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The Transformation of EU Equality
Law: From a Common Market Issue
to a Fundamental Right

Av Paul Lappalainen

THE TRANSFORMATION OF EU EQUALITY LAW: FROM A COMMON MARKET ISSUE TO A FUNDAMENTAL RIGHT

Paul Lappalainen*

1. INTRODUCTION

The 8 minute 46 second killing of George Floyd in the US on 25 May 2020 was seen around the world. There were protests and demonstrations not only in the US, but many other countries. The immediate and spontaneous response in Europe indicated that the Black Lives Matter movement had a deep resonance among portions of Europe's population in relation to racism and race discrimination in Europe today.

This trans-Atlantic dialogue, US and EU, concerning issues of non-discrimination and equality is neither novel nor new. The movement of ideas and concrete legal tools and processes from North America (the US and Canada) into EU equality law, particularly the directives, is traced. Rather than focusing on the differences between jurisdictions, the convergence of the different systems relating to their common problems and potential solutions is addressed – with the perspective being on equality law.¹ This article examines European Union equality² law as an important stimulus and conduit in the modern development of equality law in Europe. Even though the Council of Europe and the Euro-

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¹ Here I have been inspired by the approach of Watson regarding comparative law, in particular that of borrowing and "legal transplants", see Watson, Alan, *Legal Transplants – An approach to Comparative Law*, 2nd ed., The University of Georgia Press 1993.

² The terms equality, equal treatment, non-discrimination and anti-discrimination are used interchangeably here.

pean Convention on Human Rights play an important role together with the EU,³ much of the attention here is on the EU due to some of the more practical implications of EU law concerning legislation and litigation. In this context, it is interesting to note that discrimination in EU member states, first in the 1950's with respect to sex and equal pay, and later in the 1990s with respect to race, provided a stimulus to expanding the EU's powers concerning counter-acting discrimination.

The EU directives in turn have played a major role in requiring the establishment of a higher level of minimum legal protection in all EU Member States. The protection against sex discrimination was an early key to this development. A form of "ethnic" discrimination law had developed prior to the 2000 Race Directive through the case law relating to the free movement of EU citizens. Case law concerning sex discrimination and equal treatment of EU citizens provided some of the outlines for the equality developments of the 1990s as eventually capped by the Race Directive. Civil society, particularly in the form of anti-racist organizations advocated for a specific racial discrimination directive which also provided support to adoption of Article 13 of the Amsterdam Treaty, expanding the EU's power in the field of discrimination. This led in turn to the Race Directive, the 2000 Employment Equality Directive, and the updating and amendment of the sex equality directives. The Race Directive in particular seems to have been the result of bottom-up pressure, mainly by civil society, on the EU. Much of the inspiration in this process seems to have come from other legal systems, especially the US. This article examines the development of the transformation of equality law from an EU common market issue to a fundamental right and lays a foundation for further questions related to implementation.

The increasing pre-eminence of European law over national law is an important factor in the development and application of EU equality law. The idea of a higher law, and a higher court interpreting that higher law, creates a similarity to the US that is fairly new for at least some of the EU member states such as Sweden.⁴ There is also a growing emphasis on individual rights. Individuals have been increasingly empowered in terms of being able to demand rights.

³ The European Convention on Human Rights (ECHR) is a key part of EU law and the rights in ECHR constitute general principles of EU law. This has been part of EU case law and is now codified in Article 6.3 of TEU.

⁴ A profound study on the impact of European Law in regard to Swedish Law has been made by Bernitz in Bernitz, Ulf, *Europarättens genomslag*, Norstedts Juridik, Vällingby, Sweden 2012. See also Bernitz, Ulf, *Preliminary References and Swedish Courts*, in Cardonnel, Pascal, Rosas, Allan & Wahl, Nils (red.), *Constitutionalising the EU Judicial System – Essays in Honour of Pernilla Lindh*, Hart Publishing, Oxford 2012. It is also clear that EU-law has in particular had a substantial effect on non-discrimination law in Sweden, see e.g. Bruun, Niklas and Malmberg, Jonas *Arbetsrätten i Sverige och Finland efter EU-inträdet* i Ahlberg, Kerstin (red.) *Tio år med EU – effekter på arbetsrätt, partsrelationer, arbetsmarknad och social trygghet*, Arbetslivsinstitutet, Stockholm.

