of homosexual couples from a human rights perspective in a way similar to that taken by the Court of Justice in respect of transsexuals in *P* v. *S and Cornwall County Council*.[101]

Conclusions

Article 13 has real potential to meet the expectations to which I have referred. As the Community moves into the next millennium, it will be of the greatest importance, in creating a Union truly founded on human rights. It brings the principle of non-discrimination closer than ever before to those who are in need of protection from discrimination. Although the Article is one which empowers further action by the Community, its adoption, is of itself, a significant political fact. It has created an expectation that action will be taken. Despite the need for unanimity it will surely be impossible for no action to be taken under this provision. The challenge is to take *effective* action. I look forward to working towards the achievement of this goal.

The 'sleeping giant' awakes

There followed five further short lectures which discussed some of the possibilities for action,[102] followed by the usual workshops. Other participants at the Conference discussed whether different kinds of Community initiatives might be appropriate such as awareness training activities and exchanges of experience. All considered the extent to which radical action rather than incremental steps were appropriate. In a memorable phrase, in one of the workshops, former judge of the Court of Justice, Manfred Zuleeg, described Article 13 as a 'sleeping giant' and stated that it was the task of the Conference and by implication the Commission, to wake it up and demonstrate its strength. It was a challenge which was welcomed by all who attended and one which the Commission has continued to address with energy and commitment.

[101] Case C-13/94 [1996] ECR I-2143.

[102] The other speakers and their topics were A. Heymann-Doat, 'Motives of Discrimination, Discriminatory practices and means to combat them', B. Niven, 'Combating discrimination – What types of Community Action?', W. Okresek, 'Article 13 and the legal environment – an instrument for the fight against discrimination', G. Shaw, 'Balancing legislative standards and voluntary action: experience from the business sector' and M. Zuleeg, 'The content of Article 13 of the Treaty establishing the European Community as a amended by the Treaty of Amsterdam'.

Thus there was loud applause when, at the conclusion of the conference, Commissioner Padraig O'Flynn announced that the Commission would indeed immediately bring forward two draft directives: the first would be wide ranging in scope and based on race; the other would provide a framework for equality in relation to all the other grounds contained in Article 13, save sex, but would be limited to the employment context.[103] These were the first steps of the giant, but more were to come. Specific aspects of the giant's waking life are discussed in other chapters of this book, yet one or two are worth mentioning here.

Firstly, the Conference contributed significantly to a developing political impetus for immediate action and within record time the directives became law as Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Race Directive') and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('the Employment Framework Directive'). This impetus has continued but not in an entirely uniform way. Most states have taken some steps to implement these Directives but enforcement proceedings in the Court of Justice have had to been taken by the Commission under Article 226 EC against Austria, Germany, Luxembourg and Finland,[104] and it is understood that the implementation by other countries has been criticised by the Commission.

Secondly, this legislative programme has been the precursor to other important acts of the organs of the Community, ranging from action by the Commission to Council Resolutions. The first and most important was a decision to have a Community Action Programme in relation to combating discrimination.[105] This Programme has been hugely influential in the dissemination, across old and new Member States, of the ideas contained within Article 13 and developed in the Vienna Conference. A first review of the Programme took place in the Green Paper published in 2004.[106] This led to some changes in the way in which the Commission has worked. The Programme is now coming to an end and is being evaluated[107] and a further Green Paper is expected to be published to propose

[103] See the Report of the Conference, pp. 60–3.

[104] See http://ec.europa.eu/employment_social/fundamental_rights/legis/lginfringe_en.htm.

[105] Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006) (2000/750/EC).

[106] See http://ec.europa.eu/employment_social/fundamental_rights/pdf/ pubst/grpap04_en.pdf.

[107] See http://ec.europa.eu/employment_social/fundamental_rights/ policy/aneval/eval_en.htm.

the next steps in the autumn of 2006. There is no doubt that there is more to be done and already there have been calls for more and deeper legislation in relation to the protected grounds.[108] One important sign of that is the decision that 2007 be designated European Year of Equal Opportunities for All.

