OJ	Official Journal of the European Communities
OJLS	*Oxford Journal of Legal Studies*
PL	*Public Law*
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
YEL	*Yearbook of European Law*

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Introduction

The importance of anti-discrimination law

Earlier editions of this book were entirely concerned with the law on sex equality, an area in which, from the beginning of its existence, the European Economic Community[1] possessed rules forbidding discrimination. The right to equality of opportunity irrespective of sex is fundamental to a civilized society since, without it, the individual's talents cannot be exploited to the full, human dignity is compromised, and the person concerned cannot make the most of what life has to offer: inequality on the ground of sex is simply unfair. The community at large suffers too since valuable resources go untapped and potential gifts remain unrealized. The law and the apparatus by which it is administered, of course, play a vital part in sustaining the notion of equality as between the sexes; the law cannot do the whole job, since peoples' attitudes and cultural and other influences will always overlay it, but it can prove highly instrumental in shaping behaviour and expectations.[2]

As will be seen later in this chapter, economic and political forces combined to produce the first European Community anti-discrimination legislation in the fields of sex and nationality. It was not until the dawn of the third millennium that similar laws came into existence to forbid discrimination on the grounds of race, religion, disability, age, and sexual orientation. In addition, it will be seen that other expressions of the equality principle have begun to creep into EU law. It is undeniable that this later generation of anti-discrimination law is every bit as significant as its predecessors in human, moral, political, and economic terms. The aspirations which lie behind it are justice and an improved quality of life for literally millions of people within the European Union.[3] The present volume therefore

[1] A brief account of the development of the three original European Communities, and their subsequent metamorphosis into the European Union, is given below.

[2] See further Byre, 'Applying Community Standards on Equality', in Buckley and Anderson (eds), *Women, Equality and Europe* (Macmillan, London, 1988); Mancini and O'Leary, 'The New Frontiers of Sex Equality Law in the European Union' (1999) 24 ELRev 331; and Osborne and Shuttleworth (eds), *Fair Employment in Northern Ireland: a generation on* (Blackstaff Press and the Equality Commission for Northern Ireland, Belfast, 2004). For an expression of the view that EU law is not committed to the principle of real sex equality, see Fenwick and Hervey, 'Sex Equality in the Single Market: New Directions for the European Court of Justice' (1995) 32 CMLRev 443. Similarly, see Fredman, 'European Community Discrimination Law: A Critique' (1992) 21 ILJ 119, where powerful arguments are marshalled to demonstrate that EU law fails to address the underlying structural obstacles to progress for women.

[3] Henceforth EU.

attempts to examine the scope and coverage of EU law on all the grounds (bar one) upon which it currently forbids discrimination and seeks to promote equality between people; the law forbidding discrimination on the ground of nationality is not covered in depth (though occasional reference is made to it where the context requires) for reasons of space and also because its rationale is very different from that of the other grounds, rooted as it is in the importance of the free movement of persons to the achievement of a single economic market; in addition, its scope is somewhat different from that of the other categories of discrimination and, furthermore, the whole area of nationality discrimination is being subsumed today into the wider notion of citizenship of the Union.[4]

Non-discrimination and equality

Despite the length of time which it took the EU to outlaw discrimination on this portfolio of grounds, it is not actually difficult for most people today to embrace the broad notion that at least some types of discrimination are unacceptable and should be forbidden by law. Of course, the word 'discriminate' is capable of two distinct connotations, the first of which expresses the usually laudable activity of making those kinds of choices which everyday life presents to human beings; thus, we speak, for example, of being 'discriminating' consumers of food or art, meaning that we make informed and critical judgements about these matters. This is not, however, the sense which legal systems attach to the word 'discriminate'; the law is concerned with discrimination only when it is in some generally recognized way unacceptable. As Feldman has explained, discrimination becomes 'morally unacceptable' when it takes the form of treating a person less favourably than others on account of a consideration which is 'morally irrelevant'.[5] The critical question which then has to be decided by the legal system is when a consideration is to be considered morally irrelevant. If taken to extremes, this principle could effectively stultify decision-making by requiring the positive justification of every matter taken into consideration by the decision-maker. Legal systems frequently, therefore, attempt to classify or to enumerate those matters which are morally irrelevant in specified contexts. Thus, there is some consensus today that many matters which fall outside the control of an individual, such as sex, race, and disability, are generally speaking morally irrelevant bases on which to disfavour people in fields such as the workplace and education. Control is not, however, the invariable key to deciding this matter. Age, for example, although outside control, may often be considered to be morally relevant to the doing of a job: a five-year-old may not be the best person to pilot a jumbo jet! Even more doubt surrounds those issues over

[4] See in particular Case C-85/96 *Martínez Sala* [1998] ECR I-2691 and Case C-184/99 *Grzelczyk v Centre Public d'Aide Sociale* [2001] ECR I-6193. See also Spaventa, 'From *Gebhard to Carpenter*: Towards a (Non-) Economic European Constitution' (2004) 41 CMLRev 743.

[5] Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford University Press, Oxford, 2002), 135–9.

which, arguably, people have some control, such as their choice of religion or (more controversially) sexual orientation.

A legal system which outlaws discrimination has also to be acutely aware of the many different ways in which discrimination manifests itself. The law cannot restrict its prohibition to conscious or deliberate acts founded on prejudice, since these are certainly not the only ways in which disadvantage grounded upon discrimination arises. Much discrimination results from the traditional, unquestioning ways in which society is ordered and the ways in which it functions in practice. For example, the ineffectual and haphazard pursuit by the London Metropolitan Police Service of the murderers of the black teenager Stephen Lawrence constituted institutional discrimination, irrespective of the wrongdoing of individual officers. In very important words, which should serve as a reminder to all legislators in this area, Sir William Macpherson's Inquiry into the matter defined the concept of 'institutional racism' as:

> The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.
>
> It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease.[6]

In addition to difficulties surrounding the identification and definition of discrimination, it has become clear from the practical operation of systems of anti-discrimination law that it is not enough to focus simply on the negative concept of non-discrimination. If the moral basis on which the law forbids discrimination is that there is a fundamental human right to be treated in the same way as other human beings,[7] the aim must logically be to produce substantive equality. This is a much more positive and value-laden concept than non-discrimination, although courts not infrequently conflate the two ideas.[8] In particular, it involves taking an active attitude to dismantling the obstacles which stand in the way of equality (however 'equality' is to be defined).[9] Thus, for example, it is not sufficient for the achievement of equality simply to require the same conditions for all people, whether male or female, black or white; this is because in practice some sections of

[6] *The Stephen Lawrence Inquiry*, Cm 4262-I (HMSO, London, 1999), para 6.34.