The EU has encouraged such a development, particularly in the field of equality rights.⁵ An important factor that has contributed to highlighting anti-racism is the ongoing and expanding migration from outside of Europe as well as within Europe, which in itself leads to the need for a broader diversity of understanding (or at least clarity) of the state, the law and the legal systems.⁶ Alongside the issue of ethnic equality, there are the varying social movements concerning equality rights related to e.g. sex/gender, religion, disability, sexual orientation and age.

These factors bring into play various issues that have been a more ongoing feature of the US as well as the Canadian legal systems, i.e. a higher law similar to a constitution. The EU court (and ECtHR) has a role, similar to that of a supreme court, playing an important socio-political function in society developing a focus on individual rights and giving regard to a broad diversity of groups in the population.⁷ In both the US and Canada, their laws and case law since the 1960s and 1970s, have developed a variety of key equality law issues such as indirect discrimination, a shifted burden of proof, sexual harassment, equality bodies, civil society litigation and non-discrimination in relation to public contracts.⁸ In particular, civil society advocacy plays a key role in the US and Canada both concerning legislation as well as advocacy through the courts. This has also been shown to be the case regarding the European Convention of Human Rights (“ECHR”) and the interplay between the European Court of Human Rights (“ECtHR”) and civil society.⁹ At the same time and more

⁵ See e.g. the early developments concerning sex equality and non-discrimination concerning EU citizens as part of the free movement of persons e.g. the EU various equality directives concerning race, sex/gender and working life (religion, disability, sexual orientation and age).

⁶ Trädgårdh, Lars and X. Delli Carpini, Michael, *The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects*, in *After National Democracy: Rights, Law and Power in America and the New Europe*, (ed Lars Trädgårdh), 2004, pp. 42–45.

⁷ Anagnostou, Dia, *Law and Rights’ Claiming on behalf of Minorities* in Anagnostou, Dia (ed.), *Rights and Courts in Pursuit of Social Change – Legal Mobilisation in the Multi-Level European System*, Hart Publishing 2014, p. 5. For a more general account of this regarding the CJEU, see Sweet, Alec Stone, *The European Court of Justice* in Craig, Paul, De Búrca, Gráinne, *The Evolution of EU Law*, 2nd ed., Oxford University Press, U.K. 2011, pp. 122–131. Regarding the constitutionalization discourse concerning the ECtHR, see Hennette-Vauchez, Stéphanie, *Constitutional v International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law* in Christoffersen, Jonas and Rask Madsen, Mikael, *The European Court of Human Rights between Law and Politics*, Oxford University Press (e-book), pp. 144–163.

⁸ Concerning the US see e.g. 1964 Civil Rights Act, the website of the US Equal Employment Opportunities Commission, at <https://www.eeoc.gov>. Concerning Canada see e.g. the Human Rights Act (1977, 1985) at <https://laws-lois.justice.gc.ca/eng/acts/h-6/> and the Human Rights Commission at <https://www.chrc-ccdp.gc.ca/eng>. Note that even though the initial stimulus to the adoption of these laws in the US and Canada was race discrimination, their focus was on a broader topic – civil rights and human rights.

⁹ Chichowski, Rachel A., *Civil Society and the European Court of Human Rights* in Christoffersen, Jonas and Rask Madsen, Mikael, *The European Court of Human Rights between*

specifically, the EU mainly through the equality directives, whose main proponents were civil society organizations, set minimum standards for national laws against discrimination, as well as increasing the potential for national laws against discrimination that go beyond these minimum standards.¹⁰

This article is divided into five parts. Part 1 deals with the early developments related to EU equality law. Part 2 presents the changes that originate in 1990s leading to an expansion of the EU's potential power in the field of discrimination along with the directives that resulted. Part 3 presents certain aspects of equality law as a part of higher equality law after Lisbon. Part 4 describes the potential complementary equality tools embedded within the EU's directives on public procurement. Finally, part 5 provides certain conclusions and final thoughts going forward.

2. EARLY EU NON-DISCRIMINATION DEVELOPMENTS

Parts of the 1957 EEC Treaty (Treaty of Rome) already concerned equality and non-discrimination in regard to equal pay between men and women as well as non-discrimination and EU member state citizenship in relation to the free movement of workers and nationality. However, the original treaties of the European communities did not contain any references to human rights. The CJEU, through its case law, instead developed a series of “general principles” of Community Law.¹¹ These principles reflected human rights protections in national constitutions and human rights treaties, in particular the ECHR.¹² The CJEU was clear in pointing out that community law would comply with these principles.¹³ The court's case law over the years contributed to subsequent revisions of the treaties, where human dignity, freedom, democracy, equality, the

Law and Politics, Oxford University Press (e-book), pp. 77–97. Hodson similarly points out the importance of civil society in regard to gay rights and the ECtHR, see Hodson, Loveday, *Activists and Lawyers in the ECtHR: The Struggle for Gay Rights* in Anagnostou, Dia (ed.), *Rights and Courts in Pursuit of Social Change – Legal Mobilisation in the Multi-Level European System*, Hart Publishing 2014, pp. 181–199.