In the field of sex discrimination, the Union has utilised Articles 13 and 141 EC, to amend the Equal Treatment Directive[109] to bring sex discrimination broadly into line with the provisions of the Employment Equality Directive.[110] Further provision has been made to outlaw discrimination on grounds of sex outside the employment field.[111]

Various Council resolutions have been passed by reference to Article 13; for instance, the Council, relying on Article 13, passed a Resolution of 15 July 2003 on promoting the employment and social integration of people with disabilities.[112] This called on Member States, among other things, to promote greater co-operation with all bodies concerned with people with disabilities; to promote the full integration and participation of people with disabilities in all aspects of society; to continue efforts to remove barriers to the integration and participation of people with disabilities in the labour market; to pursue efforts to make lifelong learning more accessible to people with disabilities; to remove barriers impeding the participation of people with disabilities in social life and, in particular, in working life, and prevent the setting up of new barriers through the promotion of design for all; and to mainstream disability issues when drafting future national action plans relating to social exclusion and poverty.

Article 13 has also not stood still. Thus in the Treaty of Nice a second paragraph was added to permit decision-making under Article 13 by qualified majority voting pursuant to Article 251, in relation to certain kinds of incentive measures to support action taken by Member States in

[108] See, for instance, the suggestion for a Directive in relation to age discrimination in relation to goods facilities and services, put forward by Age Concern and other age related organisations across Europe: www.ace.org.uk/AgeConcern/Documents/Age_Directive_one_Goods_Facilities_and_services_final1.pdf.

[109] Council Directive 76/207/EEC.

[110] See Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 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.

[111] See Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[112] See Council Resolution of 15 July 2003 on promoting the employment and social integration of people with disabilities (2003/C 175/01).

order to contribute to the achievement of the objectives in the main text of Article 13. The possibility of such decisions being taken on a less than unanimous basis underlines the importance of the objectives of Article 13 as a key element of the social policy of the Union.

Finally, it should also be noted that the draft constitution of the European Union intended to transpose Article 13 to Article III-124, which was set out in Title II of Part III of the proposed Constitution under the general heading 'Non-discrimination and Citizenship',[113] and the Charter of Fundamental Rights of the European Union 2000[114] contains extensive reference to equality rights in Chapter III. At the time of the Vienna Conference neither the proposal for a Constitution[115] nor a Charter[116] had been formulated within the Union.

Outside the Union there have been developments in relation to equality and non-discrimination. The most important development has been the agreement by the Council of Europe on a text for a twelfth Protocol to the ECHR. The text was intended to supplement Article 14 ECHR by removing its limitations as merely an accessory right. There has been a realisation that a free-standing right, somewhat akin to Article 26 of the ICCPR, was needed in the European context.[117] The essence[118] of Protocol 12 is in Article 1:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[113] See http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/c-310/c-310200412l6enoo55G85.pdf.

[114] [2000] OJ C 364/1.

[115] The proposal for constitution followed the Declaration on the Future of the Union made by the Council in 2000 in Nice.

[116] The proposal for a Charter came from the Cologne European Council of the 3–4 June 1999.

[117] The explanatory memorandum to the Protocol is at www.humanrights.coe.int/Prot12/Protocol%2012%20and% 20Exp%20Rep.htm#EXPLANATORY%20REPORT.

[118] It should be noted that the Recitals to the Protocol add that 'Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law; Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"); Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.'

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

As yet the utility of Protocol 12 has not really been tested. It only came into force on 1 April 2005 when it was ratified by a tenth state. As of July 2006 there were fourteen ratifications but of these only the Netherlands of the main Member States of the European Union had ratified it. There is as yet no jurisprudence of the European Court of Human Rights on its application.

