

EU Anti-Discrimination Law Beyond Gender

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The Impact of the 2000 Equality Directives on EU Anti-Discrimination Law Achievements and Pitfalls

ULADZISLAU BELAVUSAU AND KRISTIN HENRARD

I. Introduction

The Ancient Greeks, arguably the historical ‘fathers’ of our European non-discrimination paradigm, had a very rich understanding of equality that distinguished between its many different dimensions, *inter alia*, discerning equality in various spheres of life.¹ Originally, the European Economic Community (the predecessor of the European Union (EU)) was only concerned with one dimension of equality: equality of economic opportunity. Indeed, the EU has been deemed to foster fully fledged equality of economic opportunity amongst citizens commuting between its various Member States, to ensure their maximum prosperity and economic well-being. However, as the Union developed slowly but surely from an organisation predominantly concerned with economic integration into one with a broader political agenda, and concomitant areas of competence, its ambitions

¹ See H Glykatzis-Ahrweiler, ‘European Community as an Idea: The Historical Dimension’ in E Chrysos, PM Kitromilides and C Svopoulos (eds), *The Idea of European Community in History*, Conference Proceedings, Vol 1, National and Capodistrian University of Athens, 2003, 25; P Cartledge, *Ancient Greek Political Thought in Practice* (Cambridge, Cambridge University Press, 2009) 8–9. While ancient Greeks admittedly did not have the same concept of egalitarian equality, as we share in modernity after the French Revolution (e.g. excluding women) they did distinguish between equal rights of birth (*isogonia*), equality before the law (*isopoliteia*), equality in the body politics (*isonomia*), equality in economic distribution (*isomoiria*), equal prosperity and well-being (*eudaimonia*), and even equality regarding freedom of speech (*isegoria*). Rediscovered and philosophised *ab novo* during the Enlightenment and eighteenth-century revolutions, the principle of equal treatment gained serious trans-national recognition after World War II in a number of international instruments (eg Universal Declaration of Human Rights, ICCPR, ICESCR, CEDAW, CERD, CRDPD, ECHR, etc).

in the field of equal treatment similarly expanded towards more encompassing visions of justice.²

At the turn of the millennium, the year 2000 marked the birth of EU anti-discrimination law³ as a field in its own right, with the adoption of two major ‘Equality Directives.’⁴ Not only did they extend the prohibition of discrimination with five ‘additional’ grounds but also – albeit only for the grounds of ‘race and ethnicity’ – significantly expanded the material scope of equality regulation.⁵ These directives can be seen as launching the transition from the Garden of Earthly Delights opened for mobile EU citizens into a European Garden of Equal Delights, with the anti-discrimination norm increasingly regulating human interactions in wholly internal situations.⁶

The present book zooms in on these 2000 Equality Directives, as well as on the ‘new’ grounds of discrimination planted therein, namely *race and ethnicity* (the grounds introduced by the Race Equality Directive), *religion, sexual orientation*,⁷ *age*, and *disability* (the grounds introduced by Framework Equality Directive) and the related jurisprudence of European courts. Having reached its eighteenth birthday – the age when most Europeans are deemed to reach full adulthood according to civil and criminal law – in the year 2018, EU anti-discrimination law can now celebrate its adulthood. Yet, several problems threaten to undermine this ‘maturity.’⁸ In the first place, as is well demonstrated by the Commission’s reports,⁹ a number of countries have delayed the implementation of these

² D Kochenov, G de Búrca and A Williams (eds), *Europe’s Justice Deficit?* (Cambridge, Cambridge University Press, 2015).

³ Although the term ‘anti-discrimination law’ originates from the US doctrine, it has since gained sufficient currency in literature and law courses around the globe to justify our decision to adopt this terminology for the present volume. Alternative terminology in recent literature for the same concept include ‘EU law of equal opportunities’, ‘EU equality law’, ‘EU non-discrimination law’ and even ‘EU antidiscrimination law’, where antidiscrimination is spelt as one word.

⁴ Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Equality Directive or RED); Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L3030/16 (Framework Equality Directive or FED).

⁵ See, e.g. D Schiek, ‘From European Union Anti-Discrimination Law towards Multidimensional Equality Law for Europe’ in D Schiek and V Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon, Routledge, 2009) 3–4.

⁶ This is the reason why we symbolically chose a panel of the famous triptych by a Dutch painter Hieronymus Bosch, *The Garden of Earthly Delights*, as the cover image for this volume.

⁷ As will be explained in more detail below, EU law has been treating rights of transsexuals within the cloisters of gender equality (Art 157 TFEU). Hence, this volume – which looks beyond gender jurisprudence – will focus mainly on gay and lesbian rights, and much less on the law regarding transsexuality. For latest account of the latter, see, *inter alia*, P Dunne, ‘Towards Trans and Intersex Equality: Conflict or Complementarity?’ in T Helms, A Dutta and J Scherpe (eds), *The Legal Status of Intersex Persons* (Antwerpen, Intersentia, 2018); J Scherpe (ed), *The Legal Status of Transgender and Transsexual Persons* (Antwerpen, Intersentia, 2015).

⁸ Technically, the assessment should start from July 2003, when Member States undertook the obligation to transpose these instruments into national legislation.

⁹ See European Commission, *EU Action Against Discrimination: Activity Report 2007–2008* (Luxembourg, Office for Official Publications of the European Communities, 2009) Part 2.1.1. As noted

directives for many years.¹⁰ Second, an impressive number of countries have joined the EU in the meantime (in 2004, 2007 and 2013), further complicating our assessment of maturity. Some of the new Member States have demonstrated notorious resistance to the Equality Directives, manifesting in a very long process of transposition.¹¹ Third, as will be demonstrated in this volume, the Court of Justice of the European Union (CJEU), the guardian of the European garden of equal delights, has – for a variety of reasons – delivered a rather modest number of cases on some of the newly introduced grounds (race and religion).¹²

Nevertheless, 18 years surely marks the arrival of an appropriate term to look back and ask the central question of this book – how EU anti-discrimination law has developed in relation to these grounds of discrimination that were added to gender and nationality, to cultivate what we term the ‘Garden of Equal Delights’.¹³ This volume, therefore, sets out to capture the striking developments and shortcomings that have emerged regarding the interpretation and implementation of relevant EU secondary law during the first two decades of the twenty-first century. Firstly, the book unfolds an up-to-date systemic appraisal of the state of (anti-discrimination) law regarding the five ‘newer’ grounds of discrimination, which have so far received mostly fragmented coverage. Secondly, and more generally, the volume captures the ways and the extent to which the Equality Directives have enabled or, at times prevented, the Court of Justice from developing an even broader and more refined anti-discrimination jurisprudence. Thus, the book offers a glimpse into the past, present and – hopefully – future of EU anti-discrimination law. Despite all the flaws in the Union’s garden of equality delights, it still offers one of the highest standards of protection in comparative anti-discrimination law.¹⁴

Part 2 of this introductory chapter will first outline the genesis and main stages in the development of EU anti-discrimination law. The latter is by now undoubtedly an independent discipline within the narrative of EU law, not merely

by Barbara Havelková, for example, the Czech Anti-Discrimination Act which should have been in place at the time of accession by the Czech Republic to the EU in 2004, was only adopted and entered into force in 2009. See B Havelková, ‘Resistance to Anti-Discrimination Law in Central and Eastern Europe: A Post-Communist Legacy?’ (2016) 17 *German Law Journal* 627, 629.

¹⁰ See also ‘The Politics of Transposition in Britain, France, and Germany’ in TE Givens and R Evans *Case, Legislating Equality: The Politics of Antidiscrimination Policy in Europe* (Oxford, Oxford University Press, 2014) 92–117.

¹¹ Havelková (n 9).

¹² The Court has delivered only two preliminary rulings regarding race and ethnic origin, and two regarding religious discrimination, the latter only in 2017.

¹³ Since the Treaty of Amsterdam (1997), which first provided the grounds to legislate in this area on the EU level, and the Equality Directives 2000 that have followed.

¹⁴ Many would even find this garden more fruitful than its American counterpart at the moment. See G De Burca, ‘The Trajectories of European and American Antidiscrimination Law’ (2012) 60 *American Journal of Comparative Law* 1. See also Croon’s piece dismantling the myth about the terribly inconsistent application of the equality principle by the Court of Justice, in J Croon, ‘Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination – or – Alternative Tales on Equality Reasoning’ (2013) 19 *European Law Journal* 153.

a component of EU labour law or an emanation of EU ‘social rights.’¹⁵ The Rome (1957), Amsterdam (1997) and Lisbon Treaties (2007) mark the central stages of our historical overview. Part 3 will focus on the major normative and practical themes emerging in EU anti-discrimination law after 2000. The themes that are picked up in this volume include the personal and material scope of the directives, new forms of discrimination and mechanisms to counteract discrimination (e.g., duty of reasonable accommodation) as well as the *proceduralisation* of EU anti-discrimination law, in particular through the proliferation of equality bodies. In addition, the limits of the current EU equality framework are discussed, such as in the areas of multiple discrimination, linguistic and Roma rights. The fourth part will summarise various accounts presented by our authors in their book chapters, considering wider normative problems and/or specific ground-related issues. Thoughts about the nature, achievements, challenges and limits of the current framework of the post-2000 EU anti-discrimination law are woven throughout the introduction, and are further reflected upon by Bruno de Witte in his epilogue.

II. A Brief History of EU Anti-Discrimination Law

It is common knowledge that the EU did not start as an organisation focused on fundamental rights.¹⁶ Nor did it have or envisage developing a fully fledged system of anti-discrimination law, encompassing the complete panoply of dimensions stemming from the right to equal treatment and covering the full range of discrimination grounds.¹⁷ It is equally obvious that the EU has come a long way since then, partly due to changes in the founding treaties that have enabled adoption of Equality Directives, partly due to the jurisprudence of the CJEU, interpreting the treaty and directive provisions and developing a ‘daring’ jurisprudence, as the principle of equal treatment is held to be a general principle of EU law.¹⁸

¹⁵ The demarcation of EU anti-discrimination law beyond traditional French and German obsession with *droits sociaux* actually invites left-wing critique which insists on a more re-distributionist and de-commodifying approach to empower the poor, immunising them from market dependency. For a prominent example of this critique, see A Somek, *Engingeering Equality: An Essay on European Anti-Discrimination Law* (Oxford, Oxford University Press, 2011).

¹⁶ See also S Smismans, ‘The European Union’s Fundamental Rights Myth’ (2010) 48 *Journal of Common Market Studies* 45; P Alston, *The EU and Human Rights* (Oxford, Oxford University Press, 1999).

¹⁷ See below for a more detailed account of the gradual expansion of grounds of discrimination in EU law. The absence of the prohibition of discrimination on grounds of race or ethnic origin when the Treaty of Rome created the European Economic Community in 1957 was only ‘natural’, given that half of its Member States (and a number of subsequently acceding) countries remained colonial empires at that time. About this aspect and the initially envisaged project of Eurafrique, see ‘The Euroafrican Relaunch: The Rome Treaty Negotiations, 1955–1957’ in P Hansen and S Jonsson, *The Unfolded History of European Integration and Colonialism* (London, Bloomsbury, 2010).

¹⁸ See also S Prechal, ‘Competence Creep and General Principles of Law’ (2010) 3 *Review of European Administrative Law* 20.

This general principle of equality embodies Aristotle's formula of equal treatment, namely that one should treat like things alike, and unlike things differently to the extent of the difference.¹⁹ This formula aptly captures the fact that, in some respects, one wants to be treated alike, while in others, one wants to be treated differently. In other words, sometimes differential treatment should be contested to vindicate the right to be treated the same, while in some circumstances being treated differently ensures that one's special characteristics are taken into account.²⁰ Regarding the former, it is essential to devise criteria to distinguish between legitimate differential treatment and prohibited discrimination. In this respect, EU law has famously chosen to develop different tracks for *direct* and *indirect* discrimination. Due to the different avenues of justification, the exact dividing line between these two types of discrimination remains of interest and is – frequently – the object of debate.²¹ Other topics of ongoing controversy include positive action, more particularly when (i.e. under what conditions) this type of differential treatment would be legitimate.²² Another related theme concerns the ambit of possible duties of differential treatment (i.e. those aimed at overcoming hurdles to the equal participation of persons that are, in some respects, different). The latter consideration is interlinked with questions about the implications of the prohibition of indirect discrimination and the scope of application of the duties of reasonable accommodation. Unsurprisingly, we return to the previously mentioned discussions in this edited volume, as it sets out to trace the achievements, flaws and future developments of EU anti-discrimination law since the landmark 2000 directives. Prior to embarking on that fascinating journey, this section takes stock of the history of EU equality law.

