were objective grounds for so doing. However, until December 2006 (when the age discrimination provisions of the Framework Directive 2000/78¹⁴⁰ came into force) the need for objective justification did not apply to fixed term contracts for workers aged over 52. The Court of Justice upheld Mangold’s challenge to this rule that it was discriminatory on the grounds of age. Even though the Age Discrimination provisions of the Directive had not yet come into force, the Court said the source of the principle of non-discrimination found in the Framework Directive was various international instruments and in the constitutional traditions common the Member States.¹⁴¹ It continued: ‘The principle of non-discrimination on grounds of age must thus be

¹³⁴ Para. 20.

¹³⁵ Para. 24. See also Case C-117/01 KB v. National Health Service Pensions Agency [2004] ECR I-000 discussed by Cantor (2004) 41 CMLRev. 1113. See also Case C-423/04 Richards v. Secretary of State for Work and Pensions [2006] ECR I-000.

¹³⁶ Case 5/88 Wachauf [1989] ECR 2609, para. 19 and Case C-2/92 Bostock [1994] ECR I-995, para. 16.

¹³⁷ Case C-260/89 ERT [1991] ECR 2925.

¹³⁸ Case C-144/04 Mangold v. Helm [2005] ECR I-000.

¹³⁹ OJ [1999] L175/43.

¹⁴⁰ OJ [2000] L303/16.

¹⁴¹ Para. 74.

regarded as a general principle of Community law¹⁴² and the observance of this general principle could not be made conditional of the expiry of the transposition date of the Framework Directive.

More striking of all, the Court indicated that general principles of law could be directly effective and enforceable in the national courts. The Court said that:

In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.¹⁴³

Thus, national courts had to provide a genuine and effective remedy to enforce a general principle of Community law which applied in a horizontal situation.¹⁴⁴ If the Court follows this, then it appears that equality, as a general principle of law, could be used to challenge discriminatory conduct by employers, not only on the grounds of age but sex, race, ethnic origin, sexual orientation, religion, belief and nationality, even where the Directives have not been implemented or correctly implemented. In this respect the Court's dramatic approach, justified in the name of human rights, may well have gone too far and undermined the carefully negotiated provisions of the Article 13 Directives.

1.2 Equality as Non-discrimination

In respect of designated groups which have traditionally suffered from discrimination the legislature has identified what is meant by equality: ie who must be treated similarly with whom and the way that that equal treatment must be carried out. Thus, the legislature has required that migrants be treated the same way as nationals,¹⁴⁵ that men and women be treated in the same way,¹⁴⁶ blacks and whites, the able bodied and the disabled, gays and straights, the young and the old believers and non-believers.¹⁴⁷ It has also explained what non-discrimination means – no direct and indirect discrimination, no harassment and no instruction to discriminate. In respect of direct discrimination it has made clear that this can only be saved by reference to the express GORs while indirect discrimination can be objectively justified. The legislation has also made clear that positive action is permissible in limited circumstances, that reasonable accommodation is required in respect of disability and that the national system must provide adequate remedies and, in respect of sex, race and ethnic origin, bodies must be set up to assist the victims.

2. National Level

This brief description of the key pillars of the Community anti-discrimination legislation feeds into an analysis of the added value that Community discrimination law provides to national level rights protection. I will argue that the Community's impact is positive in the following three ways.

¹⁴² Para. 75.

¹⁴³ Para. 77.

¹⁴⁴ See also AG Tizzano's opinion, para. 99ff. Cf AG Geelhoed's Opinion in Case C-13/05 Chacón Navas v. Eurest Colectividades SA [2006] ECR I-000.

¹⁴⁵ See, e.g., Reg. 1612/68 and Dir. 2004/38.

¹⁴⁶ Art. 141 and the Sex Equality Dirs. outlined above.

¹⁴⁷ The Art. 13 Directives discussed above.

First, EC law has been influential in framing the rights and structuring the debate about sex equality. For example, the Continental tradition has never clearly distinguished between direct and indirect discrimination and has always permitted both types of discrimination to be objectively justified. EC law, drawing in part on the British law which in turn owes its structure to the US Civil Rights Act 1964, makes clear that only indirect discrimination can be objectively justified. As Ellis explains, those advocating that direct discrimination should be capable of being objectively justified misunderstand the structural elements of discrimination. Since discrimination means detrimental treatment which is grounded on sex, it consists of two elements—harm (adverse treatment) and causation (the grounding of that treatment in a prohibited classification).¹⁴⁸ The concept of justification is used in relation to indirect discrimination, where the root cause of the detrimental treatment is not clear and the defendant is seeking to show that its cause is unrelated to sex. Thus, if the adverse consequence to one group can be shown to be ‘attributable to an acceptable and discrimination-neutral factor, then there is no discrimination’.¹⁴⁹ By contrast, in direct discrimination cases, where it is proved that the detrimental treatment is grounded upon the plaintiff’s sex, cause has been established and there is no room to argue about justification.