[7] In addition to this goal of neutrality as between different groups of people, Fredman has argued that the non-discrimination principle also furthers individualism and personal autonomy: see Fredman, 'Equality: A New Generation?' (2001) 30 ILJ 145.

[8] For example, in Case T-45/00 *Speybrouck v Parliament* [1992] ECR II-33, the Court of First Instance stated that 'the principle of equal treatment for men and women in matters of employment and, at the same time, the principle of the prohibition of any direct or indirect discrimination on grounds of sex form part of the fundamental rights the observance of which the Court of Justice and the Court of First Instance must ensure' (at 46).

[9] For a compelling critique of Europe's existing race discrimination laws from this perspective, see Hepple, 'Race and Law in Fortress Europe' (2004) 67 MLR 1.

the community have been historically so disadvantaged as to be unable to compete in the race in the first place. Although most people would probably agree at a relatively rarefied plane of abstraction that equality is a proper goal, there is scope for a great deal of debate over the lengths to which it is proper to go in order to provide such a level playing-field.[10] In addition, there is the even more difficult problem of deciding to what extent equality embraces respect for minority practices and requires the recognition of diversity, as distinct from identity of treatment.[11]

There are many different ways in which the concept of equality can be expressed and in which it can be attempted to be realized in practical terms.[12] It has been described by one commentator as 'one of that genre of words . . . which have both a vague conceptual meaning and a rich emotive meaning—with the conceptual meaning being subject to constant redefinition'.[13] The same author draws attention to three main (though not exclusive) expressions of the principle of equality, namely 'formal' equality (consistency of treatment), equality of opportunity, and equality of results.

In addition, although many different models of equality can be articulated and described, legal systems often adopt their own individualized views of these various models. Current EU law, as will be seen throughout this book,[14] espouses differing approaches to the concept,[15] and is indeed subject to competing influences in this regard.[16] There are, in short, no absolutes in this area in practice, although absolute positions can be defined in theory.

The picture can perhaps best be viewed in terms of a continuum. At one end lies what is often called 'formal' equality; this is the minimal, Aristotelian postulate that like cases should be treated alike and that different cases should be treated differently, unless there is an objective reason not to do so. Thus, for example, two people with identical qualifications and experience should be paid the same wage,

[10] For a seminal, though now in part historical, analysis of the causes of inequality and the panoply of responses to it which are open to society, see McCrudden, 'Institutional Discrimination' (1982) 2 OJLS 303.

[11] See Barmes with Ashtiany, 'The Diversity Approach to Achieving Equality: Potential and Pitfalls' (2003) 32 ILJ 274. The proposed Constitution, discussed below, rather engagingly adopts a 'motto' for the EU, which is to be 'United in diversity': see its Art I-8.

[12] See McCrudden, 'Equality and Non-Discrimination', in Feldman (ed), *English Public Law* (Oxford University Press, Oxford, 2004), ch 11; Barnard, 'The Principle of Equality in The Community Context: *P, Grant, Kalanke and Marschall*: Four Uneasy Bedfellows?' (1998) 57 CLJ 352; Fredman, 'A Critical Review of the Concept of Equality in UK Anti-Discrimination Legislation', Working Paper No 3 (Cambridge Centre for Public Law and the Judge Institute of Management Studies, 1999); and Fredman, 'The Future of Equality in Britain', Working Paper Series No 5 (EOC, 2002).

[13] Barrett, 'Re-examing the Concept and Principle of Equality in EC Law' (2003) 22 YEL 117, at 120.

[14] But see ch 3 in particular.

[15] See Fenwick, 'From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex Equality Law' (1998) 4 EPL 507; Barnard and Hepple, 'Substantive Equality' (2000) 59 CLJ 562; Bell and Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 28 ELRev 349.

[16] See Flynn, 'Equality Between Men and Women in the Court of Justice' (1998) 18 YEL 259, and McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in Fredman (ed), *Discrimination and Human Rights* (Oxford University Press, Oxford, 2001).

irrespective of any dissimilarities which they may possess. This is also frequently referred to as the 'merit' principle: individuals ought to be rewarded according to their merit and not according to stereotypical assumptions made about them on account of the group to which they belong. However, such a principle is of course deceptively simple, for how is it to be judged, for example, that the qualifications and experience of two individuals are identical?[17] And to precisely which situations and decisions is the principle to be applied?[18] In addition, this analysis does nothing to improve the condition of an under-class, since it is satisfied where two individuals are treated equally badly, as well as where they are treated equally beneficially. If one of the prime rationales of equality law is the improvement of the lot of human beings, this simply will not do.

These sorts of difficulties lead some legal systems to focus on factual scenarios which can be shown empirically to produce specially severe or marked injustice and hardship ('suspect classifications' in American terminology), and then to enact quite specific laws which attempt to remedy the situation. For example, it is often perceived that, as a result of stereotyping, women and people from ethnic minorities are treated unequally in the workplace by comparison with men and the prevailing ethnic majority. A frequent legislative response is therefore to enact legislation making it unlawful to discriminate on the grounds of sex and ethnic origin in the context of employment.

A more fluid version of this principle is also encountered. This acknowledges specific instances of discrimination in practice but then tries to generalize and to cater for similar, but not yet classified, examples of discrimination. Such a model typically covers a broad range of situations in which discrimination is rendered unlawful and contains an *eiusdem generis* provision allowing the prohibition to develop organically to deal with fresh situations as they manifest themselves. McCrudden characterizes this model as prevalent in relation to the 'protection of particularly prized "public goods", including human rights'. He goes on to explain that the focus here is on the distribution of the public goods, rather than on the characteristics of the recipient, except for the purpose of justifying different treatment.[19]

These models, however, share a common shortcoming which is often analysed in terms of symmetry. In the example taken here, the rules apply identically to men

[17] See further McCrudden, 'Merit Principles' (1998) 18 OJLS 543.

