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THE PRINCIPLE OF EQUAL  
TREATMENT: WIDENING AND  
DEEPENING*Mark Bell*\*

## A. INTRODUCTION

Writing in the first edition of this book, Gillian More traced how the principle of equal treatment had developed since the founding Treaties.<sup>1</sup> There were various provisions in those Treaties which sought to establish equal treatment between the factors of production within the internal market.<sup>2</sup> The role of equal treatment in this context was instrumental; free movement and the integration of markets within the EU would be hindered if discrimination against imports, foreign companies, and migrant workers was allowed to persist. Over time, the principle of equal treatment evolved from this market integration rationale and alternative, more autonomous justifications for equal treatment began to emerge. The Court recognized equal treatment as one of its general principles of law,<sup>3</sup> and accordingly treats it as a potential ground for judicial review. More boldly, in 1978, the Court deemed non-discrimination on the ground of sex to form part of the ‘fundamental personal human rights’ which it protects.<sup>4</sup> Gillian More recognized that a process of constitutionalization was underway and she

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<sup>1</sup> G More, ‘The principle of equal treatment: from market unifier to fundamental right’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999) 517.

<sup>2</sup> See eg EC Treaty, Art 31(1) (goods), Art 39(2) (workers).

<sup>3</sup> See eg Cases 117/76 and 16/77 *Ruckdeschel & Co and Hansa-Lagerhaus Ströh & Co v Hauptzollamt Hamburg-St Annen* [1977] ECR 1753, [16]–[17].

<sup>4</sup> Case 149/77 *Defrenne v SABENA (III)* [1978] ECR 1365, [26]–[27].

identified the potential for further evolution in this direction, both in relation to the equal treatment of EU citizens and following the insertion of Article 13 into the EC Treaty.<sup>5</sup> The latter expanded EC legal competence to address a wider range of discrimination grounds, namely ‘sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.

Approaching this topic a decade later, there can be little doubt that the principle of equal treatment is now accepted as an autonomous area of EU law and policy. Although the extensive body of anti-discrimination legislation built in recent years is consistent with the objective of facilitating free movement, its contents stretch well beyond the minimum intervention required by a pure market integration rationale.<sup>6</sup> Instead of revisiting the role of equal treatment in the regulation of the internal market, this chapter focuses on the evolution which Gillian More anticipated. It will concentrate on equal treatment as a fundamental human right and consequently it is concerned with the regulation of relations between natural persons, rather than products or companies.

Compared to the situation in 1999, two trajectories can be identified in the evolution of the principle of equal treatment: widening and deepening. These will serve as two central themes for the organization of this chapter. It aims to demonstrate how the principle of equal treatment within EU law has changed, as well as considering whether there is any tension between the simultaneous widening and deepening processes.

## B. WIDENING THE PRINCIPLE OF EQUAL TREATMENT

Prior to 1999, equal treatment was primarily limited to questions of sex and nationality. The addition of Article 13 to the EC Treaty reconfigured these parameters,<sup>7</sup> rapidly leading to the adoption of a suite of new anti-discrimination Directives. While this has received substantial focus in EU law and policy, as well as within academic commentary,<sup>8</sup> two other strands can also be identified. Following the creation of a new competence for immigration and asylum law in the EC Treaty (also in 1999), a variety of Directives were adopted which address the equal treatment of third country nationals based on their immigration status. In addition, EU labour law has seen the completion of a package of Directives on ‘atypical’ work. These introduced the equal treatment principle in respect of part-time, fixed-term, and agency workers. This section of the chapter will consider each of these new strands to EU law on equal

<sup>5</sup> More (n 1 above) 548.

<sup>6</sup> L Waddington, ‘The expanding role of the equality principle in European Union law’ Policy Papers (Series on Constitutional Reform of the EU) 2003/04 (European University Institute, 2003) 11.

<sup>7</sup> Now Art 19 TFEU.

<sup>8</sup> H Meenan (ed), *Equality Law in an Enlarged European Union —Understanding the Art 13 Directives* (Cambridge University Press, 2007).

treatment, but it commences with a brief overview of the starting point of the law on nationality and sex discrimination.

## 1. WHERE IT ALL BEGAN: NATIONALITY AND SEX DISCRIMINATION

### (a) Discrimination on the ground of nationality

The strongest evidence of equal treatment as a principle within the founding Treaties related to nationality. Article 6 EEC provided a general prohibition of ‘any discrimination on grounds of nationality’.<sup>9</sup> Although this is phrased in open-ended terms, its articulation over the years has reflected the straightjacket of a market integration rationale. A human rights rationale would imply that EU law is concerned with any unjustified differential treatment based on nationality, akin to Article 14 of the European Convention of Human Rights.<sup>10</sup> In reality, subsequent legislation and case law revealed that EU law mainly intervenes where there is a connection between nationality discrimination and the exercise of free movement rights.<sup>11</sup> A classic illustration of this point is the restraint of EU law when faced with ‘purely internal’ situations, that is, where a Member State discriminates on the ground of nationality against its own nationals. EU law is not applicable to these situations, unless the national can find a link to the exercise of free movement rights.<sup>12</sup> In a similar vein, the Treaty-based protection from nationality discrimination has not been applied to third country nationals.<sup>13</sup> This limitation was not spelt out in the original text of the EEC Treaty, but Article 1(1) of Regulation 1612/68 limited free movement for employment to ‘any national of a Member State’.<sup>14</sup> Once third country nationals were excluded from the right to free movement, they fell outside the market integration rationale motivating the prohibition of nationality discrimination. Directive 2004/38 clarifies the contemporary legal situation.<sup>15</sup> Union citizens are entitled to equal treatment with the nationals of the host state, as well as any family members who have the right to reside with them, regardless of nationality.<sup>16</sup> Again this reinforces the underlying need for some connection to the exercise of free movement rights in order to trigger the EU law prohibition of nationality discrimination.

The instrumental nature of EU law on nationality discrimination tends to detach it from the familiar concepts of anti-discrimination law. In both the Treaties and in

<sup>9</sup> Now Art 18 TFEU.

<sup>10</sup> eg *Gaygusuz v Austria* (1997) 23 EHRR 364.

<sup>11</sup> See Chapter 17 by Siofra O’Leary.

<sup>12</sup> eg EU citizens returning to their Member State after exercising free movement rights have been able to invoke the principle of equal treatment: Case C-224/98 *D’Hoop v Office national de l’emploi* [2002] ECR I-6191.

<sup>13</sup> For a detailed analysis and argument in favour of applying Art 18 TFEU (ex Art 12 EC) to third country nationals, see C Hublet, ‘The Scope of Art 12 of the Treaty of the European Communities *vis-à-vis* Third-country Nationals: Evolution at Last?’ (2009) 15 ELJ 757.

<sup>14</sup> [1968] OJ Spec Ed (II) 475.

<sup>15</sup> Council Directive (EC) 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

<sup>16</sup> Art 24(1).

Directive 2004/38, the principle of equal treatment lacks any further definition or elaboration. This contrasts starkly with the EU legislation on other forms of discrimination, such as sex and ethnic origin, where discrimination is sub-divided into more detailed categories of direct and indirect discrimination, harassment, and instruction to discriminate. Those Directives also accompany the detailed definition of discrimination with measures to support victims who seek to bring a complaint, such as a duty on Member States to create institutions to assist victims.<sup>17</sup> Although the prohibition of nationality discrimination lacks this level of specificity, it has been robustly substantiated by the case law of the Court of Justice. Equality between the citizens of the Union has assumed a constitutional character subject to strict judicial scrutiny.<sup>18</sup> The Court's case law on Union citizenship is examined in more depth elsewhere in this collection of essays,<sup>19</sup> but it does include recognition that nationality discrimination can be both direct and indirect.<sup>20</sup> Nevertheless, there is no sense that the wider panoply of anti-discrimination law, such as shifting the burden of proof or positive action, is applicable or considered relevant to EU law on nationality discrimination. One explanation for this lies in the original motivation for the law. EU law on racial discrimination, for example, stems from an acknowledgement that racist and xenophobic prejudice exists within the Member States and that this results in socio-economic inequalities for ethnic minority communities. In contrast, EU law on nationality discrimination is driven by removing obstacles to free movement and there does not appear to be any underpinning assumption that EU citizen migrants constitute a disadvantaged group in society. The impact of the EU enlargements of 2004 and 2007 calls into question whether the functional nature of EU law on nationality discrimination continues to be adequate. Some of the post-enlargement migration has been accompanied by discrimination and violence against new EU citizens, ranging from Romanians in Italy to Polish communities in Northern Ireland. Such situations suggest that the Court may have to consider whether discrimination between EU citizens can also overlap with the scope of discrimination on the ground of ethnic origin. This could permit EU citizen migrants to benefit from the wider range of anti-discrimination instruments found within the Racial Equality Directive.<sup>21</sup>

#### **(b) Discrimination on the ground of sex**

There was no general commitment to equal treatment for women and men in the founding Treaties, but Article 119 EEC (now Article 157 TFEU) provided for equal

<sup>17</sup> eg Articles 19 and 20, Council Directive (EC) 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

<sup>18</sup> D Kostakopoulou, 'Ideas, norms and European citizenship: explaining institutional change' (2005) 68 MLR 233.

<sup>19</sup> See Chapter 19 by Jo Shaw.

<sup>20</sup> eg Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617.

