Eric Stein Working Paper No 4/2009

'NON-DISCRIMINATION DOES NOT FALL DOWN FROM HEAVEN': THE CONTEXT AND EVOLUTION OF NON-DISCRIMINATION IN EU LAW

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Czech Society for European and Comparative Law • Prague • Czech Republic

The Eric Stein Working Papers
http://www.ericsteinpapers.eu

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Abstract

Equality and non-discrimination in EU law are firmly embedded in EU law, either as general principles of law or they are written down in the Treaties and secondary legislation. This paper sketches the evolution of three specific forms of equality and non-discrimination, the prohibition of discrimination on grounds of nationality, gender and a number of other grounds, listed in Article 13 TEC, i.e. race, ethnic origin, disability, age, sexual orientation, religion and belief. It briefly explains their origins, their mutual relationship and how they influence each other. The paper also points at the shift in the rationales underlying equality and non-discrimination and argues that they are to be considered as human rights standards.

Keywords

Equality and Non-discrimination – Nationality – Gender - Article 13 TEC – Human Rights in the EU

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'Non-discrimination Does Not Fall Down from Heaven': The Context and Evolution of Non-discrimination in EU Law

Sacha Prechal*

1. Prelude

According to Advocate General Mazák, general principles of law are to be sought rather in the Platonic heaven of law than in the law books.[1] While this might be true, it is also true that those principles do not fall down from heaven – Platonic or otherwise – either. The principle of non-discrimination, as it developed in EU law, is a fine illustration.

As is well-known, France is quite famous for its production of cognac, armagnac, calvados and other fruit-based spirits. The country is also a major producer of those spirits. Other countries, like Ireland or Scotland, are known for their whiskey production, a spirit based on grain. The production of grain-based spirits is very limited in France. Knowing all this, how should we assess French tax rules that impose considerably higher taxes on grain-based spirits than on fruit-based spirits?

This is, in a nutshell, the problem that was submitted to the ECJ in 1978 in the case of French alcohol taxation.[2] The case provides in fact a nice example of *indirect tax discrimination* contrary to Article 90 TEC. Article 90 TEC prohibits internal taxation which treats domestic goods and imports differently, to the detriment of the latter. The Article is an expression of the prohibition of discrimination on grounds of nationality/origin which is one of the basic principles of the EC Treaty.

The French did not say that they imposed higher taxes on imported spirits. The mechanism was more subtle, based on at the first sight innocuous criteria: 'grain-based' v. 'fruit-based' spirits. Yet, if we look at the effects of these criteria, it was the foreign product that was put at a disadvantage. In terms of discrimination, this is an example of potential indirect discrimination. The second step to be taken is to see whether the use of the criteria can be justified. In this respect, the French came with a whole line of complex arguments. Some of them were so inventive that I cannot refrain from mentioning them. The French argument was based on the distinction between 'digestives' en 'aperitifs'. The fruit-based spirits were 'digestives', i.e. beverages consumed at the end of the meal. The grain-based spirits were in the category of 'aperitifs', thus spirits drunk before the meals. Since - still according to the French argument - France wanted to discourage drinking before meals as that was more damaging to human health, they have introduced higher taxation. However, the ECJ was not

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[1] Opinion in Case C-411/05 *Félix Palacios de la Villa*, [2007] ECR I-08531, point 86.

[2] Case 168/78 *Commission v. France* [1980] ECR. 347. Cf. on this case also T. Koopmans, 'Gelijke en ongelijke gevallen', *Staatkundig jaarboek 1982-1983*, Leiden 1982, p. 147-158.

convinced of these (and other) justifications. As to the digestive-aperitif distinction the Courts found that many of the spirits and in particular whiskey could be consumed at many occasions: before or after the meal and even in between or as a nightcap, etc. So the distinction did not work out.

Apart from being a nice illustration of indirect discrimination and fanciful French imagination, the French alcohol case is a good starting point for my talk which gives a brief sketch of the context *and* evolution of non-discrimination in EU law.

