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# A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives

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## Abstract

The year 2000 marked the birth of EU anti-discrimination law as a field in its own right, with the adoption of two major Equality Directives. They extended the prohibition of discrimination with five additional grounds and expanded the material scope of equality regulation. Having reached its eighteenth birthday in the year 2018, EU anti-discrimination law can now celebrate its adulthood and deserves a bird's eye exploration of its achievements, failures, and prospects. The present Article provides this exploration by zooming in on these twin Directives, as well as on the “new” grounds of discrimination planted therein, namely *race and ethnicity*—the grounds introduced by the Race Equality Directive—*religion, sexual orientation, age, and disability*—the grounds introduced by Framework Equality Directive—and the related jurisprudence of European courts. It first outlines the genesis and main stages in the development of EU anti-discrimination law, followed by a discussion of major normative and practical themes emerging in EU anti-discrimination law after 2000, such as the personal and material scope of the Directives, new forms of discrimination, mechanisms to counteract discrimination, and the *proceduralization* of EU anti-discrimination law.

**Keywords:** EU law; anti-discrimination law; Equality Directives; Court of Justice of the European Union jurisprudence; forms and grounds of discrimination

## A. Introduction

The Ancient Greeks—arguably the historical fathers of our European non-discrimination paradigm—had a very rich understanding of equality that distinguished between its many different dimensions, *inter alia* discerning equality in various spheres of life.<sup>1</sup> Originally, the predecessor of the European Union, the European Economic Community, however, was only concerned with one

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<sup>1</sup>Hélène Glykatzi-Ahrweiler, *European Community as an Idea: The Historical Dimension*, in 1 THE IDEA OF EUROPEAN COMMUNITY IN HISTORY: CONFERENCE PROCEEDINGS, 25 (Evangelos Chrysos et al. eds., 2003); PAUL CARTLEDGE, ANCIENT GREEK POLITICAL THOUGHT IN PRACTICE 8–9 (2009). While ancient Greeks admittedly did not have the same concept of egalitarian equality as we share in modernity after the French Revolution—they excluded women and slaves—they did distinguish between equal rights of birth (*isogonia*), equality before the law (*isopoliteia*), equality in the body politics (*isonomia*), equality in economic distribution (*isomoiria*), equal prosperity and well-being (*eudaimonia*), and even equality regarding freedom of speech (*isegoria*). Rediscovered and philosophized *ab novo* during the Enlightenment and 18<sup>th</sup> century revolutions, the principle of equal treatment gained serious transnational recognition after World War II in a number of international instruments, including the Universal Declaration of Human Rights, ICCPR, ICESCR, CEDAW, CERD, CRDPD, and the ECHR.

dimension of equality, namely equality of economic opportunity. Indeed, the European Union has been deemed to foster fully-fledged equality of economic opportunity amongst citizens commuting between its various Member States to ensure their maximum prosperity and economic well-being. Nevertheless, as the Union developed slowly but surely from an organization predominantly concerned with economic integration into one with a broader political agenda, and concomitant areas of competence, its ambitions in the field of equal treatment similarly expanded towards more encompassing visions of justice.<sup>2</sup>

At the turn of the millennium, the year 2000 marked the birth of EU anti-discrimination law<sup>3</sup> as a field in its own right with the adoption of two major Equality Directives.<sup>4</sup> Not only did they extend the prohibition of discrimination with five additional grounds but also—albeit only for the grounds of race and ethnicity—significantly expanded the material scope of equality regulation.<sup>5</sup> The present Article zooms in on these 2000 Equality Directives, as well as on the “new” grounds of discrimination planted therein, namely *race* and *ethnicity* (the grounds introduced by the Race Equality Directive), *religion*, *sexual orientation*,<sup>6</sup> *age*, and *disability* (the grounds introduced by Framework Equality Directive) and the related jurisprudence of European courts. Having reached its eighteenth birthday in the year 2018, EU anti-discrimination law can now celebrate its adulthood. Yet, several problems threaten to undermine this maturity.<sup>7</sup> First, as is well demonstrated by the Commission’s reports,<sup>8</sup> a number of countries have delayed the implementation of these directives for many years.<sup>9</sup> Second, an impressive number of countries joined the EU in the meantime—in 2004, 2007, and 2013—and some of the new Member States have demonstrated notorious resistance to the Equality Directives, manifesting in a very long process of transposition.<sup>10</sup> Third, the Court of Justice of the European Union (“CJEU”) known as the guardian of the European Garden of Equal Delights, has—for a variety of reasons—delivered a rather modest number of cases on some of the newly introduced ground, in particular regarding race and religion.<sup>11</sup>

<sup>2</sup>EUROPE’S JUSTICE DEFICIT? (Dmitriy Kochenov et al. eds., 2015).

<sup>3</sup>Although the term “anti-discrimination law” originates from the US doctrine, it has since gained sufficient currency in literature and law courses around the globe. Alternative terminology in recent literature for the same concept include “EU law of equal opportunities,” “EU equality law,” “EU non-discrimination law,” and even “EU antidiscrimination law,” where *anti-discrimination* is spelled as one word.

<sup>4</sup>Directive 2000/43, Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180/22) [hereinafter Race Equality Directive or RED]; Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, (2000) O.J. (L 3030/16) [hereinafter Framework Equality Directive or FED].

<sup>5</sup>See Dagmar Schiek, *From European Union Anti-Discrimination Law Towards Multidimensional Equality Law for Europe*, in EUROPEAN UNION NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES ON MULTIDIMENSIONAL EQUALITY LAW 448, 3–4 (Dagmar Schiek & Victoria Chege eds., 2009).

<sup>6</sup>See Peter Dunne, *Towards Trans and Intersex Equality: Conflict or Complementarity?*, in THE LEGAL STATUS OF INTERSEX PERSONS 300 (Jens M. Scherpe et al. eds., 2018); The Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 117–18 [hereinafter TFEU]. As will be explained in more detail below, EU law has been treating rights of transsexuals within the cloisters of gender equality. Hence, this Article—which looks beyond gender jurisprudence—will focus mainly on gay and lesbian rights, and much less on the law regarding transsexuality. For recent account of the latter; THE LEGAL STATUS OF INTERSEX PERSONS (Jens M. Scherpe et al. eds., 2018).

<sup>7</sup>Technically, the assessment should start from July 2003, when Member States undertook the obligation to transpose these instruments into national legislation.

<sup>8</sup>See EU ACTION AGAINST DISCRIMINATION: ACTIVITY REPORT 2007–2008 2.1.1 COM (April 2009); see also Barbara Havelková, *Resistance to Anti-Discrimination Law in Central and Eastern Europe: A Post-Communist Legacy?*, 17 GERMAN L. J. 30, 629 (2016) (noting the Czech Anti-Discrimination Act, which should have been in place at the time of accession by the Czech Republic to the EU in 2004, was only adopted and entered into force in 2009).

<sup>9</sup>See Terri E. Givens & Rhonda E. Case, *The Politics of Transposition in Britain, France, and Germany*, in LEGISLATING EQUALITY: THE POLITICS OF ANTIDISCRIMINATION POLICY IN EUROPE, 92–117 (2014).

<sup>10</sup>Havelková, *supra* note 8.

<sup>11</sup>The Court has delivered only two preliminary rulings regarding race and ethnic origin and two regarding religious discrimination, the latter only in 2017.

Nevertheless, eighteen years or the age when most Europeans are deemed to reach full adulthood according to civil and criminal law, surely marks the arrival of an appropriate term to look back, and ask the central question: How EU anti-discrimination law has developed in relation to these grounds of discrimination—that were added to gender and nationality—to cultivate the Garden of Equal Delights.<sup>12</sup> This Article, therefore, sets out to catch a bird’s eye view on the striking developments and shortcomings that have emerged regarding the interpretation and implementation of relevant EU secondary law during the first two decades of the 21<sup>st</sup> century. The Article, thus, offers a glimpse into the past, present, and hopefully future of EU anti-discrimination law, as despite all the flaws in the Union’s Garden of Equal Delights, it offers one of the highest standards of protection in comparative anti-discrimination law.<sup>13</sup>

In order to provide this panoramic analysis, we will first outline the genesis and main stages in the development of EU anti-discrimination law. The latter is by now undoubtedly an independent discipline within the narrative of EU law, and not merely a component of EU labor law or an emanation of EU “social rights.”<sup>14</sup> The Rome (1957), Amsterdam (1997), and Lisbon Treaties (2007) mark the central stages of our historical overview. The second part will focus on the major normative and practical themes emerging in EU anti-discrimination law after 2000. The specific themes we are focusing on include the personal and material scope of the Directives, new forms of discrimination and mechanisms to counteract discrimination—for example, the duty of reasonable accommodation—as well as the *proceduralization* of EU anti-discrimination law, in particular through the proliferation of equality bodies. Throughout these two parts and the follow-up conclusions, we reflect upon the nature, achievements, challenges, and limits of the current framework of the post-2000 EU anti-discrimination law.

## B. A Brief History of EU Anti-Discrimination Law

It is common knowledge that the EU did not start as an organization focused on fundamental rights.<sup>15</sup> The EU did not have—or envisage developing—a fully-fledged system of anti-discrimination law, encompassing the complete panoply of dimensions stemming from the right to equal treatment and covering the full range of discrimination grounds.<sup>16</sup> It is equally obvious that the EU has come a long way since then, partly due to changes in the founding treaties that have enabled adoption of Equality Directives, and partly due to the jurisprudence of the CJEU,

<sup>12</sup>Since the Treaty of Amsterdam (1997), which first provided the grounds to legislate in this area on the Union level, and the Equality Directives 2000 that have followed.

<sup>13</sup>Gráinne De Búrca, *The Trajectories of European and American Antidiscrimination Law*, 60 AM. J. COMP. L. 1, 1 (2012) (noting many would even find this garden more fruitful than its American counterpart at the moment); see also Johanna Croon, *Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination—or—Alternative Tales on Equality Reasoning*, 19 EUR. L. J. 153, 153 (2013) (dismantling the myth about the terribly inconsistent application of the equality-principle by the Court of Justice).

<sup>14</sup>See ALEXANDER SOMEK, *ENGINEERING EQUALITY: AN ESSAY ON EUROPEAN ANTI-DISCRIMINATION LAW* (2011) (critiquing the demarcation of EU anti-discrimination law beyond the traditional French and German obsession with *droits sociaux* actually invites left-wing critique, which insists on a more re-distributionist and de-commodifying approach to empower the poor, immunizing them from market dependency).

<sup>15</sup>See Stijn Smismans, *The European Union’s fundamental rights myth*, 48 J. COMMON MKT. STUD. 45, 45 (2010); see also PHILIP ALSTON ET AL., *THE EU AND HUMAN RIGHTS* (1999).