[18] This sort of problem manifested itself in Joined Cases C-122 & 125/99P *D and Sweden v Council* [2001] ECR I-4319, which concerned the alleged entitlement of a Community employee, who had a registered same-sex partnership under Swedish law, to identical treatment to that accorded to a married employee. The ECJ found that the then existing laws of the Member States showed great diversity in approach to same-sex partnerships and that they did not generally assimilate them to marriage; it held that the employee's situation was therefore not comparable with that of a married employee. On same-sex partnerships, see further Wintemute and Andenas (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, Oxford, 2001). In the UK, a Civil Partnership Bill was introduced in the House of Lords and brought to the House of Commons on 5 July 2004; this proposed legislation would grant legal recognition to same-sex partnerships and place civil partners in the same position as married people as regards discrimination on the ground of their status. At the time of writing, it had not been enacted.

[19] McCrudden, op cit, n 12, at para 11.05.

and women, and to people from all ethnic backgrounds; indeed, this is at the heart of their philosophy since they are usually predicated on a principle of fundamental human rights and the dignity which should be accorded to all human beings. However, the underlying injustice which they actually seek to counter applies predominantly to women and to people from ethnic minorities. In seeking to treat everyone alike, the law in effect forces a male, ethnic majority paradigm on all. This, it is argued, may appear to produce equality but it is in reality only a formal, superficial kind of equality which reinforces the pre-existing hegemony.[20] In addition, as Fredman has pointed out, these types of model also ignore the fact that cumulative disadvantage makes it difficult for members of the disadvantaged group ever to attain the threshold of equal qualification or merit with the dominant group.[21] Furthermore, these models usually rely heavily upon individual action, normally through litigation, to vindicate the rights protected. They do not provide either the support or the subsequent legal protection offered by a collectivist or group-based remedy. In addition, they may never actually achieve legal redress, since there may never emerge a particular 'wrong-doer' whose actions can be challenged; many manifestations of disadvantage result from an agglomeration of factors and circumstances for which no one person or body may be legally responsible.

Some systems and some bodies of law therefore approach equality from a different angle.[22] Rather than attempting to be blind to differences, they actually focus on differences, especially those which produce disadvantage in practice, and in doing so they clearly come into headlong conflict with the basic non-discrimination principle. They characteristically aim for equality of results, but the extent to which they intervene into the activities of people and organizations varies considerably. In some, there is little more than an obligation to be aware of differences and to endeavour to offer equal participation to all. Others expressly require public authorities actively to promote equality of opportunity.[23] And some are openly re-distributive, for example allocating jobs and other opportunities on the specific basis of membership of an under-privileged group.[24] Such models are clearly, though to varying extents, in tension with the liberal, non-collectivist view of equality which sees it as an individual human right.[25]

[20] MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge, Mass/London, 1987); Fredman, 'European Community Discrimination Law: A Critique' (1992) 21 ILJ 119; Lacey, 'From Individual to Group' in Hepple and Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell, London, 1992).

[21] Fredman 'The Future of Equality in Britain', op cit, n 12. See also Fredman, *Women and the Law* (Clarendon Press, Oxford, 1997).

[22] See further O'Cinneide, 'Extending Positive Duties Across the Equality Grounds' (2003) 120 EOR 12.

[23] Notable examples of this approach in the UK include the Northern Ireland Act 1998, s 75, and the Race Relations (Amendment) Act 2000, s 2.

[24] The clearest example of this approach in the UK is to be found in the Police (Northern Ireland) Act 2000; pursuant to the so-called 'Patten' reforms to the Northern Ireland police service, a 50:50 split between Catholics and Protestants was, on a temporary basis, required for recruits to that force.

[25] For a thought-provoking attempt to resolve this tension, see Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16; the author asserts that 'deviations from equal treatment are required in order to achieve the distributive aim of social inclusion. This aim requires preference or priority to members of a particular group, if the group can be classified as socially excluded. The preferential measures required are those that will contribute to the reduction of social exclusion' (at 40).

It must be emphasized that these models are often much less distinct from one another in practice than these descriptions might suggest. Legal systems frequently blur the distinctions concerned, in particular by combining the principle of non-discrimination with a requirement to promote equality of opportunity and to celebrate diversity and pluralism.[26] Such blurring is sometimes also a consequence of the fact that a court may be required to enforce law from several different sources simultaneously. In addition, it should be acknowledged that different times and political climates require different and increasingly sophisticated responses, and that this is an area where one must therefore expect a constantly shifting legislative, as well as judicial,[27] response to society's demands. The title of the present work reflects the fact that the substance of most of the existing EU law in this area refers primarily to the principle of non-discrimination; however, it is not to be taken to preclude discussion of the concept of equality, which is (as will be seen) also often referred to both in the legislation and in judicial decisions.[28]

The dynamism inherent in EU law

EU law has proved an ideal vehicle for upholding the principle of sex equality, in part at least because of the EU's undoubted potential for growth. That growth has taken place, and continues to occur, in a number of different ways. With the expansion of the Union's concerns to cover other grounds of discrimination, it would appear well-nigh inevitable that what has been true in the past for sex equality will also hold good for other fields of equality law.

When the European Coal and Steel Community (ECSC) Treaty was concluded in 1951, and the Treaties establishing the European Economic Community (EEC) and European Atomic Energy Community (Euratom) were concluded in 1957, their chief instigators intended their immediate end to be economic welfare but their long-term goal to be political integration amongst the States of Europe.[29] The architects of the three European Communities had personally witnessed the destructive forces of nationalism; many had seen their countries overwhelmed and

[26] See Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8 ELJ 290.

[27] See, eg, Lord Lester's account of attitudes to discrimination expressed in the past by UK courts and judges in 'Equality and United Kingdom Law: Past, Present and Future' [2001] Public Law 77. See also the analysis of the EU case law on sex discrimination by Pager in 'Strictness v Discretion: The European Court of Justice's Variable Vision of Gender Equality' (2003) 51 American Journal of Comparative Law 553; the author there argues that the EU's judiciary adapts the level of scrutiny which it applies according to the nature of the provision under review.