Second, and related to the first point, EC law has led from the front in key respects in this area of discrimination law. For example, it has introduced new prohibited grounds of discrimination law (eg sexual orientation, age, disability) and has made harassment and victimization on the prohibited grounds unlawful. None of this had been comprehensively covered by national laws. The Court of Justice has also shifted the terms of the debate away from an exclusive focus on formal equality (like must be treated with like) towards substantive equality (equality of outcomes, recognising the fact that women may in fact be differently situated). For example, in Thibault,¹⁵⁰ the Court said that ‘the result pursued by the Directive [76/207] is substantive, not formal, equality’. While this might appear to serve as a rhetorical device only, it led the Court in Marschall¹⁵¹ to upholding the state’s law which gave preference to a woman in a tie-break situation, subject to a saving clause operating in favour of the man. The Court said that this national rule was compatible with (the original) Article 2(4) because:

even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be

¹⁴⁸ Above n.X, 112.

¹⁴⁹ Ellis, above, n.X, 112.

¹⁵⁰ Case C-136/94 [1998] ECR I-2011, repeated in Case C-207/98 Mahlburg v. Land Mecklenburg-Vorpommern [2000] ECR I-549, para. 26; Case C-284/02 Land Brandenburg v. Sass [2004] ECR I-11143, para. 34. See also Case 109/88 Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss (Danfoss) [1989] ECR 3199 where the Court ruled that a criterion rewarding employees’ mobility — their adaptability to variable hours and places of work — may work to the disadvantage of female employees who, because of household and family duties, are not as able as men to organise their working time with such flexibility. Similarly, the criterion of training may work to the disadvantage of women in so far as they have had less opportunity than men for training or have taken less advantage of that opportunity. In both cases the employer may only justify the remuneration of such adaptability or training by showing it is of importance for the performance of specific tasks entrusted to the employee.

¹⁵¹ Case C-409/95 Marschall v. Land Nordrhein-Westfalen [1997] ECR I-6363. Cf Case C-450/93 Kalanke v Stadt Bremen [1995] ECR I-3051. These cases are considered in detail in ch. 8.

less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.¹⁵² For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.¹⁵³

It has also imposed on a duty on Member States 'actively [to] take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities' (Article 1(1a), now Article 29 of the Consolidated Directive). In addition, Member States must take the necessary measures to ensure that they abolish any laws, regulations or administrative provisions contrary to the principle of equal treatment and to ensure that any discriminatory provisions contained in collective agreements,¹⁵⁴ individual contracts of employment, staff and other internal rules of undertakings or in rules governing the independent occupations or professions and workers' and employers' organizations are or shall be declared null and void or are amended.¹⁵⁵ Thus the Directive imposes positive duties on the state to be pro-active in the elimination of discrimination and promoting equality. As Fredman points out, such duties go beyond compensating identified victims and aims at restructuring institutions. The duty bearer is not the person at fault for creating the problem but is, nevertheless, responsible for identifying the problem and for participating in its eradication.¹⁵⁶ So far, the Community legislature has not introduced equivalent duties in respect of the other strands.

Perhaps, most strikingly it has introduced the concept of mainstreaming of equality issues especially in respect of sex equality. As we have already seen, the Community institutions have already applied it to their own policies in respect of sex¹⁵⁷ and now require Member States to consider gender equality in respect of their employment policies. Gender mainstreaming has been a key aspect of the employment guidelines since 2001.¹⁵⁸ In the chapeau to 2005 guidelines, the Council says that 'Equal opportunities and combating discrimination are essential for progress. Gender mainstreaming and the promotion of gender equality should be ensured in all action taken'.

Third, the EU Directives have precipitated institutional reforms at national level. For example, Inspired by this model, and tempering somewhat the problems faced by individual litigants bring claims, the amended Equal Treatment Directive contains a provision to require other Member States to make similar provision. Article

¹⁵² See also the views of the Federal Labour Court when the Kalanke case returned to it (Nr 226), Urteil of 5 Mar. 1996-1 AZR 590/92 (A). It said that it was impossible to distinguish between opportunity and result, especially in the case of engagement and promotion because the selection itself was influenced by circumstances, expectations and prejudices that typically diminish the chances of women.

¹⁵³ Paras. 29 and 30.

¹⁵⁴ The Directive covers all collective agreements, irrespective of whether they have legal effects or not because they have important de facto consequences for employment relationships: see Case 165/82 Commission v. UK [1982] ECR 3431.

¹⁵⁵ Arts. 3(2)(a) and (b) of Directive 76/207, Arts. 23(a) and (b) of the Consolidated Dir..

¹⁵⁶ 'The Age of Equality' in Fredman and Spencer (eds) Age as an Equality Issue. Legal and Policy Perspectives (Hart, Oxford, 2003), 62.

¹⁵⁷ Commission, Incorporating Equal Opportunities for Men and Women into all Community Policies and Activities, COM(96)67.

¹⁵⁸ Co. Dec. 2001/63/EC (OJ [2001] L22/18, para. 16: 'Therefore, the Member States will adopt a gender-mainstreaming approach in implementing the Guidelines across all four pillars:
-developing and reinforcing consultative systems with gender equality bodies;
-applying procedures for gender impact assessment under each guideline;
-developing indicators to measure progress in gender equality in relation to each guideline.