¹⁰ For example, although the EU directives provided an important stimulus to various Swedish laws against discrimination, the laws have often gone further than the minimum required by the directives, both in terms of scope and grounds. Also, see Dawson, Mark, Muir, Elise and Claes, Monica, *Legal and Political Mobilisation in European Equality Law* in Anagnostou, Dia (ed.), *Rights and Courts in Pursuit of Social Change – Legal Mobilisation in the Multi-Level European System*, Hart Publishing 2014, pp. 127–128.

¹¹ Alston, Philip; Bustelo, Mara and Heenan, James, *The EU and Human Rights*, Oxford University Press, 1999, p. 10 f.

¹² ECHR as part of the general principles of law was established for the first time in the case 36/75 *Rutili* (1975) ECR 1219.

¹³ Handbook on European non-discrimination law, 2018 edition. European Union Agency for Fundamental Rights and Council of Europe. pp. 20–21.

rule of law and respect for human rights became part of the Union's founding values, embedded in its treaties and mainstreamed into all its policies and programmes.¹⁴ These values are also since 2009 explicitly laid down in Art. 2 TEU.

2.1 Equal pay between men and women – Article 119

One important equality issue specifically included in the 1957 EEC Treaty was; Article 119¹⁵ enunciated the principle of equal pay between men and women. France wanted the article included as a means of preventing social dumping, paying women less in some countries was an unfair competitive advantage and an impediment to the free movement of goods.¹⁶

In *Defrenne II* the CJEU gave direct effect to Article 119 both horizontally and vertically.¹⁷ The Court found that:

Article 119 forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the preamble to the Treaty.¹⁸

This case laid the groundwork for the developing fundamental rights approach used by the Court. This later became a basis for the EU social platform.¹⁹

In another equal pay case, the 1981 *Jenkins* case, the court established the principle of indirect discrimination. The CJEU explicitly referred to the 1971 US Supreme Court case of *Griggs* in its reasoning.²⁰

2.2 Early non-discrimination directives

During the 1970s, various directives were adopted concerning Article 119, directly or indirectly. Three directives concerned sex discrimination in employ-

¹⁴ Ibid. p. 21.

¹⁵ Now Article 157 TFEU.

¹⁶ Carlson, Laura, *Comparative Discrimination Law: Historical and Theoretical Frameworks*, 2017, Laura Carlson and Brill Publishing, pp. 13–14.

¹⁷ Direct effect vertically concerns the relations between a state and the individual while direct effect horizontally concerns the relations between individuals.

¹⁸ Case C-43/75, *Gabrielle Defrenne (No. 2) v. Societe Anonyme Belge de Navigation Aeriennes Sabena* [1976] 1 ECR-455, para. 40.

¹⁹ Carlson, Laura. *Comparative Discrimination Law: Historical and Theoretical Frameworks*, 2017, Laura Carlson and Brill Publishing, pp. 14–15.

²⁰ Case C-96/80, EU:C:1981:80. Also see Dr Jule Mulder, 'Some thoughts on European and national non-discrimination law and Brexit' (University of Bristol Law School Blog, May 2016). Available at <https://legalresearch.blogs.bris.ac.uk/2016/05/some-thoughts-on-european-and-national-non-discrimination-law-and-brexite/#more-139>.

ment addressing equal pay (75/117/EEC), equal treatment (76/207/EEC) and social security benefits (79/7/EEC).²¹

A key directive adopted over two decades later was Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. This later became an important tool as EU law developed within non-discrimination law. This directive was essentially a codification of the developing EU case law in the field. The shifted burden of proof was first applied in the EU *Danfoss* case.²² CJEU basically stated that the equal pay rules would not be effective if a burden of proof is not imposed on the employer concerning the issue of establishing that the employer's practice in the matter of wages was not in fact discriminatory. The reasoning behind the case and the directive mirrors the US Supreme Court decision in the 1973 *McDonnell Douglas* case, where the Court shifted the burden of proof to the party with the best access to the evidence.²³