In particular since the adoption of the Directive on the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC),[3] the Framework Directive on equal treatment in employment and occupation (2000/78/EC),[4] which concerns discrimination based on religion or belief, disability, age or sexual orientation, it is sometimes forgotten that EU non-discrimination law is much broader. First, it also covers discrimination based on sex or gender. For some not entirely clear reason, in particular in Commission circles, an artificial distinction is made between anti-discrimination law on the one hand and equality law on the other. Equality law is used there as referring to equal opportunities and equal treatment of women and men. Second, as will be discussed in more detail below, there is a rich tradition in EU law of dealing with discrimination based on nationality. In this law and especially in case-law we find interpretations, techniques and approaches that still hold true for other forms of discrimination as well. This is the main reason why I think that it is useful to look back and realize how non-discrimination proofing started and evolved.

This brief inquiry will also demonstrate that equality and non-discrimination is and was from the very beginning '*all over the place'* in EU law; it is written in its DNA. This means that one cannot avoid it even if one would want to. Moreover, since it was laid down in the Treaty from the very beginning, non-discrimination, also in its later manifestations, did not just come out of the blue.

2. Equality and non-discrimination as a tool for market integration

The original aim which is still very much present in EU law, economic integration, is for an important part based on the so called discrimination model: out-of-state goods, services and capital must enjoy the same treatment as their in-state equivalents. Although internal market law also developed along the lines of the market access model,[5] the prohibition of discrimination on grounds of nationality remained one of the driving forces behind integration.

[3] Council Directive 2000/43 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin) OJ 2000, L 180/22.

[4] Council Directive 2000/78 (establishing a legal framework for equal treatment in employment and occupation) OJ 2000, L 303/16.

[5] In this model national rules preventing or hindering market access are unlawful, whether they discriminate or not.

From the very beginning a number of provisions of the Treaty played a pivotal role: Article 12 TEC, the general prohibition of discrimination on grounds of nationality[6] and the specific provisions laid down in Articles 39(2) (workers), 43 (establishment), 50 and 54 (services), 75(1) (transport), 90 (taxation) and 294 (participation in the capital of companies) TEC. Article 12 EC is generally regarded as one of the 'fundamental principles of the Community' but it applies only to the extent that no special provisions of equivalent effect apply. The extensive litigation on the fundamental Treaty freedoms – free movement of workers, goods services and establishment – provided an excellent opportunity for the ECJ to develop approaches in relation to discrimination on grounds of nationality that could, later on, be used for other discriminations as well. Let me highlight two topics in this respect. First, there is the acceptance by the ECJ that 'equal' treatment can in fact lead to discrimination. There may be situations which are so different that treating them equally may amount to discrimination. The device is then to treat those cases differently, in other words: differentiation.[7] This case-law witnesses a substantive understanding of equality and is in fact the first step on the way of understanding positive action as a means by which to achieve equality and not as derogation from the principle of equal treatment.[8]

The second example, that is closely related to substantive understanding of equality and that also originates in the internal market law, is the concept of indirect discrimination. As is well known, under the indirect discrimination test, whenever the use of criteria other than nationality in fact lead to the same result as discrimination on grounds of nationality, the use of these criteria is prohibited unless there is an objective justification. Like substantive equality, indirect discrimination is very much concerned with the effects of certain treatment and takes into account everyday - social, economic, cultural or whatever - realities. Thus, for instance, a condition applied by a Dutch travel insurance company, stating that travel expenses will be reimbursed in the event of a premature return to the Netherlands, due to attending the funeral or cremation of close relatives or in case of terminal illness of these persons, amounts *prima facie* to indirect discrimination on grounds of nationality. It clearly works at the disadvantage of migrant individuals who live and work in the Netherlands, but whose close relatives usually live in their home country.

Indirect discrimination on grounds of nationality started to develop in 1974 with the *Sotgiu* case.[9] By now we find countless other examples of it in the case-law and it seems to be a fully accepted concept. To a certain extent, however, it also remains a contested or still badly understood concept. On the one hand, some scholars or practitioners may speak somewhat belittlingly about indirect discrimination, last but not least since it has not

[6] Though, this is limited to the nationality of the Member States. See Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatanze*, judgment of 4 June 2009, n.y.r. in ECR.

[7] Cf. the study by C.W.A. Timmermans, Verboden discriminatie en (geboden) differentiatie', *SEW* 1982, p. 425. [Prohibited discrimination or (prescribed) differentiation?] that concerns primarily economic law mainly.

[8] On positive action cf. Marc De Vos, Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78/EC, European Commission, D-G for Employment, Social Affairs and Equal Opportunities, Brussels 2007.