<sup>21</sup> Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

pay. As with the prohibition of nationality discrimination, this was grounded in an economic rationale, namely, the concern that certain Member States could gain a competitive advantage through cheap female labour.<sup>22</sup> During the 1970s, this bare Treaty provision was transformed into a corpus of law on equal treatment of women and men in employment and social security. On one side, the Court issued a series of vanguard judgments in which it recognized that Article 119 EEC was capable of enforcement by individuals within their national courts through the principle of direct effect.<sup>23</sup> Moreover, it began the process of recasting EU gender equality law as a question of fundamental human rights, and not merely an economic expedient.<sup>24</sup> On the other side, legislation was adopted expanding the material scope of the prohibition of sex discrimination beyond the specific issue of equal pay. Most notably, Directive 76/207 addressed equal treatment in matters relating to employment (other than pay),<sup>25</sup> whilst Directive 79/7 extended equal treatment to the sphere of social security, albeit subject to limitations.<sup>26</sup>

The initial burst of legislative activity during the 1970s slowed during the subsequent decades, and the Court became a key engine for innovation in the law.<sup>27</sup> Judgments fleshed out the meaning of concepts such as indirect discrimination<sup>28</sup> and often focused on the effectiveness of the law, for example, through permitting a shift in the burden of proof from complainant to respondent,<sup>29</sup> or excluding any prior fixing of an upper limit on compensation.<sup>30</sup> The Court also pushed the boundaries of the material scope of the law, holding that contracted-out occupational pensions were subject to Article 119 EEC.<sup>31</sup>

As will be examined below, a significant extension in EU anti-discrimination law occurred in 2000 with the adoption of Directives addressing discrimination on grounds other than sex. These instruments had the perhaps unanticipated effect of stimulating a revival of legislative innovation in relation to gender equality. In 2002,

<sup>22</sup> D Hoskyns, *Integrating Gender—Women, Law and Politics in the European Union* (Verso, 1996) 49.

<sup>23</sup> Case 80/70 *Defrenne v Belgian State (No 1)* [1971] ECR 445; Case 43/75 *Defrenne v SABENA (No 2)* [1976] ECR 455.

<sup>24</sup> ‘... this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress...’, Case 43/75 *Defrenne v SABENA (No 2)*, *ibid* [10]. Also, Case 149/77 *Defrenne v SABENA (No 3)*, (n 4 above).

<sup>25</sup> Council Directive (EEC) 76/207 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] OJ L39/40.

<sup>26</sup> eg the Directive allows Member States to exclude pensionable age from its scope: Art 7, Council Directive (EEC) 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24.

<sup>27</sup> T Hervey, ‘Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards’ (2005) 12 MJ 307.

<sup>28</sup> eg Case 170/84 *Bilka-Kaufhaus GmbH v Weber Von Hartz* [1986] ECR 1607.

<sup>29</sup> eg Case C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR I-5535.

<sup>30</sup> Case C-271/91 *Marshall v Southampton and South-West Hants Area Health Authority (No 2)* [1993] ECR I-4367.

<sup>31</sup> Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

significant amendments were made to Directive 76/207.<sup>32</sup> These borrowed from and built upon the Directives of 2000 with the result that the rather general norms found in the 1976 Directive were replaced with a more detailed set of rules. For instance, a specific prohibition of sexual harassment was added. In 2004, a further Directive was adopted which extended the principle of equal treatment into the area of goods and services.<sup>33</sup> This was the first major extension in the material scope of gender equality legislation since the 1979 Social Security Directive. It is notable that the preamble situates this Directive in the context of human rights protection. Reference is made to a wide range of international and European human rights instruments, as well as the EU Charter of Fundamental Rights.<sup>34</sup> A similar linkage of sex discrimination legislation with broader human rights principles can be found in the most recent intervention, the ‘Recast’ Directive, which consolidated a variety of gender equality Directives in the field of employment.<sup>35</sup>

On the surface, it seems as if the main shift in gender equality law has been the expansion in the material scope of the legislation, combined with a thickening in the substance of the obligations. At the same time, the Court has been faced with periodic challenges as regards the boundaries of non-discrimination on the ground of ‘sex’. The first set of cases relate to pregnancy and maternity. In *Dekker*, the Court held that a decision not to appoint a woman due to her pregnancy constituted direct discrimination, following the logic that ‘only women can be refused employment on grounds of pregnancy’.<sup>36</sup> In *Mayr*, the Court of Justice extended this line of case law, holding that dismissal of a woman ‘at an advanced stage of in vitro fertilisation treatment’ constitutes sex discrimination, even though the woman was not deemed to be pregnant at this stage.<sup>37</sup> The Court’s rationale was that the medical treatment in question directly affected only women.<sup>38</sup> While this seems logical, it sits uneasily with other decisions concerning pregnancy-related illness. The Court maintains that dismissal due to a pregnancy-related illness which arises *after* maternity leave has ended does not constitute sex discrimination:

Male and female workers are equally exposed to illness. Although certain disorders are, it is true, specific to one or other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex.<sup>39</sup>

<sup>32</sup> European Parliament and Council Directive (EC) 2002/73 amending Directive (EEC) 76/207 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 [2002] OJ L 269/15.

<sup>33</sup> Council Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

<sup>34</sup> Recitals 1, 2, and 4.

<sup>35</sup> Council Directive 2006/54 (n 17 above) recitals 2 and 5.

<sup>36</sup> Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen* [1990] ECR I-3941, [12].

<sup>37</sup> Case C-506/06 *Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017, [52]. On the facts, *in vitro* fertilized ova existed but they had not been transferred to the woman’s uterus, *ibid* [53].

<sup>38</sup> *ibid* [50].

<sup>39</sup> Case C-179/88 *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR I-3979, [17]; E Caracciolo di Torella and A Masselot, ‘Pregnancy, Maternity and the Organisation of Family Life: An Attempt to Classify the Case-law of the Court of Justice’ (2001) 26 *ELRev* 239.

In the wake of *Mayr*, it seems that the Court distinguishes between differential treatment based on a sex-specific medical treatment which will constitute sex discrimination, and differential treatment due to a sex-specific illness which will not constitute sex discrimination. This seems a fragile and tenuous boundary, not least because sex-specific illnesses may give rise to sex-specific medical treatment.<sup>40</sup>

Another area where the Court has wrestled with the meaning of ‘sex’ discrimination is sexual orientation and gender identity. Beginning in *P v S and Cornwall County Council*,<sup>41</sup> the Court has held on several occasions that discrimination related to ‘gender reassignment’ constitutes sex discrimination.<sup>42</sup> In *P*, the Court expressly linked its decision to upholding respect for human dignity,<sup>43</sup> whilst later decisions have referred to judgments from the European Court of Human Rights regarding transgender people.<sup>44</sup> The undertone of these decisions is a concept of gender equality infused by human rights protection. The value-based reasoning in these cases stands in contrast to the strict comparator test applied in *Grant*.<sup>45</sup> This concerned a workplace policy which provided travel concessions to married or unmarried opposite-sex partners of workers. Borrowing from the Court’s language in *P*, it was argued that this was ‘essentially if not exclusively’ discrimination on the ground of sex; Lisa Grant was treated less favourably than a male worker because her partner was a woman rather than a man. The Court rejected this approach and instead opted for a narrow concept of formal equal treatment:

[S]ince the condition imposed by the undertaking’s regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex.<sup>46</sup>

The inconsistencies in the Court’s approach to the scope of ‘sex’ discrimination suggest uncertainty about the compass to be followed when legislative ambiguity leaves discretion for judicial interpretation. There seems to be a qualitative difference between the reasoning in *P* and that subsequently applied in *Grant*. In retrospect, the gender reassignment cases provide examples of how the Court can move beyond a narrow reading of the law by taking into account contextual principles of human rights. Given the reference to human rights in the preambles of the Gender Recast and Goods and Services Directives, the Court may feel emboldened to pursue further this approach to interpretation in the future. This is unlikely to reopen the question of sexual orientation discrimination, which is now

<sup>40</sup> eg questions arise as to whether treatment for prostate cancer would be regarded as sex-specific.

<sup>41</sup> Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

<sup>42</sup> Case C-117/01 *KB v NHS Trust Pensions Agency* [2004] ECR I-541; Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585.

<sup>43</sup> *P* (n 41 above) [22].

<sup>44</sup> *KB* (n 42 above) [33]–[36].

<sup>45</sup> Case C-249/96 *Grant v South-West Trains* [1998] ECR I-621. Waddington argues that the reasoning of the Court in *P* is also constrained when a comparison is made with the Opinion of the AG in that case, who relied more explicitly on fundamental human rights (n 6 above) 20.

<sup>46</sup> *ibid* [28].

dealt with in separate legislation (at least in respect of employment). It could, though, assist the Court in dealing with other instances of discrimination related to sex. Notably, the Court has so far considered only ‘gender reassignment’. Although this concerns one aspect of the transgender umbrella, there are a wider range of situations where gender identity and gender expression can give rise to discrimination without any connection to the individual undergoing a medical process of gender reassignment.<sup>47</sup>

## 2. THE NEXT GENERATION: EU ANTI-DISCRIMINATION LAW

The EU’s focus on nationality discrimination and gender equality was a remarkably stable feature of this area of law until 1999. Although pressure had been growing from civil society and the European Parliament for EU action on a wider range of discrimination grounds, especially ethnic origin and disability, such calls were typically rebuffed by the supposed lack of legal competence of the Union for other forms of discrimination.<sup>48</sup> Those campaigns eventually proved fruitful and the Treaty of Amsterdam amended the EC Treaty in order to extend the legal competence. This is now found in Article 19(1) TFEU, which states:

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.<sup>49</sup>

Unlike the original Article 119 EEC, this provision was evidently permissive in nature and accordingly did not confer rights that were capable of bearing direct effect. In addition, the requirement of unanimity naturally raised doubts as to whether the Member States would be able to find consensus on issues that tend to provoke considerable social and political controversy, such as the rights of religious minorities or same-sex couples. By an unusual twist of political fate, the potential political pitfalls fell by the wayside. As is well documented,<sup>50</sup> the entry of an extreme right-wing party into the Austrian government in February 2000 sparked a clamour for a reaction from the EU and part of that response was the fast-tracking of the Commission’s proposal for a Directive on discrimination on grounds of racial or ethnic origin. Having adopted the

<sup>47</sup> S Whittle, ‘Gender Identity Discrimination’, Paper presented at the European Commission conference ‘Legal seminar on the implementation of EU law on equal opportunities and anti-discrimination’, Brussels, 6 October 2009.