2.3 Non-discrimination on the basis of EU nationality

Another important early EU issue was the development of the fundamental principle concerning the prohibition of non-discrimination on the basis of nationality. Today this principle is set out in the Treaty on the Functioning of the EU (Articles 18 and 45 of the TFEU). Its early forerunner, the Treaty of Rome (1957) in e.g. Articles 48–51 provided a right for the free movement of workers within the European Economic Community. According to Article 48 (2) the free movement of workers entailed "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment." The principle of free movement has expanded over the years from workers, to job-seekers, the self-employed, students, and retired persons.²⁴

This protection applies to persons having nationality in another EU member state, and not to third country nationals, i.e. those coming from outside of the EU. Nevertheless, some protection is provided indirectly since there are cases indicating that unequal treatment of third country nationals who are e.g. spouses of EU nationals can be construed as an improper limit on the free movement rights of the EU national. In 2018, in the *Coman* case, the CJEU

²¹ Carlson 2017, p. 16.

²² C-109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, agissant pour Danfoss* [1989] ECR 3199.

²³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This case determined the burdens and nature of proof in proving a Title VII case under the 1964 Civil Rights Act, in particular the shifting of the burden of proof.

²⁴ European Commission, "Free Movement of Persons", at https://ec.europa.eu/employment_social/soc-prot/disable/freedom_en.htm.

determined that the right of free movement also applied to same-sex married couples.²⁵

The right to free movement has been applied, developed and clarified by case law providing protection against discrimination due to nationality. For example, in 1974 in *Giovanni Maria Sotgiu v Deutsche Bundespost*, the issue involved a person who was employed in Germany in the "national public service." Due to nationality this person was not eligible for certain benefits under the employment contract. The government referred to the exception in Art. 48 (4) of the EEC Treaty which states: "the provisions of which 'shall not apply to employment in the public service'." The CJEU ruled that Art. 48(4) of the EEC Treaty was limited to restricting admission of foreign nationals to certain activities in the public service, and that it did not justify unequal treatment once a person had been employed within the national service. The CJEU also went on to say that "The rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result."²⁶ This case is only one of a number of cases that expanded and clarified the case law concerning free movement, EU nationality and the right to equal treatment.²⁷ While the issue of discrimination did not seem to initially be a primary issue for the EU, the developments concerning sex discrimination and EU nationality discrimination nevertheless laid a framework for the non-discrimination directives that were to come in the 2000s.

2.4 Reflections on this initial period

The EU, through the developing case law as indicated by *Defrenne II*, was moving beyond the focus on equality as a market issue (the economic union) toward the principle of equality as a fundamental right. The case law in turn brought about some of the pressure for the directives during the 1970s. An early US

²⁵ See in particular the 2018 case *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, C-673/16, EU:C:2018:385 in which the CJEU basically determined, inter alia, that according to EU law, same-sex married couples have the right to reside in the country if one of the spouses is a Romanian citizen who has exercised his right to free movement. In this case, a Romanian was married in Brussels to a third country national. This does not require Romania to allow same-sex marriage in Romania, but does require Romania to respect the rights of an EU citizen who is married to a third country national. At <http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0673&lang1=en&type=TEXT&ancre=>.

²⁶ *Giovanni Maria Sotgiu v Deutsche Bundespost*, C-152/73, 12 February 1974, para 11. ECLI:EU:C:1974:13.

²⁷ Other EU case law concerning nationality and equal treatment can be found at <http://ec.europa.eu/social/main.jsp?catId=953&langId=en&intPageId=1217>.

influence was also apparent in regard to the 1981 *Jenkins*²⁸ case concerning indirect discrimination and on the shifting of the burden of proof established in the 1989 *Danfoss* case.²⁹ The court was not only dealing with equality as a fundamental right, it was also filling out the concept of equality with practical tools to make it more effective. Part of this process was also declaring that the ECHR would be seen as a part of the general principles of EU law.

3. ARTICLE 13 AND THE ANTI-DISCRIMINATION DIRECTIVES IN THE 2000s

Article 13 in the Amsterdam Treaty paved the way for new EU initiatives in the field of equality and non-discrimination (Art. 19 TFEU). The Racial Equality Directive 2000/43/EC (race and ethnic origins), the broadest of the directives in terms of scope, opened the doors. The Employment Equality Framework Directive 2000/78/EC (religion or belief, disability, age and sexual orientation) followed, though with a more limited focus, i.e. employment. The Equal Treatment Directive 2006/54/EC (recast), consolidating and expanding several earlier directives along with Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services established an EU level of protection against discrimination that was comparable to that provided by the Race Directive.³⁰ Finally, a gap directive intended to raise the level and scope of protection against discrimination concerning all grounds covered by EU law, has been proposed but never been put to a vote. Civil society in the form of the Starting Line Group provided the initial stimulus to the Racial Equality Directive, in turn spurring the adoption of Article 13 as well as the other later anti-discrimination directives.