[9] Case 152/73 *Sotgiu* [1974] ECR 153.

fulfilled the promises. A factor of importance here is the possibility of justifying the *prima facie* discrimination, which pulls some teeth out of the concept. On the other hand, for many countries, in particular the Member States on the continent, as opposed to the UK and Ireland who have a much longer and richer tradition in anti-discrimination law, the introduction of this concept was a small revolution. That was, for instance, the case in the Netherlands and even more recently in France, probably due to the fact that the French have a very formal understanding of equality. It took until 1996 for the *Cour de Cassation* to recognize indirect discrimination for the first time.[10]

While much of the current thinking about discrimination in EU law can be traced back to the economic integration origins and to non-discrimination as a tool for market integration, there is also another development that deserves attention.[11] Already relatively early on in a number of cases, in particular those involving individuals, the nexus between economic integration and non-discrimination has been weakened in the sense that social consideration has also been taken on board. The result was the entitlement of individuals – then mainly migrant workers and their family members – to various kinds of social benefits. One may even go a step further and argue that the prohibition of discrimination on grounds of nationality is gradually being transformed into a fundamental right standard. As such it has been codified in Article 21 of the Charter of Fundamental Rights of the European Union.[12] Illustrative for this transformation is the case-law on Article 12 TEC, in combination with European citizenship, which goes well beyond market integration.[13] Moreover, fundamental treaty freedoms are, certainly as far as persons are concerned, increasingly treated as rights having a fundamental right like status in EU law. The step from here to recognition of non-discrimination on grounds of nationality as a fundamental right is very small indeed.

3. Prohibition of sex discrimination

Another Article that was written in the (E)EC Treaty right from the start, i.e. 1957, was Article 119 TEEC, now Article 141 TEC Treaty, the principle of equal pay between men and women for equal work. The insertion of this provision into the Treaty was motivated by economic considerations. The Member States, in particular France, wanted to eliminate distortions in competition between undertakings established in different Member States. France had adopted provisions on equal pay for men and women much earlier and it feared that cheap female labour in other Member States would put French undertakings and the economy at a disadvantage.

While in the late 1950s there was only this Article on equal pay, as from the mid-seventies there was a very active legislative policy in the area of sex-discrimination, with as result

[10] Cf. *Cour de Cassation, Chambre sociale* 9 April 1996, 92-41103. A vague reference to indirect discrimination was also made in 1995 in *Cour de Cassation, Chambre criminelle* 10 January 1995, 94-82725.
[11] See also below, Section 6.
[12] Charter of Fundamental Rights of the European Union of 14 December 2007, OJ 2007 C 303/1.
[13] Some cases *Grzelczyk*, [2001] ECR I-6193; and Case C-148/02, *Avello*, [2003] ECR I-11613. In the meantime, European citizenship seems to develop into a 'fifth freedom', a freedom that would seem to be without an economic drive. Cf. for instance Joined Cases C-11/06 & C-12/06 *Morgan* [2007] ECR I-09161.

some nine directives which prohibit discrimination on the grounds of sex in various areas.[14] A number of reasons can explain this 'legislative activity' by the then EEC up to the 1990s.

First, Article 119 TEEC should have been implemented before 1 January 1962, but the Member States were unable or unwilling to implement this Article. Even after recommendations by the European Commission and the adoption of a new timetable, this Article was not transposed into national law. The implementation of the principle of equal pay became one of the priorities of the social programme agreed upon in 1974, a first serious effort to develop social policy and to give the economic integrations project a 'human face'. [15] It was in this context that the Member States decided to adopt a new directive on equal pay between men and women.

Second, from 1975 onwards, there were cases brought to the ECJ in which the Court decided that Article 119 TEEC has direct effect, which means that individuals may rely on that Article before national courts in order to fight pay discrimination. While this case-law enabled individuals to bring cases before the courts, it also made it clear that it is difficult to isolate pay from other aspects of working conditions, pension arrangements included.[16] Together with the social programme from 1974, this provided an important impetus for legislation in the area of the equal treatment of men and women.

A further stimulus was introduced by the Treaty of Amsterdam in 1999. According to Article 2 TEC, the promotion of equality between men and women throughout the European Community has become one of the essential tasks of the Community. Furthermore, Article 3(2) TEC provides that the Community shall aim to eliminate inequalities, and to promote equality, between men and women in all the activities listed in Article 3 EC.