<sup>16</sup>See *The Euroafrican Relaunch: The Rome Treaty Negotiations, 1955-1957*, in *EURAFRICA: THE UNTOLD HISTORY OF EUROPEAN INTEGRATION AND COLONIALISM* (Peo Hansen & Stefan Jonsson eds., 2014); see *infra* for a more detailed account of the gradual expansion of grounds of discrimination in EU law. The absence of the prohibition of discrimination on grounds of race or ethnic origin, when the Treaty of Rome created the European Economic Community in 1957, was only “natural,” given that half of its Member States—and a number of subsequently acceding countries—remained colonial empires at that time. For more information about this aspect and the initially envisaged project of *Eurafrrique*.

interpreting the treaty and directive provisions and developing a daring jurisprudence, as the principle of equal treatment is held to be a general principle of EU law.<sup>17</sup>

This general principle of equality embodies Aristotle's formula of equal treatment, namely that one should treat like things alike and unlike things differently to the extent of the difference.<sup>18</sup> This formula aptly captures that in some respects one wants to be treated alike, while in others one wants to be treated differently. In other words, sometimes differential treatment should be contested to vindicate the right to be treated the same, while in some circumstances being treated differently in fact ensures that one's special characteristics are taken into account.<sup>19</sup> Regarding the former, it is essential to devise criteria in order to distinguish between legitimate differential treatment and prohibited discrimination. In this respect, EU law has famously chosen to develop different tracks for *direct* and *indirect* discrimination. Due to the different avenues of justification, the exact dividing line between these two types of discrimination remains of interest and is frequently the object of debate.<sup>20</sup> Other topics of ongoing controversy include positive action, more particularly when—and under what conditions—this type of differential treatment would be legitimate.<sup>21</sup> Another related theme concerns the ambit of possible duties of differential treatment, for example those aimed at overcoming hurdles to the equal participation of persons that are in some respects different. The latter consideration is interlinked with questions about the implications of the prohibition of indirect discrimination and the scope of application of the duties of reasonable accommodation.

Prior to embarking on the fascinating journey analyzing the scope and impact of the 2000 Directives, this section takes stock of the history of EU equality law.

In outlining the evolution of EU anti-discrimination law, we broadly distinguish three phases<sup>22</sup> structured around the two defining moments of amendments to the founding treaties, namely the Treaty of Amsterdam (1997) and the Treaty of Lisbon (2007).

### **I. Phase 1: Prior to The Treaty of Amsterdam (1958–1999)**

Turning to the three phases that can be distinguished in the development of EU anti-discrimination law, the first phase begins with the adoption of the EEC Treaty in 1957 and its entry into force in 1958. From the start, the right to equal treatment played an instrumental role in the construction and development of the European Economic Community (EEC).<sup>23</sup> The original rationale for including a prohibition of discrimination was the realization of the single economic market.<sup>24</sup> This realization is clearly visible on the grounds of discrimination that were included

<sup>17</sup> See Alexandra Prechal, *Competence Creep and General Principles of Law*, 3 REV. EUR. ADMIN. L. 5–22, 20 (2010).

<sup>18</sup> ARISTOTLE, 3 NICHOMACHEAN ETHICS.

<sup>19</sup> See KRISTIN HENRARD, EQUAL RIGHTS VERSUS SPECIAL RIGHTS: MINORITY PROTECTION AND THE PROHIBITION OF DISCRIMINATION (2007); see also SANDRA FREDMAN, DISCRIMINATION LAW (2011); see also ANN NUMHAUSER-HENNING, LEGAL PERSPECTIVES ON EQUAL TREATMENT AND NON-DISCRIMINATION (2001).

<sup>20</sup> See CHRISTA TOBLER, INDIRECT DISCRIMINATION: A CASE STUDY INTO THE DEVELOPMENT OF THE LEGAL CONCEPT OF INDIRECT DISCRIMINATION UNDER EC LAW (2005).

<sup>21</sup> See Mark Bell & Lisa Waddington, *Exploring the Boundaries of Positive Action under EU law: A Search for Conceptual Clarity*, 48 COMMON MKT. L. REV. 1503, 1503 (2011); see also Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives*, 44 HARV. INT'L L. J. 331, 331 (2003); see also Colm O'Cinneide, *Positive Action and the Limits of Existing Law*, 13 MAASTRICHT J. EUR. & COMP. L. 351, 351 (2006).

<sup>22</sup> See EVELYN ELLIS & PHILIPPA WATSON, EU ANTI-DISCRIMINATION LAW (2012); see also *infra* on the central role of the Court in the development of EU anti-discrimination law. Note that Ellis and Watson also identify three phases, while distinguishing the second phase as the period between 1987 and 1997 due to the multiple amendments of the EEC treaty during that time, as well as the significant stream of judgments produced by the CJEU. For reasons that will be more fully explained further, we identify the three phases on the basis of the EEC Treaty, the Amsterdam Treaty, and the Lisbon Treaty.

<sup>23</sup> See Jo Shaw, *Mainstreaming Equality in European Union Law and Policymaking*, 58 CURRENT LEGAL PROBS. 255–312 (2004) (“[I]n one guise or another, the concept of equality has always been central to the evolving legal order of the EU.”).

<sup>24</sup> MARK BELL, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION 6–12 (2002).

in the original EEC Treaty, giving the EC competence to legislate on nationality and gender. Indeed, “nationality” as prohibited grounds of discrimination—Article 12 EEC, now Article 18 TFEU—only concerns the citizenship of an EU Member State and is intended to eliminate the disadvantageous treatment of persons in one EU country holding the nationality of another EU country. In this respect, it has correctly been pointed out that the prohibition of discrimination on the basis of nationality was intended to support and realize the free movement rights of persons, services, goods, and capital lying at the heart of the common market project.<sup>25</sup> Working, providing services, or offering goods for sale should not be made more complicated for persons coming from another EU Member State as compared to the own nationals of a country. Otherwise, this would jeopardize the realization of the common market, predicated on a free, unimpeded flow of persons, services, goods, and capital—financial flows in payment for services, goods, among other things.<sup>26</sup> Similarly, the inclusion of an at first sight very limited version of gender discrimination prohibition—namely one confined to equal pay (Article 119 EEC, now Article 157 TFEU)<sup>27</sup>—can also be understood from this internal market perspective. It was simply meant to prevent competitive advantages for countries where women are not paid as well as men.<sup>28</sup>

Since the Treaty of Rome—and notwithstanding the most humble status of the equality principle therein—the prohibition of gender discrimination has experienced an impressive expansion. Few scholars could have imagined in the 1950s that the short provision of Article 119 EEC would pave the way to the far-reaching ambit of the prohibition of gender discrimination we know today, covering not only labor law and social rights, but also translating into the regulation of sex work as well as the prohibition of domestic violence and human trafficking.<sup>29</sup> The most important EU institutions—the CJEU, the Council, the Commission, and the Parliament—have at various times, and to varying degrees, taken part in this development.<sup>30</sup>

The 1970s were crucial for anti-discrimination law, as it was the period when the CJEU, through several preliminary rulings, provided effective protection against discrimination, not only on grounds of nationality, but also on grounds of gender. Through these preliminary rulings, the Court introduced—and applied—direct effect for several Treaty articles that were clearly directed at Member States, thus allowing action against those that had not managed, or did not have the political will, to turn these Treaty provisions into fully fledged legislative programs before the end of the transitional period on December 31, 1969.<sup>31</sup> In the process, the Court fostered the emancipation of EU gender equality. That legal space has been successfully mobilized in the advocacy of feminist cause litigators and social movements.<sup>32</sup> On the basis of the direct effect of Article

<sup>25</sup>ELLIS & WATSON, *supra* note 22, at 2.

<sup>26</sup>TFEU, *supra* note 6, art. 45.

<sup>27</sup>Also referenced in literature as EEC art. 141 in the Treaty nomenclature during the period between Maastricht (1992) and Lisbon (2007) Treaties.

<sup>28</sup>BELL, *supra* note 24, at 8; see also SILKE ROTH, GENDER POLITICS IN THE EXPANDING EUROPEAN UNION: MOBILIZATION, INCLUSION, EXCLUSION (2013); Dagmar Schiek, *Broadening the scope and the norms of EU gender equality law: Towards a multidimensional conception of equality law*, 12 MAASTRICHT J. EUR. & COMP. L. 427–466, 427 (2005) (noting that Mark Bell highlights, “the French delegation had identified differences in national legislation on equal pay for men and women as being likely to disturb the balance of trade in the common market.” This reasoning was built on the premise that countries that do not protect equal pay for women can reduce their production costs due to their reliance on cheap female labor).

<sup>29</sup>Uladzislau Belavusau, *EU Sexual Citizenship: Sex Beyond the Internal Market*, in EU CITIZENSHIP AND FEDERALISM: THE ROLE OF RIGHTS 417–42 (Dimitry Kochenov ed., 2015).

<sup>30</sup>*Id.*

<sup>31</sup>Morten Rasmussen, *How to Enforce European law? A New History of the Battle Over the Direct Effect of Directives, 1958–1987*, 23 EUR. L. J. 290, 290 (2017).

<sup>32</sup>Case 80/70, *Defrenne I*, Gabrielle Defrenne v. Belgian State, 1971 E.C.R. 445; see also Case 43/75 *Defrenne II*, Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena, 1976 E.C.R. 455; see also Case 149/77 *Defrenne III*, Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena, 1978 E.C.R. 1365 (The first equality case was adjudicated in Luxembourg in the 1970 *Case 43/75 Defrenne II*, while primary law did not offer any anti-discrimination

119 EEC, the CJEU has since developed its doctrine of sex equality as a general principle of EU law.<sup>33</sup>

Over the last thirty years, the EU has passed nine directives on gender equality that closely reflect the CJEU's judgments on the topic.<sup>34</sup> The activist Luxembourg Court has extended the primary law provision by interpreting the gender aspects of equal pay to include pension and social guarantees for men and women, as well as regulations regarding pregnancy and child-raising.<sup>35</sup> Arguably, the Court's activist interpretation in this period culminated in its rulings on transsexuals. Indeed, in the 1996 judgment *P. v. S.*,<sup>36</sup> the Court interpreted the provision on the equality of men and women as applying to cases of gender reassignment.<sup>37</sup>

provisions apart from EEC art. 141, which maintained that men and women should enjoy equal pay for equal work. Vogel-Polsky, who used the *Defrenne* saga to mainstream gender non-discrimination in EU law, supported Ms. Defrenne, the plaintiff employed as a flight attendant. She was essentially the first to question whether EEC art. 119 had direct effect. See Eliane Vogel-Polsky, *L'article 119 du traité de Rome peut-il être considéré comme self-executing*, J. DES TRIBUNAUX 233–243, 233 (1967). For more information about Vogel-Polsky, see ELIANE GUBIN & CATHERINE JACQUES, ÉLIANE VOGEL-POLSKY: UNE FEMME DE CONVICTION (2007)).

<sup>33</sup>In this respect, the jurisprudence of the Court in the follow-up phases described *infra* is different, because the Court could not rely on the direct effect of TFEU art. 19—TEC art. 13—which was designed by the Amsterdam Treaty as clearly requiring the adoption of secondary legislation to be effective. Thus, the Equality Directives 2000 are central in understanding the structure and development of EU anti-discrimination law beyond gender.