[28] For discussion of the way in which the draft EU Constitution (examined further below) reflects notions of formal and substantive equality, negative and positive duties, and diversity, see Bell, 'Equality and the European Union Constitution' (2004) 33 ILJ 242.

[29] See in particular Ionescu, *The New Politics of European Integration* (Macmillan, London, 1972) and Kitzinger, *The Politics and Economics of European Integration* (Greenwood Press, Westport, Conn, 1963).

occupied during the Second World War. They were increasingly aware of the rise of the then 'Super Powers' and of the threat of Communism in the East. The Schuman Declaration of 9 May 1950, which preceded the formation of the ECSC, made very clear its author's ultimate political aspirations. Robert Schuman, the French Minister for Foreign Affairs, proposed that the whole of the French and German coal and steel production industries be placed under a common 'high authority', within the framework of an organization open to participation by the other countries of Europe. He went on to explain:

> The pooling of coal and steel production will immediately provide for the setting up of common bases for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims. The solidarity in production thus established will make it plain that any war between France and Germany becomes, not merely unthinkable, but materially impossible.

His overall plan was to build a united Europe 'through concrete achievements, which first create a *de facto* solidarity'. The Coal and Steel Community was to be just a first step in an ever-tightening web of economic, and thus political, integration. It was believed that the integration of the coal and steel industries would create common spheres of interest as between the French and the (then West) Germans, which would encourage greater political friendship between those nations; further common economic and social issues would then begin to present themselves and a political framework would have to be established to deal with them. Gradually, the process would gather momentum. This scheme for 'rolling interdependence' between the States of Europe is now, and was from the start, clearly echoed in the founding Treaties. It was taken a stage further when the Member States pledged themselves in the Single European Act of 1986 to make greatly increased use of majority voting in the Council, thereby relinquishing a significant portion of their national sovereignty in favour of the Community. Furthermore, despite the antagonism of many, in particular the British Government, to the use of the word 'federal' in the Treaty on European Union of 1993,[30] it is clear that that Treaty nevertheless continued the progress towards tightening the web; its Preamble proclaims the Member States:

> Resolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,
> ...[And] Resolved to continue the process of creating an ever closer union among the peoples of Europe...

It also transformed the nature of the enterprise so as to create the 'European Union'. Founded upon the European Community which was still governed by its own Treaty,[31] the EU was also to direct its attention (albeit in a looser and less supranational fashion) to the wider issues of a Common Foreign and Security

[30] Henceforth referred to in the present work as the TEU. This Treaty is also known colloquially as the Maastricht Treaty. [31] Henceforth normally referred to in the present work as the TEC.

Policy and Justice and Home Affairs; the way was also paved for economic and monetary union.[32] The Amsterdam Treaty of 1997, concluded after the holding of an Intergovernmental Conference (IGC) mandated by the TEU,[33] made numerous technical changes intended to reinforce the economic, social, political, and other links between the Member States.[34] The Member States, however, made clear their unease with the existing constitutional arrangements surrounding the EU in a Declaration on the Future of the Union which was issued in Nice in 2000, and they therefore decided to convene a new IGC, intended to agree the necessary Treaty amendments. A further Declaration made at Laeken in the following year established a Convention under the chairmanship of ex-President Giscard d'Estaing of France, charged with providing a discussion document for the IGC. This Convention produced a draft Constitution for the Union in 2003, an amended text of which was signed by the Heads of State or Government of all the Member States (but subject to ratification by all of them in accordance with their respective constitutional requirements) on 29 October 2004;[35] it is to enter into force on 1 November 2006, provided that it is duly ratified by that date.[36] The Constitution is an amalgam of legal provisions, both articulating the most fundamental of principles on which the Union is based and also containing a mass of detailed rules, substantive and institutional; it consolidates much existing law and also amends and rationalizes other areas. If and when it enters into force, it will repeal all the preceding Treaties. The third recital to its Preamble proclaims that 'the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny'.[37] Thus, it is evident that, although public relish for formal federalization has perceptibly waned over recent years, the process of European integration is set to continue, probably bringing in its wake yet further legislation supporting closer economic and political ties which are well-nigh certain to touch on the spheres of equality and non-discrimination.

The process of European integration has not, however, been restricted to the deepening of ties between the States of Europe. It has also been significant because it has hugely broadened the geographical scope of the enterprise. The Treaties,

[32] The original title 'European Economic Community' was abbreviated to the 'European Community' by the TEU. The EU was hereafter the pediment (essentially a single institutional framework) over-arching three so-called 'pillars': these pillars are constituted at the time of writing by (i) the Economic Community and Euratom, (ii) the Common Foreign and Security Policy, and (iii) Police and Judicial Cooperation in Criminal Matters. [33] See TEU, Art N(2).

[34] Art 12 and the Annex to the Treaty of Amsterdam renumbered the articles of both the TEU and the TEC. The discussion which follows adopts the new numbering.

[35] The draft Constitution collapses the pillar structure and, in Art I-1, simply establishes 'the European Union'. It is for this reason that, although equality law is formally at the moment governed only by the EC pillar, the decision has been made to refer in the present work to 'EU' equality law, except where the context demands otherwise. In any event, the term 'EU law' is increasingly used in practice now, notwithstanding the technicalities of the matter.

[36] Art IV-447 of the Constitution. If not ratified by this date, it is to enter into force on the first day of the second month following the deposit of the instrument of ratification by the last ratifying State.

[37] See also Recital 1 of the Preamble to Part II of the Constitution.

of course, provide for the accession of new Member States[38] and, although only six States joined in the wake of the original Schuman Declaration,[39] the EU today consists of 25 Member States and spans most of Western and Central Europe.[40]

A third way in which the development of modern Europe has provided important support for the principle of equality is through its enhanced emphasis in recent times on the protection of human rights.[41] The Treaty of Amsterdam amended the TEU so as to articulate this emphasis. Article 6 of the TEU now provides:

> 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> 2. The Union shall respect fundamental human rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Moreover, a procedure was introduced by Article 7 of the TEU for dealing with a 'clear risk of a serious breach by a Member State of the principles mentioned in Article 6(1)'; in the event of such a breach being established, certain of the defaulting Member State's Treaty rights, including the right to vote in the Council, may be suspended. The Cologne European Council of June 1999 proclaimed the protection of fundamental rights as an 'indispensable prerequisite' to the EU's legitimacy, and a decision was taken to promulgate a Charter of Fundamental Rights. This Charter was formally proclaimed by the European Parliament, the Council, and the Commission in Nice in December 2000[42] and contains a number of provisions protecting people from discrimination and guaranteeing equality. Although the Charter was not originally intended to have legal force, it now occupies Part II of the draft Constitution and will in effect become the Union's Bill of Rights if and when the Constitution is adopted.[43]

The Constitution itself clearly emphasizes the importance of human rights protection to the Union. The opening recital of its Preamble states that the signatories:

> Drawing inspiration from the cultural, religious and humanist inheritance of Europe, have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.