How did gender equality law contribute to the development of non-discrimination in general? First, the cases brought before it enabled the ECJ to elaborate the central concepts, such as direct and indirect discrimination, victimization, the scope of positive action. Most of this work was later – sometimes less successfully[17] – codified in EC directives. Another great merit of the ECJ case-law in the area of sex discrimination was the contribution to better enforcement of EC law in general and equality law in particular. The by now well-known doctrine of consistent interpretation, the principles of effective judicial protection and the requirement of effective, dissuasive and proportionate sanctions originate in sex

[14] I.e. nine directives if we do not count the amending ones. The two most recent directives are Directive 2004/113 (implementing the principle of equal treatment between men and women in the access to and supply of goods and services) OJ 2004, L 373/37 and Directive 2006/54 (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)) OJ 2006, L 204/23.

[15] Council Resolution of 21 January 1974 concerning a social action programme, OJ 1974, C 13/1.

[16] In particular the application of Article 141TEC to occupational pensions has been very important. It has led to extensive and sometimes ground-breaking case law.

[17] See, for instance, the definition of indirect discrimination in the Burden of proof Directive (Directive 97/80, OJ 1998, L 14/6); The introduction of Section 4 in Article 141 TEC was for a part a reaction to the ECJ judgment in Case C-450/93 *Kalanke* [1995] ECR I-3069.

discrimination cases. Indeed, this case-law later went far beyond non-discrimination and had - and still has – far-reaching impact on other areas of EU law.[18]

Still within the context of non-discrimination, some solutions found in a sex discrimination case have later been transposed to discrimination on grounds of nationality. In the rather old FNV-case the question aroused what the national court could or should do once it found that there is discrimination in national legislation.[19] The Dutch government argued that this was an issue to be resolved by new legislation and that it was not for the courts to say how to realize equal treatment. However, the ECJ held that as long as there are no new rules, the persons who are disadvantaged must be treated as the category of persons which are better off. In the FNV-case this meant that women must get the same unemployment benefit as men. Later the ECJ began to apply this rule to other forms of discriminations as well, such as, for instance, in the case of migrant workers.[20]

Like in the case of discrimination on grounds of nationality, the ECJ weakened the initial economic orientation of equal treatment of men and women. It did so in a much more explicit fashion. In 1976 the Court ruled that Article 119 TEEC not only had an economic, but also a social aim. As such, it contributed to social progress and the improvement of living and working conditions.[21] Some fourteen years later on, the ECJ ruled that the economic aim pursued by Article 141 TEC - elimination of distortions - is secondary to the social aim of that provision. And the Court added that the principle of equal pay is an expression of a fundamental right.[22] Later, the ECJ even equated equal treatment to a fundamental right.[23]

4. Article 13 TEC

We have seen that for discrimination both on grounds of nationality and discrimination on grounds of sex there was from the very beginning an explicit provision in the Treaty and that the very initial motivation of both was an economic one. For the other grounds - racial or ethnic origin, religion or belief, disability, age, sexual orientation – there was no 'trigger' in the original Treaty that would stimulate the development of non-discrimination on these grounds. The only exceptions were transsexuals and homosexuals who relied, though with varying success, on the sex discrimination provisions.[24] Seen against this background, the introduction of Article 13 into the EC Treaty by the Treaty of Amsterdam was an important landmark, a sort of miracle – perhaps in a sense Article 13 did fall down from heaven!

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[18] Cf. on this mine EU Gender Equality Law: a source of inspiration for other EU legal fields?, European Gender Equality Law Review 2008-1, p. 8-14, available at http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.htm.
[19] Case 71/85 *FNV* [1985] ECR 3855.
[20] Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47.
[21] Case 43/75 *Defrenne II* [1976] ECR 455.
[22] Case C-50/96 *Schröder* [2000] ECR I-743.
[23] Case C-25/02 *Rinke* [2003] ECR I-08349.
[24] Cf. Case C-13/94 *P v. S* [1996] ECR I-2143, Case C-117/01 *KB v. National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541 and Case C-249/96 *Grant* [1998] ECR I-621.

Article 13 TEC itself does not contain a prohibition of discrimination on the grounds mentioned in that article. It merely creates the competence to adopt measures in order to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Shortly after the entry into force of the Treaty of Amsterdam in 1999, the Council adopted the Race Directive (2000/43) and the Framework Directive (2000/78).