<sup>34</sup>Of particular relevance—and in part inspirational for 2000 Equality Directives—are: Directive 75/117/EEC, on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, 1975 O.J. (L 45/19); Directive 76/207/EEC, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 1976 O.J. (L 39/40); Directive 79/7/EEC, on the progressive implementation of the principle of equal treatment for men and women in matters of social security, 1978 O.J. (L 6/24); Directive 86/378/EEC, on the implementation of the principle of equal treatment for men and women in occupational social security schemes, 1986 O.J. (L 225/40); Directive 86/613/EEC, on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, 1986 O.J. (L 359/56); Directive 92/85/EEC, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), 1992 O.J. (L 348/1); Directive 96/34/EC, on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, 1996 O.J. (L 145/4); Directive 97/80/EC, on the burden of proof in cases of discrimination based on sex, 1997 O.J. (L 14/6); Directive 2002/73/EC, of the European Parliament and of the Council amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Text with EEA relevance), 2002 O.J. (L 269/15) (substantially amending the 1976 Equal Treatment Directive by adding definitions of indirect discrimination, harassment, and sexual harassment, and requiring Member States to set up equality bodies to promote, analyze, monitor, and support equal treatment between women and men); Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services, 2004 O.J. (L 373/37); Directive 2006/54/EC, of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), 2006 O.J. (L 204/23) [hereinafter Equal Treatment Directive] (to enhance the transparency, clarity, and coherence of the law, this Directive was adopted in 2006, putting the existing provisions on equal pay, occupational schemes, and the burden of proof into a single text).

<sup>35</sup>Uladzislau Belavusau, *From Lëtzebuerg to Luxembourg: EU Law, Non-Discrimination and Pregnancy*, 2 EUR. L. REP. 45–49, 45 (2010) (overviewing the case law regarding pregnancy and child-raising); see also Samantha Besson, *Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?*, 8 HUM. RTS. L. REV. 647–82 (2008); Denis Martin, *Strasbourg, Luxembourg et la discrimination: influences croisées ou jurisprudences sous influence?*, 69 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 107, 132 (2007) (echoing a corresponding liberalization at the European Court of Human Rights, making European law an important arena for the refinement of gender citizenship).

<sup>36</sup>Case C-13/94 *P v. S* and *Cornwall County Council*, 1996 E.C.R. I-2143; see also Case C-117/01 *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, 2004 E.C.R. I-541.

<sup>37</sup>ILDA FIGUEIREDO, REPORT ON THE ASSESSMENT OF THE RESULTS OF THE 2006–2010 ROADMAP FOR EQUALITY BETWEEN WOMEN AND MEN, AND FORWARD-LOOKING RECOMMENDATIONS (2010) (incorporating into Directive 2006/54/EC, Recital 3 Preamble:

The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

## II. Phase Two: The Treaty of Amsterdam Until Lisbon (1999–2009)

The second phase was kick-started with the Treaty of Amsterdam—signed in 1997, entered into force in 1999—which was in at least two ways extremely important for the development of EU anti-discrimination law. First, gender equality was mainstreamed with Article 3(2) TEC—now Article 8 TFEU—which stipulated that in all of its activities, the European Community “shall aim to eliminate inequalities, and to promote equality, between men and women.”<sup>38</sup> This significantly strengthened the prohibition of discrimination on the basis of gender, as it raised constant awareness of potential discriminatory effects that policies and legislation may cause for women.

Second, the Treaty finally multiplied the protected grounds of discrimination, while establishing EU legislative competence in relation to five new grounds: (1) Race and ethnicity; (2) religion; (3) disability; (4) age; (5) and sexual orientation.<sup>39</sup> This extension in protected grounds clearly implied a move for EU anti-discrimination law beyond the common market rationale towards a more social ethos.<sup>40</sup> In fact, the extension of grounds covering prohibited discrimination also signifies the importance of the right to equal treatment in securing human dignity.<sup>41</sup> In turn, this shift linked perfectly with the more central role of human rights in the EU, clearly articulated previously by the Treaty of Maastricht (1992) and figuring as a true core of the EU in the Treaty of Amsterdam (1997); thus it built on the CJEU’s recognition that respect for human rights amounted to a general principle of EU law.<sup>42</sup> Furthermore, Article 19 TFEU—introducing new grounds of equality beyond gender—found its domicile in Part Two of the Treaty, entitled “Non-Discrimination and Citizenship of the Union.” In this respect, the project of EU anti-discrimination law is joined with the wider vision of citizenship-formation in the Union, with equality becoming a distinctive feature of EU citizenship, not only horizontally, amongst nationals of Member States, but also vertically, amongst different groups of citizens inside Member States.<sup>43</sup>

When the Treaty of Amsterdam came into force in 1999 it was quickly followed by the adoption of two watershed directives, the first focusing on race—Race Equality Directive (“RED”)—and the

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In June 2010, the European Parliament adopted a resolution—the “Figueiredo Report”—calling for an inclusive EU gender equality strategy, specifically addressing issues linked to gender identity).

<sup>38</sup>Cf. TFEU, *supra* note 6, art. 157 (original EEC art. 119). “Men and women should enjoy equal pay for equal work.” The original EEC art. 119 is now incomparably broader than TFEU art. 19 that has given rise to 2000 Equality Directives. TFEU art. 157 states:

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
  - (b) that pay for work at time rates shall be the same for the same job.
3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures 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.

<sup>39</sup>TEC art. 13 (now TFEU art. 19).

<sup>40</sup>This is one of the central themes in the monograph by BELL, *supra* note 24.

<sup>41</sup>In this period, the CJEU only rarely referred to human dignity as underlying the right to equal treatment, like in Case C-13/94 P. v S., *supra* note 36, at para. 22.

<sup>42</sup>Bruno De Witte, *From a “Common Principle of Equality” to “European Antidiscrimination Law,”* 53 AM. BEHAV. SCI. 1715–30, 1715 (2010) (highlighting the principle of equality). Interestingly, the follow-up Equality Directives of 2000 refer to TEU art. 6 as inspiration in their Preambles. See e.g., Recital (2) in the Preamble to Race Equality Directive.

<sup>43</sup>Bruno De Witte, *The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law*, 13 CITIZENSHIP STUD. 515–25 (2009).

second focusing on the other four new grounds—Framework Equality Directive (“FED”)—introduced in Article 13 TEC, now Article 19 TFEU. The impressively speedy and smooth adoption of these instruments has been hailed in literature on the topic.<sup>44</sup> It can be attributed to the combination of a certain post-Amsterdam optimism regarding equality matters in the Union amongst then center-left elites on the one hand and the willingness to counteract xenophobia following the rise of the radical right in the Austrian elections on the other.<sup>45</sup> This is also the epoch when a separate mechanism was introduced in Article 7 TEU aimed at ensuring that Member States respect the fundamental values of the EU— including the rule of law—through early warning and sanctioning.<sup>46</sup> The speedy adoption of these Equality Directives was equally a pragmatic necessity in light of the impending Eastern enlargement. On the one hand, the adoption of these directives was expected to become more difficult in a Council of Ministers comprising many more Member States, several of which with post-communist baggage—for example CEE countries, or conservative elites like Cyprus or Malta. On the other hand, the swift adoption of these directives would make them part of the Union equality *acquis*, with which the acceding states would have to comply by virtue of the Copenhagen conditionality.<sup>47</sup> Nonetheless, Eastern European States were not the only ones delaying and resisting the new machinery of EU anti-discrimination law.<sup>48</sup> German legal elites, often a driving force behind EU federalism, gradually became skeptical too, especially in the wake of the CJEU’s jurisprudence on age discrimination.<sup>49</sup>

The ensuing case law during this second phase was not as abundant as expected for several of the five additional grounds. Nevertheless, this phase did generate some landmark judgments,<sup>50</sup> such as *Mangold* (2005)<sup>51</sup>—which recognized the principle of non-discrimination on grounds of age as a general principle of Community law—and *Coleman* (2008)<sup>52</sup>—which established “discrimination by association,” and thus further extended the reach of EU anti-discrimination law. The first—and for many years, also the only—race equality judgment of the Court of Justice, *Feryn* (2008),<sup>53</sup> was also decided at the very end of this period, along with *Maruko* (2008),<sup>54</sup> which concerned the grounds of sexuality in the Framework Equality Directive.

<sup>44</sup>Bruno De Witte, *National Equality Institutions and the Domestication of EU Non-Discrimination Law*, 18 MAASTRICHT J. EUR. & COMP. L. 157, 161 (2011); see also Rhonda Evans Case & Terri E. Givens, *Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive*, 48 J. COMMON MKT STUD. 221, 221 (2010); BELL, *supra* note 24.

<sup>45</sup>In 2000, Jörg Haider’s Freedom Party unexpectedly came in second after the Social Democrats—SPÖ—in the Austrian parliamentary elections.

<sup>46</sup>Wojciech Sadurski, *Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jorg Haider*, 16 COLUM. J. EUR. L. 385 (2009).

<sup>47</sup>Havelková, *supra* note 8 (confirming the correctness of this political prediction by the vivid resistance of a number of new Member States, many of whom have delayed transposition or have faced significant criticism regarding the way they have transposed Equality Directives).

<sup>48</sup>In 2007, the Commission was pursuing legal proceedings against no fewer than fourteen Member States for belated or incomplete implementation of RED and against seventeen Member States related to the transposition of FED.

<sup>49</sup>In this regard, scholars cite an emblematic statement by H. Ladeur, the Dean of Law Faculty at Hamburg University, who suggested “[t]hat [the Anti-Discrimination Law] shall be integrated into the [German Civil Code] with its dear systematic liberal approach, one of the masterpieces of European legal culture, has to be regarded as an act of legal vandalism”; see also Givens & Case, *supra* note 9, at 92; see also *infra* on Germany’s resistance to the Commission proposal for a new equality directive on the same grounds as Directive 2000/78.

<sup>50</sup>Thien Uyen Do, 2011: *A Case Odyssey into 10 Years of Anti-Discrimination Law*, EUR. ANTI-DISCRIMINATION L. REV. 11, 12 (2011) (calling these pioneering judgments “explosive”).

<sup>51</sup>Case C-144/04 Werner Mangold v. Rudiger Helm, 2005 E.C.R. I-9981.

<sup>52</sup>Case C-303/06 Coleman v. Attridge Law and Steve Law, 2008 E.C.R. I-5603.

<sup>53</sup>Case C-54/07 Centrum voor de Gelijkheid van Kansen en Racismebestrijding v. firma Feryn BV, 2008 E.C.R. I-5187.

<sup>54</sup>Case C-267/06 Maruko v. Versorgungsanstalt der deutschen buhnen, 2008 E.C.R. I-1757.



### III. Phase 3: Lisbon and Beyond (2009 to The Present)

The Lisbon Treaty—signed in 2007, entered into force in 2009—unfolded the third phase of EU anti-discrimination law, giving an even stronger central position to the principles of equality and non-discrimination.<sup>55</sup> In addition to several other prominent references to equality in the core Treaty provisions,<sup>56</sup> Article 10 TFEU enshrines a general obligation to mainstream the right to equal treatment in relation to all grounds.<sup>57</sup> Albeit programmatic, this central and outspoken position for the right to equal treatment within EU law goes hand in hand with a stronger position for human rights within the EU. Indeed, the Lisbon Treaty made the EU Charter of Fundamental Rights (“Charter, CFR”)<sup>58</sup> part of primary EU law and thus legally binding.<sup>59</sup>

It should be acknowledged, however, that the Charter already had a certain influence on the development of EU law prior to the Lisbon Treaty,<sup>60</sup> even though it was initially merely invoked as additional support, affirming rights already enshrined in EU law through general principles.<sup>61</sup> Though the influence of the Charter on the development of EU human rights law increased steadily over time<sup>62</sup>—since the Lisbon Treaty—the instrument has been exponentially relied upon by the CJEU in more bold ways.<sup>63</sup> Even if Article 6(1) TEU underscores that the Charter’s status as primary law will not imply an extension of the competences of the Union as defined in the Treaties, it has aptly been pointed out that the Charter’s status will breathe new life into the EU competences by focusing on the rights of the individual with regard to all EU policies.<sup>64</sup> In fact, all of Chapter III of the Charter is dedicated to equality and covers broader anti-discrimination law, including a general provision on equality before the law—Article 20 CFR—as well as a provision obliging the Union to respect cultural, religious, and linguistic diversity—Article 22 CFR.