[38] See now TEU, Art 49.

[39] France, West Germany, Italy, Belgium, The Netherlands, and Luxembourg.

[40] The UK, Ireland, and Denmark became members of the Communities from 1 January 1973; Greece acceded as of 1 January 1981, Spain and Portugal as of 1 January 1986, and Austria, Finland and Sweden as of 1 January 1995. The latest accessions took place on 1 May 2004 and brought into membership of the Union Hungary, Poland, the Czech Republic, Slovakia, Slovenia, Malta, Cyprus, Estonia, Latvia, and Lithuania.

[41] For a highly sceptical view of the approach of the EU to human rights, see Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press, Oxford, 2004).

[42] OJ [2000] C364/01.

[43] Its provisions on non-discrimination and equality are discussed more fully in ch 7.

Article I-2 also provides that the Union is 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.

These aspects of the development of the EU are vital to an understanding of its equality laws. The Treaties and their present provisions are in no sense intended to be an end in themselves but rather a staging-post in an ultimate design. The social provisions, especially those protecting fundamental human rights, are growing and developing as the linkage between the Member States becomes closer. Furthermore, the Union's geographical extension brings its jurisdiction to bear over a vastly expanded population. What this means in practical terms is that a continuously developing body of equality law now reaches a very large, and ever-expanding, group of people. An element of dynamism is contained within this formula which is almost always lacking in any wholly domestic context.

Sources of EU anti-discrimination law

Crucial to the concept of federation is the existence of a distinct legal system, belonging exclusively to the federation itself. This means that a federation must be able both to create its own laws and to enforce them effectively through its own system of courts or tribunals. The drafters of the European Community Treaties, eager as they were to create the germ from which a federation would grow, were aware of these needs and therefore provided for a system of Community law, together with appropriate law-making powers, enforceable through the medium of the European Court of Justice (ECJ)[44] and the local courts. Essentially, they made provision for both primary and secondary tiers of Community law. Interestingly, the existing Treaties stop short of the use of the actual word 'legislation' in describing the legal system which they create, presumably for the political and psychological reasons that this might have proved unacceptable to national parliaments at the time of their accession to the European Communities.[45]

The Constitution contains a number of provisions which, if the instrument is ratified, will have a direct and important impact in the field of non-discrimination and equality law. In particular, it proclaims in Article I-2 that the Union's values 'are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail'.

Article I-3 includes amongst the Union's objectives the combating of 'social exclusion and discrimination' and pledges to 'promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child'. Article I-45, entitled 'The principle of democratic

[44] The ECJ's sister court, the Court of First Instance (hereafter the CFI), was created in 1988 and began work on 31 October 1989. If the Constitution becomes effective, the CFI will be re-named 'the General Court': see Art I-29.

[45] However, such qualms were not experienced by the drafters of the Constitution and, as will be discussed below, that document does refer to 'legislative acts' of the Union.

equality', provides: 'In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies'.[46]

(i) The EC Treaty (TEC)

The main primary source of Community law at present is the founding Treaties, together with the amendments which have been made to them over the years. Of the three founding Treaties, the only one to make specific reference to equality is the Treaty establishing the European Community, the TEC, and it is with that Treaty, as subsequently amended, that this book is therefore mainly concerned.[47]

The TEC contains a number of provisions which are relevant in this field. Such provisions are of two types, namely, those which themselves convey substantive rights and those which confer enabling authority on the institutions of the EU to make secondary legislation.

Taking first the substantive provisions, the importance to the Union of outlawing sex discrimination is indicated by the enumeration in Article 2 of the TEC of the promotion of 'equality between men and women' in the list of 'tasks' of the European Community. Furthermore, Article 3(2) provides that, in engaging in all its activities, 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women'. Article 141[48] enunciates the principle of equal pay for equal work irrespective of sex. As the Treaty was originally drafted, this was the only explicit mention anywhere in it of the principle of sex equality,[49] and so it provided the inspirational springboard for the subsequent developments in this area. As it is currently drafted, the Article also protects the wider principles of equality of opportunity and equal treatment in the world of work.

The second type of Treaty provision relevant in the present context is that which provides the legal authorization for further, secondary legislation. The Treaty makes clear the need for specific authorization for particular measures of secondary legislation in Article 249, which enables the European Parliament, the Council, and the Commission[50] to make secondary legislation 'in order to carry

[46] Art III-257(3) also pledges the Union to 'endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia'.

[47] Henceforth, unless otherwise stated, all Treaty references in the present work will therefore be to the TEC.

[48] Under the pre-Amsterdam numbering, the substance of what today are the first two paragraphs of Art 141 were contained in Art 119. Many of the older cases cited in the text therefore refer to Art 119. For the sake of verbal simplicity, discussion in the text of the present work will just refer to Art 141, unless the context demands otherwise. If and when the Constitution enters into effect, Art 141 will be metamorphosed once again, this time into Art III-214.

[49] A number of references to sex equality were added by the Amsterdam Treaty, as will be discussed.

[50] For general discussion of the powers and functions of the main institutions of the Communities, in particular the European Parliament, the Council, Commission, and ECJ, see *Wyatt and Dashwood's European Community Law*, 4th edn (Sweet & Maxwell, London, 2000); and Weatherill and Beaumont, *EU Law*, 3rd edn (Penguin, London, 1999).

out their task', but only 'in accordance with the provisions of this Treaty'. In other words, the institutions may create fresh secondary legislation only where a particular provision of the Treaty authorizes this. They possess no inherent or implied law-making capacity.