The background of the adoption of this article and the two directives is rather complex and many considerations played a role.[25] There were still a few market-related factors behind the adoption of the directives, such as free movement of persons and the fight against racism that had a priority within the context of the European Employment Strategy. However, more important was the evidence of persistent or even growing racism and xenophobia as from the 1980s. There was also a clear relationship with growing immigration and EU immigration and asylum policies that developed during the same period. A crucial contribution was made by a very active and effective lobby against racism. The Starting Line Group, for instance, submitted already at a very early stage, in 1993 (!), a draft directive for the elimination of racial discrimination.[26] To this one may add the concerns due to the ageing of the population, a growing (international) attention for disability rights and also strong and effective lobbying for the disabled. The call for action and the proposals found a ready ear in the European Parliament, the European Commission and the European Council's Reflection Group, set up to make preparations for the intergovernmental conference in 1996, which had to negotiate the Amsterdam Treaty. Last but not least, broad anti-discrimination protection became part of the policy aiming at bridging the gap between the Union and „its" citizens.

In many respects, the Article 13 directives drew on the experiences in the area of discrimination on grounds of nationality and sex discrimination. For instance, the enforcement framework is modeled along the lines developed in legislation and case-law on sex discrimination. Or in the Maruko case, the ECJ did not hesitate to use the definition of pay, developed in the context of article 141 TEC in a case of discrimination on grounds of sexual orientation prohibited under the Framework Directive. It also works the other way round, however. The current definitions of central concepts such as direct and indirect discrimination and harassment were articulated in the Article 13 directives and only later inserted into the body of sex discrimination law.[27] The definition of indirect discriminations provides a nice example. Indirect sex discrimination was first codified in the Burden of Proof Directive,[28] but a few years later it was again redefined in Directive 2002/73. The latter step was deemed necessary because the Race Directive and the Framework Directive contain a new definition of indirect discrimination. It was believed that, for reasons of consistency, the definition in the field of sex discrimination should be the same. An

[25] For one of the many discussions of the background of Art. 13 EC and the directives, see e.g. M. Bell, *Anti-Discrimination Law and the European Union*, Oxford, 2002, with further references, and R. Allen, „Article 13 EC, eovolution and current contexts" , in H. Meenan, *Equality Law in an Enlarged European Union*, Cambridge 2007.
[26] Cf. I. Chopin & J. Niessen (eds.) Proposals for legislative measures to Combat Racism and to promote Equal Rights in the European Union, Brussels, Commission for Racial Equality,1998.
[27] Cf. Directive 2002/73 (amending the equal treatment Directive 76/207), O.J. 2002, L 269/15.
[28] Directive 97/80, O.J. 1998, L 14/6.

important result of these codifying operations is that in all the areas concerned, there is a more or less uniform definition of indirect discrimination, since the definition used by the two Article 13 directives is based on the concept as it has been defined by the ECJ in the area of discrimination on grounds of nationality.[29]

The inclusion of article 13 in the Treaty and next, the adoption of the Race Directive and the Framework Directive, marks even more sharply than in the case of sex discrimination and nationality-discrimination a shift away from the economic integration motives towards the recognition of equality and non-discrimination as a self-standing fundamental right. In the same vain, it has been observed that the rationale for enacting the new anti-discrimination rules „lies preponderantly in the concepts of fairness, autonomy, human dignity and respect for human rights, the creation of a better society in which the quality of people's lives will be improved."[30]

5. Back to the source: Equality as general principle of law

The commonalities in the interpretation of the various discrimination rules are underpinned by the very fact that the ECJ considers the non-discrimination rules as being an expression of the general principle of equality, which is one of the fundamental principles of Community law.[31] The general principle has even been equated to a fundamental right.[32] According to the Court, both the principle of equality and the prohibition of discrimination require that, save where there is an objective justification, comparable situations must not be treated differently and different situations must not be treated in the same way.[33]

As a general principle of law, the principle of equality may indeed pop up everywhere in EU law, i.e. also outside the scope of the specific prohibitions of discrimination laid down in the Treaty and secondary legislation.[34] In this respect the general equality principle operates as a safety net: it applies particularly in those situations where no other written provision of EU law is available. However, it can also serve as a standard for the interpretation of the written non-discrimination provisions. As several EU law provisions are formulated as prohibitions of discrimination, equality is normally approached in terms of non-discrimination. Briefly, this means that the ECJ examines whether a distinction has been made on a prohibited ground, such as nationality, sex or race. In some cases the Court

[29] Cf. C-237/94, *Mr O'Flynn* [1996] ECR I-2617.