<sup>48</sup> For a more detailed history, see M Bell, *Anti-discrimination Law and the European Union* (Oxford University Press, 2002).

<sup>49</sup> Art 19(2) TFEU applies the ordinary legislative procedure, but only for adopting ‘basic principles of Union incentive measures, excluding any harmonization of the laws and regulations of the Member States’.

<sup>50</sup> G de Búrca, ‘The Drafting of the European Union Charter of Fundamental Rights’ (2001) 26 *ELRev* 126, 136.

Racial Equality Directive in June 2000,<sup>51</sup> the Member States moved swiftly to complement this with the Employment Equality Directive,<sup>52</sup> which extended the prohibition of discrimination to the grounds of religion or belief, disability, age, and sexual orientation.

The two Directives share a very similar approach to the construction of discrimination. They prohibit direct and indirect discrimination, as well as harassment and instructions to discriminate.<sup>53</sup> Member States may permit positive action, but this is not obligatory.<sup>54</sup> They are both based on a paradigm of complaints-based enforcement by individuals. To this end, both Directives include measures to facilitate individual litigation. Borrowing from gender equality law, there is provision for a shift in the burden of proof from the complainant to the respondent.<sup>55</sup> Individual litigants are protected from victimization<sup>56</sup> and sanctions have to be effective, proportionate, and dissuasive.<sup>57</sup> Associations are entitled to engage in legal proceedings under the Directive either on behalf or in support of the complainant.<sup>58</sup> Notwithstanding the high degree of overlap between the Directives, there are three principal differences.

First, the material scope of the Racial Equality Directive is much wider than that of the Employment Equality Directive. Whereas the latter mainly covers employment and vocational training,<sup>59</sup> the former extends to social protection (including social security and healthcare); social advantages; education; goods and services (including housing).<sup>60</sup> Indeed, the Racial Equality Directive has a broader legal scope than EU gender equality legislation, which does not cover social advantages, education, or those aspects of social protection falling outside the material scope of the 1979 Social Security Directive.<sup>61</sup> Secondly, the Racial Equality Directive, and the subsequent gender equality Directives, require Member States to establish a body or bodies for the promotion of equal treatment.<sup>62</sup> These must include within their mandates the provision of independent assistance to victims of discrimination. No such obligation exists within the Employment Equality Directive. Thirdly, the exceptions to the prohibition of discrimination are notably wider in the Employment Equality Directive when compared to those found within the Racial Equality Directive.<sup>63</sup> This is also true

<sup>51</sup> Council Directive 2000/43 (n 21 above).

<sup>52</sup> Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

<sup>53</sup> Art 2, Council Directive 2000/43; Art 2, Council Directive 2000/78.

<sup>54</sup> Art 5, Council Directive 2000/43; Art 7, Council Directive 2000/78.

<sup>55</sup> Art 8, Council Directive 2000/43; Art 10, Council Directive 2000/78.

<sup>56</sup> Art 9, Council Directive 2000/43; Art 11, Council Directive 2000/78.

<sup>57</sup> Art 15, Council Directive 2000/43; Art 17, Council Directive 2000/78.

<sup>58</sup> Art 7(2), Council Directive; Art 9(2), Council Directive 2000/78.

<sup>59</sup> Art 3, Council Directive 2000/78.

<sup>60</sup> Art 3, Council Directive 2000/43.

<sup>61</sup> E Ellis, *EU Anti-Discrimination Law* (Oxford University Press, 2006) 350–362.

<sup>62</sup> Art 13, Council Directive 2000/43; Art 12, Council Directive 2004/113 (n 33 above); Art 20, Council Directive 2006/54, (n 17 above).

<sup>63</sup> D Schiek, 'A new framework on equal treatment of persons in EC law?' (2002) 8 *ELJ* 290, 301–302.

if a comparison is made between the Racial Equality Directive and the Gender Goods and Services Directive.<sup>64</sup>

The disparities between the Directives have been a long-running bone of contention. In academic literature, there has been a debate around whether this constitutes a 'hierarchy of equalities', and, if so, whether or not this is justified.<sup>65</sup> Unsurprisingly, civil society associations and the European Parliament have demanded additional legislation to prohibit discrimination on grounds of religion or belief, disability, age, and sexual orientation in areas outside the labour market. This culminated in the Commission's proposal of a new anti-discrimination Directive in 2008.<sup>66</sup> In relation to material scope, this would level up protection from discrimination for these grounds to replicate the material scope of the Racial Equality Directive. At the time of writing, negotiations in the Council were ongoing, but it seems that many Member States are reluctant to accept the broad-brush approach to material scope which was assumed in the rushed negotiation of the Racial Equality Directive. Ten years later, it appears that Member States desire a more nuanced and circumscribed regulation of the extent to which EU anti-discrimination legislation can impact upon domestic law in relation to health, education, and social protection.<sup>67</sup> Consequently, it seems inevitable that differences in the material scope of the prohibition of discrimination will continue to exist between the various grounds, even if the proposed Directive is adopted.

### 3. FRAGMENTING EQUAL TREATMENT AND THIRD COUNTRY NATIONALS

Although there have been rapid advances in EU anti-discrimination law, the picture is less healthy when considering equal treatment in relation to third country nationals. The traditional justification for the non-application of the principle of equal treatment resided in the market integration rationale; equal treatment was designed to facilitate free movement, but third country nationals did not possess autonomous free movement rights. This logic for the exclusion of third country nationals has become more tenuous over time. There have been tentative steps to open free movement rights to certain third country nationals. Specifically, those with long-term resident status or holding the EU 'Blue Card' are entitled to reside in another Member State, subject to certain provisos.<sup>68</sup> Moreover, a blanket denial of equal treatment to third country

<sup>64</sup> E Caracciolo di Torella, 'The Principle of Gender Equality, the Goods and Services Directive and Insurance: a Conceptual Analysis' (2006) 13 MJ 339.

<sup>65</sup> See, eg, Schiek (n 63 above) 308; M Bell and L Waddington, 'Reflecting on inequalities in European equality law' (2003) 28 ELRev 349; E Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU law' (2006) 13 MJ 443.

<sup>66</sup> Commission, '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.

<sup>67</sup> Council, Document 16594/08 ADD 1, 9 December 2008, 15–16.

<sup>68</sup> Art 14, Council Directive (EC) 2003/109 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44; Art 18, Council Directive (EC) 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17.

nationals seems increasingly hard to reconcile with the Union's rhetorical commitments to promoting migrant integration<sup>69</sup> and the fight against racism and xenophobia.<sup>70</sup> Nevertheless, old habits seem hard to break. The Racial Equality Directive specifically excludes difference of treatment based on nationality,<sup>71</sup> and nationality was omitted from the list of grounds mentioned in the general non-discrimination guarantee within the Charter of Fundamental Rights.<sup>72</sup>

One area where signs of change are emerging is immigration legislation. Following the insertion of competences for immigration and asylum into the EC Treaty in 1999, there has been a rolling programme of legislation designed to construct an EU *acquis* in these fields. Many of these instruments have touched upon the question of equal treatment of third country nationals. The most comprehensive approach is found within the Long-Term Residents Directive. Equal treatment with (domestic) nationals is to be provided in the areas of employment; education and vocational training, including recognition of qualifications; social security, social assistance, and social protection; tax benefits; access to goods and services, including procedures for obtaining housing; freedom of association and participation in employer, employee, or professional organisations; and free access to the entire territory of the Member State.<sup>73</sup> The impressive length of this list has to be read alongside various qualifications and exceptions.<sup>74</sup> Member States are entitled to retain existing restrictions which limit access to employment or self-employment to EU/EEA citizens.<sup>75</sup> Equal treatment in social assistance and social protection can be restricted to 'core benefits'.<sup>76</sup> Equal access to employment is not applicable where there is 'even occasional involvement in the exercise of public authority'.<sup>77</sup> These significant qualifications must be combined with the rather limited concept of long-term resident. This is based on five years of legal and continuous residence, but subject to broad exceptions such as residence for the purpose of study or training.<sup>78</sup>

<sup>69</sup> The Council adopted 'Common Basic Principles for Immigrant Integration Policy in the European Union' in 2004: Council, 'Press Release: 2618th Council Meeting Justice and Home Affairs' 14615/04 (Press 321), 19 November 2004, 15.

<sup>70</sup> European Council Declaration on the 50th anniversary of signing the EEC Treaty: <[http://www.eu2007.de/de/News/download\\_docs/Maerz/0324-RAA/English.pdf](http://www.eu2007.de/de/News/download_docs/Maerz/0324-RAA/English.pdf)>; Hublet (n 13 above) 765.

<sup>71</sup> Art 3(2). For a detailed critique, see S Benedí Lahuerta, 'Race Equality and TCNs, or How to Fight Discrimination with a Discriminatory Law' (2009) 15 ELJ 738.

<sup>72</sup> Art 21(1). Discrimination on the ground of nationality is dealt with separately in Art 21(2), but in terms that echo Art 18 TFEU, which has been traditionally applied only to differences in treatment between EU citizens.