In outlining the evolution of EU anti-discrimination law, we broadly distinguish three phases²³ structured around the two defining moments of amendments to the founding treaties, namely the Treaty of Amsterdam (1997) and the Treaty of Lisbon (2007).

¹⁹ Aristotle, *Nicomachean Ethics*, V.3.

²⁰ See, *inter alia*, K Henrard, *Equal Rights versus Special Rights: Minority Protection and the Prohibition of Discrimination* (Luxembourg, Office for Official Publications of the European Communities, 2007). See also S Fredman, *Discrimination Law* (Oxford, Oxford University Press, 2011); A Numhauser-Henning, *Legal Perspectives on Equal Treatment and Non-discrimination* (The Hague, Kluwer, 2001).

²¹ See C Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Antwerpen, Intersentia, 2005).

²² See, *inter alia*, M Bell and L Waddington, 'Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity' (2011) 48 *Common Market Law Review* 1503; D Caruso, 'Limits of the Classic Method; Positive Action in the European Union after the New Equality Directives' (2003) 44 *Harvard International Law Journal* 331; C O'Conneide, 'Positive Action and the Limits of Existing Law' (2006) 13 *Maastricht Journal of European and Comparative Law* 351.

²³ Note that Ellis and Watson also identify three phases, while distinguishing as the second phase the period between 1987 and 1997 due to the multiple amendments of the EEC treaty during that time, as well as the significant stream of judgments produced by the CJEU (see also below on the central role of the Court in the development of EU anti-discrimination law) – see E Ellis and P Watson, *EU Anti-Discrimination Law*, 2nd edn (Oxford, Oxford University Press, 2012). For reasons that will be more fully explained later, we identify the three phases on the basis of the EEC Treaty, the Amsterdam Treaty and the Lisbon Treaty.

A. Phase 1 – Prior to the Treaty of Amsterdam (1958–1999)

Turning to the three phases that can be distinguished in the development of EU anti-discrimination law, the first phase begins with the adoption of the EEC Treaty in 1957 and its entry into force in 1958. From the start, the right to equal treatment played an instrumental role in the construction and development of the European (Economic) Community (EC).²⁴ The original rationale for including a prohibition of discrimination was the realisation of the single economic market.²⁵ This is clearly visible in the grounds of discrimination that were included in the original EEC Treaty, giving the EC competence to legislate on nationality and gender. Indeed, ‘nationality’ as prohibited grounds of discrimination (Article 12 EEC, now Article 18 TFEU) only concerns the citizenship of an EU Member State and is intended to eliminate the disadvantageous treatment of persons in one EU country holding the nationality of another EU country. In this respect, it has correctly been pointed out that the prohibition of discrimination on the basis of nationality was intended to support and realise the free movement rights of persons, services, goods and capital lying at the heart of the common market project.²⁶ Working, providing services or offering goods for sale should not be made more complicated for persons coming from another EU Member State as compared to the own nationals of a country. Otherwise, this would jeopardise the realisation of the common market, that being predicated on a free, unimpeded flow of persons, services, goods and capital (financial flows in payment for services, goods, etc.).²⁷ Similarly, the inclusion of an (at first sight) very limited version of gender discrimination prohibition, namely one confined to equal pay (Article 119 EEC, now Article 157 TFEU)²⁸ can also be understood from this ‘internal market’ perspective. It was simply meant to prevent competitive advantages for countries where women are not paid as well as men.²⁹

Since the Treaty of Rome, notwithstanding the humble status of the equality principle therein, the prohibition of gender discrimination has experienced

²⁴ See also, in relation to the EU, J Shaw, *Mainstreaming Equality in European Union Law and Policy Making* (Brussels, ENAR, 2004) 2: ‘in one guise or another, the concept of equality has always been central to the evolving legal order of the EU’.

²⁵ See also M Bell, *Anti-Discrimination Law and the European Union* (Oxford, Oxford University Press, 2002) 6–12.

²⁶ Ellis and Watson (n 23) 2.

²⁷ Art 39 EEC Treaty, now Art 45 TFEU.

²⁸ Also referenced in literature as Art 141 EEC Treaty in the Treaty nomenclature during the period between Maastricht (1992) and Lisbon (2007) Treaties.

²⁹ As Mark Bell highlights, ‘the French delegation had identified differences in national legislation on equal pay for men and women as being likely to disturb the balance of trade in the common market’. This reasoning was built on the premise that countries that do not protect equal pay for women can reduce their production costs due to their reliance on cheap female labour – see Bell (n 25) 8. See also S Roth (ed), *Gender Politics in the Expanding European Union: Mobilisation, Inclusion, Exclusion* (New York, Berghahn, 2008); D Schieck, ‘Broadening the Scope and the Norms of EU Gender Equality’ (2005) 12 *Maastricht Journal of European and Comparative Law* 427.

an impressive expansion. Few scholars could have imagined in the 1950s that the laconic provision of Article 119 EEC would pave the way to the far-reaching ambit of the prohibition of gender discrimination we know today, covering not only labour law and social rights, but also translating into the regulation of sex work, the prohibition of domestic violence and of human trafficking.³⁰ All the principal EU institutions (the CJEU, the Council, the Commission and the Parliament) have at various times and to varying degrees taken part in this development.³¹

The epoch of the 1970s was crucial for anti-discrimination law, as this was the period when the CJEU, through several preliminary rulings, provided effective protection against discrimination, not only on grounds of nationality, but also on grounds of gender. Through these preliminary rulings, the Court introduced (and applied) direct effect for several Treaty articles that were clearly directed at Member States, thus allowing action against those that had not managed or did not have the political will to turn these into fully fledged legislative programmes before the end of the transitional period on 31 December 1969.³² In the process, the Court fostered the emancipation of EU gender equality. That legal space has been successfully mobilised in the advocacy of feminist cause litigators and social movements.³³ On the basis of the direct effect of Article 119 EEC, the Court has since developed its doctrine of sex equality as a general principle of EU law.³⁴

Over the last 30 years, the EU has passed nine directives on gender equality which closely reflect the CJEU's judgments on the topic.³⁵ The activist Luxembourg

³⁰ See U Belavusau, 'EU Sexual Citizenship: Sex Beyond the Internal Market' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge, Cambridge University Press, 2017) 417–442.

³¹ *ibid.*

³² M Rasmussen, 'How to Enforce European law? A New History of the Battle over the Direct Effect of Directives' (2017) 23 *European Law Journal* 290.

³³ One of the earliest examples is Elaine Vogel-Polsky, the lawyer who litigated the landmark *Defrenne* cases (1971, 1976 and 1978). Case 80/70 *Defrenne I* EU:C:1971:55; Case 43/75 *Defrenne II* EU:C:1976:56; Case 149/77 *Defrenne III* EU:C:1978:130. The first equality case was adjudicated in Luxembourg in the 1970s – Case 43/75 *Defrenne II*, while primary law did not offer any anti-discrimination provisions apart from Art 141 EEC which maintained that men and women should enjoy equal pay for equal work. Vogel-Polsky, who used the *Defrenne* saga to mainstream gender non-discrimination in EU law, supported Ms *Defrenne*, the plaintiff employed as a flight attendant. She was essentially the first to question whether Art 119 EEC had direct effect. See E Vogel-Polsky, 'L'article 119 du traité de Rome peut-il être considéré comme self-exécutant?' [1967] *Journal des tribunaux* 233. About Vogel-Polsky, see the book by E Gubin and C Jacques, *Eliane Vogel-Polsky* (Brussels, Institute for the Equality of Women and Men, 2007).

³⁴ In this respect, the jurisprudence of the Court in the follow-up phases described below is different, since it could not rely on the direct effect of Article 19 TFEU (Art 13 TEC), which was designed by the Amsterdam Treaty as clearly requiring the adoption of secondary legislation to be effective. Thus, the Equality Directives 2000 are central in understanding the structure and development of EU anti-discrimination law beyond gender.

³⁵ Of particular relevance (and in part inspirational for 2000 Equality Directives) are: Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19; Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access

Court has extended the primary law provision by interpreting the gender aspects of equal pay to include pension and social guarantees for men and women, as well as regulations regarding pregnancy and child-raising.³⁶ Arguably, the Court's activist interpretation in this period culminated in its rulings on transsexuals. Indeed, in the 1996 judgment *P v S*,³⁷ the Court interpreted the provision on the equality of men and women as applying to cases of gender reassignment.³⁸

to employment, vocational training and promotion, and working conditions [1976] OJ L39/40; Council Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1978] OJ L6/24; Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L225/40; Council Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood [1986] OJ L359/56; Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) [1992] OJ L348/1; Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/4; Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex [1997] OJ L14/6; Directive 2002/73/EC of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Text with EEA relevance) [2002] OJ L269/15 (substantially amending the 1976 Equal Treatment Directive adding definitions of indirect discrimination, harassment and sexual harassment and requiring Member States to set up equality bodies to promote, analyse, monitor and support equal treatment between women and men); Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37; Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 (Equal Treatment Directive) (to enhance the transparency, clarity and coherence of the law, this directive was adopted in 2006, putting the existing provisions on equal pay, occupational schemes and 'the burden of proof' into a single text).

³⁶ About case law regarding pregnancy and child-raising, see U Belavusau, 'From Lëtzebuerg to Luxembourg: EU Law, Non-Discrimination and Pregnancy' (2010) 2 *European Law Reporter* 45. The CJEU's progressive stance on gender equality during this phase seems to echo a corresponding liberalisation at the European Court of Human Rights, making European law an important arena for the refinement of gender citizenship: S Besson, 'Gender Discrimination under EU and ECHR Law' (2008) 8 *Human Rights Law Review* 647; D Martin, 'Strasbourg, Luxembourg et la discrimination: influences croisées ou jurisprudences sous influence?' (2007) 69 *Revue Trimestrielle des Droits de l'Homme* 132.

³⁷ Case C-13/94 *P v S* EU:C:1996:170. Also pertinent in this context is Case C-117/01 *KB* EU:C:2004:7.

³⁸ Discrimination of transsexuals since then has been treated as an aspect of gender equality, as incorporated into Directive 2006/54/EC, Recital 3 Preamble: 'The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.' In June 2010, the European Parliament adopted a resolution (the 'Figueiredo Report') calling for an inclusive EU gender equality strategy, specifically addressing issues linked to gender identity – I Figueiredo, European Parliament, 'Report on the assessment of the results of the 2006–2010 Roadmap for equality between women and men, and forward-looking recommendations' (2009/2242 (INI)).

B. Phase Two: The Treaty of Amsterdam until Lisbon (1999–2009)

The second phase was kick-started with the Treaty of Amsterdam (signed in 1997, entered into force in 1999). This was, in at least two ways, extremely important for the development of EU anti-discrimination law. First of all, gender equality was mainstreamed, with Article 3(2) TEC (now Article 8 TFEU) stipulating that in all of its activities, the European Community ‘shall aim to eliminate inequalities, and to promote equality, between men and women.’³⁹ This significantly strengthened the prohibition of discrimination on the basis of gender as it raised constant awareness of potential discriminatory effects policies and legislation may have for women.

Secondly, the Treaty finally multiplied the protected grounds of discrimination, while establishing EU legislative competence in relation to five new grounds – race and ethnicity, religion, disability, age and sexual orientation.⁴⁰ This extension in protected grounds clearly implied a move for EU anti-discrimination law beyond the common market rationale towards a more social ethos.⁴¹ In fact, the extension of grounds covering prohibited discrimination also signifies the importance of the right to equal treatment in securing human dignity.⁴² This shift, in turn, linked perfectly with the more central role of human rights in the EU, clearly articulated previously by the Treaty of Maastricht (1992) and figuring as a true core of the EU in the Treaty of Amsterdam (1997), thus building on the CJEU’s

³⁹ Cf. Original Art 119 EEC: ‘Men and women should enjoy equal pay for equal work.’ Art 157 TFEU (original Art 119 EEC) is now incomparably broader than Art 19 TFEU which has given rise to the 2000 Equality Directives. Art 157 TFEU states:

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

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.
3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

⁴⁰ Art 13 TEC, now Art 19 TFEU.