6(3) of the Equal Treatment Directive/Article 17(2) of the Consolidated Directive now provides:

Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainants, with his approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

In addition, Article 8a/Article 20 requires Member States to designate a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies with responsibility at national level for the protection of human rights or the safeguard of individuals' rights. These bodies should be able to:

- Provide independent assistance to victims of discrimination in pursuing their complaints about discrimination (without prejudice to the bodies laid down in Article 6(3)/Article 17(2);
- conduct independent surveys concerning discrimination;
- publish independent reports and making recommendations on any issue relating to such discrimination.

Furthermore, Article 8c/Article 22 requires Member States to encourage dialogue with appropriate non-governmental organisations with a legitimate interest in contributing to the fight against discrimination on grounds of sex.

In addition, the Directives envisage a significant role for the social partners. Article 8b(1)/Article 21(1) provides that Member States must take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices. Article 8b(2)/Article 21(2) provides that Member States should also encourage the social partners, without prejudice to their autonomy, to promote equality between women and men and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields coming within the material scope of the Directive which fall within the scope of collective bargaining.

Individual employers also have a role: Article 8b(3)/Article 21(3) provides that Member States must encourage employers to promote equal treatment for men and women in the workplace in a 'planned and systematic' way. Employers must also be encouraged, according to Article 8b(4)/Article 21(4), to provide employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking at appropriate regular intervals. Such information may include:

- statistics on proportions of men and women at different levels of the organisation and
- possible measures to improve the situation in cooperation with employees' representatives.

These provisions (Articles 8a-c), introduced by the Equal Treatment Directive 2002/73, are intended to introduce a 'new governance' approach into what is broadly an 'old governance' measure. Thus, it encourages a wider range of actors to become involved in the process of securing equality, largely through mainstreaming and 'gender proofing' workplace practices and collective agreements. Equivalent provisions apply in respect of the Race and Ethnic origin Directive 2000/43.

E. The Future?

1. Introduction

So far, we have concentrated on the positive contribution made by Community discrimination law to national law on this subject. Of course, all in the garden is not rosy and there are of course criticisms that can be levelled at the Community's approach but my interest now is to consider how the Community might build on its achievements to date to take discrimination law forward.

In his important article, Hugh Collins makes an eloquent case that the principle of social inclusion provides a more satisfactory intellectual framework to underpin (British) anti-discrimination legislation than existing approaches based on substantive equality.¹⁵⁹ I shall argue that, at European Union level at least, it is the principle of citizenship which provides the legal justification for giving equal rights to those seen to be disadvantaged and that, at the heart of the citizenship, lies the concept not so much of social inclusion but solidarity.

The Oxford English Dictionary defines solidarity as a 'mutual dependence, community of interests, feelings, and action'. In his opinion in Sodemare¹⁶⁰ Advocate General Fennelly develops this idea further. He says:

Social solidarity envisages the inherently uncommercial act of involuntary subsidization of one social group by another.¹⁶¹

From these definitions we can see that these two concepts – solidarity and social inclusion - overlap significantly. However, I would suggest that 'solidarity' is more positive than social inclusion. While both have inclusiveness at their core, solidarity does not suggest that those suffering from discrimination are necessarily disadvantaged, marginalised victims. Often, in the free movement context they are not: they are successful, skilled, highly motivated individuals who wish to take advantage of the opportunities offered by the single market but who are faced with detailed regulation imposed by the host state (concerning qualifications, licences and registration) which obstructs them from being fully integrated into the (host state) community. The same can often be said about those litigants bringing claims for equal treatment on the grounds of sex – indeed this is one of the criticisms of the existing law – because it is generally invoked by those already empowered (such as men bringing claims for equal occupational pension age).

Solidarity is partly to do with equality but it goes beyond that. Underpinning the idea of solidarity is the notion that the ties which exist between the individuals of a relevant group justify decision-makers taking steps – both negative and positive – to ensure that all individuals are integrated into the community thereby enabling them to have the chance to participate and contribute fully. The negative steps include removing obstacles to integration and participation; positive steps include active programmes to encourage participation of those otherwise excluded. If this reading is correct then the use of solidarity as a guiding principle can help liberate decision-makers and decision-takers from the straightjacket of formal equal treatment.

In the context of the EU, I shall argue that the principle of solidarity provides a useful framework to explain the Court of Justice's emerging jurisprudence on equality between migrant citizens and nationals. It is a concept that the Court itself uses in its

¹⁵⁹ H.Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16.

¹⁶⁰ Case C- 70/95 Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia [1997] ECR I-3395.

¹⁶¹ Para. 29.

own case law,¹⁶² enabling it legitimately to tailor the equality on offer: limited equality in the case of temporary migrants where there is only limited solidarity between nationals of the host state and migrants; full equality where the migrant is permanently established in the Member State where there is (or should be) greater solidarity between the migrant and the national. In this respect solidarity helps to facilitate the migrant's integration into the host state while also justifying the equal treatment. If this is the case then the integration argument helps explain the relatively recent evolution in the Court's jurisprudence which justifies going beyond a model based on discrimination towards one based on removing the impediments of access to the market.

These interesting developments in the transnational context might inform our thinking about equality in the national context where principles of citizenship and solidarity are much more firmly rooted. I begin by examining the EU developments in respect of free movement of citizens before considering the implications they may have for domestic labour law.

