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Article 13 EC, evolution and current contexts

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Introduction

Amongst the most exciting of the new possibilities in the Amsterdam Treaty[1] is the provision enabling European legislation to be made in relation to equality and non-discrimination.[2] This provision is contained in Article 13 EC, which as then agreed,[3] stated:

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

It was clear from the outset that action under Article 13 depended for its content on proposals from the European Commission. As soon as the Amsterdam Treaty was agreed the Commission began to mull this over. There was time to do this. Although the Amsterdam Treaty was signed by the high representatives on 2 October 1997 it required ratification by each Member State to come into effect. This was not concluded until 1 May 1999,[4] and the hiatus provided a useful opportunity for some preliminary consideration as to the effect that would be given to it. For this purpose

[1] OJ C340, 10/11/1997.

[2] For a discussion of the background to the drafting of this provision see E. Guild, 'The European Union and Article 13 of the Treaty Establishing the European Community', in G. Moon (ed.), *Race Discrimination, Developing and Using a New Legal Framework* (Hart and JUSTICE, 2000) and M. Bell, *Anti-discrimination Law and the European Union (Oxford Studies in European Law*, Oxford University Press, 2002).

[3] An additional sub-article was added by the Treaty of Nice, see below.

[4] By Article 14 it did not come into force until the first day of the second month following that in which the instrument of ratification is deposited by the last signatory state to fulfil the formality of ratification.

the Commission held a major conference over 3 and 4 December 1998 to discuss what could and should be done with Article 13.

Before this conference it had been suggested that at least one Directive should be made at an early stage but the form and content of that Directive was not then settled.[5] In this respect, the venue for the first major Commission conference could not have been more apt. In the second half of 1998, the Presidency had moved to Austria, where the rise of Jörg Haider's Austrian Freedom Party with its ultra-nationalist platform, was already causing great consternation across European capitals. So when the conference took place in the city of Vienna, and was run with the co-operation of the Austrian Federal Ministries for Labour, Health and Social Affairs, and for Justice, race and ethnicity discrimination was very much on the political agenda. All participants were keen to discuss how this should be addressed. But this was not the only issue, since the chosen title of the conference was 'Anti-Discrimination: the way forward'. It was a central question to be debated whether *more* than just race and ethnicity should be addressed in the first stage, or whether a limited approach should be taken. Related to this was a question as to the most desirable scope of any new provision.

History, of course, reveals that the more comprehensive approach was indeed taken: proposals for two Directives swiftly followed and these soon became law.[6] The Vienna conference was seen by all as the first big step in giving effect to Article 13. The fight for such an Article which had been fought for with such determination had to be converted into real action at Community level.

The next part of this chapter explores how the debate was started at Vienna, while following parts discuss the evolution and current context of the debate on the use of Article 13 EC. Some of the events of that conference[7] and its significance are discussed from a perspective allowed only by the passage of time.

In some respects the seven years since the conference might seem quite a long time for reflection, but in the context of the *acquis* this is not so. After all the second of the two Directives made in 2000 under Article 13

[5] The British Presidency had held an initial conference in Oxford in early 1998.

[6] The two proposals made at the Vienna Conference became Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[7] For the full report of the Conference see 'Article 13, Anti-Discrimination: the Way Forward' (Europaforum Wien, 1999).

EC permitted Member States until 2 December 2006 to implement its provisions in relation to age and disability.[8] Moreover, at present Article 13 EC has only been cited in very few Opinions[9] and Judgments of the Court of Justice,[10] and the Directives have barely featured at all. Of course, the *thinking* around non-discrimination and equality has developed enormously and this is dealt with elsewhere in this book.

It was my privilege to be invited by the European Commission to give the keynote speech to the Vienna Conference.[11] The speech was written with the express purpose of setting out the legal context within which the participants might address the possibilities for action under Article 13 EC.[12] In one sense it is therefore a statement of the starting point from which life was breathed into Article 13. That is one reason why it has been incorporated into the second part of this chapter. A second reason is that it provides a marker by which to measure the developments which have since occurred in the evolution and use of Article 13.

The Vienna Conference Keynote Address

Article 13 and the search for equality in Europe: an overview

Introduction

It is my task to address the main areas of discrimination which will be in scope under Article 13, to consider the possibilities it offers, to give some thoughts for the future and to share some personal reflections. The invitation to undertake that task was one that I accepted with great pleasure because Article 13 promises so much. I know how eagerly its implementation has been awaited. I very much hope that what I have to say will help to animate the discussions that are to follow.

Until now, the human right not to suffer discrimination has been seen by many citizens and third country nationals as having only secondary

[8] See Art 18 of Council Directive 2000/78/EC.

[9] See Cases C-186/01 *Dory*, C-117/01 *K. B.* and C-227/04 P *Lindorfer* v. *Council*. A reference has also been made by a Spanish Court in Case C-411/05 *Félix Palacios de la Villa* v. *Cortefiel Servicios SA, José María Sanz Corral and Martin Tebar Less* in relation to mandatory retirement ages, and by an Employment Tribunal in Great Britain in Case No. 2303745/2005 *Coleman* v. *Attridge Law*.