Commentary

The conference was an undoubted success in providing an important opportunity for contributions from many different experts. Yet it is now appropriate to consider some of the aspects of the development of equality and non-discrimination law which it anticipated well and to consider some of the problems which the conference either underestimated or did not foresee.[119]

The five conditions

Broadly the five conditions that I posited for effective legislation against discrimination have been met in the two Directives which followed the Vienna conference. Yet there are some important lacunae which should be noted.

Firstly, while both Directives require effective sanctions neither expressly states that criminal sanctions may be necessary. However, in the period in between, in which I have discussed these issues with judges and jurists from every Member State and candidate country, I have *not* heard that a lack of criminal sanctions has been a problem. The necessary criminal laws seem to be there; the issue is the willingness to invoke criminal law when it is necessary to secure compliance with the principle of equal treatment.

In part this may reflect the lack of efficient enforcement mechanisms in the hands of equality bodies. While the Race Directive required such a body to be set up in each Member State, the Employment Equality Directive did not. This was a real missed opportunity which was fortunately avoided in the re-enactment of the Equal Treatment Directive.

It must be acknowledged that the Commission has worked hard in relation to information and training through the Action Programme. This

[119] For these the author must take at least a fair share of blame!

activity has not always been transposed into the Member States though perhaps paradoxically the new Member States, who have been required to demonstrate their compliance with the principle of equal treatment, have in some cases done best in this respect.

Much still needs to be done in relation to the mainstreaming of these ideas. This depends very much on adequate monitoring and here too there was perhaps a missed point. Implementation of the Directives has pointed out the difficulties that exist in relation to the uniform collection of data in relation to these protected grounds across Europe. While in the UK there is a happy familiarity with the process of data collection through the means of a census or otherwise, many, indeed possibly most, European countries are not so at ease. This is a particular legacy of the worst parts of their common history through the twentieth century, firstly, in the World Wars and, secondly, through the era of communist states. The Commission has, however, worked hard to address the issues of data collection. In a very important conference in Helsinki in December 2004 these issues were addressed and proposals formulated, but much more needs to be done.[120] The pursuit of equality depends on good data.

Scope

A good deal of the time at the conference was taken up with discussions about the material scope of Article 13 EC. The possibilities for action seemed so large that there was a real concern as to the extent to which the material scope of the EC Treaty was itself a limiting factor. In practice, however, this has not proved to be a major concern. In this respect the skill of the Commission in choosing to lead with the proposal for the extensive Race Directive may come to be seen as critical. Had the Commission led with a comprehensive Directive covering all the grounds in Article 13 and extending to the full extent of the scope of the Race Directive it seems certain that arguments would have raged as to the limitations to the material scope of Article 13.[121] On the other hand, leading with only a proposal for a far-ranging Race Directive might equally have drawn extensive criticism.

[120] The papers are available at http://ec.europa.eu/employment_social/ fundamental_rights/events/helsinki04_en.htm.

[121] While the Commission has commenced proceedings against several Member States for failure to fully transpose these two Directives, it is not understood that in any case has a plea been entered that either Directive exceeded the permitted material scope of the source power in Art. 13.

In the event, no Member State felt able to argue that the ultimate scope of the Race Directive covering the wide range from employment, vocational matters, social protection, social advantages, education and housing, went too far.[122] This is probably one of the most important points to take out of the conference, since it was always possible that a more restrictive view of the possibilities envisaged by the Member States when articulating and agreeing Article 13 EC at Amsterdam would prevail. In particular it must be remembered that health is an area in which Member States have been concerned to maintain a degree of autonomy.[123] Likewise it is noteworthy that that Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services was implemented without extending to education. Perhaps this was because a separate approach to the education of boys and girls is too entrenched for European legislation. Yet in the context of equality any separate provision should always be subject to the closest scrutiny. Separateness has long been a cloak for different and less favourable.