[30] Ellis, „The principle of non-discrimination in the Post-Nice Era", in Arnull and Wincott (Eds.), *Accountability and Legitimacy in the European Union*, Oxford 2002, p. 293.

[31] Cf. for example, Case C-13/94 *P v S* [1996] ECR I-2143, Case 147/79 *Hochstrass* [1980] ECR 3005, Case C-224/00 *Commission v Italy* [2002] ECR I-2965 and Case C-280/93 *Germany v Council* [1994] ECR I-4973.

[32] Cf. Case C-442/00 *Caballero* {2002] ECR I-11915.

[33] Cf. Case C-306/93 *Winzersekt* [1994] ECR I-5555, Case C-434/02 *Arnold André* [2004] ECR I-11825, Case C-313/04 *Egenberger*, [2006] ECR I-6331, Case C-309/89 *Codorniu* [1994] ECR I-1853 and Case C-411/98 *Ferlini* [2000] ECR I-8081.

[34] In addition to the provisions already mentioned here above, the Treaty also contains discrimination between producers or consumers in Article 34(2) TEC; Articles 81 and 82 TEC (competition) also imply a ban on discrimination (no dissimilar conditions to equivalent transactions with other trading parties). As to secondary legislation, see, for instance, Directive 2004/38 (residence of EU citizens), OJ 2004, L 158/77, and Directive 96/92 (internal market in electricity), OJ 1997, L 27/20.

seems to fall back on the underlying general principle, however, and carries out a comparability test, i.e. it examines whether the situations involved are similar or not.[35]

As regards the equality principle as a standard in interpretation, the principle has a much broader scope than as a mere 'aid' in the interpretation of the written non-discrimination provisions. First, secondary Community law in general must as far as possible be interpreted so as to be consistent with the general principles of Community law. Thus, this obligation of consistent interpretation relates not only to the non-discrimination provisions, but to other rules as well as. Moreover, general principles of law may also serve as a standard for review of the validity of secondary law. Second, the Member States must also observe general principles when they act within the scope of Community law, as is the case with the implementation of a directive. The potentially far-reaching and heavily contested application of the principle of equality in such a context occurred in the *Mangold* case.[36]

Mangold concerned the German law implementing Directive 99/70 (fixed term work).[37] According to the law, as a rule a fixed term employment contract could be concluded only where there were objective grounds to do so. An exception was, inter alia, that until December 2006 there was no need for objective justification for fixed term contracts for workers of 52 years or older. In December 2006, the age discrimination provision of Directive 2000/78 (the anti-discrimination framework directive)[38] came into force in Germany.[39] Despite the fact that the deadline for implementation has not expired yet, in its judgment the Court upheld *Mangold's* claim that there was discrimination on grounds of age, but the Court did not do so on the basis of Directive 2000/78. It pointed out that the source of the principle of non-discrimination was various international agreements and national constitutional traditions. The principle of non-discrimination on grounds of age must therefore be regarded as a general principle of Community law which the Member States have to observe when they act within the scope of Community law, such as is the case with the implementation of a directive (i.e. Directive 99/70).[40] For that same reason, the observance of the principle could not be made conditional on the expiry of the transposition date of the Framework Directive. The Court followed by stating that:

'it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.'[41]

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[35] Cf. Case C-132/92 *Birds Eye Walls* [1993] ECR I-5579 or Case C-391/97 *Gschwind* [1999] ECR I-5451.
[36] Case C-144/04 *Mangold* [2005] ECR I-9981.
[37] OJ 1999, L 175/43.
[38] OJ 2000, L303/16
[39] Germany benefited in this respect from an additional period for implementation.
[40] The ECJ refers here to various fundamental rights instruments. As is well known, under EU law, fundamental rights form a separate category of principles of law. For want of a binding EU list of such rights, fundamental rights in the EU are protected as 'general principles of Community law'.
[41] Para. 77 of the judgment.