[10] See Cases C-186/01 *Dory*, C-144/04 *Mangold* and C-13/05 *Sonia Chacón Navas* v. *Eurest Colectividades SA*.

[11] Written on the 16 November 1998.

[12] The footnotes have been renumbered and in a few places there have been some minor corrections to the text.

importance and being only weakly enforceable. In many areas it has been limited in scope or even non-existent in municipal legislation; though there are also undoubtedly examples of good practice.[13] In those Member States with proactive official equality organisations the wish for more effective and obvious results remains as strong as ever. I know this to be true of the United Kingdom[14] and I believe it to be true of other countries. At an important conference in Utrecht[15] this summer I heard something similar about Austria. One participant said that even after 20 years' work the effects of the Austrian Equal Treatment Commission on the position of women in society were still unclear.[16] So the task of giving effect to the aspirations contained in Article 13 is by no means to be underestimated.

I propose to start by outlining the international human rights context for action under this Article.

The human rights context

Article 14 of the European Convention of Human Rights[17] states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be enjoyed without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a minority, property, birth or other status.

However, that Article does not provide a free-standing right not to be discriminated against. It only operates with the other provisions of the Convention. It has been accurately described as having an 'accessory nature'[18] and 'no independent existence'.[19] Moreover, even when presented with a complaint under Article 14, the European Court of Human Rights has

[13] For instance, the Dutch Equal Treatment Commission (*Commissie Gelijke Behandeling*) deals with unequal treatment involving religion, personal conviction and views, political orientation, race, gender, nationality, sexual preference, marital status and duration of employment. It plainly takes active steps in all these areas: see its Annual Report 1997.

[14] See, e.g. the introduction by Sir Herman Ouseley to 'Reform of the Race Relations Act 1976' (Commission for Racial Equality, 1998).

[15] The International Conference on Comparative Non-Discrimination Law, Universiteit Utrecht, 22–4 June 1998, jointly organised by the Dutch Equal Treatment Commission and the School of Human Rights Research.

[16] Paper given to the Utrecht Conference, 'The Austrian Equal Treatment Commission as an Instrument of Equality Law Enforcement', by Anna Sporrer, Chair of the Equal Treatment Commission (Private Sector) of Austria.

[17] Hereafter the ECHR.

[18] See 'Law and Practice of the European Convention on Human Rights and the European Social Charter' by Gomien, Harris and Zwaak (Council of Europe, 1996), p. 346.

[19] See, e.g., the *Belgian Linguistics Case* (1979–1980) 1 EHRR 578, para 9, and *Airey* v. *Ireland* (1979–1980) 2 EHRR 305, para 30.

often failed or declined to consider what is the impact of Article 14.[20] As a result, the jurisprudence of the Human Rights Court on this Article is limited. For instance, in a recent discrimination case brought against the UK concerning the proper conduct of discrimination litigation in Northern Ireland, the Human Rights Court declined even to consider whether there had been a breach of Article 14.[21] Nevertheless this is an Article which the Community must take seriously.[22]

There is also Article 26 of the United Nations International Covenant of Civil and Political Rights (ICCPR):[23]

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

This Article *does* provide a free-standing right to non-discrimination. Its enforcement is through the Human Rights Committee of the United Nations and its impact has proved to be fairly limited,[24] although some Member States have incorporated it into their municipal law.[25]

There is now an increasing awareness at international level of the need for a strong protection of the right not to suffer discrimination. In the Council of Europe, recognising the weakness of Article 14 of the European Convention on Human Rights, the Minister's Deputies have instructed the Steering Committee on Human Rights to draft an additional protocol, or protocols, to the ECHR broadening in a general fashion the field of application of Article 14. While the nature of that protocol is still under debate, action cannot be delayed indefinitely. The steering committee is required to report to the Ministers by the end of next year. There is hope

[20] See Gomien, Harris and Zwaak, p. 349.

[21] See *Tinnelly and Sons Ltd. and others and McElduff and others* v. *UK* Case No 62/1997/846/1052–1053 Judgment 10.7.98.

[22] See, for instance, Case C-260/89 *ERT* [1991] ECR I-2925, and also Art 6 (formerly F) and 49 (formerly O) of the Treaty of European Union as amended by the Amsterdam Treaty, as examples of the central place of the convention in the Community.

[23] Referred to below as the ICCPR.

[24] See Lord Lester of Herne Hill QC and Joseph 'Obligations of Non-discrimination' in Haris and Joseph (eds.) *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, 1995).

[25] For instance, the Netherlands by Act of 24 November 1978.

of action in the Council of Europe to run in parallel with action within the Community.

The Belfast Agreement[26] made earlier this year between the United Kingdom and the Republic of Eire and the political parties in Northern Ireland is also significant. Its central theme is the principle of non-discrimination.