The definition of disability

One issue which concerned me at the Vienna conference was the concept of disability. Though raised in the keynote speech it was not given a closed definition in the Employment Equality Directive.

This point was picked up by a Spanish Court which made the first reference to the Court of Justice in a case concerning the transposition: C-13/05 *Sonia Chacón Navas* v. *Eurest Colectividades SA*. The judgment of the Court is particularly interesting though not perhaps as informative as might be hoped. The Court ruled that:

> It follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question.[124]

[122] See Race Directive Art. 3.

[123] See, e.g., Art. 152 EC, and see also Case C-372/04 *The Queen (on the application of Yvonne Watts)* v. *Bedford Primary Care Trust, and the Secretary of State for Health.*

[124] See para. 40.

It pointed out that since disability and sickness were not to be equated and since sickness was not used, mere sickness did not give rise to protection under the Employment Equality Directive.

The question posed to the Court of Justice related to rudimentary facts, so the more difficult question whether any particular state of ill-health amounted to disability was not addressed. It did not need to be. Much work is currently underway under the auspices of the United Nations and it seems likely that if a common worldwide definition of disability is adopted the Court would be likely to adapt its interpretation of the autonomous meaning to that definition. At present this issue remains unresolved.

Associative and perceived grounds

Although there was a good deal of discussion as to the way in which discrimination can occur, it is much to be regretted that discrimination on *associative* or *perceived* grounds was not discussed. When a person suffers less favourable treatment not because they are themselves black or disabled, but because they *associate* with persons of minority ethnic origin or care for disabled persons, it would seem that they are as much in need of protection. This was not specifically discussed. In the UK at least the first of these two examples is considered highly controversial.[125] Indeed, the UK has taken an inconsistent approach permitting perceived discrimination in some but not all cases. By contrast, it was a conscious decision not to define the concept of disability more closely[126] and this has led to an early reference to the Court of Justice.

It seems likely that those who receive adverse treatment because they are *perceived* as gay, or disabled or having some other protected status would be considered by the Court of Justice to be in scope, but this too must await a definitive interpretation.

[125] The UK expressly rejected the recommendation of the Parliamentary Pre-legislative Scrutiny Committee on this point when deciding how to incorporate the Employment Equality Directive into UK law, however, a reference has now been made in relation to this by the Employment Tribunal in Case C-303/06; *Coleman* v. *Attridge Law* Case No. 2303745/2005 the questions asked include questions as to whether in the context of the prohibition of discrimination on grounds of disability, the Employment Equality Directive only protects from direct discrimination and harassment persons who are themselves disabled, and if not whether it protects employees who, though they are not themselves disabled, are treated less favourably or harassed on the ground of having a disabled son for whom they care.

[126] It is important to recall that the Amsterdam Treaty contained its own Declaration Regarding Persons with a Disability.

This may yet prove to be a major issue across Europe though in some countries, such as the Republic of Ireland,[127] appropriate implementation to secure that such discrimination is in scope, has been made. It seems likely that the Court of Justice will in due course interpret the two Directives as prohibiting such discrimination but this cannot yet be guaranteed.

Indirect discrimination

One of the major differences between the two Directives made in 2000 and the *acquis* in relation to sex discrimination lay in the definition of indirect discrimination. As the keynote speech has pointed out there were real difficulties of application and effectiveness in the existing jurisprudence. The definition in the Directives takes a much more practical approach, permitting reliance on statistics but not requiring them.[128] Thus, taking the Race Directive, by Article 2(2)(b) indirect discrimination is said to occur:

> where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

This is a really important development and ought to enable much more recourse to be made to the concept of indirect discrimination as a tool for analysing situations for compliance with the principle of equal treatment.