It remains to be seen how the CJEU will use the non-discrimination clause enshrined in Article 21 CFR because this prohibits “any discrimination based on *any ground, such as sex, race, color,*

<sup>55</sup>ELLIS & WATSON, *supra* note 22, at 13.

<sup>56</sup>TEU arts. 2–4, 9, 21; TFEU, *supra* note 6, arts. 8, 153(1), 157(4). See also Rebecca Zahn, *The EU Lisbon Treaty: What implications for anti-racism?*, EUR. NETWORK AGAINST RACISM 11 (Nov. 2009), [https://www.storre.stir.ac.uk/bitstream/1893/6937/1/FINAL-lisbontreaty\\_EN\\_LRfinal.pdf](https://www.storre.stir.ac.uk/bitstream/1893/6937/1/FINAL-lisbontreaty_EN_LRfinal.pdf).

<sup>57</sup>DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW: CASES AND MATERIALS (2010) (calling TFEU art. 10 “the most significant commitment to promoting equality outside the framework of the rights-based model”).

<sup>58</sup>Charter of Fundamental Rights of the European Union [2016] O.J. C202/2.

<sup>59</sup>TEU art. 6(1).

<sup>60</sup>Opinion of AG Tizzano, at paras. 27–28, Case C-173/99 BECTU v. Secretary of State for Trade and Industry, 08/02/2001, <http://curia.europa.eu/juris/document/document.jspx?text=&docid=46070&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2537372>. See also Case T-54/99 Max Mobil Telekommunikation Service GmbH v. Commission 2002 E.C.R. II-00313, paras. 48, 57; Case C-540/03 European Parliament v. Council, 2006 E.C.R. I-05769; Case C-432/05 Unibet 2007, E.C.R. I-02271, para. 37; Case C-438/05 Viking Line 2007, E.C.R. I-10779. See the discussion in Steve Peers, *The EU Charter of rights and the right to equality*, 11 ERA F. 571, 571 (2011); Case C-540/03 *European Parliament v Council*, 2006 E.C.R. I-05769, para. 38 (noting that the fact that the Community legislator itself referred to the Charter in the Directive at issue in the latter case presumably helped persuading the Court to similarly acknowledge the Charter’s existence. Indeed, the Court highlighted that, “while the Charter is not a legally binding instrument, the Community legislator did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognized not only by Article 8 of the ECHR but also in the Charter”).

<sup>61</sup>Peers, *supra* note 60, at 572. See also Elizabeth F. Defeis, *The Treaty of Lisbon and Human Rights*, 16 ILSA J. INT’L & COMP. L. 413, 416 (2009).

<sup>62</sup>Defeis, *supra* note 61, at 416.

<sup>63</sup>See Marek Safjan, *Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union*, EUI LAW, Centre for Judicial Cooperation, DL, 2014/2, at 2 (noting that the Charter is relied upon to “influence the process of interpretation, of determination of the very content of particular norms, their extent and legal consequences, and thus they provide for the enlargement of the field of application of the European rules in the national legal orders”).

<sup>64</sup>Francesca Ferraro & Jesús Carmona, *Fundamental rights in the European Union: The Role of the Charter after the Lisbon Treaty*, EUR. PARLIAMENTARY RES. SERV. BRIEFING 3 (2015).

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.” While this opens the door for any ground of discrimination, several grounds of interest are explicitly added in Article 21 of the Charter—in comparison to the already-existing palette of grounds outlined in TEU and TFEU—such as “language,” “membership of a national minority,” and “genetic features.” Although the Treaties may not contain provisions for legislating over these additional grounds, Article 51 CFR does stipulate that the principles set out in the Charter should guide the development of EU policies and the implementation of these policies by national authorities.<sup>65</sup> Hence, difficult questions may arise before the CJEU when EU legislation and policies—and/or the national implementation thereof—have disproportionate effects on groups defined on these additional grounds of discrimination. In this respect, questions surrounding the status of third-country nationals may (re)surface.

At the level of secondary equality legislation, the European Union in this third phase has so far failed to adopt an updated directive proposed by the Commission in 2008—the Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation.<sup>66</sup> This proposal aims to extend the material scope of application of the prohibition of discrimination to the fields of education, social protection—including healthcare and social security—social advantages, and access to goods and services—including housing. The proposal thus sought to remedy the disparities in scope of application of the prohibition of discrimination on grounds of race and gender. The envisaged directive also for the first time attempted to introduce specific provisions about multiple discrimination and to extend the prohibition of discrimination to transport.

Strikingly—and unlike the smoothly-adopted 2000 Directives—this Commission proposal has been burdened with several unsuccessful negotiation rounds, reflecting a changed political climate. The changing wind has brought vivid resistance from several Member States with a range of concerns.<sup>67</sup> In comparison with the 2000 Directives, the negotiating parties have grown exponentially in numbers, proportionately augmenting the potential for disagreement. The rise in right-wing governments<sup>68</sup>—as opposed to the predominance of central-left political forces at the turn of the century—further explains the increased resistance against progressive expansions of the anti-discrimination norm. Some Member States—including influential players such as Germany—view the proposed directive as an encroachment on national competences, also with a view to subsidiarity considerations.<sup>69</sup> Certain Member States have a particular resistance to the inclusion of social protection and education in the scope *ratione*

<sup>65</sup>See Gráinne De Búrca, *The Drafting of the EU Charter of Fundamental Rights*, 26 EUR. L. REV. 126, 136 (2001) (analyzing the phrase “implementing Union law” in CFR art. 51).

<sup>66</sup>*Commission Proposal for a Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, COM (2008) 426 final (July 2, 2008); *Commission staff working document accompanying the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation—Summary of the impact assessment*, COM (2008) 426 final, SEC (2008) 2180 (July 2, 2008).

<sup>67</sup>Mark Bell, *The Principle of Equal Treatment: Widening and Deepening*, in *THE EVOLUTION OF EU LAW* 611, 620 (Paul Craig & Gráinne de Búrca eds., 2nd ed. 2011).

<sup>68</sup>See ANOOTH CHAKELIAN, *RISE OF THE NATIONALISTS: A GUIDE TO EUROPE’S FAR-RIGHT PARTIES* NEW STATESMAN (2017), <https://www.newstatesman.com/world/europe/2017/03/rise-nationalists-guide-europe-s-far-right-parties> (last visited Oct. 25, 2018).

<sup>69</sup>Presidency of the Council of the EU, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation—Progress Report*, 14867/17 paras. 2–4 (Nov. 24, 2017). Some of the states raising concerns have good track records in terms of anti-discrimination law—and human rights more generally—such as Germany. See also *supra* about initial optimism and subsequent disillusion of such states with regard to the 2000 Directives.

*materiae* of the proposed directive.<sup>70</sup> Given the requirement of unanimity in the Council for the adoption of this directive under Article 19 TFEU, actual progress in this respect seems indiscernible at the moment.

#### IV. Overarching Development Trends

Throughout the three outlined phases, a steady growth of commitment to the principle of equality can be detected.<sup>71</sup> As highlighted above, a constant feature underpinning these three phases reveals the central influence of the CJEU's jurisprudence on the development of EU non-discrimination law. Indeed, Treaty provisions and secondary legislation are often vague and contain ill-defined concepts, thus requiring clarification through jurisprudence. In this respect, it is important to acknowledge that EU anti-discrimination law projects a somewhat thin line between interpretation and application, on the one hand, and law-making, on the other.<sup>72</sup>

In the end, it is this jurisprudence—and ultimately the CJEU's case law—that demarcates the reach of these concepts and rules, and also the level of protection that is provided against unjustified differential treatment.<sup>73</sup> The CJEU is known for its teleological interpretation, aimed at effective protection against discrimination.<sup>74</sup> The CJEU's determined and sustained approach in this respect is *inter alia* visible in its jurisprudence on non-discrimination concepts, a move towards substantive equality—beyond mere formal equality—particularly through the development of the notion of indirect discrimination, and its softening approach regarding positive action measures.<sup>75</sup> Similarly, the Court's recognition of the right to equal treatment and the prohibition of discrimination as general principles of Union law,<sup>76</sup> and—last but not least—its case law on procedural requirements and remedies merits highlighting here.<sup>77</sup>

The Court has often underscored that because equality of treatment is a fundamental objective of both Treaty provisions and implementing legislation, a broad purposeful approach is required.<sup>78</sup> A prominent example of the Court's embrace of substantive equality is its development of the concept of *indirect discrimination*, thus significantly enlarging the reach of the

<sup>70</sup>Mark Bell, *Advancing EU Anti-Discrimination Law: The European Commission's 2008 Proposal for a New Directive*, 3 EQUAL RTS. REV. 11, 11–13 (2009).

<sup>71</sup>ELLIS & WATSON, *supra* note 22, at 495.

<sup>72</sup>See Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49 (2013). See also Andrew Guzman, *The Consent Problem in International Law*, BERKELEY PROGRAM IN LAW AND ECONOMICS WORKING PAPER SERIES 55 (2011); Vassilis P. Tzevelekos, *Juris Dicer: Custom as a Matrix, Custom as a Norm, and the Role of Judges and (their) Ideology in Custom Making*, in THE POWER OF LEGALITY: PRACTICES OF INTERNATIONAL LAW AND THEIR POLITICS 191, 206 (2016).

<sup>73</sup>ELLIS & WATSON, *supra* note 22, at 501–02.

<sup>74</sup>*Id.* at 498.

<sup>75</sup>Case C-96/80 JP Jenkins v. Kinggate (Clothing Productions) Ltd, 1981 E.C.R. 00911. See also Case C-170/84 Bilka-Kaufhaus GmbH v. Karin Weber von Hartz, 1986 E.C.R. 01607; Case C-127/92 Enderby v. Frenchay Health Authority and Secretary of State for Health 1993, E.C.R. I-05535. Regarding the CJEU's softening approach towards positive action, see Case C-476/99 H. Lommers v. Minister van Landbouw Natuurbeheer en Visserij, 2002 E.C.R. I-02891.

<sup>76</sup>Joined Cases 117/76 and 16/77 Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen; Diamalt AG v. Hauptzollamt Itzehoe, 1977 E.C.R. 1753. See also Case C-283/83 Firma A. Racke v. Hauptzollamt Mainz, 1984 E.C.R. 3791; Case C-15/95 EARL de Kerlast v. Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux, 1997 E.C.R. I-01961; Case C-292/97 Kjell Karlsson and Others, 2000 E.C.R. I-02737.

<sup>77</sup>Joined cases C-231/06 to C-233/06 Office nationale des pensions, 2007 E.C.R. I-05149. See also Case C-81/12 Asociația Accept v. Consiliul Național pentru Combaterea Discriminării, EU:C:2013:275, para. 61.