So, in the wider international context, the implementation of Article 13 is keenly awaited. This is also true of Europe. Let me take just three specific examples where the need for its implementation has been highlighted recently within the Community:

- In *Grant* v. *South-West Trains Ltd.*[27] the Court of Justice decided that the Equal Pay and Equal Treatment Directives[28] could not be extended to protect two lesbian women. However, the Court pointed out that the future implementation of legislation under Article 13 could provide equivalent protection.[29]
- The Starting Line Group (whose important work I consider further below) has emphasised how:

> Up till now efforts to combat racism, xenophobia, anti-Semitism, and religious hatred and intolerance have been constrained by lack of competence in the Union's institutions. The new Article 13 marks the first time that racial and religious discrimination have been mentioned in the treaty . . . After ratification, it will be possible to draft and pass a Community directive, establishing a common standard of protection for citizens throughout the Union and requiring member states within a time limit to pass their own legislation enforcing this standard.[30]

- Finally a '*Comité des Sages*'[31] has very recently said that:

> A European Union which fails to protect and promote human rights consistently and effectively will betray Europe's shared values and its long-standing commitment to them. However, the Union's existing policies in

[26] See 'The Belfast Agreement: An Agreement reached at the Multi Party Talks on Northern Ireland' Cm 3883: in particular pp. 16–18 'Rights, Safeguards and Equal Opportunity'.

[27] Case C-249/96. [28] Directive 75/117/EEC and Directive 76/207/EEC.

[29] See in particular paras. 47 and 48

[30] See 'Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union', Isabelle Chopin and Jan Niessen (eds.) (Commission for Racial Equality, 1998) p. 16.

[31] Judge Antonio Cassesse, Mme Catherine Lalumière, Professor Peter Leuprecht, and Mrs Mary Robinson. See 'Leading by Example; A Human Rights Agenda for the European Union for the Year 2000' (Academy of European Law, European University Institute, Florence, 1998). I refer to this document below as 'the Agenda'.

> this area are no longer adequate. They were made by and for the Europe of yesterday; they are not sufficient for the Europe of tomorrow. The strong rhetoric of the Union is not matched by the reality. There is an urgent need for a human rights policy which is coherent, balanced, substantive and professional.[32]

With that exhortation very much in mind, I turn now to make some observations on the constituent parts of the Article.

The relationship with the other parts of the treaty

Without prejudice to the other provisions of this Treaty . . .

This phrase would seem to mean that other provisions of the Treaty (TEC) are not to be constrained by Article 13. It has been pointed out by Mark Bell[33] and others that there are other provisions of the TEC that provide scope for action to prevent discrimination. The social powers of the TEC in Articles 131–146 mainly relate to employment but certainly contain some possibilities for action. In particular it has been suggested that Article 137(1) allows for the adoption of directives on 'integration of persons excluded from the labour market' and would therefore permit directives on race discrimination at work. If this is so then it brings into question the proper way in which to legislate. Under these social provisions the European Parliament has a more important role and qualified majority voting is possible.[34] Thus the legal base for action needs to be considered very carefully.

The limits of the Article

. . . within the limits of the powers conferred by [the Treaty] *upon the Community . . .*

This point is re-enforced by the next part of the Article. The word 'powers' is very important here. It can be interpreted in a variety of ways: broadly permitting far reaching action, or narrowly permitting much more limited action. Bell concludes that:

[32] Ibid. para. 2

[33] I wish to acknowledge my debt to Mark Bell of the European University Institute whose paper to the Justice Seminar at London 22 October 1998 has helped me enormously with the issues arising under Article 13 in particular in respect of competence. His paper is to be published as 'The new Article 13 EC Treaty: a sound basis for European anti-discrimination law?' in the *Maastricht Journal of European and Comparative Law*.

[34] See Art 137(2) EC.

> Article 13 is slightly less broad in its field of application than Article 12. The implication is that Article 13 may be relied upon to prohibit discrimination within those areas for which the Community already has competence.[35]

In my view this is an issue about political will. Since Article 13 requires unanimity in Council it seems unlikely that the resulting legislation could be subject to an effective challenge on the basis that it goes beyond the limits of the powers conferred by the Treaty. It is of primary significance that Article 13 is to be found within that part of the TEC which is headed 'Principles' and that it relates so closely to other international human rights norms. Moreover, Article 13 asserts the basic concept of equal treatment in a very wide range of areas.

Certainly I am confident that Article 13 permits action beyond the field of employment. As Article 13 includes discrimination on grounds of sex it must have in mind legislation outside that field as there can be no doubt that the Community already has the necessary powers to deal with discrimination on grounds of sex in employment.

Education and housing have been suggested by Bell and others as being in scope. Education is specifically dealt with under the TEC by Chapter 3 Title X1.[36] It is less obvious how housing could be brought within the scope of Article 13, though it is obviously connected with issues relating to the free movement of workers and is a prime cause, as well as an effect, of social exclusion which is dealt with in Article 137(2).

I consider that there are other important areas where there can be discrimination particularly in access to goods and services. It should be noted that Article 1 of the draft Starting Line Directive concerning the Elimination of Racial and Religious Discrimination identifies[37] as in scope: professional activities; access to jobs or posts, dismissals, and other working conditions; social security, health and welfare benefits, education, vocational guidance and training; housing; the provision of goods facilities and services; the exercise of functions by any public body; and participation in political, economic, social, cultural, and religious life or any other public field.