<sup>73</sup> Art 11, Council Directive 2003/109 (n 68 above).

<sup>74</sup> L Halleskov, 'The Long-Term Residents Directive: A Fulfillment of the Tampere Objective of Near-equality?' (2005) 7 EJML 181.

<sup>75</sup> Art 11(3)(a).

<sup>76</sup> Art 11(4) and recital 13.

<sup>77</sup> Art 11(1)(a).

<sup>78</sup> Art 3(2). A more detailed analysis is provided in: S Peers, 'Implementing equality? The Directive on long-term resident third-country nationals' (2004) 29 ELRev 437; S Boelaert-Suominen, 'Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third Country Nationals who are Long-term Residents: Five Places Forward and Possibly Three Paces Back' (2005) 42 CML Rev 1011.

A more searching critique of the Directive is the absence of any guidance on what the principle of equal treatment might entail in this context. Equal treatment is an isolated norm within a broader legislative instrument and in this respect it appears much thinner than the approach to equal treatment found within the anti-discrimination Directives. As with EU law on nationality discrimination vis-à-vis EU citizens, there is no reference to concepts such as indirect discrimination or positive action. No procedural mechanisms are established to assist victims of discrimination. Furthermore, the Long-Term Residents Directive is not truly concerned with discrimination on the ground of nationality; rather it is focused on discrimination based on a particular immigration status. Given the threshold for acquisition of long-term resident status, many third country nationals will fall outside the scope of the Directive. Beyond the privileged status of long-term resident, a range of legislation has accumulated dealing with other migration categories, such as family members, researchers, students, refugees, asylum applicants, or those benefiting from subsidiary or temporary protection.<sup>79</sup> There is little consistency in the manner in which each of these Directives deals with the principle of equal treatment. For example, researchers are entitled to equal treatment in working conditions, including pay and dismissal, whereas there are no provisions regarding equal treatment of students who engage in employment (even though the relevant Directive permits them to work 10 hours per week).<sup>80</sup> The resulting picture is one where the principle of equal treatment has been fragmented and attached to immigration status rather than nationality. The EU legislator appears to reward economically attractive forms of migration with better rights to equal treatment than those provided for less-desired categories such as asylum applicants. This is manifest in the Directive on highly qualified employment (the EU 'Blue Card'), which aims to make the EU more attractive in the global market for highly qualified workers.<sup>81</sup> These sought-after individuals receive equal treatment rights which are similar in their extent to those of long-term residents,<sup>82</sup> but they are entitled to exercise free movement rights after eighteen months, placing them in a more privileged position than long-term residents.<sup>83</sup>

The variable geometry applied to the principle of equal treatment in respect of third country nationals arguably reflects the failure of the Union to embed its legislative framework in a human rights perspective. The treatment of nationality discrimination by EU law stands in contrast to the European Convention on Human Rights. Article 14 of the Convention prohibits nationality discrimination in respect of all persons; it is not apportioned according to immigration status.

<sup>79</sup> A more detailed analysis of the equal treatment rights of each of these categories is available in M Bell, 'Civic Citizenship and Migrant Integration' (2007) 13 EPL 311, 325–326.

<sup>80</sup> *ibid.* <sup>81</sup> Recital 7, Council Directive 2009/50 (n 68 above).

<sup>82</sup> *ibid* Art 14. <sup>83</sup> *ibid* Art 18.

#### 4. STRETCHING THE EQUAL TREATMENT PRINCIPLE: ATYPICAL WORKERS

The final issue to consider in the ‘widening’ section of this chapter is the application of the principle of equal treatment to atypical workers. Since 1997, the Union has extended equal treatment rights to certain categories of worker based on contractual status. In this respect, there is a parallel with equal treatment according to immigration status; individuals are receiving equal treatment rights based on a legal category rather than a personal attribute. This is somewhat distinct from equal treatment by reference to the grounds found in Article 19 TFEU; the protected personal characteristics found therein may not immutable, but they do stem from individuals’ innate attributes. In contrast, the type of employment contract an individual works under is considerably more likely to fluctuate over time and reflects the work rather than the worker.

For several decades, the Member States had been debating what, if any, legislative response the EU should adopt to the diversification of employment contracts. The legislative breakthrough emerged from the social dialogue process between European trade unions and employer organizations. Two Framework Agreements were reached, on part-time and fixed-term work, and each was given binding force of law through the subsequent adoption of a Directive.<sup>84</sup> Choosing the principle of equal treatment as the method for regulating part-time work resonates well with sex discrimination law given that women are substantially over-represented in part-time work and EU case law on indirect sex discrimination has often addressed less favourable treatment of part-time workers.<sup>85</sup> The rationale for recourse to the principle of equal treatment is less obvious in relation to fixed-term work, where there is no settled pattern linking fixed-term contracts and gender across the Member States.<sup>86</sup> The most recent piece in the legislative jigsaw was the Temporary Agency Work Directive adopted in 2008.<sup>87</sup>

Although the Directives are not purely concerned with the principle of equal treatment,<sup>88</sup> this lies at their heart. They adopt an asymmetrical approach to equal treatment, so the rights are conferred only on the protected category; in other words, full-time workers have no corresponding protection from being treated less favourably than part-time workers. In the Directives on part-time and fixed-term work, equal treatment is tightly defined by reference to a comparable full-time or permanent worker:

<sup>84</sup> Council Directive (EC) 97/81 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L14/9; Council Directive (EC) 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/43.

<sup>85</sup> Ellis (n 61 above) 91–93.

<sup>86</sup> O Hardarson, ‘Men and women employed on fixed-term contracts involuntarily’ *Statistics in focus: population and social conditions*, 98/2007 (Eurostat, 2007).

<sup>87</sup> Council Directive (EC) 2008/104 on temporary agency work [2009] OJ L327/9.

<sup>88</sup> eg the Framework Agreement on Fixed-Term Work aims to prevent abuse arising from the successive use of fixed-term contracts (cl 5).

[I]n respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.<sup>89</sup>

This implies that part-time or fixed-term workers need to be able to find a comparable worker in order to assert their rights to equal treatment. The Directives also indicate that this comparator needs to be in the same employment, unless otherwise provided in national law or collective agreement. This hurdle creates the risk that workers will struggle to locate an appropriate comparator, especially if the employer concentrates part-time or fixed-term workers into certain parts of the enterprise, or alternatively if the workforce is fragmented through contracting-out. There are obvious echoes here of the difficulties encountered in EU equal pay law where an actual comparator needs to be identified and pay must be attributed to a single source.<sup>90</sup> In contrast, the Agency Work Directive permits a hypothetical comparator:

The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.<sup>91</sup>

The centrality of the principle of equal treatment within the atypical work Directives evokes EU anti-discrimination legislation, but the parallels do not extend far. Rather like the situation with nationality discrimination law, the atypical work Directives do not contain reference to concepts such as direct and indirect discrimination, or positive action.<sup>92</sup> Furthermore, the atypical work Directives are underpinned by a careful balancing of equal treatment with labour market flexibility. Less favourable treatment of part-time or fixed-term workers is open to justification on objective grounds. Although the Court of Justice has clarified the need for such justification to pursue a genuine need which is appropriate and necessary,<sup>93</sup> the possibility to justify direct discrimination is not a feature of most EU anti-discrimination legislation.<sup>94</sup> While objective justification is not referred to in the Agency Work Directive, it provides flexibility through several broad possibilities to derogate from the principle of equal treatment.<sup>95</sup>

<sup>89</sup> Cl 4(1), Framework Agreement on Part-Time Work. Equivalent text is found in clause 4 of the Framework Agreement on Fixed-Term Work.

<sup>90</sup> Case C-256/01 *Allonby v Accrington & Rossendale College* [2004] ECR I-873; S Fredman, 'Marginalising Equal Pay Laws' (2004) 33 ILJ 281.

<sup>91</sup> Art 5(1), Council Directive 2008/104 (n 87 above).

<sup>92</sup> It has been suggested that the use of the word 'solely' in clause 4 in the Part-Time and Fixed-Term Work Framework Agreements may exclude their application to situations of indirect discrimination: C Vigneau, 'The principle of equal treatment of temporary and permanent workers' in C Vigneau, K Ahlberg, B Bercusson, and N Bruun (eds), *Fixed-term Work in the EU: A European Agreement against Discrimination and Abuse* (National Institute for Working Life, Stockholm, 1999) 135, 145.

<sup>93</sup> Case C-307/05 *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECR I-7109, [58].

<sup>94</sup> The exception is age: Art 6, Council Directive 2000/78 (n 52 above).

<sup>95</sup> eg Member States may impose a qualifying period prior to which the principle of equal treatment will not apply; Art 5(4), Council Directive 2008/104 (n 87 above).

Standing back from the atypical work Directives, they appear to be less rooted in the protection of fundamental rights than the anti-discrimination Directives. Each Directive states that it is designed to improve the quality of part-time/fixed-term/agency work.<sup>96</sup> This portrays a more instrumental image of equal treatment as a tool in labour market management. This seems qualitatively different to the anti-discrimination Directives, which draw a connection between their aims and those of international human rights treaties.<sup>97</sup>

## 5. CONCLUSION

Taking an overview, a gap emerges between the approach adopted in respect of the grounds found in Article 19 TFEU and other manifestations of the principle of equal treatment between persons. The former can be collected together under the heading ‘EU anti-discrimination law’. This body of legislation has converged around a common template. Relatively consistent definitions of discrimination have been coupled with a shared menu of procedures and standards relating to the enforcement of the law. Although there is not a complete harmony in the approach adopted in respect of each discrimination ground, there is a tendency to dovetail law and policy on these grounds, and this trajectory has arguably increased in the past decade. Outside this inner circle, there is less coherence in the way in which the principle of equal treatment is articulated. At one level, it is easy to explain why the approach adopted differs between immigrant researchers and students, or between fixed-term and agency workers; each has been subject to the vagaries of the legislative process and the *ad hoc* striking of political bargains. Yet underneath it reveals the absence of a shared vision concerning what equal treatment means within these instruments or why it should be applied to these categories. Whereas anti-discrimination legislation has, to some extent, been anchored in a framework of human rights protection, equal treatment within immigration law or labour law lacks this ethical compass.