<sup>78</sup>See Joined Cases C-75/82 and C-117/82 Razzouk & Beydoun v. Commission, 1984 E.C.R. 01509, para. 16. See also Case C-147/80 Jürgen Römer v. Freie und Hansestadt Hamburg, 2011 E.C.R. I-03591; Case C-150/85 Jacqueline Drake v. Chief Adjudication Officer, 1986 E.C.R. 01995; Case C-303/06 Coleman, *supra* note 52; Colm O'Conneide, *The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground*, 22 MAASTRICHT J. EURO. & COMP. L. 370, 371 (2015).

prohibition of discrimination.<sup>79</sup> The Court's judgment in *Mangold* (2005),<sup>80</sup> that has sparked controversy in certain circles in Germany,<sup>81</sup> and its more recent judgment in *Tests-Achats* (2011),<sup>82</sup> as well as the daring way in which it employs the right to equal treatment as a general principle of Union law, shows a judiciary set on protecting the right to equal treatment as best it can.<sup>83</sup> This approach is similarly confirmed by the consistent jurisprudence on a restrictive, rigorous interpretation of provisions concerning exceptions and derogations to the non-discrimination principle. Equally essential is how the Court clarifies the sharing of the burden of proof in discrimination cases, thus effectuating the reduction of the—traditionally often insurmountable—burden of proof on behalf of the victim.<sup>84</sup>

Importantly, also in light of the development of a coherent body of EU anti-discrimination law, the CJEU has taken care to use common interpretation techniques and to treat common issues consistently across the distinctive grounds of discrimination.<sup>85</sup>

The following section will elaborate upon several of the related major trends and themes.

## C. Major Trends and Themes Since The Adoption of The 2000 Equality Directives

### I. Disproportionality Amongst Grounds of Discrimination in CJEU jurisprudence

Our assessment of the major trends and themes emerging since the adoption of the 2000 Equality Directives is based foremost on the activities of the Court of Justice, which—as has been shown in the historical exploration above—has traditionally played a most activist role in sustaining the rise of its anti-discrimination law. Yet, such a court-centric perspective suffers from a natural limitation. Before drawing a wider picture of the post-2000 EU anti-discrimination law, we have to keep a certain limitation in mind, namely that the number of judgments delivered by the CJEU with regard to the five new equality grounds—added by Article 19 TFEU and 2000 Equality Directives—has been anything but equal. Gender equality still remains the most judicialized aspect of equality in Luxembourg, often setting a comparative paradigm for dealing with the other five non-discrimination grounds. In contrast, from 2000 until 2018, the Court of Justice produced a substantive number of decisions regarding discrimination on the grounds of age and disability, much less so with regard to sexual orientation, and scarcely with regard to race and religion.<sup>86</sup>

Summing up this account of the Court's jurisprudence by the beginning of 2018, we can herald only two full-fledged judgments of the CJEU concerning the grounds of race and ethnicity,<sup>87</sup> and

<sup>79</sup>See Case C-237/94 *O'Flynn v. Adjudication Officer*, 1996 E.C.R. I-02617. See also Case C-96/80 *Jenkins*, *supra* note 75.

<sup>80</sup>Case C-144/04 *Mangold*, *supra* note 51. See also EU ANTI-DISCRIMINATION LAW BEYOND GENDER (Uladzislau Belavusau & Kristin Henrard eds., 2018).

<sup>81</sup>IP Berlin, *MANGOLD V. HELM—ECJ CASE C-144/04: DID THE COURT GET IT WRONG?* (2013); Lisa Waddington, *Recent Developments and the Non-Discrimination Directives: Mangold and More*, 13 MAASTRICHT J. EUR. & COMP. L. 365–73, 365 (2006). See also Tamara Čapeta, *The Advocate General: Bringing Clarity to CJEU Decisions? A Case-Study of Mangold and Küçükdeveci*, 14 CAMBRIDGE Y.B. EUR. L. STUD. 563–86, 563 (2012).

<sup>82</sup>Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres*, 2011 E.C.R. I-00773.

<sup>83</sup>ELLIS & WATSON, *supra* note 22, at 508.

<sup>84</sup>See Kristin Henrard, *The Effective Protection against Racial Discrimination and the Burden of Proof: Making up the Balance of the Court of Justice's Guidance*, in ANTI-DISCRIMINATION LAW BEYOND GENDER (Uladzislau Belavusau & Kristin Henrard eds., 2018).

<sup>85</sup>See ELLIS & WATSON, *supra* note 22, at ch. 4 (noting this commonality in approach across the distinctive grounds of discrimination allows for the identification and discussion of “key concepts in EU anti-discrimination law,” such as direct and indirect discrimination or burden of proof, as is reflected in textbooks on EU anti-discrimination law).

<sup>86</sup>See Erica Howard, *The Case for a Considered Hierarchy of Discrimination Grounds in EU Law*, 13 MAASTRICHT J. EUR. & COMP. L. 445, 420 (2006). See also Lisa Waddington & Mark Bell, *More Equal than Others: Distinguishing European Union Equality Directives*, 38 COMMON MKT. L. REV. 587, 587 (2001) (highlighting the alleged hierarchy embedded in the set-up of the EU Equality Directive).

<sup>87</sup>Case C-54/07 *Feryn*, *supra* note 53. See also Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia* EU:C:2015:480, Judgment of 16 July, 2015.

two parallel judgments decided on the grounds of religion.<sup>88</sup> Apart from the sensitive nature of these areas for Member States, the scarce number of judgments can be attributed to an array of factors, including the low awareness of discriminated plaintiffs belonging to ethnic and religious minorities about their material and procedural rights under EU law, as well as an often multiple nature of experienced discrimination—like the combination of gender and race.<sup>89</sup> Furthermore, the distinction between ethnic and religious discrimination is not always crystal-clear, as the material scope of the former prohibition is much wider than simply the field of employment, which the Framework Equality Directive prescribes for the latter. Finally, more litigation could be expected with the rise and empowerment of equality bodies to support race and religion cases in the future, as will be explained below.

## II. Material and Personal Scope of Equality Directives

While the 2000 Directives contain several common provisions, they differ markedly in terms of their scope *ratione materiae*. The Framework Equality Directive is confined to the employment sphere, while the Race Equality Directive also covers social protection, including social security and healthcare, education, and access to goods and services available to the public, such as housing.<sup>90</sup> The Directives are further constrained because they do not cover the prohibition of discrimination on the basis of nationality.<sup>91</sup> Furthermore, the FED includes an exception regarding religious occupational requirements for religious bodies.<sup>92</sup>

On the one hand, it remains an enigma that RED—while enjoying such a rich material scope—has eventually led to only two cases decided by the Court of Justice in seventeen years.<sup>93</sup> On the other hand, the limited scope of FED partially explains the failure of the Court to extend the application of EU anti-discrimination law to its case law on name-spelling as part of the language rights of ethnic minorities. This jurisprudence was regarded by the CJEU as exclusively part and parcel of discrimination based on nationality—tantamount to citizenship of EU Member States—instead of as ethnic discrimination. In the absence of a formal possibility to advance RED in the nationality context, the Court took an unfortunate restrictive turn in its interpretation of language rights,<sup>94</sup> satisfying the political appetites of local nationalism and shielded by the esoteric protection of national identity embedded in post-Lisbon primary

<sup>88</sup>Case C-157/15 Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV EU:C:2017:203. See also Case C-188/15 Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA EU:C:2017:204.

<sup>89</sup>See generally Raphaële Xenedis, *Multiple Discrimination in EU Anti-Discrimination Law: Towards Redressing Complex Inequality?*, in EU ANTI-DISCRIMINATION LAW BEYOND GENDER (Uladzislau Belavusau & Kristin Henrard eds., 2018).

<sup>90</sup>For the scope of application, see Article 3 of the Race Equality Directive (compare to the modest scope embedded in Article 3 of the Framework Equality Directive).

<sup>91</sup>RED, *supra* note 4, art. 3(2) stipulates that it does not cover difference of treatment based on nationality.

<sup>92</sup>FED, *supra* note 4, art. 4(2) stipulates:

[T]his Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

<sup>93</sup>Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1315 (2007) (noting this might be attributed to the procedural path-dependence. On the continent, race discrimination traditionally pertains to the field of criminal law rather than civil or anti-discrimination regulation as in the USA. For this point, in the context of the comparative study on US-French law).

<sup>94</sup>Case C-208/09 Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien 2010, E.C.R. I-13693. See also Case C-391/09 Malgożata Runevič-Vardyn & Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija & Others, 2011 E.C.R. I-03787; Dimitry Kochenov, *When Equality Directives Are Not Enough: Taking an Issue with the Missing Minority Rights Policy in the EU*, in EU ANTI-DISCRIMINATION LAW BEYOND GENDER (Uladzislau Belavusau & Kristin Henrard eds., 2018) (analyzing of this stream of cases, critiquing the Court for playing the tune of nationalism).

EU law.<sup>95</sup> Likewise, the Court has delivered a highly disputable judgment, in which it left the door open for states to restrict blood donations by gay and bisexual individuals.<sup>96</sup> Without a *de jure* possibility to advance FED in this medical context, the CJEU indeed left the ultimate decision to the national court whether or not a blanket ban on blood donation by MSM—men who had had sex with other men—is in line with the prohibition of discrimination on grounds of sexual orientation.<sup>97</sup> The CJEU, thus, has been criticized for the failure to qualify such blanket bans as unjustifiable because they are deemed unacceptably over- and under-inclusive, and therefore inspired by a deep-seated homophobia rather than the protection of public health.<sup>98</sup>

The recent decline of democracy in the Union—in particular in Hungary and Poland<sup>99</sup>—has placed another dilemma for the material scope of EU anti-discrimination law, namely on whether Equality Directives can play a safeguard role to protect rule of law in the Member States. Two judgments from the Court of Justice are emblematic to this debate. The first is *Commission v. Hungary* in 2012. In this case, the right-wing government in Hungary managed to substitute a considerable number of judges and prosecutors with new Fidesz appointees by radically lowering the age of retirement in the beginning of 2010 s. Although the CJEU indeed established age discrimination based on the FED, the verdict for the 2012 case brought by the EU Commission against Hungary<sup>100</sup> has been criticized as toothless for its failure to establish a clear nexus between the rule of law and age discrimination and belated enough—despite its accelerated procedure—to permit the ruling party substituting judicial office in the meantime.<sup>101</sup> Yet, in its most recent ordinance in a similar case regarding the retirement age for the judges of the Supreme Court in Poland (2018),<sup>102</sup> the Vice-President of the CJEU ordered to suspend the effects of the Polish Judiciary Reform Act and, in particular, to ensure that no sitting judge is removed as a result of the new retirement age, which has been regarded as revolutionary.<sup>103</sup>

In contrast to the material scope, the *ratione personae* is similar between RED and FED, and covers both public and private sectors, including individuals and public bodies, such as state authorities, companies, and social partners.<sup>104</sup> More specifically, EU anti-discrimination law envisages an implementation possibility through social partners, provided that they take the necessary steps to ensure that they are at all times able to guarantee the result required by the FED.<sup>105</sup> Accordingly, EU

<sup>95</sup>Adam Lazowski et al., *The Importance of Being Earnest: Spelling of Names, EU Citizenship and Fundamental Rights*, 11 CROATIAN Y.B. EUR. L. & POL. 1, 1 (2015) (stating that TEU art. 4(2) obliges EU to respect Member States’ “national identities, inherited in their fundamental structures”).