[35] Bell refers also to the similar opinion of R. Whittle in 'Disability Discrimination and the Amsterdam Treaty' (1998) *European Law Review* 23, pp. 50, 53.

[36] Formerly Title VIII.

[37] Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union, p. 26.

Action to combat discrimination

. . . appropriate action to combat discrimination . . .

It is perhaps on this aspect of Article 13 that this section will concentrate most. If the action that is taken is weak or ineffectual there will be a sense of alienation between those who have hoped for so much and the political process which will have delivered too little. Here I want to emphasise some points about the different ways in which discrimination can occur so as to help this conference focus on what action is appropriate at Community level.

• **The Court of Justice and the concept of discrimination** When we consider what is meant by appropriate action to combat discrimination we do not start with a blank piece of paper. The Community has already learnt much about what is appropriate action from the way in which it has provided protection from discrimination, both in relation to equal pay and sex discrimination, and in the exercise of free movement rights.[38]

The concept of discrimination used by the Court of Justice (which accords with the jurisprudence of the Human Rights Court[39]) is found in propositions such as the following:

> comparable situations are not to be treated differently and . . . different situations are not to be treated alike . . .[40]
> or
> discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.[41]

It is well established that discrimination may be justifiable on objective grounds.[42] It is worth noting here that the Human Rights Court considers some kinds of direct discrimination as being particularly suspect and therefore less likely to be justified. Discrimination which is exclusively on the grounds of sex or race will rarely be compatible with the ECHR.[43]

[38] For a very substantial overview of the law see D. Martin, 'Discriminations, entraves et raisons impérieuses dans la traité CE: trois concepts en quête d'identité'.
[39] See, e.g., *Belgian Linguistics* (1986) 1 EHRR 252, para. 10.
[40] E.g. Case 203/86 *Kingdom of Spain* v. *Council of the European Communities* [1988] ECR 4563, para. 25.
[41] See, e.g., Case C-279/93 *Finanzamt Koeln-altstadt* v. *Roland Schumacker* [1995] ECR I-225.
[42] Case 170/84 *Bilka-Kaufhaus GmbH* v. *Karin Weber von Hartz* [1986] ECR 1607.
[43] See *Schmidt* v. *Germany* (1994) 18 EHRR 513 and *Belgian Linguistics* supra.

However, a problem arises when legislating under Article 13, because the Court of Justice has not been consistent in the way that it approaches indirect or disguised discrimination. In my view, this problem must be addressed because it is this type of discrimination which is both the most difficult to identify and the most important to eradicate.

In cases involving the free movement of workers the test for indirect discrimination was stated thus in *O'Flynn* v. *Adjudication Officer*:[44]

> A provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.

This 'intrinsically liable' test does not call for elaborate statistical evidence. It is almost intuitive – the risk of particular disadvantage is enough. This contrasts sharply with some of the jurisprudence of the Court of Justice in the field of sex discrimination and equal pay. Here a more statistical or even formulaic approach has been developed. The origin of this approach can be found in *Jenkins* v. *Kingsgate Clothing Productions*.[45] The Court of Justice ruled that if the impugned requirement affected 'a considerably smaller proportion of women' it was necessary to examine whether there was any objective justification.[46] Thereafter, the Court has sometimes referred to numbers rather than proportions.[47] This approach can be seen in numerous subsequent cases and has led to detailed statistical considerations in cases of sex discrimination and equal pay.[48] It has also led to the Directive on the burden of proof in cases of discrimination based on sex[49] defining indirect discrimination as occurring:

[44] Case C-237/94 [1996] ECR I-2417, paras. 20 and 21; see also Case C-278/94 *Commission* v. *Belgium* [1996] ECR I-4307 and Case 35/97 *Commission* v. *France* Judgment 24 September 1998.
[45] Case 96/80 [1981] ECR 911, initially in the Opinion of Advocate General Jean Pierre Warner.
[46] See para. 13.
[47] See, e.g., Case C-102/88 *M. L. Ruzius-Wilbrink* v. *Bestuur van de Bedrijfsvereniging voor Overheidsdienste* [1989] 4311.
[48] See, e.g., the approach taken in Case C-127/92 *Enderby* v. *Frenchay Health Authority* [1993] ECR I-5535, paras. 16 et seq.
[49] Directive 97/80/EC.

> Where an apparently neutral provision, criterion, or practice disadvantages a substantially higher proportion of the numbers of one sex unless that provision criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.[50]

Yet adequate statistics are not always available. Is it to be said that such cases must fail even where it is quite clear that a provision, criterion or practice is liable to disadvantage the protected group? There may simply be too few persons in a firm who are affected by the provision in question to provide adequate statistics,[51] or where the provision, criterion or practice has only just been introduced, there may have been inadequate time for statistics to be collected.[52]

In my view, there is no good reason to treat indirect sex discrimination less favourably than indirect discrimination in the exercise of free movement rights.[53] Accordingly, in this respect I consider that the draft directive proposed by the Starting Line Group does not go far enough. In my view, the *O'Flynn* approach is necessary to secure appropriate action to combat discrimination.