⁴¹ This is one of the central themes in the monograph by Bell, *Anti-Discrimination Law* (n 25).

⁴² In this period, the CJEU only rarely referred to human dignity as underlying the right to equal treatment, e.g. in Case C-13/94 *P v S* (n 37) para 22.

recognition that respect for human rights amounted to a general principle of EU law.⁴³ Furthermore, Article 19 TFEU (introducing new grounds of equality beyond gender) found its domicile in Part Two of the Treaty, entitled ‘Non-Discrimination and Citizenship of the Union.’ In this respect, the project of EU anti-discrimination law is joined with the wider vision of citizenship formation in the Union, with equality becoming a distinctive feature of EU citizenship not only horizontally amongst nationals of Member States but also vertically amongst different groups of citizens inside Member States.⁴⁴

The coming into force of the Treaty of Amsterdam in 1999 was quickly followed by the adoption of two watershed directives, the first focusing on race (Race Equality Directive, RED), the second on the other four new grounds (Framework Equality Directive, FED) introduced in Article 13 TEC (now Article 19 TFEU). The impressively speedy and smooth adoption of these instruments has been hailed in the literature.⁴⁵ It can be attributed to the combination of a certain post-Amsterdam optimism regarding equality matters in the Union amongst then centre-left elites, on the one hand, and the willingness to counteract xenophobia following the rise of radical right in the Austrian elections, on the other.⁴⁶ This is also the epoch when a separate mechanism was introduced in Article 7 TEU, aimed at ensuring, through early warning and sanctioning, that Member States respect the fundamental values of the EU, including the rule of law.⁴⁷ The speedy adoption of these Equality Directives was equally a pragmatic necessity in light of the impending Eastern enlargement. On the one hand, the adoption of these directives was expected to become more difficult in a Council of Ministers comprising many more Member States, several of which with post-communist baggage (e.g. CEE countries) or conservative elites (e.g. Cyprus or Malta). On the other hand, the swift adoption of these directives would make them part of the Union equality *acquis*, with which the acceding states would have to comply by virtue of the Copenhagen conditionality.⁴⁸ Nonetheless, Eastern European States were not

⁴³ About the principle of equality, see B de Witte, ‘From a Common Principle of Equality to European Antidiscrimination Law’ (2010) 53 *American Behavioral Scientist* 1715. Interestingly, the follow-up Equality Directives of 2000 refer to Art 6 TEU as inspiration in their Preambles, see eg Recital (2) in the Preamble to Race Equality Directive.

⁴⁴ See also B de Witte, ‘The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law’ (2009) 13 *Citizenship Studies* 515.

⁴⁵ See e.g. B de Witte, ‘National Equality Institutions and the Domestication of EU Non-Discrimination Law’ (2011) 18 *Maastricht Journal of European and Comparative Law* 157, 161; R Evans Case and TE Givens, ‘Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive’ (2010) 48 *Journal of Common Market Studies* 221; Bell (n 25).

⁴⁶ In 2000, Jörg Haider’s Freedom Party unexpectedly became second after the Social Democrats (SPÖ) in the Austrian parliamentary elections.

⁴⁷ W Sadurski, ‘Adding Bite to a Bark: The Story of Article 7, EU Enlargement and Jörg Haider’ (2010) 16 *Columbia Journal of European Law* 385.

⁴⁸ The correctness of this political prediction was later confirmed by the vivid resistance of a number of new Member States, many of whom have delayed transposition or have faced significant criticism regarding the way they have transposed Equality Directives. See Havelková (n 9).

the only ones delaying and resisting the new machinery of EU anti-discrimination law.⁴⁹ German legal elites, often a driving force behind EU federalism, gradually became sceptical too, especially in the wake of the CJEU's jurisprudence on age discrimination.⁵⁰

The ensuing case law during this second phase was not as abundant as expected for several of the five additional grounds. Nevertheless, this phase did generate some landmark judgments,⁵¹ such as *Mangold* (2005),⁵² recognising the principle of non-discrimination on grounds of age as a general principle of Community law and *Coleman* (2008),⁵³ establishing 'discrimination by association', thus further extending the reach of EU anti-discrimination law. The first – for many years also the only – race equality judgment of the Court of Justice, *Feryn* (2008),⁵⁴ was also decided at the very end of this period along with *Maruko* (2008),⁵⁵ concerning the grounds of sexuality in the Framework Equality Directive.

C. Phase 3: Lisbon and Beyond (2009 to Present)

The Lisbon Treaty (signed in 2007, entered into force in 2009) unfolded the third phase of EU anti-discrimination law, giving an even stronger central position to the principles of equality and non-discrimination.⁵⁶ In addition to several other prominent references to equality in the core Treaty provisions,⁵⁷ Article 10 TFEU enshrines a general obligation to mainstream the right to equal treatment in relation to all grounds.⁵⁸ Albeit programmatic, this central and outspoken position for the right to equal treatment within EU law goes hand-in-hand with a stronger

⁴⁹ In 2007, the Commission was pursuing legal proceedings against no fewer than 14 Member States for belated or incomplete implementation of RED and against 11 Member States related to the transposition of FED.

⁵⁰ In this regard, scholars cite an emblematic statement by H Ladeur, the Dean of Law Faculty at Hamburg University, who suggested '[t]hat [the Anti-Discrimination Law] shall be integrated into the [German Civil Code] with its dear systematic liberal approach, one of the masterpieces of European legal culture, has to be regarded as an act of legal vandalism' (see TE Givens and R Evans *Case, Legislating Equality* (n 10) 92). See also below on Germany's resistance to the Commission proposal for a new equality directive on the same grounds as Directive 2000/78.

⁵¹ Sometimes these pioneering judgments were even called 'explosive' (see T Uyen Do, 'A Case Odyssey into 10 Years of Anti-Discrimination Law' (2011) 12 *European Anti-Discrimination Law Review* 12).

⁵² Case C-144/04 *Werner Mangold v Rudiger Helm* EU:C:2005:709.

⁵³ Case C-303/06 *Coleman v Attridge Law and Steve Law* EU:C:2008:415.

⁵⁴ Case C-54/07 *Centrum voor de Gelijkheid van Kansen en Racismebestrijding v firma Feryn BV* EU:C:2008:397.

⁵⁵ Case C-267/06 *Maruko v Versorgungsanstalt der deutschen buhnen* EU:C:2008:179.

⁵⁶ Ellis and Watson (n 23) 13.

⁵⁷ Arts 2, 3, 4, 9 and 21 TEU and Arts 8, 153(1) and 157(4) TFEU. See also R Zahn, *The EU Lisbon Treaty: What Implications for Anti-Racism?* (Brussels, ENAR, 2009) 11.

⁵⁸ Art 10 TFEU has been called 'the most significant commitment to promoting equality outside the framework of the rights-based model': D Chalmers, G Davies and G Monti, *European Union Law: Texts and Materials*, (Cambridge, Cambridge University Press, 2014) 618.

position for human rights within the EU. Indeed, the Lisbon Treaty made the EU Charter of Fundamental Rights (Charter, CFR)⁵⁹ part of primary EU law and thus legally binding.⁶⁰

It should be acknowledged, however, that the Charter already had a certain influence on the development of EU law prior to the Lisbon Treaty,⁶¹ even though it was initially merely invoked as additional support, affirming rights already enshrined in EU law through general principles.⁶² While the influence of the Charter on the development of EU (human rights) law increased steadily over time,⁶³ since Lisbon, the instrument has been exponentially relied upon by the CJEU, also in more bold ways.⁶⁴ Even if Article 6(1) TEU underscores that the Charter's status as primary law will not imply an extension of the competences of the Union as defined in the treaties, it has aptly been pointed out that the Charter's status will breathe new life into the EU competences by focusing on the rights of the individual with regard to all EU policies.⁶⁵ An entire chapter (III) of the Charter is, in fact, dedicated to 'equality' and covers broader anti-discrimination law, including a general provision on equality before the law (Article 20 CFR) as well as a provision obliging the Union to respect cultural, religious and linguistic diversity (Article 22 CFR).

It remains to be seen how the CJEU will use the non-discrimination clause enshrined in Article 21 CFR, since this prohibits 'any discrimination based on *any ground, such as sex, race, colour, ethnic or social origin, genetic features, language,*

⁵⁹ Charter of Fundamental Rights of the European Union [2016] OJ C202/2.

⁶⁰ Art 6(1) TEU.

⁶¹ It was indeed almost immediately picked up by Advocates General in their opinions (e.g. Case C-173/99 *BECTU v Secretary of State for Trade and Industry* EU:C:2001:81, *Opinion of AG Tizzano*, paras 27–28), swiftly followed by the Court of First Instance (Case T-54/99 *Max Mobil Telekommunikation Service GmbH v Commission* EU:T:2002:20, paras 48 and 57) and, from 2006 onwards, also by the CJEU, more particularly since Case C-540/03 *European Parliament v Council* EU:C:2006:429. See also Case C-432/05 *Unibet* EU:C:2007:163, para 37; Case C-438/05 *Viking Line* EU:C:2007:772 and the discussion in S Peers, 'The EU Charter of Rights and the Right to Equality' (2011) 11 *ERA Forum* 571. The fact that the Community legislator itself had referred to the Charter in the Directive at issue in the latter case presumably helped persuade the Court to similarly acknowledge the Charter's existence. Indeed, the Court highlighted that 'while the Charter is not a legally binding instrument, the Community legislator did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter' – Case C-540/03 *European Parliament v Council*, para 38.

⁶² Peers (n 61) 572. See also EF Defeis, 'The Treaty of Lisbon and Human Rights' (2010) 16 *ILSA Journal of International & Comparative Law* 416.

⁶³ Defeis (n 62) 416.

⁶⁴ Judge Safjan notes that the Charter is relied upon to 'influence the process of interpretation, of determination of the very content of particular norms, their extent and legal consequences, and thus they provide for the enlargement of the field of application of the European rules in the national legal orders'. See M Safjan, 'Fields of Application of the Charter of Fundamental Rights and Constitutional Dialogues in the European Union', *EUI LAW*, Centre for Judicial Cooperation, DL, 2014/2, 2.

⁶⁵ F Ferraro and J Carmona, *Fundamental Rights in the EU: The Role of the Charter after the Lisbon Treaty* (European Parliamentary Research Service, 2015) 3.

religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.’ While this opens the door for any ground of discrimination, several grounds of interest are explicitly added in Article 21 of the Charter (in comparison to the already-existing palette of grounds outlined in TEU and TFEU), such as ‘language’, ‘membership of a national minority’, and ‘genetic features’. While the treaties may not contain provisions for legislating over these additional grounds, Article 51 CFR does stipulate that the principles set out in the Charter should guide the development of EU policies and the implementation of these policies by national authorities.⁶⁶ Hence, difficult questions may arise before the CJEU when EU legislation and policies (and/or the national implementation thereof) have disproportionate effects on groups defined on these additional grounds of discrimination. In this respect, questions surrounding the status of third country nationals may (re)surface.

At the level of secondary equality legislation, the Union in this third phase has so far failed to adopt an updated directive proposed by the Commission in 2008 – the Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation.⁶⁷ This proposal aims to extend the material scope of application of the prohibition of discrimination to the fields of education, social protection (including health-care and social security), social advantages and access to goods and services (including housing), thus remedying the disparities in scope of application of the prohibition of discrimination on grounds of race (and gender). The envisaged directive also for the first time attempted to introduce specific provisions about multiple discrimination and to extend the prohibition of discrimination to transport.

Strikingly, and unlike the smoothly adopted 2000 Directives, this Commission proposal has been burdened by several unsuccessful negotiation rounds, reflecting a changed political climate. The changing wind has brought vivid resistance from several Member States with a range of concerns.⁶⁸ In comparison with the 2000 Directives, the negotiating parties have grown exponentially in numbers, proportionately augmenting the potential for disagreement. The rise

⁶⁶ For an analysis of what the phrase ‘implementing Union law’ in Art 51 CFR means, see eg G de Búrca, ‘The Drafting of the European Union Charter of Fundamental Rights’ (2001) 26 *European Law Review* 136.