2. *Citizenship and solidarity: the EU context*

Article 18(1) EC provides that every citizen of the Union has the right to move and reside freely within the territory of the Member States 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. The Court's case law on Article 18 provides an interesting illustration of how it has used the strong language of citizenship to justify a decision based on solidarity to ensure the attainment of equality between migrants and nationals. Grzelczyk¹⁶³ shows this very clearly.

Grzelczyk, a French national, began a four year course of university studies in physical education at a Belgian university. During the first three years, he covered the costs of his studies by taking on various jobs and loans. At the beginning of his fourth and final year, he applied to the Belgian authorities for payment of the minimex, a non-contributory social benefit designed to assist individuals in need. Under Belgian law as it then stood, Community nationals could receive the benefit but only if they were workers. Because the authorities thought Grzelczyk was a migrant student and not a worker he was denied the benefit; Belgian students in the same circumstances did, however, receive the benefit.¹⁶⁴ Grzelczyk was therefore suffering from discrimination on the grounds of nationality.

The Court said that, as a citizen of the Union lawfully resident in Belgium, Grzelczyk could rely on the Article 12 prohibition of discrimination on the grounds of nationality¹⁶⁵ in respect of those situations which fell within the material scope of the Treaty,¹⁶⁶ which included the right to move and reside freely in another Member State.¹⁶⁷ It then said that

¹⁶² Joined Cases C-159/91 and C-160/91 Poucet and Pistre v. AGF and Cancava [1993] ECR I-637; Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-5751, para. 87. See further C. Barnard, 'Citizenship and 'Incremental Inclusion' in M. Dougan and E. Spaventa (eds) EU Social Welfare, (Oxford, Hart, 2004, forthcoming).

¹⁶³ Case C-184/99 Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193.

¹⁶⁴ Para. 29.

¹⁶⁵ Para. 30.

¹⁶⁶ Para. 32.

¹⁶⁷ Para. 33, citing Case C-274/96 Bickel and Franz [1998] ECR I-7637.

Union citizenship is destined to be the fundamental status of nationals of the member States enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.¹⁶⁸

One such exception can be found in Article 1 of Directive 93/96 which provides that the migrant student have sufficient resources. The Court used the citizenship provisions to limit the scope of the derogation. It said that where a migrant student did have recourse to social assistance a Member State could either withdraw his residence permit or not to renew it.¹⁶⁹ However, the Court added that such acts could not become the automatic consequence of a migrant student having recourse to the host State's social assistance system¹⁷⁰ since the Preamble to the Directive provided that migrant students could not become an 'unreasonable' burden on the public finances of the host State.¹⁷¹ In Bidar¹⁷² the Court built on the ruling in Grzelczyk to justify finding that the UK was obliged to treat legally resident migrants equally with nationals in respect of access to maintenance grants and loans. However, the Court said that the UK would be justified in imposing a three residence requirement before the individual could claim maintenance grants and loans.

The implications of Grzelczyk were spelt out in Baumbast,¹⁷³ this time in respect of Directive 90/364 on persons of independent means. Baumbast, a German national, had been working in the UK first as an employee and then as a self-employed person. He brought his family with him and they continued to reside there even after his work had ceased, funding themselves out of their own savings. They also had comprehensive medical insurance but this was for treatment in Germany and did not cover them for the UK. For this reason the Secretary of State refused to renew Mr Baumbast's residence permit and the residence documents of his Columbian wife and children. The Court insisted on reading the limitations in Directive 90/364 subject to the principle of proportionality¹⁷⁴ and found that, given neither he nor his family had become a financial burden on the state, it would amount to a disproportionate interference with the exercise of the right of residence conferred on him by Article 18(1) EC if he were denied residence on the ground that his sickness insurance did not cover the emergency treatment given in the UK.¹⁷⁵

The careful articulation of the proportionality principle in Baumbast helps to explain Grzelczyk: Grzelczyk could not be refused a minimex under Article 1 of Directive 93/96 because he had been lawfully residing in Belgium for three years during which time he had had sufficient resources (and medical insurance). Now that he was suffering 'temporary difficulties' it would be disproportionate to deny Grzelczyk the minimex to cover this. However, Grzelczyk goes further than Baumbast by requiring the Belgian authorities to grant Grzelczyk the benefit (minimex) which he would undoubtedly take advantage of, rather than merely granting him the possibility of the benefit (access to the host state's health service) which Baumbast and his family may never need to take up. Therefore, in Grzelczyk the Court recognised that there was 'a certain degree of financial solidarity' between nationals of a host

¹⁶⁸ Para. 31.

¹⁶⁹ Para. 42.

¹⁷⁰ Para. 43.

¹⁷¹ Para. 44.

¹⁷² Case C-209/03 R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills, judgment of 15 March 2005, not yet reported.

¹⁷³ Case C-413/99 [2002] ECR I-000, para. 91.

¹⁷⁴ *Ibid.*

¹⁷⁵ Para. 93.