• **Situations of particular disadvantage** It is important to bear in mind that the focus in assessing whether there has been discrimination will differ according to the protected group in question. In most cases it is rightly assumed that a person in the protected group is equally competent to undertake a particular task as a person outside it. Thus it will normally be assumed that a female is as competent as a male to undertake any task. On the other hand, in some circumstances we recognise from the beginning that a person suffers a particular disadvantage.

For instance, when a woman is pregnant there comes a time when she is not as able to work. At that stage it is inappropriate to compare her with a man. She must have a protected status and her inability to carry out a job should not be compared with that of, for instance, an ill

[50] Article 2(2).

[51] For an example of this dilemma see *London Underground* v. *Edwards (2)* [1998] IRLR 664. In that case the Court of Appeal of England and Wales concluded that a requirement to work flexible hours which adversely affected only one woman out of twenty-two, and none out of 2,023, was indirectly discriminatory, but only after locating the statistics in a wider social context.

[52] This is one of the issues that has arisen in *R.* v. *Secretary of State for Employment ex parte Seymour Smith*, currently before the Court of Justice.

[53] I have discussed this point further in 'Equal Treatment, Social Advantages and Obstacles: in Search of Coherence in Freedom and Dignity' in E. Guild (ed.), *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer, 1998).

man.[54] It is now well understood that in asking whether there has been discrimination against a pregnant woman it will be inappropriate to carry out a comparison. Acting to the detriment of the pregnant woman is direct discrimination.[55]

Article 13 concerns another situation of particular disadvantage – disability. Where treatment disadvantages a person because of the disability the key question must be whether there has been a proper attempt to provide for the disabled person in order to minimise or reduce the disadvantage that otherwise would be suffered by that person.[56] The focus of the inquiry is on the nature of the disability and not on the ability of the person. This is not to equate pregnancy with disability. The key point is that for some groups special treatment is essential to ensure that there is no discrimination. It is impermissible to argue on behalf of a man or able-bodied person that they were disadvantaged by the failure to provide them with the special treatment that was necessary for the pregnant woman or disabled person.

It may be that as we consider the situations of the protected groups that other special situations will emerge as important and relevant. For instance, in considering discrimination against the old or young it may be that a similar approach should be taken.

• **Equality before and under the law; equal protection and equal benefit of the law; affirmative action** The text of Article 26 ICCPR reminds us that action under Article 13 should aim to secure both equal protection before the law and equality under the law. Both of these aspects of equality are important and both need to be addressed. Equal benefit of the law is also necessary.[57] Also the key issue of positive discrimination or affirmative action must be addressed here.

Equal treatment by itself may not be enough if it does not lead to an equality of outcomes. The present effect of past disadvantage, in, for instance, education, social or immigration status, may mean that equal treatment will or may lead to unequal outcomes. This is not just a point about indirect or disguised discrimination but about the need to remedy

[54] See, e.g., C-32/93 *Webb* v. *EMO* Case [1994] I-3567, para. 24.

[55] Case C-179/88 *Handels- og Kontorfunktionærnes Forbund i Danmark, acting on behalf of Hertz* v. *Dansk Arbejdsgiverforening acting on behalf of Aldi Marked K/S* [1990] ECR I-3979 ('Hertz'), para. 13 and C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, para. 15.

[56] In the UK the Disability Discrimination Act 1995 differs markedly in its approach to the definition of discrimination from the Race Relations Act 1976 or the Sex Discrimination Act 1975.

[57] Compare s. 15(1) of the Canadian Charter of Rights and Freedoms.

past disadvantage. For instance, in decisions about recruitment, minimum educational attainment rules may be readily justified. However, if in one region all the best educational establishments are run by the churches, there will be a structural disadvantage for Muslim children. It is therefore not enough to look at discrimination solely from the point of equality before the law. This accords with international human rights norms. In interpreting Article 26 ICCPR the UN Human Rights Committee[58] has stressed the need for states to take affirmative action to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. It is also an approach which is consistent with other major constitutional documents which expressly permit affirmative action.[59]

Nevertheless it is clear from the US experience that affirmative action raises many further problems. Perhaps the right way forward is to adopt the approach of the Indian Supreme Court that a measure of affirmative action must 'contain [within] itself the seed of its termination'.[60] It may be that affirmative action should also be limited to particular issues such as training. Certainly, time limiting affirmative action ensures that it is focused and more acceptable to those who cannot take the benefit of the action.

The need for affirmative action is one which has already been discussed both in the Court of Justice in *Kalamke* v. *Freie Hansestadt Bremen*[61] and *Marschall* v. *Land Nordrhein-Westfalen*[62] and at Community level in Commission proposals for an amendment to the Equal Treatment Directive.[63] In my view, this is an area where it is most obvious that a European approach is essential. Affirmative action is about social coherence in the fullest sense. It seeks to give an equalised stake in the future to groups which have very different and unequal social attributes and histories.