Harassment

Another major issue at the time was racial and sexual harassment. To an extent this was protected in some civil law countries through criminal provisions more effectively than in common law countries. Racial harassment was specifically discussed in the context of the experience across the different Member States. All were concerned to see effective protection. In 1992 the European Commission had issued a Recommendation and Code of Practice on the protection of the dignity of men and women at work[129] which encouraged a more proactive response to such harassment. When they came to be enacted both the Race and the Employment Framework

[127] The Irish Legislation can be found at www.equality.ie/index.asp?locID = 60&docID = -1.
[128] See Recital 15 to each Directive.
[129] See Commission Recommendation 92/131/EEC.

Directives contained strong provisions in relation to harassment which are based on the protection of the key human rights concept of dignity.[130] Thus the Race Directive states that:

> Harassment shall be deemed to be a form of discrimination . . . when unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.[131]

In retrospect it is perhaps surprising that not more was made of the contribution of the concept of dignity to the development of these ideas.[132] However, if that was an omission it is one which is being made good. The importance of dignity across the European Union can be seen quite clearly in the Charter of Fundamental Rights of the European Union which devotes the whole of its first Chapter to dignity,[133] in the conjunction of equality and dignity as core values in Article I-2 of the draft Constitution,[134] and in recent case law of the Court of Justice holding that the Court must 'ensure that the fundamental right to human dignity and integrity is observed'.[135]

Comparable situations

The Vienna conference probably took too much for granted in respect of the issue of comparability. The two Article 13 Directives made after the conference are based squarely on the equal treatment principle but it is a principle which is not always easy to apply. It is becoming an increasingly vexed question of when the principle requires that it is appropriate to treat two persons as being in an analagous or comparable situation, and when not.

[130] See, e.g., the United Nations Declaration of Human Rights. Respect for human dignity is also a key part of common constitutional traditions across Europe.
[131] See Art. 2(3) Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The Employment Equality Directive contains a similar text.
[132] Both the French and German Constitutions have strong dignity provisions: see the Preamble and Art. 1 of the French Constitution of 4 October 1958, and Art. 1 of the German Basic Law.
[133] http://europa.eu.int/scadplus/constitution/objectives_en.htm.
[134] http://europa.eu.int/constitution/en/ptoc2_en.htm#a3.
[135] See Case C-377/98 *Netherlands* v. *the European Parliament, and the Council of the European Union*, Judgment 9 October 2001, at [70].

At present there is no single explicit set of principles by which to determine whether two persons are in a comparable position so that equal treatment is entailed. Comparisons can be established generically at the level of legislation and must be established more specifically in individual cases. So there are two aspects to this problem: what are the principles by which to decide generically whether a comparison should be made, and how should specific questions about comparability be addressed? This deficit has a direct social cost leading to more litigation and less certainty. It is regrettable that more work was not done on this issue at the outset. As it is, the Court of Justice has addressed it on a rather piecemeal and unsatisfactory basis.[136]

Positive action

The conference was perfectly clear that positive action was essential in some cases. Although the jurisprudence under the Equal Treatment Directive was brought to the attention of the participants not much progress was made in discussing just how much should be done. It is therefore particularly noteworthy that in her closing contribution to the Vienna conference, Lore Hostasch, the Austrian Minister for Labour Health and Social Affairs reiterated, with emphasis, the point that equal treatment by itself may not be enough if it does not lead to equality of outcomes.[137]

Ultimately, the two Article 13 Directives took the safe course of adopting almost completely the text of the amendment to Article 119 of the EC Treaty as it was when transposed to Article 141.[138] The key concept utilised in the two Directives is 'full equality in practice'. At present it seems that the Court of Justice will permit this concept to provide at least a small step change in the possibilities for securing a more substantive equality. Thus the Court has recently contemplated permitting steps to be taken to eradicate historic disadvantage so as to secure a more profound equality of opportunity.[139] In retrospect, Vienna was perhaps a missed opportunity to look more deeply and harder at the reasons why the principle of equal treatment can sometimes seem an arid rule of mere formal justice. While

[136] See, e.g., Cases C-356/98 and C-466/00 *Kaba* v. *Home Secretary* (1) and (2), and Case C-19/02 *Hlozek* v. *Roche Austria Gesellschaft mbH.*

[137] See Conference Report p. 66.