⁶⁷ Commission of the European Communities, Proposal for a Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, COM(2008) 426 final; Commission staff working document accompanying the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Summary of the impact assessment (COM(2008) 426 final), SEC(2008) 2180.

⁶⁸ M Bell, ‘The Principle of Equal Treatment: Widening and Deepening’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011) 620.

in right-wing governments,⁶⁹ as opposed to the predominance of central-left political forces at the turn of the century, further explains the increased resistance against progressive expansions of the anti-discrimination norm. Some Member States, including such influential players as Germany, view the proposed directive as an encroachment on national competences, also with a view to subsidiarity considerations.⁷⁰ Particular resistance is noted among certain Member States regarding the inclusion of social protection and education in the scope *ratione materiae* of the proposed directive.⁷¹ Given the requirement of unanimity in the Council for the adoption of this directive under Article 19 TFEU, actual progress in this respect seems indiscernible at the moment.

Grounds	Phase One (1958–1999)	Phase Two (1999–2009)	Phase Three (2009–...)
Gender Equality	<p>(a) Art 119 EEC (a fairly general single provision)</p> <p>(b) Secondary legislation (examples of directives)</p> <p>(c) Active jurisprudence of the Court of Justice on gender equality, based on the extensive interpretation of the general principle of equality</p>	<p>(a) Art 141 TEC (expansion of the provision)</p> <p>(b) Secondary legislation (examples of directives)</p> <p>(c) CJEU jurisprudence</p>	<p>(a) Art 157 TFEU (Parliament receives a role in adoption of the secondary legislation)</p> <p>(b) Charter of Fundamental Rights receiving status of primarily law (Art 23 equality between men and women)</p> <p>(c) Secondary legislation (examples of directives and regulations currently at place)</p> <p>(d) CJEU jurisprudence</p>

⁶⁹ See, *inter alia*, A Chakelian, 'Rise of the Nationalists: A Guide to Europe's Far-right Parties' (New Statesman, 8 March 2017). Available at: www.newstatesman.com/world/europe/2017/03/rise-nationalists-guide-europe-s-far-right-parties.

⁷⁰ Presidency of the Council of the EU, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – Progress Report, 14867/17 (24 November 2017) 2–4. Some of the states raising concerns have good track records in terms of anti-discrimination law (and human rights more generally), such as Germany. See also above about initial optimism and subsequent disillusiones of such states with regard to the 2000 Directives.

⁷¹ See also M Bell, 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive' (2009) 3 *Equal Rights Review* 7, 11–13.

Grounds	Phase One (1958–1999)	Phase Two (1999–2009)	Phase Three (2009–...)
Race and ethnicity, religion, sexual orientation, age, disability	(a) No provisions in primary law (b) CJEU case law on transsexuals (c) Failure to frame sexual orientation as a part of gender equality (d) Episodic reference to race, religion and other grounds	(a) Art 13 TEC (b) Adoption of the two key Equality Directives in 2000 (c) First jurisprudence of the Court regarding 2000 Directives (C-144/04 <i>Mangold</i> 2005, C-54/07 <i>Feryn</i> 2008, etc.)	(a) Art 19 TFEU (b) Charter of Fundamental Rights receiving status of primarily law (Chapter III on equality and other relevant provisions) (c) EU becomes party to the UN Convention on the Rights of Persons with Disabilities (d) Intensification of the Court’s jurisprudence on Equality Directives 2000
Other grounds (eg linguistic rights, intersection between anti-discrimination law and rights of EU citizens, multiple discrimination)	(a) CJEU jurisprudence regarding right to a name (C-168/91 <i>Konstantinidis</i> 1992) (b) Language rights of EU citizens	(a) Permissive stage in CJEU jurisprudence regarding right to a name (C-148/02 <i>Garcia Avello</i> 2003) (b) Language rights of EU citizens	(a) Charter of Fundamental Rights receiving status of primarily law (Art 1 on dignity and several other grounds added, eg ‘language’, ‘membership of a national minority’, ‘property’ and ‘political or any other opinion’ and ‘genetic features’) (b) Restrictive stage in CJEU jurisprudence regarding right to a name (C-208/09 <i>Von Wittgenstein</i> 2010, C-391/09 <i>Wardyn</i> 2011) ⁷²

⁷² About ‘permissive’ and ‘restrictive’ stages in the Court’s jurisprudence about right to name, see chapter by D Kochenov in the present volume.

D. Overarching Development Trends

Throughout the three outlined phases, a steady growth of commitment to the principle of equality can be detected.⁷³ As highlighted above, a constant feature underpinning these three phases reveals the central influence of the CJEU's jurisprudence on the development of EU non-discrimination law. Indeed, Treaty provisions and secondary legislation are often vague, and contain ill-defined concepts, thus requiring clarification through jurisprudence. In this respect, it is important to acknowledge that EU anti-discrimination law projects a somewhat thin line between interpretation and application, on the one hand, and law-making, on the other.⁷⁴

In the end, it is jurisprudence, and ultimately the CJEU's case law, that demarcates the reach of these concepts and rules, and also the level of protection that is provided against unjustified differential treatment.⁷⁵ The CJEU is known for its teleological interpretation, aimed at effective protection against discrimination.⁷⁶ The CJEU's determined and sustained approach in this respect is, *inter alia*, visible in its jurisprudence on non-discrimination concepts, its move towards substantive equality (beyond mere formal equality), particularly through the development of the notion of indirect discrimination and its softening approach as regards positive action measures.⁷⁷ Similarly, the Court's recognition of the right to equal treatment and the prohibition of discrimination as general principled of EU law,⁷⁸ and – last but not least – its case law on procedural requirements and remedies merit highlighting here.⁷⁹

The Court has often underscored that since equality of treatment is a fundamental objective of both Treaty provisions and implementing legislation, a broad purposeful approach is required.⁸⁰ A prominent example of the Court's embrace

⁷³ Ellis and Watson (n 23) 495.

⁷⁴ See, *inter alia*, A Van Bogdandy and I Venzke, 'On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority' ACIL Research Paper 2012/10, 9 and 19; A Guzman, 'The Consent Problem in International Law', Berkeley Program in Law and Economics Working Paper Series 2011, 55. See also V Tzevelekos, 'Juris Dicere: Custom as a Matrix, Custom as a Norm and the Role of Judges and their Ideology in Custom Making' in NM Rajkovic, T Aalberts and T Gammeltoft-Hansen (eds), *Power of Legality: Practices of International Law and their Politics* (Cambridge, Cambridge University Press, 2011) 191, 206.

⁷⁵ See, *inter alia*, Ellis and Watson (n 23) 501–2.

⁷⁶ *ibid.*, 498.

⁷⁷ Case C-96/80 *JP Jenkins v Kingsgate (Clothing Productions) Ltd* EU:C:1981:80; Case C-170/84 *Bilka – Kaufhaus GmbH v Karin Weber von Hartz* EU:C:1986:204; Case C-127/92 *Enderby v Frenchay Health Authority and Secretary of State for Health* EU:C:1993:859. Regarding the CJEU's softening approach towards positive action see, *inter alia*, Case C-476/99 *H Lommers v Minister van Landbouw Natuurbeheer en Visserij* EU:C:2002:183.

⁷⁸ Joined cases 117/76 and 16/77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co v Hauptzollamt Hamburg-St Annen*; *Diamalt AG v Hauptzollamt Itzehoe* EU:C:1977:160; Case C-283/83 *Firma A Racke v Hauptzollamt Mainz* EU:C:1984:344; Case C-15/95 *EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux* EU:C:1997:196; Case C-292/97 *Kjell Karlson and Others* EU:C:2000:202.

⁷⁹ See, *inter alia*, Joined cases C-231/06 to C-233/06 *Office nationale des pensions* EU:C:2007:373; Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* EU:C:2013:275, para 61.

⁸⁰ See, *inter alia*, Joined cases C-75/82 and C-117/82 *Razzouk and Beydoun v Commission* EU:C:1984:116, para 16. See also Case C-147/80 *Römer v Freie und Hansestadt Hamburg* EU:C:2011:286;

of substantive equality is its development of the concept of *indirect discrimination*, thus significantly enlarging the reach of the prohibition of discrimination.⁸¹ The Court's judgments in *Mangold* (2005)⁸² that has sparked controversy in certain circles in Germany,⁸³ and more recently in *Test-Achats* (2011),⁸⁴ as well as the daring way in which it employs the right to equal treatment as a general principle of EU law, shows a judiciary set on protecting the right to equal treatment as best it can.⁸⁵ This approach is similarly confirmed by the consistent jurisprudence on a restrictive, rigorous interpretation of (provisions concerning) exceptions and derogations to the non-discrimination principle. Equally essential is how the Court clarifies the sharing of the burden of proof in discrimination cases, thus effectuating the reduction of the (traditionally often insurmountable) burden of proof on behalf of the victim.⁸⁶ Importantly, also in light of the development of a coherent body of EU anti-discrimination law, the CJEU has taken care to use common interpretation techniques and to treat common issues consistently across the distinctive grounds of discrimination.⁸⁷ The following section will elaborate upon several of the related 'major trends and themes'.

III. Major Trends and Themes since the Adoption of the 2000 Equality Directives

A. Disproportionality amongst Grounds of Discrimination in CJEU Jurisprudence

Our assessment of the major trends and themes emerging since the adoption of the 2000 Equality Directives is based foremost on the activities of the Court of

Case C-150/85 *Jacqueline Drake v Chief Adjudication Officer* EU:C:1986:257; Case C-303/06 *Coleman* (n 53). See also C O'Connell, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground'. (2015) 22 *Maastricht Journal of European and Comparative Law* 370, 371.

⁸¹ See, *inter alia*, Case C-237/94 *O'Flynn v Adjudication Officer* EU:C:1996:206; Case C-96/80 *Jenkins* (n 77).

⁸² Case C-144/04 *Mangold* (n 52). See also the chapters by R Horton and B ter Haar in the present volume.

⁸³ See, *inter alia*, IP Berlin, 'Mangold v Helm – ECJ Case C-144/04: Did the Court Gets it Wrong?', presentation at the 9th ECLN-Conference, EUI Florence, 18–19 November 2013; L Waddington, 'Recent Developments and the Non-Discrimination Directives: Mangold and More' (2006) 13 *Maastricht Journal of European and Comparative Law* 365. See also T Čápet, 'The Advocate General: Bringing Clarity to CJEU Decisions? A Case-Study of Mangold and Küçükdeveci' (2012) 14 *Cambridge Yearbook of European Legal Studies* 563.

⁸⁴ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* EU:C:2011:100.

⁸⁵ *Ellis and Watson* (n 23) 508.

⁸⁶ See the chapter by K Henrard in the present volume.

⁸⁷ This commonality in approach across the distinctive grounds of discrimination allows for the identification and discussion of 'key concepts in EU anti-discrimination law', such as direct and indirect discrimination or burden of proof, as is reflected in textbooks on EU anti-discrimination law, eg *Ellis and Watson* (n 23) Chapter 4.

Justice, which – as has been shown in the historical exploration above – has traditionally played a most activist role in sustaining the rise of its anti-discrimination law. Yet such a court-centric perspective suffers from a natural limitation. Before drawing a wider picture of the post-2000 EU anti-discrimination law, we have to keep this limitation in mind: namely that the number of judgments delivered by the CJEU with regard to the five ‘new’ equality grounds – added by Article 19 TFEU and the 2000 Equality Directives – has been anything but equal. Gender equality still remains the most *judicialised* aspect of equality in Luxembourg, often setting a comparative paradigm for dealing with the other five non-discrimination grounds. In contrast, from 2000 until 2017, the Court of Justice produced a substantive number of decisions regarding discrimination on the grounds of age and disability, much less so with regard to sexual orientation, and little with regard to race and religion.⁸⁸

Summing up this account of the Court’s jurisprudence by the beginning of 2018, we can herald only two fully fledged judgments of the CJEU concerning the grounds of race and ethnicity,⁸⁹ and two parallel judgments decided on the grounds of religion.⁹⁰ Apart from the sensitive nature of these areas for Member States, the scarce number of judgments can be attributed to an array of factors, including the low awareness of discriminated plaintiffs belonging to ethnic and religious minorities about their material and procedural rights under EU law, as well as an often multiple nature of experienced discrimination (e.g. combination of gender and race).⁹¹ Furthermore, the distinction between ethnic and religious discrimination is not always crystal clear, while the material scope of the former prohibition is much wider than simply the field of employment which the Framework Equality Directive prescribes for the latter. Finally, more litigation could be expected with the rise and empowerment of equality bodies to support race and religion cases in the future, as will be explained below.