• **Subsidiarity** Legislation under Article 13 must comply with the principle of subsidiarity[64] in particular as set out in the Protocol to the Amsterdam Treaty on the application of the principles of subsidiarity

[58] General Comment 18/37 of 1989.
[59] See for instance section 15(2) of the Canadian Charter of Rights and Freedoms and Articles 15(3) and (4) of the Indian Constitution and Article 4 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.
[60] See *Indra Sawhey* v. *Union of India* 80 AIR SC 477 1993.
[61] Case C-450/93 [1995] ECR I-3051. [62] Case C-409/95 [1997] ECR I-6363.
[63] Case C-179/88 OJ 1996 C 179, p. 8. See also the amendment to TEC Article 141 (ex 119) made by the Amsterdam Treaty.
[64] See Article 5 EC.

and proportionality.[65] Legislation under Article 13 must enable Member States to take the action that is appropriate to their situation within a framework set by the Community as a whole.

> For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.[66]

The Protocol provides a three point guidance on when Community action will be justified:

- 'the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States';

An example of a situation where this might apply is in relation to age discrimination. It is well known that the age profile of Europe is changing rapidly. However, very few European countries have specific legislation which protects older workers, and where it does exist such legislation is said often to be flouted.[67] In another area, the Amsterdam Treaty might be cited for its recognition of the problem of cross-border racism and xenophobia.[68]

- 'actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests';

Here social cohesion is likely to be the key issue. This conference will add to the evidence that is available.[69] One recent study[70] of racially motivated crime[71] in three major European cities has made this need for action at Community level very clear. The authors stated that:

[65] OJ C 340, 10/11/1997, p. 105. [66] See Art. 5 of Protocol 30 to the Treaty.
[67] *European Industrial Relations Review* 247 (August 1994), pp. 13–16.
[68] See the new Art. 29 (Formerly Art. K1) of the TEU.
[69] See the Agenda already referred to.
[70] J. Chirico, A. Das and C. Smith, *Racially Motivated Crime – Responses in three European Cities: Frankfurt Lyons and Rome*, Dummett, A. (ed.) (Commission for Racial Equality, 1997).
[71] See also R. Oakley, 'Report on Racial Violence and Harassment in Europe', by (1993) Strasbarg: (Council of Europe ref: MG-CR (91) 3 rev. 2; Council of Europe, 23 September 1992, and the Report Consultative Commission on Racism and Xenophobia for the Cannes European Council (Kahn Commission) SN 2129/95).

> Many of the interviewees [in Frankfurt] expressed the view that an increased European dialogue would help all policy actors to improve their policies and procedures[72] [and] . . . racism . . . is widespread across Europe and to combat it effectively . . . structures . . . [are needed] . . . that transcend national bodies, because in electoral campaigns at national level the parties of the extreme right exploit the issue[73]

Also, there can be no doubt that competition can be distorted by discrimination. It was no accident that the original treaty contained the equal pay provisions in Article 119.[74] The Commission has already pointed out that: 'The Union must act to provide a guarantee for all people against the fear of discrimination if it is to make a reality of free movement within the single market.'[75]

- 'action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States'.

In my view there are some very obvious reasons why action at Community level would have effects which would produce comparatively greater benefits than those achievable within Member States alone. The creation of a uniform base of rights to non-discrimination would certainly facilitate the deepening of the concept of European Citizenship, assist other countries that wish to become members of the Community to know what are the basic standards of the Community in these important areas, and discourage social migration within the Community because certain states secured the rights in Article 13 more or less effectively.

• **Five conditions for effective legislation against discrimination** In my view there are five essential conditions for real equality under the rule of law.

Individual rights and remedies Effective anti-discrimination laws must give a victim a right to an effective personal remedy against the person or body who has perpetrated the discrimination. The Court of Justice has already declared the need for adequate individual remedies, which 'guarantee real and effective judicial protection and have a real deterrent effect on the employer', in *Helen Marshall* v. *Southampton and South-West Hampshire Area Health Authority*.[76] This need is equally true of all the

[72] Per A. Das at p. 139. [73] Per J. Chirico at p. 139. [74] Now Art. 141.
[75] See 'European Social Policy – A way forward for the Union' Com (94) Final 333, 27/7/94, Ch. VI, para. 27.
[76] Case C-271/91[1993] ECR I-4367, para. 24.

other grounds set out in Article 13. This implies proper access to the Courts and equality of arms before the Courts.[77] Some states have Commissions which help with the preparation and funding of discrimination cases; others will have to consider what assistance is necessary to make sure that such individual rights are real.

Criminal sanctions Some discriminatory acts are so grave that the state must invoke the criminal process against the perpetrators. There are three main reasons for this.

Firstly, often the victim will be too alienated or feel too weak or frightened to seek an individual remedy. In those circumstances the state cannot stand by and permit the wrongful act to occur and perhaps to re-occur. Secondly, the state exercising the democratic will of the people, and the courts as guardians of human rights, must mark disapproval of grave acts of discrimination, especially those involving violence or grave oppression. Thirdly, and more particularly, public order can be quickly undermined by racist or other discriminatory attacks, or by vigilante action or retaliation provoked by acts of discrimination. Only through an effective criminal process will that be prevented.