[138] See Art. 5 of the Race Directive and Art. 7 of the Employment Framework Directive.

[139] See Case C-319/03 *Serge Briheche* v. *Ministre de l'Intérieur, Ministre de l'Éducation Nationale and Ministre de la Justice.* See in particular the Advocate-General's Opinion for a review of the possibilities that are presented by this concept.

I commented that it was not enough to look at discrimination solely from the point of view of equality before the law, the conference did not adequately address the challenge that this comment posed.

The next step in a social Europe must be to address deep-seated inequalities arising from past disadvantages. In this context the response to demographic change will be key. The Commission has stated that by 2009 across Europe there will be more persons in the last cohort of working life than in the first. The implications of this have been extensively discussed in its Green Paper 'Confronting Demographic change: a new solidarity between generations'.[140] In essence the loss of productive capacity can only be addressed by more immigration, longer working or more family friendly working. Each of these demands a sound equality framework to provide the necessary solution. So it seems inevitable that for this if no other reason the Commission will have to revisit how rights for and action to secure substantive equality can be achieved.

Conflict of rights

Neither the Vienna conference nor the two Directives addressed generically the question of how and by what principles should conflicts of rights between competing equality claims be resolved. Article 4 of the Employment Equality Directive makes a passing reference to the kinds of conflict that can arise between religious affairs and other protected grounds, but its text is a study in ambiguity.[141] Indeed, it is known that the relevant text was added at a late stage in the discussions to secure agreement but not to resolve the problems that can arise on a general basis.

These problems are occurring increasingly and it may be anticipated that with the development of new grounds of protection from discrimination such conflicts will become more frequent. Religion and sex provide particularly fertile grounds but others have also arisen. At present it is not at all clear how, that is to say by what mechanism or juridical principle, such disputes should be resolved.[142] It is regrettable that more work was not done on developing a principle akin to the Canadian concept of

[140] Brussels 16.3.2005, COM(2005) 94 final.

[141] The relationship between age rules and sex discrimination may prove to be the most difficult in the future but this relationship, while recognised as existing (see *Price* v. *Civil Service Commission* [1978] ICR 27), is only now beginning to lead to more developed case law, see, e.g., Case C-187/00 *Kutz-Bauer* v. *Freie und Hansestadt Hamburg* [2003] ECR I-2741.

[142] It is only in Art. 4(2) Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation that we find any attempt to offer a

reasonable adjustment, by which the rights of one protected group might be moderated when in conflict with those of another. Either the European legislator or domestic legislature will have to address them or else judges will have to cope on a case-by-case basis.[143] This point links closely with the issue of intersectional discrimination.

Intersectional discrimination

This is a contrasting problem that was also not properly addressed in either the Vienna conference or the Directives. It concerns the proper way to address discrimination arising on combined or multiple grounds. This issue is one which is now increasingly apparent as requiring special consideration.[144] The separate existence of the Race and Employment Equality Directive may well come to be seen as anachronistic as multiple ground discrimination demands greater action.

Some obvious examples of this can be cited. Thus it is widely recognised that Roma women are often in a state of particular disadvantage, and youth and ethnicity can also be specific markers for disadvantage. Moreover it is obvious that direct age discrimination can be indirect sex discrimination. Issues which will have to be addressed either by the Community legislator

resolution of a possible conflict of right between religion and other matters addressed: '2. Member states may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.'

Provided that its provisions are otherwise complied with, 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.

143 For an example of the kinds of difficulties that can occur see *O'Neill* v. *Governors of St. Thomas More Roman Catholic Voluntarily Aided Upper School* [1997] ICR 33.