3.1 Civil society proposes a racial equality directive, spurring adoption of Article 13

Throughout Europe in the early 1990s various racist and xenophobic incidents and actions were taking place. Mosques were burned, Jewish cemeteries were

²⁸ Case C-96/80, EU:C:1981:80. Also see Dr Jule Mulder, 'Some thoughts on European and national non-discrimination law and Brexit' (University of Bristol Law School Blog, May 2016). Available at <https://legalresearch.blogs.bris.ac.uk/2016/05/some-thoughts-on-european-and-national-non-discrimination-law-and-brexit/#more-139>.

²⁹ C-109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, agissant pour Danfoss* [1989] ECR 3199.

³⁰ Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), consolidating several earlier directives, and Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

desecrated, and refugee centres were attacked. In Sweden the “laser man” targeted immigrants. Certain organizations involved in anti-racism, anti-discrimination and migration came together in response to form the Starting Line Group (SLG) in 1991.³¹ The SLG’s main strategy was to combat racism and discrimination through concrete legal measures and sanctions, with a focus on the European level. They could see that few countries had specific laws for counteracting racism and race discrimination. Furthermore, concerning those that provided protection, the laws in place were often lacking in scope and limited in implementation. Essentially there were no coherent European minimum standards. In 1992 the SLG’s efforts resulted in the drafting of a concrete proposal for a directive eliminating racial discrimination, the so-called Starting Line. This proposal both paralleled and went beyond the EU legislation at the time concerning equality between men and women.³²

As to the concrete inspiration for the SLG proposal, according to Jan Niessen, a key figure if not the key figure, in the initial work in the SLG, “During the drafting process we took the lessons at heart from the Anglo-Saxon world: US, Canada and the UK. This was about definitions, scope and enforcement.”³³ Even the civil society advocacy technique concerning organisations representing less powerful interests of putting forward specific and concrete legislative proposals is similar to examples found in those countries.³⁴ This is reflective of e.g. the civil rights movement, the disability movement, the women’s movement and the LGBT movement.

As pointed out by Isabelle Chopin, the current director of the Migration Policy Group, “this was the first time CSOs came with a very concrete proposal for a directive. At the time, organisations were more prone to criticise what

³¹ The British Commission for Racial Equality, the Dutch National Bureau against Racism and the Churches Commission for Migrants in Europe took the initiative. Soon other NGOs joined the Group, including the Commissioner for Foreigners of the Berlin Senate, the Belgian Centre for Equal Opportunities and against Racism, Caritas Europa, the European Jewish Information Centre, the Migrants Forum and the European Anti-Poverty Network. Towards the late 1990s the SLG constituted an informal network of nearly 400 NGOs, semi-official organizations, trade unions, churches, independent experts and academics from throughout the EU. See Isabelle Chopin, *The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment*, 1 Eur. J. Migration & L. 111 (1999), p. 111.

³² Isabelle Chopin, *The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment*, 1 Eur. J. Migration & L. 111 (1999), 111–115.

³³ Email from Jan Niessen, 18 September 2020. Jan Niessen became the founder and director from 1995 to 2015 of the Migration Policy Group, a key organization in this field.

³⁴ In my view, this is common for organizations that represent more powerful interests in Sweden such as labor unions and employers’ organizations. They produce their own legislative proposals, in addition to being willing to go to court to test the boundaries of the laws. For some reason, those that represent less powerful interests seem less familiar with this type of advocacy.

existed rather than coming with concrete proposals. Since then it has become a common pattern.³⁵

SLG's initial proposal came about in a time when there was growing support for action at the EU level. This can be seen in the clear support expressed in 1993 by the European Parliament for the Starting Line proposal, in particular recommending that the Commission draw up directive along those lines.³⁶ At the same time there was opposition from parts of the Commission referring to the lack of power in the treaties as well as some member states invoking the subsidiarity principle and a preference for intergovernmental cooperation. This opposition in turn led the SLG to shift its focus to a proposal amending the EC treaty in order to provide the competence to act on racial and religious discrimination as well as other discrimination grounds.³⁷