## C. DEEPENING THE PRINCIPLE OF EQUAL TREATMENT

As mentioned in the introduction, Gillian More observed that a process of constitutionalization was occurring in relation to the principle of equal treatment.<sup>98</sup> For current purposes, this can be summarized as a process where the norm is entrenched and accorded a higher legal status. This implies that it is more deeply rooted in the

<sup>96</sup> Clause 1, Framework Agreement on Part-Time Work; Clause 1, Framework Agreement on Fixed-Term Work; Art 2, Council Directive 2008/104, *ibid*.

<sup>97</sup> Recitals 2 and 3, Council Directive 2000/43 (n 21 above); Recitals 1 and 4, Council Directive 2000/78 (n 52 above); Recitals 1 and 2, Council Directive 2004/113 (n 33 above).

<sup>98</sup> More (n 1 above) 548.

legal system in the sense that it is less vulnerable to change or repeal, and that where conflicts of legal norms arise, those which are constitutionalized will be attributed with a greater weight. More broadly, Shaw refers to the ‘undoubtedly foundational character of constitutional law and discourse for any polity’.<sup>99</sup> She argues that constitutional texts become a defining frame of reference. Consequently, the extent to which issues such as equality are present or absent in constitutional texts is of wider significance than a doctrinal focus on the precise interpretation of any rights thereby conferred. In considering the extent to which there has been a deepening of the principle of equal treatment, this section of the chapter will begin with a brief review of the case law of the Court of Justice, which identified equal treatment as one of the general principles of EU law. It will then turn to consider the subsequent reforms to the founding Treaties and the evidence of embedding equal treatment within these constitutional documents. In the light of this evidence, it will consider how this process affects the interpretation given to the principle of equal treatment.

## 1. EQUAL TREATMENT AS A GENERAL PRINCIPLE OF EU LAW

A key part of the Court’s constitutional architecture is the notion of ‘general principles’ of law. Respect for these higher legal norms is a condition for the legality of EU legislation or other acts of the EU institutions; breach of the general principles forms a ground for judicial review. The Treaties contain no definitive catalogue of general principles, but the Court’s case law has consistently recognized that equal treatment falls therein. As a general principle of law, equal treatment is a loose principle that amounts to little more than a general standard of fairness and rationality.<sup>100</sup> A standard formula is the following: ‘[T]he principle of equal treatment is breached when two categories of persons whose factual and legal circumstances disclose no essential difference are treated differently or where situations which are different are treated in an identical manner.’<sup>101</sup> This can be applied to a wide diversity of situations, ranging from differences in the treatment of agricultural products through to differences of treatment between natural persons, the latter being the focus of this chapter. Alongside the general principle of equal treatment, another strand of the Court’s general principles is respect for fundamental rights. Equal treatment for natural persons arguably occupies a special place as it straddles both the general principle of equal treatment and that of respect for fundamental rights.<sup>102</sup> For example, in *Defrenne (No 3)*, the Court states:

<sup>99</sup> J Shaw, ‘The European Union and Gender Mainstreaming: Constitutionally Embedded or Comprehensively Marginalized?’ (2002) 10 *Feminist Legal Stud* 213, 215.

<sup>100</sup> C McCrudden and H Kountouris, ‘Human rights and European equality law’ in H Meenan (ed), *Equality Law in an Enlarged European Union—Understanding the Art 13 Directives* (Cambridge University Press, 2007) 73, 75.

<sup>101</sup> Case T-10/93 *A v Commission* [1994] ECR II-179, [42].

<sup>102</sup> D Schiek, ‘The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation’ (2006) 35 *ILJ* 329, 333.

[R]espect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.<sup>103</sup>

Locating equal treatment of persons within a context of constitutionally protected principles has provided the Court with a point of reference when considering how to exercise its discretion in interpreting anti-discrimination legislation. For example, in *P* (discussed earlier), the Court reiterates the above quotation from *Defrenne (No 3)* in support of its broader reading of what constitutes sex discrimination.<sup>104</sup> Similarly, in *Schröder*, the Court relies on general principles in rejecting arguments for the curtailment of retrospective equal pay where this could place the Member State concerned at a competitive disadvantage:

[I]t must be concluded that the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.<sup>105</sup>

Although the Court has demonstrated its willingness to rely on general principles as a means of bolstering its interpretation of anti-discrimination legislation, its approach to the discrimination grounds added via Article 13 EC is more difficult to read. Having invoked general principles of human rights in *P*, in *Grant v South-West Trains* the Court rejected the argument that general principles could be relied upon to include sexual orientation within the scope of sex discrimination.<sup>106</sup> In contrast to the Court's conservatism in *Grant*, a much bolder approach was adopted in *Mangold*.<sup>107</sup> In this case, the Court was confronted with a provision of German law permitting fixed-term contracts for workers over the age of 52 without the normal requirement of objective justification for employment under a temporary contract. The facts arose between two private parties and during the extended period granted to Germany for transposition of the age provisions of the Employment Equality Directive, so recourse to the doctrine of direct effect was apparently obstructed. The Court circumvented this barrier by an extensive interpretation of its general principles case law. The domestic legislation in question fell within the scope of the Fixed-Term Work Directive and the Court requires Member States to respect the general principles of EU law when implementing EU legislation.<sup>108</sup> The Court held that those general principles include non-discrimination on the ground of age, therefore, the German legislation had to be set

<sup>103</sup> Case 149/77 *Defrenne v SABENA (No 3)* [1978] ECR 1365, [26]–[27].

<sup>104</sup> *P v S and Cornwall County Council* (n 41 above) [19].

<sup>105</sup> Case C-50/96 *Deutsche Telekom AG v Schröder* [2000] ECR I-743, [57].

<sup>106</sup> *Grant v South-West Trains*, (n 45 above) [45]; C Favilli, *La non discriminazione nell'Unione europea* (Il Mulino, Bologna, 2008) 196.

<sup>107</sup> Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

<sup>108</sup> Opinion of AG Sharpston, Case C-427/06 *Bartsch v Bosch und Siemens Hausgeräte Altersfürsorge GmbH* [2008] ECR I-7245, [69].

aside insofar as it was inconsistent with that principle. Strikingly, the Court embodies the ‘general principle of equal treatment’ with the detailed contents of the Employment Equality Directive, stating that the general principle entailed an obligation to ensure ‘appropriate legal remedies, the burden of proof, protection against victimization, social dialogue, affirmative action’.<sup>109</sup>

The decision in *Mangold* provoked a lively debate amongst academics and Advocates General.<sup>110</sup> Some of this comment contended that the Court had overstretched the elastic boundaries of the general principle of equal treatment; this might explain the prudent silence in subsequent case law where the Court omitted to elaborate on *Mangold*.<sup>111</sup> The Court has, though, returned to the fray with its decision in *Kücükdeveci*.<sup>112</sup> This case concerned a rule that when calculating length of employment, periods of service prior to the age of 25 were not counted. This impacted negatively on the claimant in respect of the length of notice to which she was entitled from her employer upon dismissal. Unsurprisingly, the Court held that this constituted direct age discrimination that lacked justification.<sup>113</sup> Although the time limit for implementation of the Employment Equality Directive had expired, the problem raised by the national court was that the dispute was between two private parties. This horizontal relationship apparently excluded the doctrine of direct effect and the national court felt that there was no possibility to reinterpret the national legislation in a manner compatible with the Directive as it was unambiguous.<sup>114</sup> In its judgment, the Court places great emphasis on the general principle of equal treatment, rather than the Directive. Indeed, it argued that ‘Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment’.<sup>115</sup> Moreover, the Court underlined the significance in the legal order of the general principle of equal treatment by linking it to the right to non-discrimination in the Charter of Fundamental Rights.<sup>116</sup> Consequently, the national court was *obliged* to decline to apply national legislation that was incompatible with the principle of equal treatment.<sup>117</sup>

The decisions in *Mangold* and *Kücükdeveci* provide a good indication of the way in which the Court has constitutionalized anti-discrimination legislation by embedding it in higher legal norms and then drawing upon these as a justification for an extensive interpretation of the legislation. As discussed below, the legal context is altered by the Treaty of Lisbon and the attribution of binding legal status to the Charter of Fundamental Rights. Arguably, this provides a more authoritative foundation than the general principles. The unwritten nature of the latter means that their content is inevitably contentious. It might have been expected that the Court would shift its focus to the Charter following the Treaty of Lisbon, but the reasoning in *Kücükdeveci*

<sup>109</sup> *Mangold* (n 107 above) [76].

<sup>110</sup> For an overview, see the Opinion of AG Sharpston (n 108 above) [31]–[41].

<sup>111</sup> Favilli (n 106 above) 201.

<sup>112</sup> Case C-555/07 *Kücükdeveci v Swedex GmbH & Co. KG* [2010] OJ C63/4.

<sup>113</sup> *ibid* [39]–[42]. <sup>114</sup> *ibid* [16]. <sup>115</sup> *ibid* [50].