<sup>96</sup>Case C-528/13 Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang EU:C:2015:288.

<sup>97</sup>Not only does the FED not cover healthcare, TFEU art. 168(7) also provides that “[u]nion action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care.”

<sup>98</sup>For critique of the judgement, see Uladzislau Belavusau, *Towards EU Sexual Risk Regulation: Restrictions on Blood Donation as Infringement of Active Citizenship*, 7 EUR. J. RISK REG. 801, 802 (2016). See also Alina Tryfonidou, *The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination in EU law*, in EU ANTI-DISCRIMINATION LAW BEYOND GENDER, 244–45 (Uladzislau Belavusau & Kristin Henrard eds., 2018).

<sup>99</sup>CARLOS CLOSA & DIMITRY KOCHENOV, REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION (2016).

<sup>100</sup>Case C-286/12 Commission v. Hungary EU:C:2012:687.

<sup>101</sup>Uladzislau Belavusau, *On Age Discrimination and Beating Dead Dogs: Commission v. Hungary*, 50 COMMON MKT. L. REV. 1145, 1145 (2013) (analyzing the case, including its *age* and *rule of law* components).

<sup>102</sup>Ordonnance of the Vice-President of the Court of Justice of the European Union (Oct. 19, 2018) EU:C:2018:852.

<sup>103</sup>DANIEL SARMIENTO, INTERIM REVOLUTIONS: THE CJEU GIVES ITS FIRST INTERIM MEASURES RULING ON THE RULE OF LAW IN POLAND EU LAW ANALYSIS (2018), <http://eulawanalysis.blogspot.com/2018/10/interim-revolutions-cjeu-gives-its.html>.

<sup>104</sup>See FED, *supra* note 4, art. 3(1).

<sup>105</sup>See FED, *supra* note 4, preamble at para. 36. The Court has delivered important and ardently-discussed jurisprudence regarding the rights of trade unions in advancing their claims in Case C-341/05 Laval un Partneri, 2007 E.C.R. I-11767, and Case C-438/05 Viking, *supra* note 60. For analysis, see Uladzislau Belavusau, *The Case of Laval in the Context of the Post-Enlargement EC Law Development*, 9 GERMAN L.J. 2279, 2279 (2008).

legislation forces some states to reconsider their traditional view that fundamental rights should be binding and enforceable only against state authorities and not against private bodies.<sup>106</sup>

Geographically, the Equality Directives cover all current—pre-Brexit—twenty-eight Member States of the Union.<sup>107</sup> Depending on the country concerned, RED and FED may be indirectly relevant beyond the EU in the EFTA zone.<sup>108</sup> Although the 2000 Directives are not formally incorporated into the EEA Agreement due to the lack of a legal basis, there are signs that those states are often willing to adopt similar legislation so as to be in line with the EU mainstream.<sup>109</sup> In the future, these Equality Directives will also remain a guiding force for the acceding Member States in satisfying the Copenhagen criteria of observing fundamental rights and equality.

### III. Proceduralization of EU Equality Law

One way in which the 2000 Equality Directives have undoubtedly advanced EU anti-discrimination law pertains to the new procedural set-up of this field. This is the area where one can observe a rise in cause lawyering, learning from the experience of the US Civil Rights Act of 1964 and its advancement by the Equal Employment Opportunity Commission in the United States.<sup>110</sup> In a somewhat similar mode, the Equality Directives gave *locus standi* for organizations to represent disadvantaged groups in the absence—or on behalf—of the individual plaintiffs. The Directives also enabled these organizations to collect information and provide advice. According to Articles 7(2) RED and 9(2) FED:

Member States shall ensure that associations, organizations or other legal entities that 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 that complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

Likewise, earlier developments with similar national bodies in the United Kingdom and the Netherlands—borrowing from the American model—have inspired the institutionalization of equality bodies on the EU level.<sup>111</sup> So far this is only required under RED, however, not under FED. Put differently, RED stipulates:

Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defense of human rights or the safeguard of individual rights.<sup>112</sup>

But in practice, such bodies tend to cover all grounds of discrimination from Article 19 TFEU. As a result of these incorporations into EU anti-discrimination law, two major cases reached the CJEU via preliminary rulings from national jurisdictions, notwithstanding the absence of actual

<sup>106</sup>See De Witte, *supra* note 42 (according to De Witte, the European-driven horizontalization of anti-discrimination law is a major challenge for many national legal systems and contributes to the emergence of new, but not uncontroversial, conceptions of inclusive citizenship).

<sup>107</sup>Nevertheless, FED art. 15 makes a reservation for Northern Ireland, where positive discrimination is allowed in order to tackle the under-representation of one of the main religious communities in the police service and education.

<sup>108</sup>Iceland, Liechtenstein, Norway, and Switzerland.

<sup>109</sup>See Dóra Gudmundsdóttir, *The Framework Directive and Icelandic Law: Sexual Orientation Discrimination*, in *EQUALITY INTO REALITY: ACTION FOR DIVERSITY AND NON-DISCRIMINATION IN ICELAND* 333 (Evelyn Ellis & Kristin Benediksdóttir eds., 2011).

<sup>110</sup>Bruno De Witte, *New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance*, 60 *AM. J. COMP. L.* 49, 49 (2012).

<sup>111</sup>De Witte, *supra* note 42, at 160 (according to De Witte, we have witnessed “a neat migration sequence US → UK → NL → EU → all individual EU states”).

<sup>112</sup>RED, *supra* note 4, art. 13.

individual plaintiffs complaining about discriminatory hiring practices: The case of *Feryn*, regarding a statement by an employer in media about his reluctance to hire Moroccans,<sup>113</sup> and the case of *Asociația ACCEPT* (2013), where a club patron heralded that he will never hire a homosexual football player to the team.<sup>114</sup> Both cases reached the Court from Belgium and Romania in the virtual absence of a single plaintiff pertaining to the disadvantaged groups at stake: Moroccan people in *Feryn* and gay individuals in *Asociația ACCEPT*. In *Feryn*, it is additionally striking that the plaintiff organization—anti-racist center—was an “equality body” established in line with Article 13 RED. That organization launched a claim before a national labor court against the firm *Feryn* that then wound up at the Court in Luxembourg through a preliminary reference. In *ACCEPT*, an LGBT organization brought a case against the national equality body under the FED for having failed to offer an accurate interpretation of EU anti-discrimination law.

These scenarios for strategic litigation, by either a strong and genuinely independent equality body—like in the Belgian case—or by an autonomous human rights organization—like in the Romanian case—essentially revolutionize future development of anti-discrimination law in Europe. Such a litigation option provides a veritable boost to otherwise desperate cases with no individual plaintiffs available.

There are a number of factors that potentially prevent individual plaintiffs from launching a case, including *inter alia*:

- Low awareness of legal possibilities to seek judicial redress, frequently combined with imperfect knowledge of the official language of procedures, which very often affects migrants;
- Serious physical or mental handicaps in cases involving disabled people;
- Age of affected victims, for cases involving both the youth and the elderly;
- Religious considerations or subordinated status—for example, women in some traditional Islamic families; and
- Fear of public disgrace or considerations of privacy and safety—for example, cases with LGBT plaintiffs.

The 2000 mechanism, thus, for the first time facilitates access to national courts and, depending on the willingness of these national courts to request preliminary rulings, to the CJEU on behalf of collective actors, an aspect which—in contrast—remains a weak spot in the Strasbourg mechanism with its accent on individual claims. Hence, advocacy groups get access to courts on equality matters, albeit to a different extent in various Member States. In this respect, EU law offers an easier procedural track for collective claims pertaining to group minority interests than individual, and often timely and lengthy, claims at the European Court of Human Rights. Apart from preliminary rulings in the CJEU, other EU opportunities include infringement procedures and annulment actions by the institutions.<sup>115</sup>

If facilitated through sufficient financial and informational resources—a task that should be duly understood as an objective of the EU anti-discrimination scheme—this focus on NGOs is capable of strengthening equal opportunities in Europe under the double vigilance of EU institutions and civil society.<sup>116</sup> As has been highlighted in literature, EU equality bodies, however, face significant

<sup>113</sup>Case C-54/07 *Feryn*, *supra* note 53. For an overview of the case, see Kristin Henrard, *The First Substantive ECJ Judgement on the Racial Equality Directive: A Strong Message in a Conceptually Flawed, and Responsively Weak Bottle 1* (2009); Uladzislau Belavusau, *Fighting hate speech through EU law*, 4 AMSTERDAM L. F. 20, 20 (2012).

<sup>114</sup>Case C-81/12 *Asociația Accept*, *supra* note 77. For an extensive commentary, see Uladzislau Belavusau, *A Penalty Card for Homophobia from EU Non-Discrimination Law: Comment on Asociația Accept*, 21 COLUM. J. EUR. L. 353, 353 (2014).

<sup>115</sup>Uladzislau Belavusau & Dimitry Kochenov, *Federalizing Legal opportunities for LGBT Movements in the Growing EU*, in EU ENLARGEMENT AND GAY POLITICS 96 (2016) (noting current EU legal opportunities specifically mapped out for LGBT litigants).

<sup>116</sup>Mark Dawson & Elise Muir, *Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma*, 48 COMMON MKT. L. REV. 751, 751–55 (2011) (noting the concept of double vigilance in EU law within the context of Rome protection).



challenges, including a reduction of resources, restructuring, threats to independence, and lack of expertise, among other problems.<sup>117</sup> Nonetheless, where the national parliament and government have endowed such bodies with substantial functions, these new organizations appear to fulfill an active role.<sup>118</sup>

#### IV. Forms of Discrimination in EU Anti-Discrimination Law

Following a formal interpretation of the 2000 Equality Directives, we can deduce four forms of discrimination underpinning EU anti-discrimination law for the time being.<sup>119</sup> The four forms of discrimination cover direct discrimination, indirect discrimination, harassment, and instruction to discriminate. In addition, all of the Directives outlaw victimization of those complaining of discrimination. Both RED and FED require Member States to: [I]ntroduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.<sup>120</sup>

As new grounds of prohibited discrimination are added to the palate of EU anti-discrimination law, old debates are bound to be rekindled, such as the dividing line between direct and indirect discrimination.<sup>121</sup> These two forms of discrimination remain central in the Court's analysis, leaving harassment and instruction to discriminate in a rather more obscure role for the time being. The stark distinction in EU law between possible justifications for direct versus indirect discrimination has elicited several discussions on the scope of this dichotomy, highlighting the considerable grey zone in this regard.<sup>122</sup> This grey zone is particularly acute in cases of so-called systemic discrimination, where ingrained prejudice in society plays a considerable role. In instances of deep-seated prejudice, are neutral rules really "neutral" notwithstanding their disparate impact maintained over decades? This line of thinking has been developed in relation to the Roma people—studied as a paradigmatic example of victims of systemic discrimination—but reasoning is arguably equally valid for several other discriminated groups regarding grounds of discrimination in the EU's palate. Put differently, a more nuanced, holistic approach is needed when qualifying particular instances of discrimination as amounting to direct or indirect discrimination.