Article 141 itself conferred no secondary law-making power until its amendment by the Amsterdam Treaty. A new para (3) was, however, inserted by that Treaty, providing:

> The Council, acting in accordance with the procedure referred to in Article 251,[51] and after consulting the Economic and Social Committee,[52] 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.[53]

The breadth of this enabling provision is noteworthy; it permits measures in general and is not limited to any one form of legislative instrument.[54] It is expressed to extend to measures ensuring equality of opportunity and is not restricted to those simply outlawing discrimination.[55] Furthermore, it encompasses not merely pay equality but also other aspects of equal treatment. The important issue of how far it will be permitted to extend to equal treatment outside the traditional world of paid work will depend on the policy adopted by the ECJ in relation to the interpretation of the word 'occupation'.

The Amsterdam Treaty also created what is now Article 13(1):[56]

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community,[57] the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament,[58] may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[59]

[51] Art 251 gives a power of 'co-decision' to the Council and the European Parliament; this involves a complicated process of exchange and negotiation between the two institutions.

[52] This Committee consists of 'representatives of the various economic and social components of organised civil society, and in particular representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers and the general interest': Art 257.

[53] The substance of this provision will be contained in Art III-214(3) of the proposed Constitution, if and when that instrument enters into force.

[54] See discussion below of the different legislative instruments available in EU law.

[55] See discussion above.

[56] As to the genesis of Art 13, see Flynn, 'The Implications of Article 13 EC—After Amsterdam, Will Some Forms of Discrimination be More Equal Than Others?' (1999) 36 CMLRev 1127.

[57] Note the subtly different opening words of Art 12 on nationality discrimination: 'Within the *scope of application of this Treaty* and without prejudice to any *special* conditions contained therein' (emphasis added). It remains to be seen whether any significance will be ascribed by the ECJ to these verbal differences.

[58] The marginal role assigned by Art 13 to the European Parliament is ironic, given that this area touches the very heart of social policy. The difference between the Parliament's role under Art 13 and that under Art 141(3) has led to differences in the texts of the instruments adopted pursuant to these respective provisions.

[59] Considerable disagreement between the Member States preceded the adoption of this Article. Whilst most agreed on the need to include sex, race, and religion, there was much less commitment to the other grounds. The UK, under Conservative administrations, was opposed to any EU instrument on discrimination; this attitude changed only with the election of a Labour Government in 1997, whose

It is noteworthy that this Article is to be found in Part One of the TEC, headed 'Principles'; this will enable the ECJ, if it is so inclined, to emphasize the constitutional importance of the instruments adopted pursuant to Article 13. The opening phrase of the Article indicates that it is not to be used where other, more specific enabling authority exists, and Article 141(3) will thus usually be the appropriate provision for legislation dealing exclusively with sex discrimination; however, Article 13 could be used for the enactment of a composite measure which addressed discrimination based on sex as well as the other prohibited classifications. Like Article 141(3), Article 13 authorizes all types of legislative or other instrument,[60] but it should be noted that its ambit is restricted to the prohibition of discrimination and that it does not extend to measures to promote equality of opportunity on the wider scale.

Before the creation by the Amsterdam Treaty of enabling provisions dealing expressly with sex equality, more general enabling provisions had to be utilized for the enactment of secondary legislation in this area. The most obvious candidates were Articles 94 and 308. Article 94 permits the Council, acting unanimously on a Commission proposal and after consulting the European Parliament and the Economic and Social Committee, to make directives[61] 'for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market'. This is often called 'harmonization' legislation. Article 308 is generally a little wider in its scope and provides:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Some further bases for harmonization legislation were provided by the Single European Act of 1986, in particular what was then Article 118a. This was used to mandate Council directives for improving the health and safety of workers.[62] The Amsterdam Treaty generalized the provision[63] and today its successor,

support made possible the unanimous agreement necessary for the adoption of the new Article. The Irish Presidency of the Council in the second half of 1996 is widely credited for the eventual text of Art 13. (Ireland's enthusiasm for such legislation was also manifested shortly afterwards by the adoption of its own wide-ranging national Employment Equality Act 1998.)

[60] See Waddington, 'Testing the Limits of the EC Treaty Article on Non-discrimination' (1999) 28 ILJ 133. If and when the Constitution comes into operation, Art 13(1) will be slightly modified: Art III-124 of the proposed Constitution provides authority for anti-discrimination legislation on the same grounds as Art 13, but it will require the Council to act unanimously 'after obtaining the consent of the European Parliament'. Note: this does not involve the full co-decision procedure and, although increasing the Parliament's powers in this area from its present powers, somewhat limits its input to the debate over new measures. [61] For the definition and characteristics of a directive, see below.

[62] In this form it provided the authorization for the Pregnancy Directive (Directive 92/85, OJ [1992] L348/1), discussed in ch 5.

[63] It absorbed into the body of the TEC the provisions which had formerly been contained in the Agreement on Social Policy, discussed below.

Article 137,[64] provides that the Community will support and complement the activities of the Member States in a number of fields including:

> (a) improvement in particular of the working environment to protect workers' health and safety;
> (b) working conditions;
> (c) social security and social protection of workers;
> ...
> (h) the integration of persons excluded from the labour market...;
> (i) equality between men and women with regard to labour market opportunities and treatment at work.