The SLG acted on both the European and Member State levels in order to provide support for the expansion of power in this regard. This also meant reaching out to a broader base for support. The network expanded to about 400 civil society organizations.³⁸ It was possible to mobilize broader civil society support and pressure since Article 13 was to encompass non-discrimination from a human rights perspective by covering a broad variety of grounds – sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

In the end, Article 13 was the result of the compromises necessary to pave the way for adoption in the Amsterdam Treaty. Even though it was a major step forward, it was quite general and did not focus on racial discrimination, it did not have direct effect, and unanimity was required concerning directives that were based on Article 13.³⁹ As the movement supporting adoption of Article 13 was ongoing, SLG started revising and updating its original proposal, with a focus on racial or ethnic origin. A new campaign was initiated to build support for the New Starting Line, covering racial discrimination in working life and other parts of society including education, social services and goods and services, along with direct, indirect discrimination and victimization, as well

³⁵ Email from Isabelle Chopin, Director of the Migration Policy Group (MPG), 19 January 2021. MPG was the informal leader of the SLG network. Note that while this type of advocacy may be common at the EU level, it does not seem to be the norm for advocacy by discriminated groups at the member state level.

³⁶ See Bell, M. (2001) "Meeting The Challenge? A Comparison Between the EU Racial Equality Directive and the Starting Line". Chopin, I. and Niessen, J. (eds) *The Starting Line and the Incorporation Of The Racial Equality Directive into the National Laws of the EU Member States and Accession State*, p. 22, and Par. 4, Parliament Resolution on racism and xenophobia; OJ [1993] C 342/19, 2 December 1993; calling 'on the Commission to draw up as a matter of urgency a Directive laying down measures to strengthen the legal instruments existing in this field in the Member States, using the document entitled the Starting Line'.

³⁷ Isabelle Chopin, *The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment*, 1 Eur. J. Migration & L. 111 (1999), pp. 115–116.

³⁸ *Ibid.* pp. 115–118.

³⁹ Isabelle Chopin, *The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment*, 1 Eur. J. Migration & L. 111 (1999), 120.

as a right of standing for civil society organizations, a shifted burden of proof, effective sanctions, the establishment of equality bodies and allowed for but did not require positive treatment.⁴⁰

3.2 Article 13 Amsterdam Treaty expands the EUs non-discrimination mandate

Article 13 of the Amsterdam Treaty⁴¹ states:

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.

This substantially broadened the EU's power to act within the field of discrimination concerning all of the grounds mentioned. At the same time, the requirement of Council unanimity was expected to be a high hurdle concerning any potential legislation. This expansion of power was significant, but almost as important was that a key driving force, in my opinion, and perhaps the primary driving force, was civil society in the form of the Starting Line Group. The broad range of organizations involved in anti-racism, equality and/or migration are not generally looked upon as being particularly powerful in Brussels or in the member states.

3.3 The Racial Equality Directive⁴²

The New Starting Line proposal provided inspiration to the directive developed by the Commission. In November 1999 the Commission presented its proposal for a Council directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. While covering direct and indirect discrimination, victimization and harassment, requiring a shifted burden of proof and allowing for positive treatment, the proposal was somewhat more limited than the SLG proposal in terms of scope. The major difference was that the Commission proposal did not take into account religious discrimination.

⁴⁰ Isabelle Chopin, *The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment*, 1 Eur. J. Migration & L. 111 (1999). 125–127.

⁴¹ Currently article 19 of the TFEU – Treaty on the Functioning of the EU.

⁴² Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Nevertheless it was substantially more expansive than anything yet proposed by the Commission concerning anti-discrimination.⁴³

The Commission's proposal was negotiated and adopted by the Council in seven months. This was a record given the substantial level of legislative changes that would be required at the national level. However, this was not an indication of strong support from member states. Most of them had at best very weak, symbolic laws against racial or ethnic discrimination. Various governments had serious reservations concerning different issues, particularly the far-reaching nature of the Directive. However, there were weightier socio-political factors at work.⁴⁴

At the same time that there were difficult negotiations concerning the directive, there was also an ongoing concern about inclusion in the Austrian Government of the Freedom Party of Jörg Haider. This led to a political will focused on speeding up the process concerning the Race Discrimination Directive,⁴⁵ while leaving the work on the Framework Employment Equality Directive covering the other grounds for a later time.⁴⁶ Apparently, Jörg Haider played an important role in the speed with which the Race Directive was adopted. At the time that the Directive was voted on by the Council, the Council was in the middle of a boycott concerning Austria.⁴⁷ Since Article 13 required unanimity, any member state could have vetoed the Directive when it was put to a vote. At that particular point, there were none who had sufficiently strong reservations. Austria wanted a removal of the boycott, which meant that Austria would not veto the Directive. Any other country that put in a veto would have seemed like it was supporting Austria.