B. Material and Personal Scope of Equality Directives

While the 2000 Directives contain several common provisions, they differ markedly in terms of their scope *ratione materiae*. The Framework Equality Directive is

⁸⁸ On the alleged hierarchy embedded in the set-up of the EU Equality Directive, see also E Howard, ‘The Case for a Considered Hierarchy of Discrimination Grounds in EU law’ (2006) 13 *Maastricht Journal of European and Comparative Law* 420. See also L Waddington and M Bell, ‘More Equal than Others: Distinguishing European Union Equality Directives’ (2011) 38 *Common Market Law Review* 587.

⁸⁹ Case C-54/07 *Feryn* (n 54) and Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* EU:C:2015:480.

⁹⁰ Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* EU:C:2017:203 and Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l’homme (ADDDH) v Micropole SA* EU:C:2017:204.

⁹¹ On this point, see more generally the chapter by R Xenidis in the present volume.

confined to the employment sphere, while the Race Equality Directive also covers social protection, including social security and healthcare, education and access to goods and services which are available to the public, such as housing.⁹² The directives are further constrained as they do not cover the prohibition of discrimination on the basis of nationality.⁹³ The FED furthermore includes an exception regarding religious occupational requirements for religious bodies.⁹⁴

On the one hand, it remains an enigma that RED, while enjoying such a rich material scope, has eventually led to only two cases decided by the Court of Justice in seventeen years.⁹⁵ On the other hand, the limited scope of FED partially explains the failure of the Court to extend the application of EU anti-discrimination law to its case law on name-spelling as part of the language rights of ethnic minorities. This jurisprudence was regarded by the CJEU as exclusively part and parcel of discrimination based on nationality (tantamount to citizenship of EU Member States), instead of as ethnic discrimination. In the absence of a formal possibility to advance RED in the 'nationality' context, the Court took an unfortunate restrictive turn in its interpretation of language rights,⁹⁶ satisfying the political appetites of local nationalism, and shielded by the esoteric protection of national identity embedded in post-Lisbon primary EU law.⁹⁷ Likewise, the Court has delivered a highly disputable judgment with regard to blood donation by gay individuals, which justified its restriction in a number of Member States,⁹⁸ without a *de jure* possibility to advance FED in this medical context.⁹⁹

⁹² For the scope of application, see Art 3 of the Race Equality Directive (compare to the modest scope embedded in Art 3 of the Framework Equality Directive).

⁹³ Art 3(2) RED stipulates that it does not cover difference of treatment based on nationality.

⁹⁴ Art 4(2) FED stipulates that '[...] this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.

⁹⁵ In part, this might be attributed to the procedural path-dependence. On the continent, race discrimination traditionally pertains to the field of criminal law rather than civil or anti-discrimination regulation as in the USA. For this point, in the context of the comparative study on US-French law, see JC Suk, 'Procedural Path Dependence: Discrimination and the Civil-Criminal Divide' (2008) 85 *Washington University Law Review* 1315.

⁹⁶ Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* EU:C:2010:806; Case C-391/09 *Malgożata Runevič-Vardyn and Lukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* EU:C:2011:29. For a detailed analysis of this stream of cases, critiquing the Court for playing the tune of nationalism, see chapter by D Kochenov in the present volume.

⁹⁷ Art 4(2) TEU obliges EU to respect Member States' 'national identities, inherited in their fundamental structures'. For a comment on this inconsistent CJEU jurisprudence on the right to a name, see A Lazowski, E Dagilyte, P Stasinopoulos, 'The Importance of Being Earnest: Spelling of Names, EU Citizenship and Fundamental Rights' (2015) 11 *Croatian Yearbook of European Law and Policy* 1.

⁹⁸ Case C-528/13 *Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang* EU:C:2015:288.

⁹⁹ Not only does the FED not cover healthcare, Art 168(7) TFEU provides that 'Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care'. For critique of the judgment, see U Belavusau, 'Towards EU Sexual Risk Regulation: Restrictions on Blood Donation as Infringement of Active Citizenship' (2016) 4 *European Journal of Risk Regulation* 802.

In contrast to the material scope, the *ratione personae* is similar between RED and FED, and covers both public and private sectors, including individuals and public bodies, such as state authorities, companies and social partners.¹⁰⁰ More specifically, EU anti-discrimination law envisages an implementation possibility through social partners, provided they take the necessary steps to ensure that they are at all times able to guarantee the result required by the FED.¹⁰¹ Accordingly, EU legislation forces some states to reconsider their traditional view that fundamental rights should be binding and enforceable only against state authorities and not against private bodies.¹⁰²

Geographically, the Equality Directives cover all current (pre-Brexit) 28 Member States of the Union.¹⁰³ Depending on the country concerned, RED and FED may be indirectly relevant beyond the EU, in the EFTA zone.¹⁰⁴ Although the 2000 Directives are not formally incorporated into the EEA Agreement due to the lack of a legal basis, there are signs that those states are often willing to adopt similar legislation so as to be in line with the EU mainstream.¹⁰⁵ In the future, these Equality Directives will also remain as a guiding force for the acceding Member States in satisfying the Copenhagen criteria of observing fundamental rights and equality.

C. Proceduralisation of EU Equality Law

One way in which the 2000 Equality Directives have undoubtedly advanced EU anti-discrimination law pertains to the new procedural set-up of this field. This is the area where one can observe a rise in cause lawyering, learning from the experience of the US Civil Rights Act 1964 and its advancement by the Equal Employment Opportunity Commission in the United States.¹⁰⁶ In a somewhat similar mode, the Equality Directives gave *locus standi* for organisations to

¹⁰⁰ See e.g. Art 3(1) FED.

¹⁰¹ See Preamble (36) FED. The Court has delivered important and ardently discussed jurisprudence regarding the rights of trade unions in advancing their claims in Case C-341/05 *Laval un Partneri* EU:C:2007:809 and Case C-438/05 *Viking* (n 61). For analysis, see U Belavusau, 'The Case of Laval in the Context of the Post-Enlargement EC Law Development' (2008) 9 *German Law Journal* 2279.

¹⁰² See B de Witte, 'The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law' (2009) 13 *Citizenship Studies* 515. According to De Witte, the European-driven 'horizontalisation' of anti-discrimination law is a major challenge for many national legal systems and contributes to the emergence of new, but not uncontroversial, conceptions of inclusive citizenship.

¹⁰³ However, Art 15 FED makes a reservation for Northern Ireland, where positive discrimination is allowed to tackle the under-representation of one of the main religious communities in the police service and education.

¹⁰⁴ Iceland, Liechtenstein, Norway and Switzerland.

¹⁰⁵ See, in particular, D Gudmundsdóttir, 'The Framework Directive and Icelandic Law: Sexual Orientation Discrimination' in E Ellis and K Benediktsdóttir (eds), *Equality into Reality: Action for Diversity and Non-Discrimination in Iceland* (Reykjavik, University of Iceland Press, 2011) 333.

¹⁰⁶ See B de Witte, 'New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance' (2012) 60 *American Journal of Comparative Law* 49.

represent disadvantaged groups either in the absence or on behalf of the individual plaintiffs, and also enabled these organisations to collect information and provide advice. According to Articles 7(2) RED and 9(2) FED:

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

Likewise, earlier developments with similar national bodies in the United Kingdom and the Netherlands – borrowing from the American model – have inspired the institutionalisation of equality bodies on the EU level.¹⁰⁷ However, so far, this is only required under RED, not under FED. Put differently, RED stipulates:

Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individual rights.¹⁰⁸

In practice, however, such bodies tend to cover all grounds of discrimination from Article 19 TFEU.

As a result of these incorporations into EU anti-discrimination law, two major cases reached the CJEU via preliminary rulings from national jurisdictions notwithstanding the absence of actual individual plaintiffs complaining about discriminatory hiring practices: in the case of *Feryn*, regarding a statement by an employer in media about his reluctance to hire Moroccans,¹⁰⁹ and in the case of *Asociatia ACCEPT* (2013), where a club patron stated that he would never hire a homosexual football player for his team.¹¹⁰ Both cases reached the Court from Belgium and Romania in the virtual absence of a single plaintiff pertaining to the disadvantaged groups at stake: Moroccan people in *Feryn* and gay individuals in *Asociatia ACCEPT*. In *Feryn*, it is furthermore striking that the plaintiff organisation (anti-racist centre) was an ‘equality body’ established under the RED’s mechanism. That organisation launched a claim before a national labour Court against the firm *Feryn* which then wound up at the Luxembourg Court through a preliminary reference. In *ACCEPT*, an LGBT organisation brought a case against

¹⁰⁷ According to De Witte, we have witnessed ‘a neat migration sequence US → UK → NL → EU → all individual EU states’ – B de Witte, ‘National Equality Institutions and the Domestication of EU Non-Discrimination Law’ (2011) 18 *Maastricht Journal of European and Comparative Law* 159, 160.

¹⁰⁸ Art 13 RED.

¹⁰⁹ Case C-54/07 *Feryn* (n 54). For an overview of the case, see K Henrard, ‘The First Substantive ECJ Judgment on the Racial Equality Directive’ NYU Jean Monnet Working Paper Series, 2009, 1; U Belavusau, ‘Fighting Hate Speech through EU Law’ (2012) 4 *Amsterdam Law Forum* 20.

¹¹⁰ Case C-81/12 *Asociatia Accept* (n 79). For an extensive commentary, see U Belavusau, ‘A Penalty Card for Homophobia from EU Non-Discrimination Law’ (2015) 21 *Columbia Journal of European Law* 353.

the national equality body under the FED for having failed to offer an accurate interpretation of EU anti-discrimination law.

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

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

- (a) low awareness of legal possibilities to seek judicial redress, frequently combined with imperfect knowledge of the official language of procedures (very often affecting migrants);
- (b) serious physical or mental impairments (in the case of disabled people);
- (c) age of affected victims (in the cases of both the youth and the elderly);
- (d) religious considerations or subordinated status (e.g. women in some traditional Islamic families); and
- (e) fear of public disgrace, considerations of privacy and safety (e.g. LGBT plaintiffs).

The 2000 mechanism, thus, for the first time facilitates access to national courts and, depending on the willingness of these national courts to request preliminary rulings, to the CJEU on behalf of collective actors, an aspect which – in contrast – remains a weak spot in the Strasbourg mechanism with its accent on individual claims. Hence, advocacy groups get access to courts on equality matters, albeit to a different extent in various Member States. In this respect, EU law offers an easier procedural track for collective claims pertaining to group minority interests than individual and often timely and lengthy claims at the European Court of Human Rights. Apart from preliminary rulings in the CJEU, other EU opportunities include infringement procedures and annulment actions by the institutions.¹¹¹

If facilitated through sufficient financial and informational resources (a task that should be duly understood as an objective of the EU anti-discrimination scheme), this focus on NGOs is capable of strengthening equal opportunities in Europe under the double vigilance of EU institutions and civil society.¹¹² As has been highlighted in literature, EU equality bodies, however, face significant challenges, including a reduction of resources, restructuring, threats to

¹¹¹ For current EU legal opportunities specifically mapped for LGBT litigants, see U Belavusau and D Kochenov, ‘Federalizing Legal Opportunities for LGBT Plaintiffs in Europe’ in K Sloomaeckers et al (eds), *The EU Enlargement and Gay Politics* (London, Palgrave, 2016) 69–96.