144 See, e.g., S. Hannett, 'Equality at the Intersections: the Legislative and Judicial Failure to Tackle Multiple Discrimination' *Oxford Journal of Legal Studies* (2003) 23, p. 65. Note also that the Equal Opportunities Commission has recently launched an investigation into the position of ethnic minority women at work. See 'Moving on up? ethnic minority women at work' at www.eoc.org.uk/Default.aspx?page = 17696&lang = en.

or the Court of Justice will also include what is the proper approach to objective justification where two grounds are present in the same factual situation. A good example of this was brought to light when I was arguing for the Equal Opportunities Commission that length of service pay increments were prima facie indirectly discriminatory against women and required to be justified.[145] The UK pointed out that such pay systems would also be potentially indirect age discrimination and that there were different European rules for the justification of age discrimination.[146] The UK argued that two rules for justifying the same pay system made little sense.

The Commission seems likely to discuss the possibility for a different approach to legislation to deal with this point. Thus a non-discrimination Directive which addressed all aspects of goods, facilities and services or all aspects of employment might be proposed. In many ways this should be welcomed but it is important to post a note of caution too. At the stage when there are still serious problems about transposition of the existing Article 13 Directives this might be a bridge too far. Moreover, the legislative process for such harmonisation is likely to be lengthy and difficult. Experience from the UK shows that the goal of a single Equality Act while highly desired is still difficult to reach.

Concluding points

The introduction of Article 13 can be seen to have been a point at which the Community, building on its experience in the field of sex discrimination, decisively adopted a human rights approach to equality. Social Europe required social cohesion, not exclusion, and Article 13 provides a key mechanism by which important contributions can be made to this end. It has given rise to a huge exercise, organised by the Commission, of dissemination and training to judges and NGOs. It has provided a basis for discussions with the new Member States when they were merely candidate countries as to the steps that they have taken in preparation for accession to the EC Treaty. It has therefore operated at a normative level even before it has been litigated in the Court of Justice. It has already proved that it is indeed worthy of its place at the beginning of the Treaty in Part One, under the rubric 'Principles', since it states clearly that non-discrimination

145 Case 17/05 *Cadman* v. *Health and Safety Executive* argued in the Grand Chamber of the European Court of Justice 8 March 2006.

146 See Art. 6 of the Framework Directive.

is indeed a principle of the Treaty. In due course it seems likely that the Equality Provisions of the Charter of Fundamental Rights of the European Union 2000 which are more extensive might lead to a further development of Article 13. However, it must always be remembered that it was Article 13 which took the critical step in enabling policy and legislation to be adopted on a Europe-wide basis in relation to discrimination.

3

Human rights and European equality law

CHRISTOPHER McCRUDDEN AND HARIS KOUNTOUROS*

Introduction

This chapter provides an analysis of the evolving human rights and equality contexts within which the European Union (EU) equality and non-discrimination Directives were developed and continue to operate.[1] Part I sets out a theoretical framework for considering the variety of differing conceptions of equality that we shall subsequently identify as operating in European equality and human rights law. We then trace how these differing approaches are seen in the differing areas of EU law in which equality features. Part II sets out the international, regional and domestic human rights law on equality and non-discrimination, which has played and will continue to play an important role in the development of EU human rights and equality law. In Part III we focus on human rights and equality in EU Law more specifically and place human rights in the context of EU values and objectives. The negotiations over treaty amendments between 2004 and 2007 played a vital part in shaping this role. A proposed new Constitutional Treaty bringing together the existing treaties failed to gain sufficient support. Instead, a European Council held in Brussels in June 2007 agreed a mandate for a somewhat less ambitious draft Reform Treaty, but incorporating many features of the proposed Constitutional Treaty, to be agreed by an Intergovernmental Council during 2007. In this context,

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[1] This chapter concentrates particularly on those adopted under Art. 13 EC: Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; 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, hereafter referred to as 'the Race Directive', 'the Employment Framework Directive' and 'the Sex Equality Directive', respectively.