Accordingly, an effective code of criminal laws, an adequately resourced and motivated system of criminal investigation and a suitable judicial process giving proportionate sentences are all essential.

Information and training The scope and principle of equal treatment and the need for objective justification for differential treatment is not naturally part of the public discourse. Experience shows that merely giving rights to individual remedies and creating mechanisms for state enforcement will not be enough. The principle of equal treatment needs to be fully understood and accepted as desirable for society, ensuring that decisions are taken on an objective basis thereby promoting stability and social coherence. The more effective the system of public information is the less need there will be for either of the previous two remedies.

There are two general levels for such public information: information to the adult public and education to those of school age as a core curriculum issue. Additionally, more detailed training and information will be necessary for judges, the police and other social actors. I want to emphasise particularly the need for education and training of the police and the judiciary. Neither group can be assumed to understand what Article

[77] See *Airey* v. *Ireland* (1979–1980) 2 EHRR 305.

13 means. Experience in my country teaches me that ensuring that such education is effective is a long and slow process.[78] I do not suggest that the education should be delivered at Community level, but that the need for it is recognised and encouraged through Community action.

Mainstreaming All social actors have a responsibility to ensure that their policies are formulated with a due regard to the importance of all equality issues. Unless this responsibility is taken very seriously the effectiveness of any legislation under Article 13 will be much reduced. The importance of mainstreaming was most notably recognised at an international level in relation to the position of women at the Fourth United Nations World Conference on Women.[79] Mainstreaming has already been taken up by the Community in its Fourth Medium-term Community Action Programme on Equal Opportunities for Men and Women (1996 to 2000).[80] It has also been recognised that its implications go further than just gender issues: for instance, the European Parliament called for a similar policy in relation to disability matters in accordance with UN Standard Rules on Equalisation of Opportunities for Persons with Disabilities.[81] The Amsterdam Treaty included the following declaration: 'In drawing up measures under Article 100a the institutions of the Community shall take account of the needs of persons with a disability.'[82]

So, in my opinion, an assessment of the impact on all equality issues is a necessary precondition for the proper formulation of all laws, rules, and policies, by all social actors. Mainstreaming should not just be limited to governmental organisations, though of course they must take a lead in this.

Monitoring Without continual monitoring of the situation of those classes of persons who are in the scope of the anti-discrimination

[78] It was only very recently that the Judicial Studies Board, which is responsible for the training of judges in England and Wales, created an Equal Treatment Advisory Committee. There has been some excellent work done by Her Majesty's Inspectorate of Constabulary (for instance the Thematic Inspection on Police, Community and Race Relations 1996/7 entitled 'Winning the Race – Policing Plural Communities') and the Home Office. However, this work has not been universally welcomed. I expect that this is a problem that will be common to many Member States.

[79] See 'Platform for Action and the Beijing Declaration – the Report of the Fourth World Conference on Women, Beijing China 4–15 September 1995' (United Nations Department of Public Information, 1996) in particular para. 204.

[80] Council Decision 95/593/EC, [1995] OJ L335, 30/12/1995, pp. 37–43.

[81] Resolution on the rights of disabled people OJ C020, 20/01/1997, p. 389.

[82] Declaration 22, OJ C340, 10/11/1997, p. 135.

provisions, the four previously mentioned conditions will be only partly and incompletely achieved. It is essential that the effect of laws and policies are monitored. It is essential that workplace practices and commercial polices are monitored. There is increasing experience of the importance of monitoring. In Northern Ireland it has proved an invaluable tool in securing tolerance of religious and political diversity in the workplace.[83] The argument for wider monitoring is perhaps most fully made out in the recitals to the Council Regulation establishing a European Monitoring Centre on Racism and Xenophobia.[84]

Whatever legislation is proposed under Article 13 it must be set in a framework which will meet these five conditions.

The protected grounds

I wish to add only a few further remarks about discrimination in relation to the grounds which Article 13 protects.

Sex A key question for this conference will be what areas of sex discrimination outside employment require protection. The Equal Treatment Directive has already been interpreted to provide protection to transsexuals in *P* v. *S and Cornwall County Council*.[85] However, discrimination against transsexuals goes much further than just employment. Here the case law of the Human Rights Court has not yet been helpful,[86] although there was a strong dissenting opinion that holds out hope for the future.[87] Distinctions between post- and pre-operative transsexuals have no place in any modern legislation on sex discrimination.

Racial or ethnic origin Here I can do no better than to refer to the Starting Line proposals on which I have already commented. The need for such action is now very widely appreciated. Obviously the task is to consider the way in which these proposals meet the needs of the Community.[88] A

[83] In Northern Ireland the Fair Employment (Northern Ireland) Acts 1976 and 1989 which prohibit religious and political discrimination in the employment field impose detailed and effective monitoring requirements on firms. For a useful guide to these Acts see the *Fair Employment Handbook*, C. McCrudden (ed.) (Industrial Relations Services, 1995).