Member State and nationals of other Member States,¹⁷⁶ and the same reasoning must apply to Baumbast. From these cases it would seem that in ‘emergency’ situations (pressing financial or medical need) the Court recognises that there is sufficient solidarity between nationals and migrants to justify the host state providing assistance to the migrant on equal terms to nationals, especially in respect of benefits which are non-contributory.

How then does this limited version of solidarity explain Martinez Sala?¹⁷⁷ Martínez Sala was a Spanish national who had been living in Germany since 1968 when she was 12. She had various jobs and various residence permits in that time. When she gave birth to a child in 1993, she did not have a residence permit, but she did have a certificate saying that an extension of the permit had been applied for. The German authorities refused to pay her a child raising allowance on the grounds that she was neither a German national nor did she have a residence permit. The Court said that, as a citizen of the Union lawfully residing in the territory of another Member State she was entitled under Article 17(2) to benefit from the principle of equal treatment laid down in Article 12 in respect of ‘all situations falling within the scope ratione materiae of Community law’¹⁷⁸ which included payment of a child raising allowance.¹⁷⁹ Because she was suffering from direct discrimination on the grounds of nationality this contravened Article 12.¹⁸⁰

Why then was Martínez Sala granted full equal treatment in respect of a social benefit when she did not satisfy any of the criteria laid down in Directive 90/364 on persons of independent means? I think that part of the explanation lies in the fact that the Court did not consider her to be a temporary migrant but a migrant who was fully integrated into the host state’s community, having lived there for 25 years. Given that she had spent most of life in Germany (and had at times contributed to the German exchequer when she had worked), she was effectively more integrated into German society than Spanish and so she was entitled to be treated in exactly the same way as a German national. This explanation can be supported by Bidar. In paragraph 56 the Court referred to the need for Member States to show ‘a certain degree of financial solidarity with nationals of other Member States’ in the organisation and application of their social assistance systems. It then continued in paragraph 57 that:

In the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State.¹⁸¹

The Court then makes clear that length of residence is a key indicator of integration:¹⁸²

... the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host state for a certain length of time.

¹⁷⁶ Para. 44.

¹⁷⁷ Case C-85/96 Martínez Sala [1998] ECR I-2691

¹⁷⁸ Para.67.

¹⁷⁹ Ibid.

¹⁸⁰ Para.64.

¹⁸¹ Emphasis added.

¹⁸² Para. 59. See also AG Geelhoed’s remarks in Case C-413/01 Ninni-Orasche v. Bundesminister für Wissenschaft [2003] ECR I-000, paras. 90-91. For an emphasis on the contextual approach which takes account of length of residence and degree of integration, see AG Ruiz-Jarabo Colomer’s opinion, in Case C-138/02 Brian Francis Collins v. Secretary of State for Work and Pensions [2003] ECR I-000, paras. 65-67.

Thus, Bidar emphasises a ‘quantitative’ approach:¹⁸³ the longer migrants reside in the Member State, the more integrated they are in that state and the greater the number of benefits they receive on equal terms with nationals. The corollary of this is that in respect of newly arrived migrants there is insufficient solidarity between them and the host state taxpayer to justify requiring full equal treatment in respect of social welfare benefits. This was the view taken by Advocate General Ruiz-Jarabo Colomer in Collins.¹⁸⁴ Collins, who was Irish, arrived in the United Kingdom and promptly applied for a job-seeker’s allowance which was refused on the grounds that he was not habitually resident in the UK. The Advocate General distinguished Grzelczyk¹⁸⁵ and concluded that Community law did not require the benefit to be provided to a citizen of the Union who entered the territory of a Member State with the purpose of seeking employment while lacking any connection with the state or link with the domestic employment market.¹⁸⁶

The incremental approach to the principle of equal treatment suggested by the case law was also recognised by Advocate General La Pergola in Stöber. He said that the ultimate purpose of the citizenship provisions was to bring about increasing equality between citizens of the Union, irrespective of their nationality.¹⁸⁷ The idea is further fleshed out in the Directive on Citizens’ Rights 2004/38 which replaces the various directives on workers, the self employed and service providers and the three Residence Directives, with a single Directive giving rights to all Union citizens who move to or reside in another Member State and to their family members as defined.¹⁸⁸ The Directive envisages three categories of migrants. The first group are those wishing to enter the host state for up to three months. They are not subject to any conditions (eg as to resources, medical insurance) other than holding a valid identity card or passport. They enjoy the right to reside in the host State for themselves and their families and the right to equal treatment but they have no entitlement to social assistance during the first three months of their stay.¹⁸⁹

The second group are those residing in the host state for more than three months. They have a ‘right to residence’ if¹⁹⁰ they are engaged in gainful activity in an employed or self-employed capacity; or have sufficient resources for themselves and comprehensive sickness insurance cover; or they are students with comprehensive sickness insurance cover and sufficient resources. They have the right to engage in gainful activity and the right to equal treatment. The third group concerns those legally residing in the host state for a continuous period of more than five years.¹⁹¹ These citizens (and their family members who are not nationals but who have resided with the Union citizen for five years) will have the right of permanent residence. None of the conditions applicable to the second group apply to those seeking permanent residence. As with the second group, the third group also enjoy the right to work and

¹⁸³ This idea is developed further in Barnard, Bidar (2005) 42 *CMLRev.* forthcoming.