To these ends, the Council is authorized to adopt directives setting 'minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States'.[65] Such directives must not, however, impose administrative, financial, and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.[66] The Council is also permitted to adopt measures

> designed to encourage co-operation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States.[67]

Such action is to be in accordance with Article 251, after the Council has consulted the Economic and Social Committee and the Committee of the Regions.[68] Exceptionally, however, in order to take action *inter alia* in the fields of social security and social protection, the Council has to act unanimously on a proposal from the Commission, after consulting the European Parliament, the Economic and Social Committee, and the Committee of the Regions.[69]

Until its repeal by the Amsterdam Treaty, the Protocol on Social Policy annexed at Maastricht to the TEC provided a vehicle for a special kind of secondary legislation.[70] The Protocol contained an Agreement on Social Policy, acquiesced in by all the Member States apart from the UK, which refused whilst under Conservative administration to be involved in any further extension of the powers of the Community in the field of social policy.[71] Legislative action[72]

[64] If and when the proposed Constitution enters into force, this will become Art III-210.
[65] Art 137(2)(b). [66] Ibid. [67] Art 137(2)(a). [68] Established by Art 263.
[69] Art 137(2).
[70] Art 311 provides that Protocols annexed to the TEC are to form 'an integral part thereof'.
[71] It was suggested by some writers that the UK's social policy opt-out could be contrary to a 'higher principle' of Community law (ie, superior in legal force to the written rules of the Treaty), such as that of the uniform application of EC law or the principle of legal certainty, and that it was therefore invalid. See Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 LQR 95; Whiteford, 'Social Policy After Maastricht' (1993) 18 ELRev 202; and Curtin, 'The Constitutional Structure of the European Union: a Europe of Bits and Pieces' (1993) 30 CMLRev 17.
[72] Art 2(2) permitted the Council to adopt directives in accordance with the procedure referred to in Art 252, after consulting the Economic and Social Committee. Art 2(3) permitted unspecified action to be taken by the Council unanimously on a proposal of the Commission, after consulting the European Parliament and the Economic and Social Committee, in areas which included social security and the protection of workers. Art 4 envisaged Community level collective agreements which could, in certain

pursuant to the Agreement took place according to the usual EC institutional procedures, but without the participation of the UK in the relevant Council meetings since such legislation did not bind the UK.[73] It could supplement but could not detract from the pre-existing *acquis communautaire*.[74]

Several instruments were concluded under the aegis of the Protocol and Agreement, the first being the Directive on Works Councils.[75] This was followed by a European-level collective agreement on Parental Leave signed on 14 December 1995. The agreement was subsequently enacted in the form of a directive in June 1996.[76] A directive on parental leave had been proposed as long ago as 1984, but was consistently opposed by the UK Government on financial grounds. The proposal was resurrected after the Social Policy Agreement came into force. Another measure which had remained stalled for a long time because of the intransigence of the UK Government of the day was a proposed directive on the burden of proof in sex discrimination cases and on the definition of indirect discrimination; the social partners decided that they did not wish to negotiate an agreement on this matter, but progress was made towards the enactment of legislation when unanimous political agreement[77] was reached on a common position at a Council meeting in the Summer of 1997.[78] In addition, an agreement between the social partners was reached in June 1997 on discrimination against part-time workers, subsequently transposed into a directive in the Summer of 1997.[79] A framework agreement on fixed-term work was concluded on the same basis and later transposed into a directive.[80] After its election in May 1997, the new Labour Government of the

circumstances, be implemented by a Council decision on a proposal from the Commission. See further Fitzpatrick, 'Community Social Law After Maastricht' (1992) 21 ILJ 199 and Watson, 'Social Policy After Maastricht' (1993) 30 CMLRev 481.

[73] Thus the Agreement created for the first time the potential for a 'two speed Europe'. For the view that the Protocol created a real danger of 'social dumping', in other words, 'investment by companies in the United Kingdom where labour costs are lower than in other Member States, which will result in workers in those other Member States being forced to accept lower standards in order to avoid unemployment', see Watson, op cit, n 72.

[74] See the opening recital to the Protocol. Curtin, op cit, n71, questioned the legal status of such 'legislation', pointing out that the wording adopted by the Protocol authorized the participating States to adopt acts 'among themselves' and arguing that the products of such agreements could not constitute EC law with the qualities set out in Art 249. The Commission, however, asserted that 'the Community nature of measures taken under the Agreement is beyond doubt, which means that the Court of Justice will be empowered to rule on the legality of directives adopted by the Eleven and to interpret them' (Communication concerning the application of the agreement on social policy presented by the Commission to the Council and to the European Parliament COM(93) 600 final). To the same effect, see also Bercusson, 'The Dynamic of European Labour Law After Maastricht' (1994) 23 ILJ 1.

[75] Directive 94/45, OJ [1994] L254/64, as to which see also Burrows and Mair, *European Social Law* (Wiley, Chichester, 1996), ch 14. At a lecture in the University of Birmingham in 1995, Prof Giorgio Gaja pointed out that the adoption of the usual EC system for the numbering of such directives was deceptive because it implied that they were ordinary instruments of EC law; furthermore, he asserted that this confused the legislative system.

[76] Directive 96/34, OJ [1996] L145/4, discussed in ch 5.

[77] Including that of the UK.

[78] COM (96) 340 final. The provisions of the eventual directive are discussed in ch 3.

[79] Directive 97/81, OJ [1998] L14/9, discussed in ch 5.

[80] Directive 1999/70, OJ [1999] L175/43, also discussed in ch 5.

UK announced its intention to commit itself to all the instruments hitherto agreed by the other Member States under the Social Policy Agreement.[81]

(ii) Secondary legislation

Secondary EC law is currently of three types: regulations, directives, and decisions. Article 249 defines the basic attributes of each. Regulations are stated to have 'general application', which means that they create binding legal obligations for every person within the Union. This is not to say that they necessarily in fact impinge on the legal situation of each and every legal person within the Community, since they are frequently of a highly specialized nature and regulate only specific activities or industries. They do, however, create general law and thus have the potential actually to affect the legal position of any legal person within the Community. Their nearest equivalent in domestic legal terms is Parliamentary legislation. Article 249 goes on to provide that regulations are binding in their entirety and 'directly applicable in all Member States'. The meaning of this latter phrase is not at once self-evident, but it is clear from comparison with what Article 249 goes on to say about the effects of directives that it is intended to indicate that regulations have automatic legal force and require no implementing measures to be taken by the legislative or other authorities in the Member States. The ECJ has also confirmed this interpretation.[82] It follows that regulations are the appropriate instrument for achieving uniformity or identity of legal provision throughout the Community.[83]

Directives, unlike regulations, are expressed by Article 249 to be addressed to States rather than being of 'general application'. A directive is binding 'as to the result to be achieved' on each Member State to which it is addressed, but it leaves to the national authorities 'the choice of form and methods'. Directives thus do not take effect within the legal systems of the Member States as they stand. Rather, they require the Member States to legislate to achieve a particular end-product. They require translation into national law and always contain a time-limit by which such translation must have been carried out. They are chiefly of use when mutually compatible, or harmonized, laws are needed amongst all the Member States, as distinct from where identical provisions are required.[84]

[81] The existing instruments were re-enacted with the agreement of the UK under Art 94; as Usher observes in *EC Institutions and Legislation* (Longmans, London, 1998), this suggests that the matters covered by the Agreement on Social Policy fell within the mainstream of Community law all along.