[84] No. 1035/97 of 2 June 1997, OJ L151, 10/06/1997, pp. 1–7.

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

[86] See the recent judgment of the Human Rights Court in *Sheffield and Horsham* v. *UK*.

[87] See in particular the dissenting judgment of Judge van Dijk at para. 3.

[88] See Prof. C. Gearty 'The Internal and External "Other" in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe' in ch. 10 of P. Alston (ed.) *The European Union and Human Rights* (Oxford University Press, 1999).

particular aspect for consideration will be the position of third country nationals.[89]

Religion or belief The Court of Justice has already decided in principle that examinations for the Community's civil service which were held on Saturday were discriminatory against Jews.[90] This should provide a starting point for a wider consideration of religious discrimination both at work and in education. It should be noted also that the connection between religion and belief echoes Article 9 ECHR. It is right that the Starting Line proposals should also consider them together because there is a very close relationship between racial and religious discrimination. The ECHR jurisprudence has conspicuously avoided giving a definitive ruling on what constitutes a religion[91] and it is probably as well not to seek a definitive answer. A particularly difficult question is the extent to which protection in respect of religion and belief should be given. Should an employer be prevented from implementing any rule at all that has a discriminatory effect, such as working on Friday,[92] Saturday or Sunday? Or is it sufficient to require that such a rule is objectively justified? In the Netherlands, discrimination of this kind in the workplace has been taken very seriously[93] and this experience may be of particular relevance.

I would like to add a few comments in respect of discrimination on grounds of belief, because this could also include political opinion. The jurisprudence of the ECHR already provides strong protection in this field under Article 10.[94] It is surely important that the Community do not take too restricted a view as to what discrimination on the grounds of belief is within any legislation under Article 13.

Disability The disabled sometimes feel that they are an invisible part of the Community. It is now well recognised that this is quite incompatible

[89] See also the Starting Line 'Draft Directive on Third Country Nationals' in 'Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union', p. 37.

[90] Case 130/75 *Prais* v. *EC Council* [1976] ECR 1589.

[91] See *X and the Church of Scientology* v. *Sweden* No. 7805/77 or *Chappell* v. *UK* No.12587/86.

[92] The Human Rights Commission rejected a complaint by a Moslem teacher that he had been denied his rights under Art. 9 ECHR when his employer would not let him attend prayers on Fridays: *X* v. *UK* 8160/78, Dec 12.3.81 DR 22, p. 27.

[93] See the Dutch High Court decision of 30 March 1984, Nederlands Jurisprudentie 1985 no 350; and see Dr. B. C. Labuschaigne 'Religious Freedom and Newly Established Religions in Dutch Law' *Netherlands International Law Review* XLIV: 2 (1997).

[94] See, e.g., *Vogt* v. *Germany* [1996] 21 EHRR 205.

with a comprehensive approach to social cohesion. Nevertheless legislating for the disabled raises difficult questions about who is in scope. Is mental disability to be treated in the same way as physical disability? Are those with hay fever to receive the same protection as those with diabetes? Are those with myopia in need of the same protection as those with schizophrenia? What is the right approach to disability through addiction to alcohol, tobacco or other drugs? These are difficult questions that have been approached in some countries in their municipal legislation. Perhaps a key question is whether to propose a unified approach to the meaning of disability.[95]

Age There is much work to be done in respect of age discrimination. In the employment field a recent survey[96] of eleven European countries identified five sets of discriminatory measures which particularly affect older persons: loss of employment, discrimination in recruitment, exclusion from special unemployment measures, exclusion from training and discrimination at retirement. The US has had long experience of age discrimination legislation which will provide a useful source for comparison. In the UK, the Government has just proposed a voluntary Code of Practice in relation to age discrimination, while accepting that legislation may be necessary in the future. I personally doubt whether such an approach is likely to be effective.

Sexual orientation The need for action in relation to sexual orientation has already been mentioned.[97] The case law of the Human Rights Court shows that discrimination against homosexuals can be contrary to the Convention[98] but it does not treat discrimination, by the more favourable treatment of married persons or heterosexual couples than homosexual couples, as a breach of Article 14.[99] There is an expectation that this may change, with the abolition of the European Commission on Human Rights.[100] It is essential that the Community addresses the rights

[95] The World Health Organisation has an International Classification of Diseases to which reference might be made.

[96] 'Age discrimination against older workers in the European Community' (Eurolink Age, 1993).

[97] See Case C 249/96 *Grant* supra.

[98] See, e.g., *Dudgeon* v. *UK* [1981] 4 EHRR 149; see also the report of the *Commission in Sutherland* v. *UK* Application No. 25186/94.

[99] *S* v. *UK* No. 11716/85 47 DR 274, and *B* v. *UK* No. 16106/90 64 DR 278.

[100] See the powerful arguments advanced in 'A case for Equality' by Peter Duffy QC in the Stonewall Lecture reported at [1998] 2 EHRR 134.