In large part, the directive that was finally adopted included much of what had originally been proposed by the SLG. There was the broad scope covering working life as well as other areas of social life, indirect discrimination, and a shift in the burden of proof. These had at least some inspiration in the development of equality law in the US. According to Marc Bell, the final directive differs only on a few points from the original proposal backed by the SLG.⁴⁸

⁴³ Isabelle Chopin, *Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European and Non-Governmental Proposals*, 2 Eur. J. Migration & L. 413 (2000). 415–417.

⁴⁴ Adam Tyson, *The Negotiation of the European Community Directive on Racial Discrimination*, 3 Eur. J. Migration & L. 199 (2001). 201–202.

⁴⁵ Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁴⁶ Adam Tyson, *The Negotiation of the European Community Directive on Racial Discrimination*, 3 Eur. J. Migration & L. 199 (2001). 218.

⁴⁷ See e.g. "EU stands firm on Austria boycott", *Guardian*, 1 March 2000, at <https://www.theguardian.com/world/2000/mar/01/austria.ianblack>.

⁴⁸ Bell, M. (2001) "Meeting The Challenge? A Comparison Between the EU Racial Equality Directive and the Starting Line". Chopin, I. and Niessen, J. (eds) *The Starting Line and the*

There were other points as well. Although the language in Article 14 concerning sanctions in the Directive ('compensation to the victim, must be effective, proportionate and dissuasive') borrows from ECJ case law, according to Case and Givens the idea originated with the early proposals from the SLG.⁴⁹ Case and Givens point out the focus of SLG on access to redress and the hope that, after transposition, local NGOs and lawyers would make use of the new laws. SLG, in this regard put forward two important issues. Empowering NGOs to be part of the enforcement process was one issue. Another was a special focus on the development of strong and independent specialized bodies that could enforce the laws. This was also a means of laying the foundation for the development of strategic litigation.⁵⁰

As a whole, the Directive broke new ground in terms of setting a high minimum standard for the level of protection that was to apply throughout the Member States concerning ethnic and racial discrimination. The Directive also became a stimulus to improving the level of protection on all grounds, including sex.

3.4 Framework directive for equal treatment in employment⁵¹

About six months after the adoption of the Race Directive, the Framework Directive was adopted. Article 1 states that its purpose is to lay down "a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

The far-reaching Race Directive paved the way for adoption of the Framework Directive. The basic difference in relation to the Race Directive was the limitation to employment and occupation. Otherwise the legal issues were basically the same: direct and indirect discrimination, harassment, instructions to discriminate, victimization, a shifted burden of proof and an allowance of positive action. The Framework Directive also required the establishment of reasonable accommodation for disabled persons. However, the Directive did not require the establishment of an equality body.

Incorporation Of The Racial Equality Directive into the National Laws of the EU Member States and Accession States.

⁴⁹ Case, Rhonda Evans, and Givens, Terri E., *Re-engineering Legal Opportunity Structures in the European Union: The Starting Line Group and the Politics of the Racial Equality Directive*. JCMS 2010 Volume 48. Number 2. pp. 221–241. 232.

⁵⁰ Case, Rhonda Evans, and Givens, Terri E., *Re-engineering Legal Opportunity Structures in the European Union: The Starting Line Group and the Politics of the Racial Equality Directive*. JCMS 2010 Volume 48. Number 2. pp. 221–241. 232.

⁵¹ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (religion, disability, sexual orientation and age).

3.5 Gender Equality Directives

There are certain key directives concerning equal treatment of men and women. The 2006 recast Directive⁵² on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation updated and consolidated various earlier directives. Its purpose according to Article 1:

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

- (a) access to employment, including promotion, and to vocational training;
- (b) working conditions, including pay;
- (c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

Sex discrimination is also prohibited in access to and the supply of goods and services (Directive 2004/113/EC), concerning statutory social security schemes (Directive 79/7/EEC) and self-employment (Directive 2010/41/EU).

To a large extent these directives together provide about the same level of minimum protection against sex discrimination as is provided by the Race Directive. This also means that there is a clear gap between the protection provided by EU law concerning race/ethnicity and sex as compared to religion, age, sexual orientation and disability.