Remarkably, there has not yet been case law focusing on the definition and scope of the prohibition of harassment<sup>123</sup> and sexual harassment, instruction to discriminate, and victimization as instances of prohibited discrimination. The related interpretative questions remain to be resolved in future case law.

<sup>117</sup>Givens & Case, *supra* note 9, at 128.

<sup>118</sup>De Witte, *supra* note 43, at 178.

<sup>119</sup>FED, *supra* note 4, art. 2(2) maintains that:

(a) [D]irect discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1; (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons.

FED art. 2(3) defines harassment, while Article 2(4) generally describes instruction to discriminate against persons on any of the grounds referred to in Article 1 as discrimination.

<sup>120</sup>RED, *supra* note 4, art. 9; a similar measure is contained in FED, *supra* note 4, art. 11.

<sup>121</sup>TOBLER, *supra* note 20 (summarizing the distinctions between direct and indirect discrimination in EU law).

<sup>122</sup>MARTINE JACOBA BUSSTRA, THE IMPLICATIONS OF THE RACIAL EQUALITY DIRECTIVE FOR MINORITY PROTECTION WITHIN THE EUROPEAN UNION: AN ANALYSIS OF THE SUBSTANTIVE PROVISIONS OF THE RACIAL EQUALITY DIRECTIVE AND THEIR IMPLEMENTATION IN FOUR MEMBER STATES: BELGIUM, ESTONIA, HUNGARY AND THE NETHERLANDS 148–56 (2010).

<sup>123</sup>Mathias Möschel, *Eighteen Years of Race Equality Directive: A Mitigated Balance*, in EU ANTI-DISCRIMINATION LAW BEYOND GENDER (Uladzislau Belavusau & Kristin Henrard eds., 2018) (discussing national case law, confirming that so far, no CJEU case law on this concept exists).

The terminology of harassment is definitely a transatlantic legal transplant, protected in the United States by virtue of Title VII of the Civil Rights Act of 1964. In the US, this provision was primarily meant to address discriminatory practices against racial minorities—which makes particular sense in the American employment context—whereas hate speech has been systematically justified by the Supreme Court under the First Amendment.<sup>124</sup> The Civil Rights Act covers the grounds of race, color, religion, sex, and national origin. By the 1980s, the US Equal Employment Opportunity Commission had issued guidelines on sexual harassment as a breach of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964.<sup>125</sup> Since the 1990s, a number of European countries have been targeting hateful expressions in the employment context as a part of workplace harassment; for example, *intimidatie* in the Netherlands, *harcèlement moral* in France, and *trakasserier* in Sweden. Sweden and France were particularly active in fostering various anti-harassment practices in labor law, linking them to a worker's dignity.<sup>126</sup>

Article 2(3) RED stipulates that “[h]arassment shall be deemed to be discrimination... when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating, or offensive environment.”<sup>127</sup> Both RED and FED permit Member States to define harassment “in accordance with the national laws and practice of the Member States.”<sup>128</sup> The Court of Justice had an opportunity to define harassment twice, but in both cases limited its dictum to fairly general phrasing that does not shed much light on the position of harassment vis-à-vis direct and indirect discrimination. In the case of *Coleman* (2008), the Court held that the prohibition of harassment is not limited to the harassment of people who are themselves disabled.<sup>129</sup> In the case of *Asociația ACCEPT*, the Court requalified harassment—there, an instance of homophobic speech—as established by the national court into an instance of direct discrimination.<sup>130</sup>

Thus, it currently remains unclear what precisely constitutes harassment as a separate form of discrimination and how national authorities should redress it. Even in cases that resemble the definition of harassment rather than direct or indirect discrimination *sensu stricto*, the Court appears to construct harassment as a sort of direct discrimination for the maximum benefit of plaintiffs.<sup>131</sup> The texts of the Directives imply that harassment “shall be deemed to be a form

<sup>124</sup> ULADZISLAU BELAVUSAU, FREEDOM OF SPEECH: IMPORTING EUROPEAN AND US CONSTITUTIONAL MODELS IN TRANSITIONAL DEMOCRACIES (2013) (comparing the approach in continental Europe, to the approach of the U.S. Supreme Court which has enfolded hate speech into the protective scope of the First Amendment. This constitutes perhaps the most striking discrepancy between the two principal Western free speech models).

<sup>125</sup>KATHRIN S. ZIPPEL, THE POLITICS OF SEXUAL HARASSMENT: A COMPARATIVE STUDY OF THE UNITED STATES, THE EUROPEAN UNION, AND GERMANY (2006); RIKKI HOLTMAAT, SEKSUELE INTIMIDATIE: DE JURIDISCHE GIDS (2009). See also ANN NUMHAUSER-HENNING & SYLVAINÉ LAULOM, HARASSMENT RELATED TO SEX AND SEXUAL HARASSMENT LAW IN 33 EUROPEAN COUNTRIES: DISCRIMINATION VERSUS DIGNITY (2011) (claiming that unlike in the US, where harassment is semantically constructed as discrimination, in Europe it is primarily articulated as a concern over dignity).

<sup>126</sup>Maria Isabel S. Guerrero, *The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Towards EU legislation*, 27 B.C. INT'L & COMP. L. REV. 477, 477 (2004).

<sup>127</sup>FED art. 2(3) gives a similar definition with regard to the respective four grounds. The Equal Treatment Directive 2006/54 gives an almost identical definition of harassment with regard to gender, but also adds one more form of discrimination, sexual harassment, consisting of “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature [which] occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.” Equal Treatment Directive, *supra* note 34, art. 2(1)(d).

<sup>128</sup>RED, *supra* note 4, art. 2(3); FED, *supra* note 4, art. 2(3).

<sup>129</sup>Case C-303/06 *Coleman*, *supra* note 52. The plaintiff was the primary caretaker of a disabled child. She was harassed and discriminated against on the grounds of her child's disability. Although it was not the plaintiff herself who was disabled, the Court established direct discrimination in that case.

<sup>130</sup>Case C-81/12 *Asociația Accept*, *supra* note 77.

<sup>131</sup>In both Case C-54/07 *Feryn*, *supra* note 53 and Case C-81/12 *Asociația Accept*, *supra* note 77, the utterances of the employer are essentially offensive claims that easily could have been interpreted under the clauses of harassment in the secondary EU law of non-discrimination. Perhaps the only clear element that separates these two cases from incidents of

of discrimination”<sup>132</sup> when unwanted conduct related to a certain ground takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating, or offensive environment. The FED, however, leaves further definition of the concept of harassment to the laws and practice of the Member States. The way that this harassment clause was implemented in many EU countries suggests that Member States view harassment as a somewhat minor form of discrimination.<sup>133</sup> As reflected in the Romanian case discussed below, the Court missed the opportunity to take a position about this fairly debatable assumption and to clarify subtle distinctions in categories.

#### V. Positive Discrimination or Affirmative Action à la Européenne

The arrival of five new grounds of discrimination with Article 19 TFEU and the 2000 Equality Directives has also put a new spotlight on so-called *positive discrimination*, often referred to in the American context as *affirmative action*. The Directives in fact merged the European and American terminologies under the heading of “positive action.” The big question, however, is whether positive action is restricted exclusively to the confines of gender equality, or if it is also applicable with regard to ethnic, religious, sexual, age, and disabled disadvantaged groups. Positive discrimination certainly aligns with the invigorated focus on substantive or real equality, but it is well known that not all its manifestations are equally well received. Indeed, as soon as a positive action measure implies preferential treatment for one category or individual—and thus disadvantageous treatment for another—positive action is in tension with the right not to be discriminated against, or not to be treated unfavorably without justification.<sup>134</sup> Consequently, in the cases discussed below, assessing the legitimacy of positive action concerns a controversial balancing act—not so much regarding the question of whether positive action measures have a legitimate aim, but rather whether these measures are proportionate.<sup>135</sup>

It has long been recognized that EU law does not wholly exclude positive action measures. Indeed, in the main anti-discrimination directives, a similar provision can be found which indicates that the principle of equal treatment shall not prevent a Member State from taking specific measures “to prevent or compensate for disadvantages linked to [the grounds covered by the Directives].”<sup>136</sup> Because these provisions are very open-ended, the case law of the CJEU and the interpretations and applications of the underlying proportionality principle provide further guidance to Member States as to what amounts to permissible action.

As highlighted by Christopher McCrudden and Sacha Prechal in their 2009 report for the EU Commission: [T]he ECJ has also recognized that to achieve equality of opportunity between women and men it will be necessary on occasion to go beyond the eradication of discrimination, and that positive action may be appropriate even where it results in the preferential treatment of the formerly disadvantaged group.<sup>137</sup>

As the authors acknowledge, however, the CJEU has traditionally adopted a very restrictive approach in its case law on gender equality, construing positive action as an exception to the right

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harassment is that, in both cases, individuals did not experience that type of racist and homophobic bullying during employment but were prevented from employment by virtue of a speech act.

<sup>132</sup>ZIPPEL, *supra* note 125.

<sup>133</sup>See Belavusau & Kochenov, *supra* note 115.

<sup>134</sup>Kristin Henrard, *Boosting Positive Action: The Asymmetrical Approach Towards Non-discrimination and Special Minority Rights*, 71 HEIDELBERG J. INT’L L., 388, 388–89 (2011).

<sup>135</sup>*Id.*

<sup>136</sup>Equal Treatment Directive, *supra* note 34, art. 3; RED, *supra* note 4, art. 5; FED, *supra* note 4, art. 7; Directive 2004/113, *supra* note 34, art. 6.

<sup>137</sup>Christopher McCrudden & Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach* 38 (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Research Paper No. 4/2011, 2011).

to equal treatment.<sup>138</sup> Gradually, however, the CJEU softened its position. For example, in *Lommers* (2002), the Court did not refer to the principle that derogations from an individual right should be interpreted strictly. Instead, it held that

[I]n determining the scope of any derogation from an individual right... due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.<sup>139</sup>

This shift towards a more open proportionality analysis remains visible in the subsequent case law, in which the Court further defines the exact parameters of what is permissible, and to what extent, in a gradual, case-by-case, process.<sup>140</sup>

Because the CJEU's case law on positive action has so far only concerned the grounds of gender, it remains to be seen whether the Court's reasoning—and more particularly its proportionality assessment—will vary for the other grounds. When looking at the additional grounds of prohibited discrimination with regard to documented histories of prejudice and discrimination, race, religion, and sexual orientation are obvious contenders for positive action measures aimed at compensating for the resulting ongoing disadvantages. Alternatively, age and disability<sup>141</sup> could lead to interesting case law on positive action of the preventive, prophylactic kind.

## VI. Duties of Reasonable Accommodation

The Framework Equality Directive was the first piece of legislation to enshrine duties of reasonable accommodation in EU law, yet only in relation to the grounds of disability. In order to discuss duties of reasonable accommodation as a mechanism to counter discrimination, it is important to identify the underlying rationale and further define the concept. Admittedly, this notion does not have the same long pedigree as the prohibition of discrimination.<sup>142</sup> Nevertheless, since its emergence in Canada and the US in the 1960s,<sup>143</sup> it has migrated to several other jurisdictions, including South Africa, Israel, and New Zealand, as well as to the level of international and regional organizations.<sup>144</sup> Duties of reasonable accommodation fit with the broader development towards a quest for equality, in particular regarding substantive equality. In the end, duties of reasonable

<sup>138</sup>See Case C-450/93 Eckhard Kalanke v. Freie Hansestadt Bremen 1995 E.C.R. I-03051. See also Case C-409/95 Hellmut Marschall v. Land Nordrhein-Westfalen 1997 E.C.R. I-06363; Case C-158/97 Georg Badeck & Others, interveners: Hessische Ministerpräsident & Landesanwalt beim Staatsgerichtshof des Landes Hessen 2000 E.C.R. I-01875; Case C-407/98 Katarina Abrahamsson & Leif Anderson v. Elisabet Fogelqvist 2000 E.C.R. I-5539.