¹⁸⁴ Case C-138/02 Brian Francis Collins v. Secretary of State for Work and Pensions [2003] ECR I-000.

¹⁸⁵ Para. 66.

¹⁸⁶ Para. 76.

¹⁸⁷ Joined Cases C-4 and 5/95 Stöber and Pereira [1997] ECR I-511, para.50.

¹⁸⁸ Art. 3(1).

¹⁸⁹ Art. 6

¹⁹⁰ Art. 7.

¹⁹¹ **Art. 16.** There are certain exceptions to the five year rule e.g. those reaching pension age or suffer a permanent incapacity or frontier workers.

to equal treatment. In addition, they can enjoy student maintenance in the form of grants or loans.¹⁹²

There are three striking features of the citizenship case law outlined above. First, because the solidarity principle is used to justify giving – even limited – equality rights to migrants it tailors equality according to the circumstances and so makes it more flexible. This avoids the political problems of ensuring full equal treatment to all migrants from the first day of their arrival in the host state.

Second, the equality rights conferred by the case law in the name of solidarity have the effect of imposing corollary duties on national authorities to make payments (Grzelczyk) and to provide benefits (Baumbast) to migrants where they are already given to nationals. In the future it could be envisaged that the solidarity principle might justify other policies necessary to help the migrant feel integrated into the host state, including some of the positive duties of monitoring that Bob Hepple has advocated and which now find their way into OMC (open method of coordination) processes..

Thirdly, this case law shows how the principle of solidarity shades into notion of integration and social inclusion. In its pre-citizenship case law the Court justified extending equality in respect of social advantages under Article 7(2) of Regulation 1612/68 to family members on the grounds that it was necessary to secure their integration into the community of the host state. This was first seen in Even¹⁹³ where the Court said that social advantages included

... which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community (emphasis added).

With its reference to residence, the decision in Even paved the way for Article 7(2) to be applied not just to workers qua workers but also their families qua lawful residents.¹⁹⁴ The Court justified this on the grounds that, first, Article 7(2) was essential to encourage free movement not just of workers but also of their families, without whom the worker would be discouraged from moving;¹⁹⁵ and secondly, it encouraged the integration of migrant workers into the working environment of the host country.¹⁹⁶

So far we have seen how the principle of solidarity has been used to justify extending equality to both temporary and permanent migrants. However, as we have seen, solidarity goes beyond that and justifies taking steps – to remove impediments to the individual's participation in and integration into the community. The Court's

¹⁹² Those with the right of residence and who are engaged in gainful activity may also have the right to students maintenance.

¹⁹³ Case 207/78 Ministère public v. Even [1979] ECR 2019.

¹⁹⁴ S.Peers, 'Social Advantages' and Discrimination in Employment: Case Law Confirmed and Clarified' (1997) 22 ELRev. 157, 164; E. Ellis, 'Social Advantages: A New Lease of Life' (2003) 40 CMLRev. 639.

¹⁹⁵ See e.g. Case 94/84 ONEM v. Deak [1985] ECR 1873 where a Hungarian national, the son of an Italian working in Belgium, applied for unemployment benefits. Since unemployment benefit was found to constitute a social advantage within the meaning of Art. 7(2), the son was entitled to receive it, irrespective of the fact that he was not a Community national.

¹⁹⁶ See also Joined Cases 389 and 390/87 Echternach and Moritz v. Minister van Onderwijs en Wetenschappen [1989] ECR 723; Case C-308/93 Bestuur van de Sociale Verzekeringsbank v. Cabanis-Issarte [1996] ECR I-2097.

case law on persons (workers, establishment and services) shows this clearly. The jurisprudence has moved beyond prohibiting direct and indirect discrimination¹⁹⁷ to removing any (substantial)¹⁹⁸ obstacle¹⁹⁹ which prevents or restricts access to the market. This change of approach was highlighted in Säger²⁰⁰ where the Court said that Article 49 on the freedom to provide services required

... not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

The Court continued that any such restriction could only be justified by imperative reasons relating to the public interest.²⁰¹

The significance of these cases is that, as Advocate General Jacobs argued in Leclerc-Siplec in the context of goods, a discrimination test is inappropriate since the central concern of the Treaty provisions on the free movement of goods was to prevent unjustified obstacles to trade between Member States. He said that 'If an obstacle to trade exists it cannot cease to exist simply because an identical obstacle affects domestic trade'.²⁰² This argument is familiar to discrimination lawyers. The consequence of this approach is that many more obstacles are in principle prohibited and the burden shifts to the decision-maker not only to justify the restriction but also to demonstrate that the steps taken were no more restrictive than necessary (ie proportionate).

An approach based on removing obstacles is an example of the sort of negative step that can be taken in the name of solidarity to help facilitate integration. An example of a more positive step can be found in the Treaty: the rights for migrants to vote in local elections in the host state and European elections (Article 19). Grzelczyk and Baumbast suggest that solidarity implies a positive obligation on the state to provide, in limited circumstances, health and social benefits at least on equal terms to nationals. The question we now turn to is the extent to which the developments in the field of free movement of persons might inform any future developments in the field of (domestic) equality law.