<sup>116</sup> *ibid* [22]. <sup>117</sup> *ibid* [53].

suggests a more nuanced approach whereby the Court will weave together the Charter and the general principles as a combined source of authority for constitutionalizing equal treatment.

## 2. ENTRENCHING THE PRINCIPLE OF EQUAL TREATMENT WITHIN THE TREATIES

The founding Treaties have always contained some references to the principle of equal treatment, such as the provisions on nationality discrimination and equal pay. Over time, the Treaties have gradually been adjusted to uncouple the link between equal treatment and the construction of the internal market.<sup>118</sup> This was already apparent in the changes made through the Treaty of Amsterdam,<sup>119</sup> but it is firmly resolved in the post-Lisbon era. The Treaty on European Union entrenches equality as one of the central missions and activities of the Union. Article 2 TEU sets out the values on which the Union is founded. These include ‘equality’ and ‘the rights of persons belonging to minorities’. Article 3 TEU on the Union’s aims includes combating discrimination, equality between women and men, and respecting cultural and linguistic diversity. In terms of the legal competences for combating discrimination, the Treaty of Lisbon made minor changes, mainly concerned with legislative procedure.<sup>120</sup> Nevertheless, two substantive changes in the Treaties will affect this field: the Charter of Fundamental Rights and the extended provisions on ‘mainstreaming’.

Article 6(1) TEU resolves the debate surrounding the legal status of the Charter by declaring that it ‘shall have the same legal value as the Treaties’. Although the Court had already begun to refer to the Charter as one of a variety of sources for the interpretation of its general principle of respect for fundamental rights, it seems reasonable to expect that it will accord much greater weight to this instrument now that it has been attributed with Treaty status. In relation to equality, the Charter offers considerable potential. The specific chapter on equality is composed of three types of provisions. First, Article 20 provides that ‘everyone is equal before the law’. This seems to echo the general principle of equal treatment and as such may be invoked to challenge any arbitrary differential treatment of persons.<sup>121</sup> Secondly, Article 21(1) contains a prohibition on discrimination:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

<sup>118</sup> Waddington (n 6 above) 11.

<sup>119</sup> eg former Art 13 EC.

<sup>120</sup> Art 19 TFEU enhances the role for the European Parliament in anti-discrimination legislation. The pre-existing consultation procedure is replaced with a requirement for the Council to obtain the Parliament’s consent for such legislation.

<sup>121</sup> Favilli notes that Art 20 was cited by the Court in a challenge to the legality of the European Arrest Warrant (n 106 above) 188.

Thirdly, several provisions address specific forms of discrimination and inequality. These vary in their substantive content; Shaw describes this as ‘a veritable “pot pourri” of rights, some of a traditional justiciable and constitutional type, some of a more aspirational nature’.<sup>122</sup> For example, Article 22 is an open-textured obligation to ‘respect cultural, religious and linguistic diversity’. In contrast, Article 23 reiterates some established tenets of EU gender equality law, such as the legality of positive action measures.

Although it is too early to predict the full impact of the Charter on this area of law, it evidently reinforces the trend towards the constitutionalization of the principle of equal treatment.<sup>123</sup> The central space occupied by equality within the Charter underscores the Treaty provisions that place equality within the core values and aims of the Union. Perhaps the greatest significance of the Charter lies in its approach to equality. It combines a common threshold of non-discrimination that extends to all grounds (Article 21), with a pluralistic vision in the ‘strand-specific’ provisions (Articles 22–26). The subtle differences in the wording of each of these provisions imply a recognition that equality is not a ‘one-size fits all’ concept. Waddington suggests that the Charter leads towards a view that ‘vulnerable groups need targeted and diverse approaches to achieve the goal of equality’.<sup>124</sup> The call in Article 22 for respect of diversity no doubt responds to the challenges arising within Europe’s multicultural social reality. Alternatively, Article 25 on the rights of the elderly refers to the right to ‘lead a life of dignity and independence’, which reflects contemporary debates around the way Europe caters for its ageing population, especially in areas such as social and health care. Critics of the Charter could rightly point to the rather woolly language used in these provisions and the difficulty of translating these principles into operational legal standards. This may, though, miss the value of the Charter as a point of reference for the Court in steering its interpretation of anti-discrimination legislation.

As well as assisting the Court, the Charter should inform the work of the EU institutions. Indeed, the Commission has already adopted the practice of monitoring legislative proposals for compliance with the Charter.<sup>125</sup> This complements the idea of mainstreaming:<sup>126</sup> mobilizing all areas of law and policy for the promotion of equality. The Treaty of Amsterdam already embarked along this path by inserting a commitment to gender mainstreaming in the EC Treaty. Article 8 TFEU (ex Article 3 (2) EC) states: ‘[I]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between women and men.’ Following the Lisbon amendments, this is now complemented by Article 10 TFEU: ‘[I]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’ The experience with Article 8 TFEU suggests that these duties have potential, but they

<sup>122</sup> Shaw (n 99 above) 218.      <sup>123</sup> *ibid.*      <sup>124</sup> Waddington (n 6 above) 23.

<sup>125</sup> Commission, ‘Compliance with the Charter of Fundamental Rights in Commission legislative proposals—methodology for systematic and rigorous monitoring’ COM(2005) 172.

<sup>126</sup> Waddington (n 6 above) 15.

will not, by themselves, bring about significant change in institutional behaviour. Notwithstanding its Treaty status, Beveridge concludes that Article 8 TFEU has operated more ‘as a political than a legal obligation’.<sup>127</sup> Indeed, Shaw found little evidence that it had been actively taken on board by the Court of Justice.<sup>128</sup> The importance of the Treaty mandate for mainstreaming lies in the foundation it provides for further steps to put this into practice. In this respect, it would have been productive if the general mainstreaming obligations had been combined with (for example) a protocol or a declaration placing more flesh on the bare bones found in the Treaty.

The equality mainstreaming duties do not exist in a vacuum. They are nested within a set of largely new or reorganized provisions at the beginning of the TFEU that pursue a similar goal to mainstreaming, in other words, seeking to have a particular objective taken into account across EU law and policy.<sup>129</sup> These duties address topics such as environmental protection, consumer protection, and animal welfare.<sup>130</sup> There is also a new, omnibus duty to take into account in all policies ‘the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’.<sup>131</sup> There are undoubtedly good reasons to support the integration of all of these diverse objectives throughout the policy-making process. The logic that underpins equality mainstreaming can be easily transposed to other issues.<sup>132</sup> The risk is that the proliferation of such duties will dilute effectiveness. Policy-makers may feel submerged amongst these different duties and there is no obvious path for the resolution of conflicts between mainstreaming duties. For example, a shortage of housing may cause Roma communities to settle on land without planning authorization. Permitting such settlements might be acceptable from the perspective of combating socio-economic inequalities, but it could conflict with environmental protection objectives. Of course, the Treaties are not the place to attempt to resolve complex public policy problems. The duties serve to remind policy-makers of the myriad of interweaving interests that need to be juggled. Yet the capacity of this framework to enhance public decision-making will depend greatly on how these new obligations are brought to life.

<sup>127</sup> F Beveridge, ‘Building against the Past: The Impact of Mainstreaming on EU Gender Law and Policy’ (2007) 32 *ELRev* 193, 208.

<sup>128</sup> Shaw (n 99 above) 223.

<sup>129</sup> J Shaw, ‘Mainstreaming Equality and Diversity in European Union Law and Policy’ in J Holder and C O’Cinneide (eds), *Current Legal Problems* 2005, Vol 58 (Oxford University Press, 2006) 255, 271.

<sup>130</sup> Arts 11–13 TFEU.

<sup>131</sup> Art 9 TFEU.

<sup>132</sup> In fact, the origins of gender mainstreaming are at least partially derived from the experience of mainstreaming other policy objectives, such as environmental protection or the promotion of small businesses: F Beveridge and S Nott, ‘Gender auditing—making the Community work for women’ in T Hervey and D O’Keeffe (eds), *Sex Equality Law in the European Union* (John Wiley & Sons, 1996) 383.

### 3. THE INTERPRETATION OF EQUAL TREATMENT

The discussion above has chartered how equal treatment has become entrenched in the Union's constitutional lexicon. This section examines the interpretation attached to these concepts in the light of constitutionalization.

#### (a) The concept of equal treatment

The Court's general principle of equal treatment adopts the Aristotelian approach that those in a like situation should be treated alike.<sup>133</sup> This is frequently summarized in the label 'formal equal treatment'. Academic literature has extensively discussed and critiqued this concept from various angles.<sup>134</sup> Prominent criticisms include the weight that this approach places on identifying who is in a comparable situation. Locating the 'correct' comparator can often seem arbitrary or inconsistent, such as in the Court's judgments in *P v S and Cornwall Country Council* and *Grant v South-West Trains*. The focus on the search for a comparator can often obscure a more penetrating inquiry about the cause or effects of the measure under scrutiny. For example, in *Österreichischer Gewerkschaftsbund*,<sup>135</sup> workers were entitled to a payment on the termination of their employment. The level of this payment varied according to length of service. In calculating length of service, periods of parental leave were not taken into account, yet periods of leave for military service were included.<sup>136</sup> This rule was challenged by an Austrian trade union as indirect discrimination against women, in particular, given that 98 per cent of people taking parental leave were women and compulsory military service exclusively concerned men.<sup>137</sup> Nevertheless, the Court of Justice held that men taking military service were not in a comparable position to women taking parental leave. It emphasized that parental leave was a voluntary choice on the part of the worker, whereas military service was, at least initially, compulsory. For the Court, the appropriate comparator was a person voluntarily taking unpaid leave for a reason other than parental leave. As this person's leave would also not be included in calculating the length of service, there was no discrimination.