<sup>139</sup>Case C-476/99 *Lommers*, *supra* note 75, at para. 39.

<sup>140</sup>Case C-319/03 Serge Briheche v. Ministre de l'Intérieur, Ministre de l'Éducation nationale & Ministre de la Justice, 2004 E.C.R. I-08807. See also Case C-366/99 Joseph Griesmar v. Ministre de l'Économie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation, 2001 E.C.R. I-09383.

<sup>141</sup>With regard to disability, there is a fascinating perspective for future discussion about the relation between positive action, on the one hand, and duties of reasonable accommodation, on the other.

<sup>142</sup>Lisa Waddington et al., *Reasonable Accommodation*, in CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW 630 (2007).

<sup>143</sup>Pierre Bosset & Marie-Claire Foblets, *Accommodating diversity in Quebec and Europe: Different Legal Concepts, Similar Results?*, in INSTITUTIONAL ACCOMMODATION AND THE CITIZEN: LEGAL AND POLITICAL INTERACTION IN A PLURALIST SOCIETY 43–50 (2009) (noting that the US was the first country to identify duties of reasonable accommodation; at first through interpretation of the 1964 Civil Rights Act, and in 1972, through an explicit provision on reasonable accommodation duties added to the 1964 Act. In Canada, duties of reasonable accommodation were introduced by jurisprudence as well—more particularly, the 1985 Supreme Court judgment in *O'Malley v. Simpsons Sears*. Subsequently, duties of reasonable accommodation were judicially recognized in relation to all fourteen enumerated grounds of prohibited discrimination in Section 15 of the Canadian Charter of Rights and Freedoms).

<sup>144</sup>U.N. General Assembly, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *The Concept of Reasonable Accommodation in Selected National Disability Legislation*, U.N. Doc. A/AC.265/2006/CRP.1 (Dec. 7, 2005).

accommodation aim at securing equal opportunities by evening out barriers to full participation due to the interaction amongst personal characteristics and the way the society is structured.<sup>145</sup> Because reasonable accommodation measures overcome these hurdles to participation, they ensure substantively equal access to employment, to public services, and to education, among other areas.<sup>146</sup>

Duties of reasonable accommodation can be framed as applications of generally accepted dimensions of the right to equal treatment—particularly the duties of differential treatment and the prohibition of indirect discrimination. In short, duties of reasonable accommodation can be seen as a particular kind of duty of differential treatment, aimed at substantive equality, while accommodation measures can be considered as important tools to prevent or remedy instances of indirect discrimination.<sup>147</sup>

Though the underlying rationale for duties of reasonable accommodation remains the same throughout, there are striking differences in their scope of application, including the grounds of discrimination covered. In some countries, duties of reasonable accommodation are identified for a broad range—or even all—grounds of discrimination, whereas for others these duties are only acknowledged in relation to particular grounds, generally disability, and often religion.<sup>148</sup> When considering UN treaties and EU secondary legislation, duties of reasonable accommodation are so far only explicitly recognized in relation to disability.<sup>149</sup> Yet it merits underscoring that in the US and Canada, the duties were originally conceptualized in order to deal with religious diversity resulting from immigration.<sup>150</sup> Hence, duties of reasonable accommodation could certainly be extended to religion. More generally, as these duties are an inherent dimension of the right to equal treatment, being intrinsically related to duties of differential treatment and the prohibition of indirect discrimination, there is no reason in principle not to grant duties of reasonable accommodation a broader scope of application.<sup>151</sup>

In terms of possible contestations with regard to measures of reasonable accommodation, it is important to note that these duties to provide accommodation are not absolute. As for any dimension of the right to equal treatment, and as expressed in the adjective “reasonable,” proportionality considerations provide intrinsic demarcations for these duties. Relevant factors to measure reasonableness and prevent undue burdens, undue hardship, or a

<sup>145</sup>GÉRARD BOUCHARD & CHARLES TAYLOR, *BUILDING THE FUTURE: A TIME FOR RECONCILIATION: ABRIDGED REPORT* 68 (2008) (emphasizing reasonable accommodations do not amount to privileges but are meant to engage in a reasonable adaptation to counteract the rigidity of certain rules or their uniform application, which would not regard the specific traits of individuals).

<sup>146</sup>Bosset & Foblets, *supra* note 143, at 37 (arguing that “the main idea underlying reasonable accommodation is that democratic states must allow everyone to participate fully in society on an equal footing as far as possible”).

<sup>147</sup>See Kristin Henrard, *Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality*, 5 ERASMUS L. REV. 59, 67 (2012). See also Frederique Ast, *Indirect Discrimination as a Means of Protecting Pluralism: Challenges and Limits*, in INSTITUTIONAL ACCOMMODATION AND THE CITIZEN: LEGAL AND POLITICAL INTERACTION IN A PLURALIST SOCIETY 97 (2010) (underscoring the right to reasonable accommodation can be portrayed as the corollary of the prohibition of indirect discrimination, but there are various ways to address the disproportionate impact inherent in indirect discrimination, not all of which qualify as reasonable accommodation).

<sup>148</sup>U.N. General Assembly, *The Concept of Reasonable Accommodation*, *supra* note 144.

<sup>149</sup>FED, *supra* note 4, art. 5; GRDP art. 5(3).

<sup>150</sup>Emmanuelle Bribosia et al., *Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?*, 17 MAASTRICHT J. EUR. & COMP. L. 137, 143 (2010).

<sup>151</sup>Jennifer Jackson-Preece, *Emerging Standards of Reasonable Accommodation Towards Minorities in Europe?*, in INSTITUTIONAL ACCOMMODATION AND THE CITIZEN: LEGAL AND POLITICAL INTERACTION IN A PLURALIST SOCIETY 120 (2010) (considering that duties of reasonable accommodation should be available for members of all structurally disadvantaged groups). See also Mark Bell & Lisa Waddington, *Reflecting on Inequalities in European Equality Law*, 28 EUR. L. REV. 349, 362 (2003) (arguing that duties of reasonable accommodation would similarly be justified on grounds of race or religion); Henrard, *supra* note 147, at 70–76 (arguing that duties of reasonable accommodation do not fall afoul of the prohibition of discrimination notwithstanding their implication of differential treatment).

disproportionate burden<sup>152</sup> on the person or institution that needs to accommodate include: The actual cost of the accommodation, sources of outside—for example, government—funding, the size of the business or institution, and the duration and scope of the accommodation.<sup>153</sup>

While this may seem straightforward in principle, in its actual application to concrete cases, the identification of relevant factors and their relative weight often proves controversial. Furthermore, it may be obvious that in relation to some grounds, the controversies will, by definition, be higher—for example, when pertaining to religious accommodation in the public space or regarding different ways of life of ethnic minorities. This varying degree of inherent controversy may explain why the EU legislature has only been willing to engage with duties of reasonable accommodation in relation to “disability.”<sup>154</sup> It is clear that in the lengthy negotiations—since 2008—of the Commission proposal for a new Equality Directive,<sup>155</sup> duties of reasonable accommodation remain reserved for the grounds of disability.<sup>156</sup>

The CJEU’s jurisprudence on disability presents thorny issues concerning judicial interpretation. Although there has been some case law on reasonable accommodation,<sup>157</sup> so far there is scant case law that assists in demarcating reasonable from unreasonable accommodations. The underlying proportionality considerations may indeed require a case-by-case analysis, and hopefully future case law of the CJEU will provide some more generalizable markers as well. This case law on duties of reasonable accommodation is bound to sharpen the view on duties of differential treatment, the second leg of the principle of EU law on equal treatment.<sup>158</sup> As the latter concept is generally applicable across the EU grounds of discrimination, it remains to be seen to what extent the CJEU might steer towards *de facto* duties of reasonable accommodation on the other grounds. The Court has thus far not been forthcoming in this respect, particularly as it concerns the grounds of religion.

#### D. Conclusions

The density of instruments dedicated to the prohibition of discrimination at both a global and a regional level—and their increasing detail—have made this norm one of the most developed and refined human rights. In this respect, the 2000 EU Equality Directives mark the birth of EU anti-discrimination law as a self-standing area. Despite all of the numerous pitfalls, this EU law offers one of the highest ceilings of protection in comparative anti-discrimination law. In this Article, we

<sup>152</sup>FED art. 5 refers to “disproportionate burden”; other legislations and/or lines of jurisprudence also refer to “undue hardship” or “undue burden.”

<sup>153</sup>Bosset & Foblets, *supra* note 143, at 49–53. See also CHRISTIAN BRUNELLE, DISCRIMINATION ET OBLIGATION D’ACCOMMODEREMENT EN MILIEU DE TRAVAIL SYNDIQUÉ 248–51 (2001).

<sup>154</sup>See earlier references to Jackson-Preece, *supra* note 151. See also Eugenia Relaño Pastor, *Religious Discrimination in the Workplace: Achbita and Bougnaoui*, in EU ANTI-DISCRIMINATION LAW BEYOND GENDER (Uladzislau Belavusau & Kristin Henrard eds., 2018).

<sup>155</sup>*Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, COM (2008) 426 final (July 2, 2008).

<sup>156</sup>Lisa Waddington, *The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law*, in EU ANTI-DISCRIMINATION LAW BEYOND GENDER (Uladzislau Belavusau & Kristin Henrard eds., 2018).

<sup>157</sup>Joined cases C-335/11 and C-337/11 HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab & HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S ECLI:EU:C:2013:222, Judgement of 11 Apr. 2013 (highlighting cases that clarify that adaptations in terms of working hours could be a reasonable accommodation).

<sup>158</sup>Lúisa Lourenço & Pekka Pohjankoski, *Breaking Down Barriers? The Judicial Interpretation of ‘Disability’ and ‘Reasonable Accommodation’ in EU Anti-Discrimination Law*, in EU ANTI-DISCRIMINATION LAW BEYOND GENDER (Uladzislau Belavusau & Kristin Henrard eds., 2018). (pointing to possible guidance from the supervisory practice of the UN Committee on the Rights of Persons with Disabilities and ECtHR).

have tried to identify the major themes in the recent discussion on the EU equality framework and to summarize how various grounds of equality “beyond gender” have been interpreted at the level of the Court of Justice. Through this exploration, we aspire to show the modes in which social movements and individuals can further capitalize on the available resources of EU anti-discrimination law. If anything, an effective protection against discrimination has only become more pressing during multiple ongoing crises, namely, the economic crisis, the refugee crisis, and the backsliding on the rule of law. EU anti-discrimination law has, thus, reached its age of maturity—its eighteenth birthday—in confusing times, which nonetheless carry huge potential. This area of law remains a vivid justification for viewing the Union today as not only concerned with economic interests, but embracing a wider ethos of equality emanating from EU law to Member States, even in wholly internal situations.