3. *Applying Solidarity principles to Equality Law*

In the previous section, I argued that the Court of Justice is using the solidarity principle to justify extending (at least limited) equality rights to migrant citizens in order to help to integrate them into the community of the host state community or at least recognising their level of integration. The negative dimension of this approach is removing restrictions or obstacles to the migrant's integration (the Säger/Kraus approach); the positive aspect is that the solidarity principle can be used to impose obligations on the state to help integrate the individual. All of this has been developed

¹⁹⁷ Case C-384/93 Alpine Investments BV v. Minister van Financiën [1995] ECR I-1141 and Case C-275/92 Customs and Excise v. Schindler [1994] ECR I-1039.

¹⁹⁸ Case C-190/98 Graf v. Filzmozer Maschinenbau GmbH [2000] ECR I-493.

¹⁹⁹ Case C-415/93 [1995] ECR I-4921, para. 104. See also Case C-18/95 Terhoeve [1999] ECR I-345, para. 39; Case C-275/92 Schindler [1994] ECR 1039, para. 45. See also Case C-221/89 ex parte Factortame Ltd and others [1991] ECR I-3905, para. 32; Case C-114/97 Commission v. Spain [1998] ECR I-6717, para. 44.

²⁰⁰ Case C-76/90 [1991] ECR I-4221, para. 12, emphasis added.

²⁰¹ Para. 15.

²⁰² Para. 40.

in the context of the rather shaky foundations of EU citizenship. How might these principles be transplanted into the more fertile soil of national citizenship where the solidarity principle is much more firmly rooted? Could it be argued that discrimination law at national level is really about integrating individuals into the workplace while maintaining a balance between work and private life, that the removal of discrimination is really about ensuring solidarity between workers?

If we look first at the 'negative' dimension of this approach then national law might provide that not only is discrimination prohibited but so is any measure, policy or practice which constituted an obstacle to or impeded the individual's participation in the economic life of a community. Such measures would be unlawful unless the obstacle could be justified and the steps taken were proportionate. This approach is resonant of that adopted by the Supreme Court in Canada in two seminal decisions on the meaning of the equality clause found in the s.15(1) of the Canadian Charter, Andrews v. British Columbia²⁰³ and Turpin v the Queen.²⁰⁴ In Andrews McIntyre J rejected the Aristotelian 'similarly situated test' as 'seriously deficient' since if applied literally it could be used to justify the Nuremberg laws of Adolf Hitler and the separate but equal doctrine of Plessey v Ferguson. Instead the Court favoured an approach to discrimination based on disadvantage rather than difference.²⁰⁵ McIntyre J said:

[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to the personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

This view was endorsed in Turpin where Wilson J added 'A finding of discrimination will, I think, in most but not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.'

The advantages of applying the Säger/Kraus approach are threefold. First, it individualises the right. This means that the claim does not depend on proving (often by complex statistical analysis) group based stereotypes (eg women have primary childcare responsibilities). Instead, it allows all individuals (both men with primary childcare responsibilities and women) to argue that an obstacle (eg evening or night working) stands in their way of being able fully to participate in the workplace. Secondly, since the existence of any such rule would need to be justified employers would be obliged to think about their practices in order to be able to justify them. Thirdly, the application of the proportionality principle might allow for some degree of mediation between the parties by requiring the employer to consider whether there are less restrictive ways of achieving the same objective (eg working a limited number of evenings/nights only on fixed days of the week?). In this way the proportionality principle could be used to achieve some form of 'reasonable accommodation'.

²⁰³ [1989] 1 S.C.R. 143. See M. Gold (1989) 34 McGill L.J 1063.

²⁰⁴ [1989] 1 S.C.R. 1296. Subsequent developments have been less positive: see, for example, D.Lepofsky, 'The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster?' (1992) 55 Law and Contemporary Problems 167; D.Beatty, 'The Canadian Charter of Rights: Lessons and Laments' (1997) 60 MLR 481, 490; T.Ison, 'A Constitutional Bill of Rights - The Canadian Experience' (1997) 60 MLR 499, 500.

²⁰⁵ See also N.Lacey, 'From Individual to Group?' in B.Hepple and E.Szyszczak, Discrimination: the Limits of the Law (Mansell, London), 1992, 104 and C.Mackinnon, 'Reflections on Sex equality under Law' (1991) 100 Yale Law Journal 1281, 1325.

There are obvious disadvantages to such an approach too. First there are problems as to definition (what constitutes an obstacle?). Secondly, it would increase the burdens on employers; and thirdly it would disrupt the well-established framework that direct discrimination can be saved only by reference to the express list of GOQs, indirect discrimination could be objectively justified (although this model has been diluted somewhat by the GORs in the Employment Directives) and fourthly, the individualised nature of the claim would leave many feeling exposed.