Cases such as the above illustrate how the requirement of comparability can constitute a preliminary hurdle, a means of obfuscating the issues at the heart of the dispute. In *Österreichischer Gewerkschaftsbund*, the underlying question concerned the State's prioritizing of military service over child-raising, but the Court of Justice avoided stepping into such sensitive terrain by its precursor finding about the comparator. A similar tactical deployment of the comparator test can be witnessed in

<sup>133</sup> D Schiek, 'Torn between Arithmetic and Substantive Equality? Perspectives on Equality in German Labour Law' (2002) 18 IJCLIR 149, 150.

<sup>134</sup> See eg Schiek (n 63 above) 303–304; S Fredman, *Discrimination Law* (Oxford University Press, 2002) 7–11.

<sup>135</sup> Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich* [2004] ECR I-5907.

<sup>136</sup> There was a minimum compulsory period of leave prior to and immediately after the birth of a child. This was included in the calculation of length of service: *ibid* [7]–[9].

<sup>137</sup> *ibid* [24]–[25].

*Maruko*.<sup>138</sup> This case concerned a survivor's occupational pension that was only available to married couples. Mr Maruko had formed a life partnership with his same-sex partner, which was a legal status similar to, but not the same as marriage under German law. When confronted with the explosive politics that surrounds questions of family, marriage, and sexuality, the Court turned to the comparator test. It held that *if* life partners were in a comparable situation to married partners, then it would constitute direct sexual orientation discrimination to refuse Maruko access to the survivor's pension; however, the answer to this question lay within the jurisdiction of the national court.<sup>139</sup>

Given that *Österreichischer Gewerkschaftsbund* and *Maruko* are relatively recent cases, they suggest that the Court's outlook on equality is still heavily shaped by the concept of formal equal treatment. Indeed, in *Österreichischer Gewerkschaftsbund* the Court introduces a comparability requirement in a claim for indirect sex discrimination, whereas the requirement on the claimant to be in a comparable situation to her comparator is only a feature of the legislative definition of direct discrimination.<sup>140</sup> Nevertheless, signals can also be found of a willingness on the part of both the Court, and the EU legislator, to go beyond formal equal treatment. A good illustration of this trajectory can be found in relation to positive action.

In *Kalanke*, the Court adopted a narrow view of the space for positive action, emphasizing that such measures were a derogation from the prohibition of discrimination between individuals.<sup>141</sup> In subsequent decisions, the Court has gradually altered its rhetoric and acknowledged that equal treatment of individuals may not produce equality in practice. In *Marschall*, the Court acknowledged that 'the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances', citing prejudice, stereotypes, and the unequal distribution of caring responsibilities.<sup>142</sup> Considering a range of positive action measures in *Badeck*, the Court acknowledged that they were 'manifestly intended to lead to an equality which is substantive rather than formal, by reducing the inequalities which may occur in practice in social life'.<sup>143</sup> This shift in thinking was reinforced by the amendment of the EC Treaty in 1999 to insert an express authorization for positive action:

*With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the*

<sup>138</sup> Case C-267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757.

<sup>139</sup> *ibid* [72].

<sup>140</sup> D Schiek, 'Indirect discrimination' in D Schiek, L Waddington, and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Hart, 2007) 323, 471.

<sup>141</sup> Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, [21].

<sup>142</sup> Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, [29]-[30].

<sup>143</sup> Case C-158/97 *Badeck and others* [2000] ECR I-1875, [32].

underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.<sup>144</sup>

The key feature of this text is its construction of positive action as consistent with, even necessary for, the realization of equality. It is not presented as a derogation from an individual right, but an essential component of achieving equality. Importantly, this wording was subsequently incorporated into the Racial and Employment Equality Directives.<sup>145</sup>

Looking at the trend within the legislation and case law on positive action, there is an acknowledgement of the limits of formal equal treatment and the need for law to be also concerned with the achievement of substantive equality in practice. It is notable, though, that the Court has not shifted from its original position in *Kalanke* that automatic and unconditional preferential treatment at the point of selection for employment constitutes unlawful discrimination. Instead, it has emphasized the scope for positive action measures that do not involve such preferential treatment. Unhelpfully, the Charter of Fundamental Rights seems to turn back the clock in the positive action debate. Article 23 states: '[T]he principle of equality *shall not prevent* the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex' (emphasis added). The language adopted returns to the portrayal of positive action as a departure from equality, rather than an intrinsic element of its fulfilment. It is also unfortunate that the Charter only refers to positive action in the context of gender equality. In the period since it was drafted, the eastward enlargement of the Union has brought much greater visibility to the deeply rooted social disadvantage encountered by Roma communities in Europe.<sup>146</sup> The extent of this deprivation makes it manifest that an approach based on formal equal treatment will be inadequate in tackling Roma inequality. For example, the legacy of institutional practices of segregation in education<sup>147</sup> will place many Roma at an inferior position in the labour market for at least several decades. This context provides an illustration of the challenges facing the Court when eventually it has to consider the scope for positive action on grounds other than gender, and in areas other than the labour market. The history of educational segregation of Roma children, combined with other forms of institutional racism,<sup>148</sup> make a compelling case for not presuming that the approach taken on positive action for women in employment should be mechanically transposed to all discrimination grounds.<sup>149</sup>

<sup>144</sup> Emphasis added; Art 157(4) TFEU (ex Art 141(4) ).

<sup>145</sup> Art 5, Council Directive 2000/43 (n 21 above); Art 7, Council Directive 2000/78, (n 52 above). It should be noted, however, that the definition of positive action in these Directives does not import the reference to 'measures providing for specific advantages' found in Art 157(4) TFEU.

<sup>146</sup> An overview is provided in: Commission, 'The situation of Roma in an enlarged European Union' (Office for the Official Publications of the European Communities, 2004).

<sup>147</sup> *DH and others v The Czech Republic* [GC] (2008) 47 EHRR 3.

<sup>148</sup> European Roma Rights Centre, 'Ambulance not on the way—the disgrace of healthcare for Roma in Europe' (Budapest: European Roma Rights Centre, 2006).

<sup>149</sup> O de Schutter and A Verstichel, 'Integrating the Roma into European society: time for a new initiative' in European Centre for Minority Issues, *Eur Ybk of Minority Issues*. Vol 4, 2004/05 (Koninklijke Brill, 2006) 429, 432.

**(b) Equal treatment and diversity**

The preceding discussion touches on an emerging theme within EU anti-discrimination law: the extent to which equality should be given the same interpretation when placed in the context of different discrimination grounds. As discussed in the first section of this chapter, EU legislation already provides some indication that equality is not interpreted or applied in a monolithic fashion. For example, there is the duty to provide reasonable accommodation, which only applies in respect of disability,<sup>150</sup> and there are various exceptions that are peculiar to specific grounds, such as the exception for employment in organizations with an ethos based on religion or belief.<sup>151</sup> The most far-reaching exception applies in respect of age, where there is the possibility to justify direct discrimination.<sup>152</sup> In *Mangold*, the Court did not attach particular weight to this distinction within the legislation. By enshrining age within the general principle of equal treatment, the Court aligned age with other discrimination grounds. This approach has encountered opposition amongst Advocates General, some of whom have queried the Court's implicit equation of age with other forms of discrimination.

On two occasions, Advocate General Mazák has robustly argued in favour of a narrow interpretation of the Employment Equality Directive as it relates to age discrimination. Both cases, *Palacios de la Villa*<sup>153</sup> and *Age Concern*,<sup>154</sup> concerned the legality of compulsory retirement upon reaching a certain age. Mazák contends that age is qualitatively different from the other grounds. In *Palacios*, he emphasizes that 'age as a criterion is a point on a scale and that, therefore, age discrimination may be graduated'.<sup>155</sup> This leads him to the conclusion that locating the appropriate comparator in an age discrimination case will be more difficult than in respect of sex discrimination. This is developed further in *Age Concern*, where he argues that there is:

a genuine difference between age and the other grounds mentioned in Article 2 of the Directive. Age is not by its nature a "suspect ground", at least not so much as for example race or sex. Simple in principle to administer, clear and transparent, age-based differentiations, age-limits and age-related measures are, quite to the contrary, widespread in law and in social and employment legislation in particular.<sup>156</sup>

Advocate General Geelhoed adopts a similar position in *Chacón Navas*, but extends the argument to include disability.<sup>157</sup> The case concerned the interpretation of the concept of 'disability' and whether this included sickness. Advocate General Geelhoed argues at some length that Article 13 EC should not be given an extensive

<sup>150</sup> Art 5, Council Directive 2000/78, (n 52 above).

<sup>151</sup> Art 4(2), *ibid.*

<sup>152</sup> Art 6, *ibid.*

<sup>153</sup> Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531.

<sup>154</sup> Case C-388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] OJ C102/6.

<sup>155</sup> Opinion of 15 February 2007 (n 153 above) [61].

<sup>156</sup> Opinion of 23 September 2008 (n 154 above) [74].