The implications of *Mangold* are certainly not limited to discrimination on grounds of age only but concern other forms of discrimination as well.[42] In any case, the Court's finding may have important consequences for the direct effect and enforceability in national courts of general principles of law, which is, until now, a far from undisputed matter.[43] However, it is not clear whether the Court is prepared to continue in the direction implied in the *Mangold* judgement. In a number of more recent cases the ECJ proceeded in a very cautious way, sticking closely to the letter of the directives, without adventurous excursions to the general principle of non-discrimination.[44]

6. Change in rationales: What difference does it make?

In the previous sections I have briefly pointed at the shift in the rationales behind equality and non-discrimination in EU law. What started as a means to market integration became a method to deliver social policies; for instance, providing protection against social exclusion. The next rationale that emerges is concerned with dignity, autonomy and respect for the person as a human being. Note that the protected grounds are often singled out exactly because they are closely related to the dignity, autonomy and respect for the person. This process of changing rationales underpins another closely related evolution, namely the transformation of equality and non-discrimination into a fundamental – human – right standard, which is an end in itself and not a means to another purpose, at least not primarily.[45] It has to be seen how far this process will go. In any case, as far as the EU is concerned, the outer limits lie in the scope of the Treaties and the competences attributed to the EU by the Member States.

However this may be, in the meantime we may ask what it means, also in more practical terms, when equality and non-discrimination are characterized as fundamental rights, last but not least also in the Charter of Fundamental Rights, which contains a whole chapter on equality and non-discrimination. A number of observations can be made in this respect.

Fundamental rights status should, in the first place, make a difference in the context of judicial review and in particular for its intensity. Fundamental rights deserve special protection in case of competing interests, which also implies a more incisive review when these rights are at stake.

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[42] Cf. also, for instance, the Opinion of AG Sharpston in Case C-227/04P *Lindorfer* [2007] ECR I-6767.

[43] Cf. for instance, AG Kokott, Opinion in Case C-73/07 *Satamedia*, delivered on 8 May 2008, at point 101-105. The direct effect issue is only one of the many criticisms on *Mangold*. The other concerned, *inter alia*, the circumvention of the prohibition of direct effect of directives and the division of powers between the Community and the Member States.

[44] Case C-13/05 *Chacón Navas* [2006] ECR I-6467, Case C-411/05 *Palacios de la Villa* [2007] ECR I- I-08531 and Case C-427/06 *Bartsch*, judgment of 23 September 2008, nyr in ECR.

[45] Arguably, even fundamental rights may serve as an integrating force. See on this G. de Burca, The Language of Rights and European Integration, in: Jo Shaw & Gillian More (eds.), *The New Legal Dynamics of European Union*, Oxford 1995, at pp. 48-49.

As far as the review of EU legislation is concerned, the *Rinke* case, for instance, started in a promising way.[46] The main issue was the compatibility of Directive 93/16 (on free movement of doctors and the recognition of their diplomas) with Directive 76/207 (equal treatment directive).[47] The last Directive contained an indirectly discriminatory feature, namely a provision requiring part-time training in general medicine to include a certain number of full-time training periods. Should this conflict be resolved according to the *lex posterior* rule? The ECJ held that the elimination of discrimination on grounds of sex forms part of fundamental rights, and respect for these rights is a condition of the legality of Community acts. Therefore the conflict had to be resolved by reviewing the „doctors directive" in the light of the prohibition of discrimination on grounds of sex. After this firm statement, however, the ECJ applied a very loose test instead of a strict one, as one would expect in a case where a fundamental right is at stake. In fact, the test was very similar to the test of arbitrariness which is common when the Court reviews community measures in the light of the general principle of equality.[48] The wide margin of discretion of the Community legislature in the area concerned was one of the main arguments for the Court's restraint.

When the review of national measures is at stake, the ECJ seems to be stricter than in the case of EU measures and it is sometimes accused of applying double standards.[49] The *Mangold* case, discussed above, is a good example of this. However, also in relation to national measures there are differences in scrutiny. For instance, the circumstances or areas in which EU law prohibition of non-discrimination is applied matter. In social security or taxation, the test applied is looser when compared to employment or pay discrimination, at least in the field of gender. There are also differences according to the grounds. Overall, nationality is very firmly applied. However, it must be noted that in the recent case of *Age Concern England* – indeed, a case on age discrimination - the Courts applied a fairly strict review, despite considerable discretion left under Article 6(1) of the Framework Directive.[50] In any case, while there is a rule of thumb – strict scrutiny wherever one of the prohibited grounds is at stake – the ECJ is rather pragmatic in its approach and not very principled, sometimes contrary to its own declaration of equality, and non-discrimination being fundamental principles or rights. This is something to be kept in mind.