¹¹² For the concept of double vigilance in EU law within the context of Rome protection, see M Dawson and E Muir, ‘Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma’ (2011) 48 *Common Market Law Review* 751–55.

independence, lack of expertise, etc.¹¹³ Nonetheless, where the national parliament and government endowed such bodies with substantial functions, these new organisations appear to fulfill an active role.¹¹⁴

D. Forms of Discrimination in EU Anti-Discrimination Law

Following a formal interpretation of the 2000 Equality Directives, we can deduce four forms of discrimination, underpinning EU anti-discrimination law for the time being.¹¹⁵ The four forms of discrimination cover *direct* and *indirect discrimination*, *harassment* and *instruction to discriminate*. In addition, all the directives outlaw *victimisation* of those complaining of discrimination. Both RED and FED require Member States to:

[I]ntroduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.¹¹⁶

As new grounds of prohibited discrimination are added to the palate of EU anti-discrimination law, old debates are bound to be rekindled, such as the dividing line between *direct* and *indirect* discrimination.¹¹⁷ These two forms of discrimination remain central in the Court's analysis, leaving harassment and instruction to discriminate in a rather more obscure role for the time being. The stark distinction in EU law between possible justifications for direct versus indirect discrimination has elicited several discussions on the scope of this dichotomy, highlighting the considerable grey zone in this regard.¹¹⁸ As Henrard underscores in her contribution to this volume, this grey zone is particularly acute in cases of so-called systemic discrimination, where ingrained prejudice in society plays a considerable role. In instances of deep-seated prejudice, are neutral rules really 'neutral' notwithstanding their disparate impact maintained over decades? This line of thinking has

¹¹³ See TE Givens and R Evans Case, *Legislating Equality* (n 10) 128.

¹¹⁴ B de Witte, 'National Equality Institutions' (n 106) 178.

¹¹⁵ Art 2(2) FED maintains that: '(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1; (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons'. Art 2(3) FED defines harassment, while Art 2(4) generally describes instruction to discriminate against persons on any of the grounds referred to in Article 1 as discrimination.

¹¹⁶ Art 9 RED. A similar measure is contained in Art 11 FED.

¹¹⁷ For a summary of distinctions between direct and indirect discrimination in EU law, see C Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EU Law* (Antwerpen, Intersentia, 2005).

¹¹⁸ See also MJ Busstra, *The Implications of the Racial Equality Directive for Minority Protection within the European Union* (The Hague, Eleven, 2010) 148–156.

been developed in relation to the Roma people, studied as a paradigmatic example of victims of systemic discrimination, but this reasoning is arguably equally valid for several other discriminated groups regarding grounds of discrimination in the EU's palate. Put differently, a more nuanced, holistic approach is needed when qualifying particular instances of discrimination as amounting to direct or indirect discrimination.

As is reflected in the coverage of this edited volume,¹¹⁹ there has not yet been case law focusing on the definition and scope of the prohibition of harassment,¹²⁰ sexual harassment, instruction to discrimination, and victimisation as instances of prohibited discrimination. The related interpretative questions remain to be resolved in the future.

The terminology of harassment is definitely a transatlantic legal transplant, protected in the United States by virtue of Title VII of the Civil Rights Act 1964. In the US, this provision was primarily meant to address discriminatory practices against racial minorities, which makes particular sense in the American employment context, whereas hate speech has been systematically justified by the Supreme Court under the First Amendment.¹²¹ The Civil Rights Act covers the grounds of race, colour, religion, sex and national origin. By the 1980s, the US Equal Employment Opportunity Commission had issued guidelines on sexual harassment as a breach of section 703(a)(1) of Title VII of the Civil Rights Act 1964.¹²² Since the 1990s, a number of European countries have been targeting hateful expressions in the employment context as a part of workplace harassment (eg *intimidatie* in Dutch, *harcèlement moral* in French and *trakasserier* in Swedish). Sweden and France were particularly active in fostering various anti-harassment practices in labour law, linking them to a worker's dignity.¹²³

Article 2(3) RED stipulates that 'h]arassment shall be deemed to be discrimination [...], when an unwanted conduct related to racial or ethnic origin takes

¹¹⁹ Several chapters enumerate these concepts, as they feature in the relevant Treaty provisions, but none of them really engages with these concepts.

¹²⁰ Do note the section on harassment in the chapter by M Möschel in the present volume, where he discusses national case law, confirming that, so far, no CJEU case law on this concept exists.

¹²¹ Unlike in continental Europe, the approach of the US Supreme Court has enfolded hate speech into the protective scope of the First Amendment. This constitutes, perhaps, the most striking discrepancy between the two principal Western free-speech models. For a broad comparative study, see U Belavusau, *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies* (Abingdon, Routledge, 2013).

¹²² For a comparative outlook, see K Zippel, *The Politics of Sexual Harassment: A Comparative Study of the United States, the European Union, and Germany* (Cambridge, Cambridge University Press, 2006); R Holtmaat, *Seksuele intimidatie: de juridische gids* (Ars Aequi Libri, 2009). See also A Numhauser-Henning and S Laulom, 'Harassment related to Sex and Sexual Harassment Law in 33 European Countries. Discrimination versus Dignity, European Network of Legal Experts in the Field of Gender Equality', 2011. The authors of the report claim that unlike in the US, where harassment is semantically constructed as discrimination, in Europe it is primarily articulated as a concern over dignity.

¹²³ MIS Guerrero, 'The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step towards EU Legislation' (2004) 27 *Boston College International and Comparative Law Review* 477.

place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.¹²⁴ Both RED and FED permit Member States to define harassment ‘in accordance with the national laws and practice of the Member States.’¹²⁵ The Court of Justice had an opportunity to define harassment twice, but in both cases limited its dictum to fairly general phrasing that does not shed much light on the position of harassment vis-à-vis direct and indirect discrimination. In the case of *Coleman* (2008), the Court held that the prohibition of harassment is not limited to the harassment of people who are themselves disabled.¹²⁶ In the case of *Asociatia ACCEPT*, the Court requalified harassment (there, an instance of homophobic speech) as established by the national Court into an instance of direct discrimination.¹²⁷

Thus, it currently remains unclear what precisely constitutes harassment as a separate form of discrimination and how national authorities should redress it. Even in cases that resemble the definition of harassment rather than direct or indirect discrimination *sensu stricto*, the Court appears to construct harassment as a sort of direct discrimination for the maximum benefit of plaintiffs.¹²⁸ The texts of the directives implies that harassment ‘shall be deemed to be a form of discrimination,’¹²⁹ when unwanted conduct related to a certain ground takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. However, the FED leaves further definition of the concept of harassment to the laws and practice of the Member States. The way that this harassment clause was implemented in many EU countries suggests that Member States view it as a somewhat minor form of discrimination.¹³⁰ As reflected in the Romanian case discussed below, the Court missed the opportunity to take a position about this fairly debatable assumption and to clarify subtle distinctions in categories.

¹²⁴ Art 2(3) FED gives a similar definition with regard to the respective four grounds. The Equal Treatment Directive 2006/54 gives an almost identical definition of harassment with regard to gender, but also adds one more form of discrimination, ‘sexual harassment’, consisting of ‘any form of unwanted verbal, non-verbal or physical conduct of a sexual nature [which] occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment’ – Art 2(1)(d) Equal Treatment Directive.

¹²⁵ Art 2(3) in both RED and FED.

¹²⁶ Case C-303/06 *Coleman* (n 53). The plaintiff was the primary caretaker of a disabled child. She was harassed and discriminated on the grounds of her child’s disability. Although it was not the plaintiff herself who was disabled, the Court established direct discrimination in that case.

¹²⁷ Case C-81/12 *Asociatia Accept* (n 79).

¹²⁸ In both Case C-54/07 *Feryn* (n 54) and Case C-81/12 *Asociatia Accept* (n 79), the utterances of the employer are essentially offensive claims that could have been easily interpreted under the clauses of harassment in the secondary EU law of non-discrimination. Perhaps the only clear element that separates these two cases from incidents of harassment is that, in both cases, individuals did not experience that type of racist and homophobic bullying during employment, but were prevented from employment by virtue of a speech act.

¹²⁹ Above n 125.

¹³⁰ See Belavusau and Kochenov, above n. 111.

E. Positive Discrimination or Affirmative Action *à la Européenne*

The arrival of five ‘new’ grounds of discrimination with Article 19 TFEU and the 2000 Equality Directives has also put a new spotlight on so-called *positive discrimination*, often referred to in the American context as *affirmative action*. The directives in fact merged the European and American terminologies under the heading of ‘positive action’. The big question, however, is whether positive action is restricted exclusively to the confines of gender equality or if it is also applicable with regard to groups of people disadvantaged for reasons related to ethnic origin, religion, sexual orientation or disability. Positive discrimination certainly aligns with the invigorated focus on substantive or real equality, but it is well known that not all its manifestations are equally well received. Indeed, as soon as a positive action measure implies preferential treatment for one category or individual and thus disadvantageous treatment for another, positive action is in tension with the right not to be discriminated against (ie not to be treated unfavourably without justification).¹³¹ Consequently, in the cases discussed below, assessing the legitimacy of positive action concerns a controversial balancing act – not so much regarding the question of whether positive action measures have a legitimate aim, but rather whether these measures are proportionate.¹³²

It has long been recognised that EU law does not wholly exclude positive action measures. Indeed, in the main anti-discrimination directives, a similar provision can be found which indicates that the principle of equal treatment shall not prevent a Member State from taking specific measures ‘to prevent or compensate for disadvantages linked to [the grounds covered by the Directives]’.¹³³ Since these provisions are very open-ended, the case law of the CJEU and the interpretations and applications of the underlying proportionality principle provide further guidance to Member States as to what amounts to permissible action.

As highlighted by Christopher McCrudden and Sacha Prechal in their 2009 report for the EU Commission:

[T]he ECJ has also recognized that to achieve equality of opportunity between women and men it will be necessary on occasion to go beyond the eradication of discrimination, and that positive action may be appropriate even where it results in the preferential treatment of the formerly disadvantaged group.¹³⁴

However, as the authors acknowledge, the CJEU has traditionally adopted a very restrictive approach in its case law on gender equality, construing positive action

¹³¹ See, *inter alia*, K Henrard, ‘Boosting Positive Action: the Asymmetrical Approach towards Non-discrimination and Special Minority Rights’ (2011) *Heidelberg Journal of International Law* 379, 388–389.

¹³² *ibid.*

¹³³ See Art 3 Equal Treatment Directive, Art 5 RED, Art 7 FED and Art 6 Directive 2004/113.

¹³⁴ C McCrudden and S Prechal, ‘The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach’, European Commission, 2009, 38.

as an exception to the right to equal treatment.¹³⁵ Gradually, however, the CJEU softened its position. In *Lommers* (2002), for instance, the Court did not refer to the principle that derogations from an individual right should be interpreted strictly. Instead, it held that:

in determining the scope of any derogation from an individual right ... due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.¹³⁶

This shift towards a more 'open' proportionality analysis remains visible in the subsequent case law, in which the Court further defines in a gradual, case-by-case, process the exact parameters of what is permissible and to what extent.¹³⁷

Since the CJEU's case law on positive action has so far only concerned the grounds of 'gender', it remains to be seen whether the Court's reasoning, and more particularly its proportionality assessment, will vary for the other grounds. When looking at the additional grounds of prohibited discrimination and having regard to documented histories of prejudice and discrimination, race, religion and sexual orientation are obvious contenders for positive action measures aimed at compensating for the resulting, ongoing disadvantages. Age and disability¹³⁸, on the other hand, could lead to interesting case law on positive action of the 'preventive', prophylactic kind.

F. Duties of Reasonable Accommodation

The Framework Equality Directive was the first piece of legislation to enshrine duties of reasonable accommodation in EU law, yet only in relation to the grounds of 'disability'. In order to discuss duties of reasonable accommodation as a mechanism to counter discrimination, it is important to identify the underlying rationale and further define the concept. Admittedly, this notion does not have the same long pedigree as the prohibition of discrimination.¹³⁹ Nevertheless, since its emergence

¹³⁵ See Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* EU:C:1995:322; Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* EU:C:1997:533; Case C-158/97 *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* EU:C:2000:163; Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* EU:C:2000:367.

¹³⁶ Case C-476/99 *Lommers* (n 76) para 39.

¹³⁷ See also Case C-319/03 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* EU:C:2004:574; Case C-366/99 *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* EU:C:2001:648.

¹³⁸ As regards disability, there is a fascinating perspective for future discussion about the relation between positive action, on the one hand, and duties of reasonable accommodation, on the other.