However, perhaps the most striking feature of any such claim would be that, unlike discrimination law, it does not expressly identify any suspect grounds. In one sense this is liberating. Claims would no longer have to be shoe-horned into existing, established prohibited grounds (eg discrimination against gays and transsexuals as sex discrimination and sex or race-plus discrimination as sex and race discrimination) and it would also pave the way for those presently without grounds to make a claim (eg those wishing to engage in other community-related activities - not connected with child or elderly care - such as being a school governor who are prevented from participating by an employer's practice or policy). On the other hand it loses the clear public statement found in existing legislation that discrimination on certain specified grounds (eg sex, race, religion) is unlawful. However, under EC law the Säger/Kraus approach supplements the existing discrimination model and the Court resorts to that in clear cases of discrimination. It would also be possible to envisage a permutation of the approach found in the US to the 14th amendment where restrictions which are based on, for example, race could be justified only according to a strict scrutiny review, while other restrictions might be subject only to intermediate (or less) review.

In respect of the positive aspect of an approach based on solidarity, this could liberate governments/employers from the strait-jacket of formal equality: where individual workers are not fully integrated or need special support, action could be taken on the grounds of solidarity. For Hepple this is crucial since he sees that some positive different treatment is an essential part of the process of integration.²⁰⁶ When considering the case of the Roma, he argues that negative rights not to interfere are insufficient. He argues that the Roma need positive rights, such as the right to adequate housing, education and health care. In respect of employers such positive acts might involve monitoring programmes, other positive action measures such as childcare provision or special training for the disadvantaged individual. This issue is of great practical importance given the current importance of the diversity agenda to HR managers.²⁰⁷ When viewed through the lens of solidarity, such programmes could be put in place without fear of challenge under formal discrimination law by groups who have not benefited that particular programme.

However, the Court of Justice's case law does pose one serious threat for existing equality law: it suggests that there are varying degrees of equality (full equality for long term residents, limited equality for new arrivals). However, this aspect of the case law must be judged in the immigration context. It has long been the case that migrants acquire a greater number of rights the longer they remain in the host state. Equality law (sex, race, ethnic origin etc), when looked at in the domestic context, applies to all residents and is premised on the idea that the beneficiaries are all established in the state. In this regard, the staggered equality envisaged by the Court's case law is not strictly transposeable to the domestic arena. However, the Court's notion could be used for beneficial purposes, assisting in the

²⁰⁶ B.Hepple, 'Race and Law in Fortress Europe', Chorley lecture , 11 June 2003.

²⁰⁷ See L.Barnes with S.Ashtiani, 'The Diversity Approach to Achieving Equality: Potential and Pitfalls' (2003) 32 ILJ 274.

integration process. It could be argued that in a transition phase certain groups need particular assistance to help integrate them into the workplace and so, as we saw above, in the name of solidarity it could be argued that differential treatment is permitted.

F. Conclusions

In this chapter I have argued that Community equality law has added value to the national level action in three ways: it has prevented national equality rules from being eroded and it has shaped the development of a sophisticated framework of rules. At Community level, it has helped to legitimize Community action and it has forced the Community to put its own house in order both in respect of the equality principle more generally, as well as in respect of non-discrimination more specifically. I conclude by suggesting that the future of equality law may well lie beyond equality. I have argued that it needs to be buttressed by another principle – solidarity – to achieve the broader social objectives intended by equality, namely integration and participation. I have argued that while the principle of non-discrimination was (and still is) a useful tool for eliminating the more egregious examples of equality we should look elsewhere for other guiding principles which might help eliminate the remaining disadvantages suffered by workers. Here the Court of Justice, confident in its role of reinforcing negative integration, has shown an interesting way forward with its Säger/Kraus case law. More interesting still is the positive use of the solidarity principle in Bidar et al by the Court. Couched in the careful rhetoric of equality, the Court has taken an important step towards imposing obligations on the states.

Yet, a wider use of this approach to secure positive rights for individuals may well have been frustrated by the legislator, through the enactment of the equality Directives, especially the Article 13 Directives. The language used in the Preambles to the two Article 13 Directives appears to locate them firmly within the context of our discussion on solidarity. For example, paragraph 8 of the Preamble to the Race Directive refers to the Employment Guidelines 2000 which stress the need to foster conditions for a socially inclusive labour market formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.²⁰⁸ Paragraph 9 goes on to say that discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty including ‘social cohesion and solidarity’.²⁰⁹ Paragraph 9 of the Horizontal Directive adds that employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

Yet despite this rhetoric the substance of the Directives is based firmly on the ‘third generation’ non-discrimination model, strongly influenced by UK’s Race Relations Act 1976.²¹⁰ The drafting took no account of ‘fourth generation’ rights which place positive duties on decision makers; nor did it look to the rather innovative Säger/Kraus line of case law to inform its approach, despite the fact that the Commission’s explanatory memorandum made express reference to the Court’s case law on persons to inform the Directive’s definition of indirect discrimination. Confined as they are to a fairly narrow conception of equality, the existence of the Directives

²⁰⁸ The eighth preambular para. to the horizontal directive adds that the reference to groups includes persons with a disability and the need to support older workers.

²⁰⁹ Similar language is used in respect of the horizontal Directive in para.11.

²¹⁰ B.Hepple, ‘Race and Law in Fortress Europe’, Chorley lecture , 11 June 2003.

may well curtail the Court of Justice's willingness to make more imaginative uses of the solidarity principle outside the confines of the free movement of persons and, in so doing, constrain national courts from demonstrating any similar creativity.