<sup>157</sup> Case C-13/05 *Chacón Navas v Eurest Colectividades* [2006] ECR I-6467.

interpretation. His analysis separates out age and disability from the other discrimination grounds, arguing that applying the principle of equal treatment to these grounds could have ‘potentially far-reaching economic and financial consequences’.<sup>158</sup> Consequently, prohibiting discrimination on these grounds should be balanced against the flexible functioning of the labour market.<sup>159</sup>

The Opinions of Mazák and Geelhoed might be best described as advancing a functional, realpolitik approach to interpreting equal treatment. In stark contrast, Advocate General Maduro has grounded his analysis in the fundamental rights tradition. In *Coleman*, the claimant was an employee who alleged that she had suffered discrimination and harassment following the birth of her son, who was disabled and in respect of whom she was the primary carer. The question arose whether an individual who is not herself disabled could rely on the Employment Equality Directive with regard to the prohibition of disability discrimination. Maduro began by seeking to uncover the aims of Article 13 EC and the Employment Equality Directive, which he defined as ‘to protect the dignity and autonomy of persons belonging to those suspect classifications’.<sup>160</sup> In support of his ‘robust conception of equality’,<sup>161</sup> he contended that ‘autonomy means that people must not be deprived of valuable options in areas of fundamental importance for their lives by reference to suspect classifications’.<sup>162</sup> Consequently, Article 13 EC and the Directive should be interpreted as extending to situations where discrimination occurs against a third person closely associated with a person belonging to a suspect classification.<sup>163</sup>

While a rich debate can thus be traced within the opinions of the Advocates General, the Court remains comparatively taciturn. *Mangold and Küçükdeveci* remain the clearest instances where the Court locates the Employment Equality Directive within the framework of fundamental rights and the general principle of equal treatment. The Court has assiduously avoided the question of whether age or disability should be approached differently to other discrimination grounds, instead concentrating on a doctrinal interpretation of the Directive’s provisions. In *Age Concern*, it refers to the ‘recognised specificity of age among the grounds of discrimination’,<sup>164</sup> but it then adopts a fairly rigorous interpretation of the scope for derogations under Article 6 of the Employment Equality Directive, imposing on Member States ‘the burden of establishing to a high standard of proof the legitimacy of the aim pursued’.<sup>165</sup> Hence, the substantive content of its judgments does not suggest that the Court embraces the idea that age is not a suspect ground of discrimination.<sup>166</sup>

In *Coleman*, the Court reached the same conclusion as Maduro, but it eschews any theoretical discussion of dignity and autonomy. The Court opts for safer, more

<sup>158</sup> Opinion of 16 March 2006, [51]. <sup>159</sup> *ibid* [55].

<sup>160</sup> Case C-303/06 *Coleman v Attridge Law and Steve Law* [2008] ECR I-5603, Opinion of 31 January 2008, [10].

<sup>161</sup> *ibid* [12]. <sup>162</sup> *ibid* [11]. <sup>163</sup> *ibid* [12].

<sup>164</sup> *Age Concern* (n 154 above) [60]. <sup>165</sup> *ibid* [65].

<sup>166</sup> This is reinforced by the detailed scrutiny applied in Case C-88/08 *Hütter v Technische Universität Graz* [2009] ECR I-5325.

traditional terrain, in particular, the need to ensure the ‘effectiveness’ of the protection conferred by the Directive,<sup>167</sup> as well as a close reading of the literal wording of the Directive.<sup>168</sup> The overall impression from the case law to date under the Racial and Employment Equality Directives is that the Court is not consciously ranking or prioritizing certain grounds as more suspect than others. Unsurprisingly, the Court has drawn on some of the principles already established in its gender equality case law,<sup>169</sup> suggesting a gradual equation of anti-discrimination law before and after Article 13 EC.

#### 4. CONCLUSION

Compared to the position in the original Treaties, it is evident that the principle of equal treatment, in various manifestations, has undergone a gradual process of constitutionalization. This finds its roots in the Court’s general principles case law, but has been latterly stamped with the authority of Treaty provisions and the prominent place of equality within the Charter of Fundamental Rights. The constitutional trajectory has been influential in releasing anti-discrimination legislation from the shackles of a market integration rationale and repositioning it within the framework of human rights protection.<sup>170</sup> Nevertheless, the reaction in some quarters to the decision in *Mangold* suggests there are limits to how far the Court can travel based purely on constitutional principles. The perception that the Court was giving autonomous force to the general principle of equal treatment may not tally with the actual content of the judgment, but the polemical debate which it provoked demonstrated ongoing contestation of the Court’s role as a constitutional innovator.

Although equal treatment has assumed the character of a constitutional norm, its contents remain a matter of evolving negotiation. Both legislation and case law dabble with the more ambitious concept of substantive equality, but without an unambiguous commitment on either part. The Court has matured its case law on positive action in a more expansive direction, but it is inescapable that nothing in EU legislation creates any obligation on Member States to permit or take such measures. At times, the Court draws upon broader constitutional principles to enrich its interpretation of equal treatment, such as the invocation of human dignity in *P v S and Cornwall County Council*. Yet such reasoning is not commonplace and it sits alongside with other decisions that seem to lack an overall vision of what the legislation is designed to achieve.<sup>171</sup> The terse nature of the Court’s judgments is not out of character, but it leaves a navigator few theoretical signposts for how the Court will approach more

<sup>167</sup> Case C-303/06 *Coleman* (n 160 above) [51].

<sup>168</sup> *ibid* [38].

<sup>169</sup> eg Case C-267/06 *Maruko* (n 133 above) [60]; Case C-246/09 *Bulicke v Deutsche Büro Service GmbH* [2010] OJ C234/13.

<sup>170</sup> Schiek (n 63 above) 293.

<sup>171</sup> See eg Case C-220/02 *Österreichischer Gewerkschaftsbund* (n 135 above).

complex equality claims. Given the expanding remit of EU anti-discrimination legislation, it seems inevitable that the Court will be confronted with topical controversies, such as the wearing of religious symbols, or conflicts between discrimination grounds. Finding a satisfactory explanation of how EU law responds to these situations will demand a greater willingness to engage with the debate about what version of equality the law seeks to achieve.

#### D. WIDENING AND DEEPENING RECONSIDERED

In the period since the first edition of this book was published, the law relating to equal treatment has undergone a considerable transformation. The strongest feature identified was the widening of the application of the principle of equal treatment. This was most pronounced in anti-discrimination legislation in the wake of Article 13 EC, but equal treatment has also crept into immigration law and labour law. The rapid advance of legislation on equal treatment is underpinned by the progressive constitutionalization of the principle. The Charter of Fundamental Rights and revised Treaties mark a new stage in this trajectory, but their effects are still to be felt. The first part of this chapter on ‘widening’ found that there was a gap between equal treatment within anti-discrimination legislation and its articulation in other contexts, namely immigration and labour law. This is reinforced by the second part of the chapter. The process of constitutionalization seems directed at the personal characteristics found within Article 19 TFEU. The Charter is equivocal in its approach to the rights of third country nationals,<sup>172</sup> whilst there is no express reference to atypical workers.

It might have been expected that the twin processes of widening and deepening would operate in contradiction to each other. The expansion of the list of protected discrimination grounds carried the risk of diluting the concept of equality. Experience suggests that widening and deepening can in fact complement each other. The wider list of protected grounds has permitted the Union to become part of the vanguard for developing the concept of equality in international human rights law. For example, EU law has increasingly influenced the case law of the European Court of Human Rights.<sup>173</sup> The underlying dilemma within EU law is the extent to which equality can or should be interpreted differently according to individual discrimination grounds.<sup>174</sup> In this regard, there remains a risk that the process of widening could yet hinder deepening. Taking the law on positive action as an example, a uniform

<sup>172</sup> Art 15(3) states that ‘nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union’. This provision is not located in the equality chapter of the Charter. As discussed earlier, the Charter provision on nationality discrimination appears primarily aimed at equal treatment of EU citizens (Art 21(2)).

<sup>173</sup> See eg *DH and others v The Czech Republic* (n 147 above) [184]; *Bekos and Koutropoulous v Greece* (2006) 43 EHRR 2, [41].

<sup>174</sup> D Schiek, ‘Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law’ (2005) 12 MJ 427, 448.

application of the standards developed by the Court in its gender equality case law would stifle the possibility of taking more far-reaching measures in response to specific instances of extreme inequality.

A malleable and context-sensitive concept of equality appears to be underscored by the approach found in the Charter, yet it tends to get trapped in a thicket of arguments about whether (or to what extent) the EU should set priorities in anti-discrimination law and policy. Insofar as this debate posits discrimination grounds in competition with each other, it reveals an ongoing weakness in the Union's concept of equality. Flowing from the structure of EU anti-discrimination legislation, discrimination grounds tend to be compartmentalized into isolated spheres. Academic and applied research has, though, gradually raised sensitivity to the reality of 'intersectionality',<sup>175</sup> in other words, the overlapping lived experience of these grounds in terms of personal identity and the ways in which discrimination is manifested. The widening process should have been fruitful terrain for law and policy to engage with inequalities linked to more than one ground. This remains a promise largely unfulfilled. Although the Racial and Employment Equality Directives make reference to gender mainstreaming and taking into account multiple discrimination as experienced by women,<sup>176</sup> the Commission report on the implementation of the Racial Equality Directive found that this remained 'largely untackled'.<sup>177</sup>

Topics such as intersectionality illustrate that, despite the rapid advancement in the law, the processes of widening and deepening are unlikely to reach a natural conclusion or to settle into a comfortable status quo. Law on equality flows from and responds to social change. This constantly throws up new complexities, which in turn demand yet further evolution, both in terms of theoretical thinking and practical solutions.

<sup>175</sup> K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory, and Antiracist Politics' in A Phillips (ed), *Feminism and politics* (Oxford University Press, 1998) 314; D Schiek and V Chege, *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish, 2009); Commission, 'Tackling multiple discrimination—practices, policies and laws' (Office of the Official Publications of the European Communities, 2007).

<sup>176</sup> Recital 14 and Art 17(2), Council Directive 2000/43 (n 21 above); Recital 3 and Art 19(2), Council Directive 2000/78 (n 52 above).

<sup>177</sup> Commission, 'The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' COM(2006) 643, [3.5].