Another, second, point to be briefly mentioned is that the different rationales not only influence the interpretation and application of the various concepts of equality and non-discrimination, they also influence their mutual relationship. The very fact that one is more closely linked to a fundamental right than another can make a difference. There may be a clash between a market integration driven non-discrimination and a more fundamental right oriented understanding of non-discrimination. This happened in *Schröder,* for instance,

[46] Case C-25/02 *Rinke* [2003] ECR I-08349.
[47] OJ 1993, L 165/1 and OJ 1976, L 39/40.
[48] For a recent application see Case C-127/07 *Arcelor,*judgment of 16 December 2008, nyr in ECR concerning the greenhouse gas emission trading scheme
[49] However, there is a trend in the ECJ case law that indicates fundamental rights being taken into account more seriously, also in relation to EU measure. Cf. Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat*, judgment of 3 September 2008, nyr in ECR. Indeed, it remains to be seen whether and in how far the matters will also change in relation to non-discrimination.
[50] Case C-388/07 *Age Concern England*, judgment of 5 March 2009, n.y.r. in ECR.

where there was a conflict of non-discrimination on grounds of sex on the one hand and economic interests of employers on the other.[51] The economic interest lay, in particular, in avoiding anticompetitive disadvantages, the initial rationale behind Article 141. But the ECJ gave precedence to the social aim of that provision, which constitutes the expression of a fundamental right. Similarly, one may submit that a concept that primarily belongs to market integration be interpreted in the light of the fundamental right reading of equality. For instance, the definition of 'worker' for the purposes of free movement of workers, which is still driven by economic considerations, turns a blind eye to persons who - temporarily - care for an ill child or an ageing relative. These persons often do not benefit anymore from their status of migrant worker and in addition, such treatment may amount to indirect sex discrimination. Arguably, a more fundamental rights oriented interpretation of who is a worker would bring consolation and clarification.

Finally, the relationship between fundamental rights, including non-discrimination, and the need for their legal enforceability is often emphasized. Indeed, the possibility for individuals to bring a claim before the courts in order to protect their fundamental rights is quintessential. However, the effectiveness of this so-called individual justice model is limited: it is often the individual who is protected and the individual who must bring a claim before the courts. Yet in a modern understanding fundamental rights are not only about judicially enforceable standards. They are also tasks and mandates for the legislator, policymakers and the administration and they call for pro-active policies.

Public authorities must implement these rights further in the sense to safeguard that fundamental rights are also operational between individuals. The authorities must also take proactive measures which are necessary to realize fundamental rights, such as the right to a clean environment or the right to social protection. The same considerations hold true for equality and non-discrimination. As in the case of other fundamental rights, equality and non-discrimination need prohibitions of discrimination to start with, but they must be complemented with proactive-policies and the so-called positive duties.[52] Moreover, here also the individual justice model must be complemented with other mechanisms for the realization of equality, for example the institution of the ombudsman.[53]

7. Summing up

This brief discussion of equality and non-discrimination has illustrated at least two things. First, we have seen that the concept has much in common, despite the very fact that it may apply in various areas and relate to various grounds. For those who work in the field of non-discrimination this means that one should not concentrate narrowly upon one or a few grounds but that an overview of what is happening in equality and non-discrimination in general is necessary and often helpful. There is no doubt that sex equality and nationality-discrimination issues will continue to influence the interpretation and application of the

[51] Cf. Case C-50/96, *Schröder*, [2000] ECR I-743.

[52] CF. S. Fredman, 'Changing the Norm: Positive Duties in Equal Treatment legislation', *Maastricht Journal of European and Comparative Law*, (2005) 12 MJ 4, 369-397.

[53] See Alex Brenninkmeijer, Discrimination beyond the Courtroom, Eric Stein Working Paper No. 5/2009, available at www.ericsteinpapers.eu/papers/2009/5.html.

'other grounds' and, indeed, vice versa. To this, one should also ad the area of the general principle of equality.

The second point that was highlighted was the discrete transformation of equality and non-discrimination into a fundamental right. A few of the implications of it were briefly addressed. The legal issues that emerge from this transformation are complex, still underdeveloped and with potentially far-reaching consequences for both lawyers and politicians.

The process of transformation is firmly coupled to the shift in the rationales underlying equality and non-discrimination: from economic integration motives to more socially oriented concerns to the protection of human dignity, autonomy and personality. On a more general level, it reflects the evolution of the Community (or now the Union) from an economic oriented organization into a more encompassing polity.