¹³⁹ L Waddington, 'Reasonable Accommodation' in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law* (Oxford, Hart Publishing, 2007) 630.

in Canada and the US in the 1960s,¹⁴⁰ it has migrated to several other jurisdictions, including South Africa, Israel and New Zealand, as well as to the level of international and regional organisations.¹⁴¹ Duties of reasonable accommodation ‘fit’ with the broader development towards a quest for equality, in particular as regards substantive equality. In the end, duties of reasonable accommodation aim at securing equal opportunities, by evening out barriers to full participation due to the interaction amongst personal characteristics and the way the society is structured.¹⁴² Since reasonable accommodation measures overcome these hurdles to participation, they ensure substantively equal access to employment, to public services, to education, etc.¹⁴³

Duties of reasonable accommodation can be framed as applications of generally accepted dimensions of the right to equal treatment – particularly the duties of differential treatment and the prohibition of indirect discrimination. In short, duties of reasonable accommodation can be seen as a particular kind of duties of differential treatment, aimed at substantive equality, while accommodation measures can be considered as important tools to prevent or remedy instances of indirect discrimination.¹⁴⁴

¹⁴⁰ The US was the first country to identify duties of reasonable accommodation, at first through interpretation of the 1964 Civil Rights Act, and in 1972, an explicit provision on reasonable accommodation duties was added to the 1964 Act. In Canada, duties of reasonable accommodation were introduced by jurisprudence as well (more particularly, the 1985 Supreme Court judgment in *O’Malley v Simpsons Sears*). Subsequently, duties of reasonable accommodation were judicially recognised in relation to all 14 enumerated grounds of prohibited discrimination in Section 15 of the Canadian Charter of Rights and Freedoms. See also P Bosset and MC Foblets, ‘Accommodating Diversity in Québec and Europe: Different Legal Concepts, Similar Results?’ in Council of Europe (ed), *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society* (Strasbourg, Council of Europe Publishing, 2010) 43–50.

¹⁴¹ United Nations General Assembly, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, The Concept of Reasonable Accommodation in Selected National Disability Legislation, A/AC.265/2006/CRP.1, 7 December 2005.

¹⁴² As Bouchard and Taylor emphasise, reasonable accommodations do not amount to privileges but are meant to engage in a reasonable adaptation to counteract the rigidity of certain rules or their uniform application, which would not regard the specific traits of individuals: G Bouchard and C Taylor, *Building the Future: A Time for Reconciliation*. Abridged Report, (Gouvernement du Quebec, 2008) 68.

¹⁴³ Bosset and Foblets argue that ‘the main idea underlying reasonable accommodation is that democratic states must allow everyone to participate fully in society on an equal footing as far as possible’. See Bosset and Foblets (n 140) 37.

¹⁴⁴ For a more extensive comment on this, see K Henrard, ‘Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality’ (2012) 5 *Erasmus Law Review* 67. As Frederique Ast correctly underscores, the right to reasonable accommodation can be portrayed as the corollary of the prohibition of indirect discrimination, but there are various ways to address the disproportionate impact inherent in indirect discrimination, not all of which qualify as reasonable accommodation: Frederique Ast, ‘Indirect Discrimination as a Means of Protecting Pluralism: Challenges and Limits’, in Council of Europe (ed), *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society* (Strasbourg, Council of Europe Publishing, 2010) 97.

While the underlying rationale for duties of reasonable accommodation remains the same throughout, there are striking differences in their scope of application, including the grounds of discrimination 'covered'. In some countries, duties of reasonable accommodation are identified for a broad range – or even all – grounds of discrimination, whereas for others these duties are only acknowledged in relation to particular grounds, generally disability, and often also religion.¹⁴⁵ When considering UN treaties and EU secondary legislation, duties of reasonable accommodation are so far only explicitly recognised in relation to disability.¹⁴⁶ Yet it merits underscoring that in the US and Canada, the duties were originally conceptualised in order to deal with religious diversity resulting from immigration.¹⁴⁷ Hence, duties of reasonable accommodation could certainly be extended to religion. More generally, as these duties are an inherent dimension of the right to equal treatment, being intrinsically related to duties of differential treatment and the prohibition of indirect discrimination, there is no reason in principle not to grant duties of reasonable accommodation a broader scope of application.¹⁴⁸

In terms of possible contestations with regard to measures of reasonable accommodation, it is important to note that these duties to provide accommodation are not absolute. As for any dimension of the right to equal treatment, and as expressed in the adjective 'reasonable', proportionality considerations provide intrinsic demarcations for these duties. Relevant factors to measure reasonableness and prevent undue burdens, undue hardship or a disproportionate burden¹⁴⁹ on the person/institution that need to accommodate include the actual cost of the accommodation, sources of outside (e.g. government) funding, the size of the business or institution, and the duration and scope of the accommodation.¹⁵⁰

While this may seem straightforward in principle, in its actual application to concrete cases, the identification of relevant factors and their relative weight often

¹⁴⁵ See also United Nations General Assembly, *The Concept of Reasonable Accommodation* (n 141).

¹⁴⁶ Art 5 FED; Art 5(3) GRDP.

¹⁴⁷ See also E Bribiosa, J Ringelheim and I Rorive, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Anti-Discrimination Law' (2010) 17 *Maastricht Journal of European and Comparative Law* 143.

¹⁴⁸ See also Jennifer Jackson-Preece who considers that duties of reasonable accommodation should be available for members of all structurally disadvantaged groups: J Jackson-Preece, 'Emerging Standards of Reasonable Accommodation Towards Minorities in Europe?' in *Council of Europe, Trends in Social Cohesion No 21, Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society* (Strasbourg, Council of Europe Publishing, 2009) 120. See also Waddington and Bell who argue that duties of reasonable accommodation would similarly be justified on grounds of race or religion: M Bell and L Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 28 *European Law Review* 362. For an argument that duties of reasonable accommodation do not fall foul of the prohibition of discrimination notwithstanding their implication of differential treatment, see Henrard, 'Duties of Reasonable Accommodation' (n 144) 70–6.

¹⁴⁹ Art 5 FED refers to 'disproportionate burden'. Other legislations and/or lines of jurisprudence also refer to 'undue hardship' or 'undue burden'.

¹⁵⁰ Bosset and Foblets (n 140) 49–53; C Brunelle, *Discrimination et obligation d'accommodement en milieu de travail syndiqué* (Cowansville (Quebec), Yvon Blais, 2001) 248–251.

proves controversial. Furthermore, it may be obvious that in relation to some grounds, the controversies will, by definition, be higher (e.g. when pertaining to religious accommodation in the public space or regarding different ways of life of ethnic minorities). This varying degree of inherent controversy may explain why the EU legislator has only been willing to engage with duties of reasonable accommodation in relation to ‘disability’.¹⁵¹ It is clear that in the lengthy negotiations (since 2008) of the Commission proposal for a new Equality Directive,¹⁵² duties of reasonable accommodation remain reserved for the grounds of disability.¹⁵³

The chapter in this volume by Louisa Lourenço and Pekka Pohjankoski, focusing on the CJEU case law regarding duties of reasonable accommodation on grounds of disability, highlights that the jurisprudence presents thorny issues concerning judicial interpretation. The authors analyse the clarifications in the text of the Directive in terms of the relevant forms of reasonable accommodation and reasonability factors. While there has been some case law on the former,¹⁵⁴ so far there is scant case law that assists in demarcating reasonable from unreasonable accommodations. The underlying proportionality considerations may indeed require a case-by-case analysis, and hopefully, future case law of the CJEU will provide some more generalisable markers. This case law on duties of reasonable accommodation is bound to sharpen the view on duties of differential treatment, the second leg of the principle of EU law on equal treatment.¹⁵⁵ As the latter concept is generally applicable across the EU grounds of discrimination, it remains to be seen to what extent the CJEU might steer towards *de facto* duties of reasonable accommodation on the other grounds. As Eugenia Pastor highlights in her chapter in this volume, the Court has thus far not been forthcoming in this respect, particularly as concerns the grounds of religion.

IV. Overview of chapters

This section offers a brief overview of the chapters in this volume, which is structured into two main blocks. The first, theoretical, block will highlight academic discussion regarding contemporary EU anti-discrimination law which transcends

¹⁵¹ See earlier references to the chapter by Waddington in the present volume and Jackson-Preece (n 148). See also the chapter by ER Pastor in the present volume.

¹⁵² Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, Brussels, 2 July 2008, COM(2008) 426 final.

¹⁵³ See the chapter by L Waddington in this volume for further details.

¹⁵⁴ For cases that clarify that adaptations in terms of working hours could be a reasonable accommodation, see Joined cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S* EU:C:2013:222.

¹⁵⁵ For now, Lourenço and Pohjankoski point to possible guidance from the supervisory practice of the UN Committee on the Rights of Persons with Disabilities and ECtHR.

the boundaries of specific grounds of discrimination, unpacking themes such as multiple discrimination in EU law which embraces several grounds for complete protection, the intricacies of the burden of proof formulated in 2000 Equality Directives, atypical contracts and their problematic fit into current EU anti-discrimination law, as well as a bird's eye view of the entire Union garden of minority protection and the gap between EU Equality Directives on the federal level and implementation. Part 2 will be composed of five sections, covering all the grounds of discrimination introduced by Article 19 TFEU and codified in the 2000 Equality Directives: (1) race and ethnicity, (2) religion, (3) sexual orientation, (4) age, and (5) disability.

A. Chapters Covering Theoretical and Procedural Aspects

Since this part of the volume looks beyond specific grounds of discrimination, it opens with a chapter by **Raphaële Xenidis** focusing on by far the most challenging case – the so-called ‘multiple discrimination’ which refers to discrimination that transcends a single ground. Xenidis first explains how the discourse on multiple discrimination has been an essentially transatlantic transplant borrowed from US anti-discrimination theory and practice, an account which is popular in the emerging EU literature on the subject. She proceeds with a detailed analysis of practically all the cases of the Court of Justice relevant for the discussion on multiple discrimination thus exploring the apparent limits of EU anti-discrimination law. Although Xenidis notes sporadic traces of positive change in the Court's jurisprudence, practice and discussion on secondary law, she contends that the most important step, the recognition of multiple discrimination in the EU legal system, has not yet been taken.

Likewise, **Mark Bell** offers an elaborate analysis of an issue that goes beyond discussing specific grounds of discrimination, and raises a question of great pertinence related to atypical contracts. While the 2000 Equality Directives, especially FED, focus mainly on the employment sector, much of the labour relations they cover or rather would fail to cover affect non-standard types of employment (e.g. non-full time or physically remote from the employer) starting from the most common case of part-time employment and ending with the emerging phenomenon of work via digital platforms (the ‘gig’ economy). Bell examines whether the interaction between EU equality law and legislation regarding non-standard forms of work enhances legal protection in a harmonious and complementary fashion or whether internal differences lead to a divergence in how each is integrated and applied. He draws on two central examples: gender equality and age, offering a valuable paradigm of comparison for our volume that in its analysis specifically aspires to go beyond gender, leaving it behind as a ‘seminal’ comparative ground. A common feature of both gender and age discrimination, as identified by Bell, is that litigants in the most precarious forms of employment, such as casual work, encounter greater obstacles in relying on the EU equality framework.

Kristin Henrard focuses on a complicated procedural issue that is at the same time crucial for the realisation of effective protection against discrimination: the distribution of the burden of proof between the applicant/alleged victim and the defendant/alleged perpetrator. In view of the difficulties for victims to produce full proof of discrimination, a ‘special’ allocation of proof has been devised for discrimination cases, following which the victim merely needs to establish a presumption of discrimination. Subsequently, the burden of proof shifts to the respondent who needs to prove that no discrimination occurred. This special allocation of the burden of proof is taken up in Article 8 RED. The ongoing uncertainties of national courts in this regard translate into preliminary references to the CJEU, inviting the Court to adduce further clarifications. Henrard critically analyses several major preliminary rulings in this context. She acknowledges that in several respects, the CJEU is becoming more generous in the (often rather concrete) guidance it is willing to provide to national courts. Nevertheless, Henrard identifies two shortcomings, thus offering two recommendations to the CJEU: (1) more consistency in the identification of a speech instance of discrimination, as distinct from the instance of discrimination emerging from actual practice, and (2) a more developed understanding of the distinction between direct and indirect discrimination, and its repercussions for the shared burden of proof.