[82] In Case 93/71 *Leonesio v Italian Ministry of Agriculture and Fisheries* [1972] ECR 287, the ECJ said (at 293): 'Therefore, because of its nature and its purpose within the system of sources of Community law it has direct effect and is, as such, capable of creating individual rights which national courts must protect. Since they are pecuniary rights against the State these rights arise when the conditions set out in the regulation are complied with and it is not possible at a national level to render the exercise of them subject to implementing provisions other than those which might be required by the regulation itself.'

[83] Pursuant to Art I-33 of the proposed Constitution, regulations are to become known as 'European laws'.

[84] Also pursuant to Art I-33 of the proposed Constitution, directives are re-named 'European framework laws'.

In practice, all the secondary legislation to date in the fields covered by the present work has taken the form of directives, so that their nature and effects are particularly significant in the present context. The directives thus far enacted have been clustered around three broad themes, namely, sex equality, non-discrimination on the ground of race, and non-discrimination on the remaining grounds set out in Article 13. The major instruments concerned are: the Equal Pay Directive[85] and Equal Treatment Directive,[86] which supplement Article 141 of the Treaty and proscribe sex discrimination;[87] the Race Directive,[88] which implements the principle of equal treatment irrespective of racial or ethnic origin; and the so-called 'Framework' Directive,[89] the purpose of which is to combat discrimination on the grounds of religion or belief, disability, age, or sexual orientation.

A decision, according to Article 249, is addressed to a particular legal person or group of such persons. Such persons can include individual people, corporations, and States. The decision is 'binding in its entirety upon those to whom it is addressed'. It does not therefore appear capable of creating any kind of generalized legal obligations.[90]

All three instruments of secondary legislation are required to state the reasons on which they are based and must refer to any proposals or opinions which the Treaty required to be obtained.[91] Because of the breadth of their legal consequences, all regulations and most directives are today required to be published in the Official Journal of the European Union.[92]

The relevant enabling article in the TEC has to be examined in order to discover what type of secondary law is permitted in any given instance.

(iii) Decisions of the ECJ and CFI

As will become evident in the rest of this book, judicial decisions have played, and continue to play, an extremely important role in shaping EU law in the area of equality and non-discrimination. Many vital concepts, words, and phrases have either been left undefined in the relevant legislation, or have been defined only

[85] Directive 75/117, OJ [1975] L45/19. [86] Directive 76/207, OJ [1976] L39/40.
[87] But note that there are a number of other directives which also support the principle of sex equality and are discussed elsewhere in the present work. [88] Directive 2000/43, OJ [2000] L180/22.
[89] Directive 2000/78, OJ [2000] L303/16. Like the Race Directive, the Framework Directive was adopted pursuant to Art 13. For the argument that Art 13 was a less appropriate Treaty base than Art 137 for the Framework instrument, and the suggestion that reasons of pragmatism and political expediency influenced the choice, see Bell and Whittle, 'Between Social Policy and Union Citizenship: the Framework Directive on Equal Treatment in Employment' (2002) 27 ELRev 677.
[90] See Greaves, 'The Nature and Binding Effect of Decisions Under Article 189 EC' (1996) 21 ELRev 3. [91] Art 253.
[92] Art 254 provides that regulations, directives, and decisions adopted in accordance with the procedure referred to in Art 251, together with regulations of the Council and the Commission and directives of those institutions which are addressed to all Member States, must be published in the Official Journal. They enter into force on the date specified in them or, in default of such specification, on the twentieth day following that of their publication. Other directives and decisions must merely be notified to those to whom they are addressed and take effect on such notification.

broadly; their articulation and effect are therefore in the hands of the ECJ. Although the Court does not adopt a formal system of precedent, and remains free to change its mind in subsequent decisions, in practice it establishes core areas of jurisprudence which act as sources of law. This is recognized in the proposed Constitution, which provides in Article IV-438(4) that the case law of the ECJ and CFI on the interpretation of the Treaties which preceded the Constitution, as well as of the secondary legislation enacted pursuant to them, is to remain 'the source of interpretation of Union law and in particular of the comparable provisions of the Constitution'.

The exclusive jurisdiction enjoyed by the ECJ over the preliminary rulings procedure[93] has meant that in practice the ECJ's jurisprudence has so far been vastly more influential in this area than that of the CFI, since preliminary rulings have provided the vehicle for most anti-discrimination litigation.

(iv) Instruments for the protection of fundamental human rights

A number of internationally agreed instruments seek to protect fundamental human rights and they exert at least an indirect influence on the content of EU law. Their relevance in the specific field of equality and anti-discrimination law will be discussed further in chapter 7. Of prime importance in this respect is the European Convention on Human Rights.[94] It has already been seen that the TEU expressly enjoins the Union to respect the principles of the ECHR, and this is a formal acknowledgement that the Convention operates as a secondary source of EU law.[95] Also of importance in this context are the European Social Charter of 1961, revised in 1996, and the Community Social Charter of 1989, both referred to in the Preamble to the TEU.[96]

Potentially of even greater significance is the Charter of Fundamental Rights, planned to become Part II of the proposed Constitution of the Union. It too is discussed in further detail in chapter 7.

(v) Other indirect sources

Since the European judicature has a wide measure of discretion in interpreting and applying anti-discrimination and equality law, it is inevitably thrown back on a number of other sources when deciding what policy consideration should guide it.

[93] This is a procedure which enables national courts to seek the help of the ECJ in interpreting and applying EU law. It is discussed more fully in ch 2. The Treaty of Nice, which came into operation on 1 February 2003, made it possible for the CFI in the future also to be given jurisdiction to make preliminary rulings in specified areas. [94] ETS No 5, 1950. Hereafter the ECHR.
[95] For recent examples of the influence of the ECHR on EU law, see Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279 and Case C-224/01 *Köbler v Austria* [2003] ECR I-10239, discussed in ch 2. [96] See Recital 4.