This theoretical section is rounded off by a chapter by **Dimitry Kochenov** who, due to his focus on minority protection, takes a notable step away from case law based on the Equality Directives and criticises the Luxembourg jurisprudence for having missed the chance to apply the 2000 Equality Directives on numerous occasions. As Kochenov reminds us, *de facto* minority protection is closely intertwined with the right to equal treatment and anti-discrimination. Unfortunately, the obvious potential of the Equality Directives in this respect remains largely untapped, partly because the CJEU has not risen to the occasion. According to the author, a lack of federal thinking by the EU weakens this minority framework in the Union. He therefore puts minority protection into federal settings, zooming in on migrant EU citizens and their undermined equality. This outlook makes him conclude that the Equality Directives remain somewhat inadequate in fulfilling the promise of empowering disadvantaged groups, whereas the current division of competences between the EU and Member States is still chiefly based on a market-driven approach.

B. Chapters Covering Specific Grounds of Discrimination

The next part of the volume covers five more chapters on each of the discrimination grounds introduced by Article 19 TFEU and the 2000 Equality Directives, which receive a detailed commentary by experts specialising in these respective fields. In order to ensure a consistent and coherent outcome, each author reflects on the underlying rationale of anti-discrimination law, the major developments in

the CJEU jurisprudence in the last 18 years (2000–2018), the themes that require further elucidation by the Court and suggestions for improvements. In regard to certain grounds, some more particular themes are also elaborated upon, such as the Roma, veil bans, and young people.

This part begins with a section on race and ethnicity, covering one of the two 2000 Equality Directives analysed in this volume. Despite a scarce number of cases, the Race Equality Directive has been the subject of lively academic debate and of ardent transposition battles at the local level, especially with regard to a number of ethnic minorities such as Roma people.

The chapter by **Mathias Möschel** provides a detailed overview regarding the various trajectories of the Race Equality Directive, its actual and future potential impact. The author starts by highlighting the momentous and smooth adoption of the RED which was contrasted by the slow and often incorrect national implementation, and the very scarce case law before the CJEU. He maps both the success and failures in three steps, having regard to the text of the Directive, the case law of the CJEU and the interpretations by the national authorities. He concludes his overview of successes by arguing that, in certain areas, the RED has improved access to justice through its generous interpretation by the Court. However, the subsequent discussion on failures or shortcomings signals several ways in which the CJEU has actually opted for a restrictive interpretation (e.g. whether equality bodies can make a preliminary ruling to the CJEU), or has omitted to recognise the relevance of the RED in relation to the interpretation of other EU legislation, more particularly the Family Reunification Directive and the Third Country Nationals Directive. In terms of future potential for the RED, Möschel identifies both promising trends, such as increasing invocation of RED in litigation concerning employment by the EU institutions, actual infringement proceedings against several Member States regarding Roma segregation in education and a worrying lack of RED-based arguments in other cases (e.g. pertaining to the headscarf). Möschel concludes by finding a mitigated balance. While the RED has certainly changed the landscape of EU anti-discrimination law, there is still a long way to go before it will fully reach its potential, which is dependent on the interplay of various actors, including institutions at the national and EU levels as well as civil society.

Morag Goodwin's chapter discusses Romani marginalisation after the Race Equality Directive took force. She documents the limited way in which the RED has been used to tackle anti-Romani hatred and intolerance, and highlights the virtually non-existent impact in terms of an actual decline in racial discrimination against Roma. She argues that in addition to widespread anti-Romani sentiment, actual discrimination against Roma – in education, housing, the workplace and in access to services – remains an equal constant. In several respects, Goodwin welcomes the CJEU's judgment in *CHEZ*, the first substantive case about discrimination against Roma decided by the Court, particularly because the CJEU recognised the destructive psychological impact of racial discrimination. However,

Goodwin's main criticism is that the Directive fails to facilitate Roma's social inclusion because the EU legislator is not interested in actual, substantive difference. According to Goodwin, the Directive is interested only in protecting difference that is 'surface' or 'skin' deep ... it focuses on the difference that is visual and not substantive. In order to begin the process of addressing anti-Romani sentiment and discrimination and to truly tackle Romani exclusion and marginalisation, the celebration of Romani difference and European diversity and compulsory group-based positive measures to rectify historical wrongs and provide genuine equal opportunities are needed. The Race Equality Directive, as it stands, only manages to scratch the surface.

From the Race Equality Directive, we transit to the Framework Equality Directive through the section about religious discrimination, as the latter often incorporates features of ethnic discrimination. Unsurprisingly, both chapters in this section on religion focus extensively on the two passionately discussed headscarf cases decided by the CJEU in 2017, pertaining to restrictions on wearing religious symbols like a headscarf at work. In fact, those are the only two cases ever decided by the Court of Justice on the grounds of religion during the 17 years the Framework Equality Directive has existed. **Eugenia Relaño Pastor** starts her chapter with a discussion of the opinions of the Advocates General in these two cases, critically analysing their underlying premise and conceptual presuppositions, which are in opposition to one another. She extends her critical analysis to the CJEU judgments, highlighting missed opportunities, also in terms of duties of reasonable accommodation, and concludes with recommendations for improvements of EU anti-discrimination law. **Anna Śledzińska-Simon** discusses the reasoning of the Court in more depth, similarly putting forward critical remarks about how it has conducted its proportionality review. Śledzińska-Simon unpacks the CJEU cases in light of a broader analysis of case law of European courts on 'laws, policies or practices that either directly target religious groups or have deleterious effects on their members'. She notes that the CJEU judgments fit the broader trend of courts deferring the veil controversy to the national decision-making authority, thus not ensuring the effective protection of freedom of religion and the freedom from discrimination in private employment, and beyond. Consequently, Śledzińska-Simon calls for a stronger stance by the courts to more resolutely address structural religious discrimination and endorse religious diversity as a legal value.

The section covering sexual orientation as a ground singled out in the Framework Equality Directive offers a certain interdisciplinary dialogue between a legal scholar and a political scientist. While **Alina Tryfonidou** offers a chapter with an almost encyclopaedically precise summary of the key legal instruments and case law in the field of EU sexual orientation law, **Phillip M Ayoub** zooms in on the factors that led to the transposition of LGB protection from EU law into national legislations, offering its empirical measurements. Tryfonidou provides a three-step account. She first assesses the FED's impact on the protection of LGB individuals and same sex-couples against discrimination, excluding transsexuals

from her analysis, since – as has also been shown earlier in this introductory chapter – the rights of transgender people were initially addressed by the Court of Justice as a matter of sex equality. She then considers whether the gaps left by the FED in its fragmented protection of gays and lesbians can sufficiently be filled by other instruments, such as the Charter. Summarising the main jurisprudence in the field, Tryfonidou completes her account by discussing the prospects for the EU anti-discrimination law framework.

Ayoub complements this sketch of LGB rights in EU law by looking into the vertical and horizontal distribution of protection amongst Member States. He wonders why the legislation on LGBT rights is introduced at higher levels in some cases and less so in others. To address this puzzle, his chapter analyses changes in LGBT legislation across EU Member States between 1970 and 2009. Ayoub identifies five categories for his analysis: anti-discrimination, criminal law, partnerships, parenting rights, and equal sexual offences provisions, with regard to ‘new’ EU Member States in Central and Eastern Europe. He further compares these diffusion patterns with their counterparts in older Member States. This comparison leads him to argue that new-adopter States are more dependent on international resources for making novel issues visible and are more inclined to see adoption as a means to gain external legitimacy and improve their reputation. In this respect, the external mechanism introduced by the FED was paramount to the diffusion of rights. Likewise, he looks into the EU conditionality mechanism regarding the Equality Directives in the context of enlargements and criticises it from the perspective of transnational social movements.

The age-discrimination section also consists of two chapters unpacking different facets of the same phenomenon – discrimination of the ‘old’ and the ‘young’. **Rachel Horton** explores the boundaries of the justification afforded to age discrimination under FED as interpreted by the CJEU. These justifications, listed in Article 6 FED, are remarkably wide and often accepted without criticism. Horton views as missing a coherent account of why age should be accepted as different from other characteristics. As with gender, it may be possible to see age discrimination being simply at an early journey towards a more robust rejection by society. A systemic approach to justifying age discrimination requires a clear account of all harms brought by age imbalance. The Court has arguably left too much discretion in this area to Member States, which tend to interpret those harms narrowly – a prospect that would need to be reversed in the future, according to the author.

Beryl P ter Haar completes this account of age discrimination by looking into policies which foster the widely pronounced youth protection in the European Union (EU). She offers her reader an eloquent question of whether EU age discrimination law has been a curse or a blessing from the standpoint of youth policy, which she categorises as a broad field with nine sub-fields. After analysing case law of the CJEU, ter Haar concludes on a positive note – almost exceptional amongst the much gloomier analyses of the Court’s rulings in other sections of this book – suggesting that FED has supported, rather than hindered, fostering the rights of young people in the EU.

Following an overview section about EU disability law, which mostly consists of anti-discrimination provisions, **Luísa Lourenço** and **Pekka Pohjankoski** in their chapter explore the judicial interpretation of ‘disability’ and ‘reasonable accommodation’ by the CJEU. Regarding the definition of ‘disability’, the authors welcome the CJEU’s acknowledgment of the paradigm shift from the medical to the social model, in accordance with the UN Convention on the Rights of Persons with Disabilities (CRPD). They do note the problem with the judicial application of a definition based on the social model of disability (i.e. that it may become so vast as to cover nearly all situations in human life, which would render its protective dimension meaningless). Similarly, the CJEU has held that the duty of reasonable accommodation must be interpreted broadly in light of the UN Disability Convention. However, this still leaves a critical question, namely when an accommodation is (un)reasonable, to be decided on a case-by-case basis, having regard to the relevant factors (enumerated in Article 5 of the FED). Due to the scarcity of the CJEU’s case law on the concept of reasonable accommodation, the authors refer to the practice of the UN Committee on the Rights of Persons with Disabilities and the European Court of Human Rights as potentially providing guidelines for assessing the proportionality of the burden of the duty bearer.

Lisa Waddington turns to the more explicit influence of the UN Convention on the Rights of Persons with Disabilities on EU anti-discrimination law. As the EU has become a party to this Convention, EU law needs to be interpreted, as far as possible, in a manner consistent with its provisions and *telos*. Her chapter firstly explores the extent to which the CJEU has indeed relied on the CRPD when interpreting the Employment Equality Directive’s prohibition of discrimination on grounds of disability. This influence is particularly visible in the definition of ‘disability’. Secondly, Waddington reviews how the revisions to the Commission proposal for a new Equality Directive covering a number of grounds, including disability, were influenced by the CRPD. Lastly, her chapter reflects on the significance of the periodic review under the CRPD, and the resulting Concluding Observations by the UN Committee on the Rights of Persons with Disabilities. While the CRPD has indeed influenced EU anti-discrimination law in several respects, Waddington also flags up many lingering shortcomings.

Finally, a short concluding Epilogue written by one of the leading scholars of EU law, **Bruno de Witte**, discusses the problematic aspects of the current equality framework, and draws conclusions on those elements still in need of substantial improvements. The strong potential of EU anti-discrimination law can be unlocked by sufficient political will from EU institutions, coupled with more activism from the Court of Justice and the mobilisation of the twin directives by social movements in those Member States, which have – surprisingly – not made preliminary references to the Luxembourg Court on the newer grounds of equal treatment.

V. Conclusions

The density of instruments dedicated to the prohibition of discrimination at both a global and a regional level, and their increasing detail, have made this norm one of the most developed and refined human rights. In this respect, the 2000 EU Equality Directives mark the birth of EU anti-discrimination law as a self-standing area. Despite all the pitfalls, this EU law offers one of the highest ceilings of protection in comparative anti-discrimination law. In this volume, we have tried to identify the major themes in the recent discussion on the EU equality framework and to summarise how various grounds of equality ‘beyond gender’ have been interpreted at the level of the Court of Justice. Through this exploration, we aspire to show the modes in which social movements and individuals can further capitalise on the available resources of EU anti-discrimination law. If anything, an effective protection against discrimination has only become more pressing during multiple ongoing crises, namely, the economic crisis, the ‘refugee’ crisis, and backsliding on the rule of law. EU anti-discrimination law has, thus, reached its age of maturity – its eighteenth birthday – in confusing times, which nonetheless carry huge potential. This area of law remains a vivid justification for viewing the EU today as not only concerned with economic interests, but also embracing a wider ethos of equality emanating from EU law to Member States, even in wholly internal situations.