3.6 The 2008 Proposal for a Horizontal Directive⁵³

If it is ever adopted, the 2008 proposal for a Horizontal Directive would raise the level of protection provided by EU law to an equivalent level for all the protected grounds. EU law has done this to some extent concerning higher EU law, even if a distinction is nevertheless maintained between gender/sex discrimination and all the other grounds even in higher EU law.

The failure to adopt this Directive underlines the fact that in practical terms, EU law provides a foundation for a relatively broad minimum level of protection against discrimination both inside and outside of working life for sex and

⁵² Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

⁵³ The Proposal for a Horizontal Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}.

race/ethnicity, while the protection concerning religion, disability, sexual orientation and age is limited only to working life. The ground dependent differences in the EU's legal protection underline the idea of a "hierarchy" of protection.⁵⁴

4. HIGHER EU EQUALITY LAW AFTER LISBON

After Lisbon, the EU now has four treaties, three⁵⁵ of which are highly relevant in the field of equality. These three are the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union.⁵⁶ As indicated above in Chapter 1, EU law as well as the ECHR have increasingly provided a form of higher European law that can be appealed to from the Member State level. However, even though the EU's founding treaties contained certain aspects that related to equality or non-discrimination (equal pay for men and women and the free movement of EU workers), equality was not seen as a fundamental right. These non-discrimination issues were at least initially primarily based on the idea of preventing unfair competition, competition that would hinder the smooth functioning of the internal market.⁵⁷ Over the years though this has given way to the idea of equality and non-discrimination as a fundamental right. The following are some of the key provisions related to equality in these treaties.

Article 2 of the Treaty on European Union (TEU) is particularly relevant to the principle of equality as a fundamental right: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Article 2 enunciates the fundamental values, including equality, at the "untouchable core" of the EU legal order.⁵⁸ This underlines the EU's move toward equality as a fundamental right.

⁵⁴ See e.g. "The Horizontal Anti-Discrimination Directive cannot wait another decade", the European Parliamentary Intergroup on LGBTI Rights, 8 May 2020. Available at <https://lgbti-ep.eu/2020/05/08/the-horizontal-anti-discrimination-directive-cannot-wait-another-decade/>.

⁵⁵ The fourth is the Treaty establishing the European Atomic Energy Community (Consolidated version 2016).

⁵⁶ According to Article 6.1, the Charter of Fundamental Rights of the European Union has the same legal value as the treaties.

⁵⁷ Makkonen, T. Equal in law, unequal in fact: racial and ethnic discrimination and the legal response thereto in Europe. 2012. 215–216.

⁵⁸ Dimitry Kochenov, D. and Klamert, M. "Article 2 TEU", p. 3. May 2019, University of Groningen Faculty of Law Research Paper No. 22/2019. Available at: <https://ssrn.com/abstract=3383828>. The value of Article 2 as representative of commonly held values has undergone and is undergoing various challenges. See e.g. Spieker, L. (2019). Breathing Life

Several articles in the Treaty on the Functioning of the European Union (TFEU) are of interest here. According to Article 8, “In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.”

According to Article 10, “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

According to Article 18,

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

According to Article 19 (ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of 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.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonization of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 19, formerly Article 13 of the Amsterdam Treaty, was a key to the adoption of the various EU anti-discrimination directives of the 2000s discussed above.

The Charter of Fundamental Rights of the European Union (the Charter) brings together the fundamental rights that are to apply to everyone living within the EU. The Charter sets out a range of civil, political, economic and social rights that are based on, among others, the European Convention on Human Rights, the constitutional traditions of the EU Member States, the Council of Europe’s Social Charter and other international conventions to which the EU or its Member States are parties. The Charter became legally binding on EU Member States in December 2009 when the Treaty of Lisbon entered into force. The Charter applies to EU institutions and its member states when they are applying EU law.

Concerning non-discrimination Article 21 is particularly relevant.

into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis. *German Law Journal*, 20(8), 1182–1213.

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

A number of relatively recent cases had a certain focus on Article 21. In the 2018 *Egenberger* case, the CJEU, among other things, clarified that “(T)he prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law.”⁵⁹

Article 23 takes up equality between men and women, as well as laying a foundation for affirmative action.

Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

There are questions concerning potential inconsistencies between the various provisions. There is, for example, the lack of clarity concerning the difference between provisions specifying equality between men and women and those specifying non-discrimination on a variety of grounds including sex. These questions are outside the scope of this paper. Nevertheless, it can be said that the equality provisions of these three treaties, the TEU, the TFEU and the Charter, taken together can be seen as the backbone of higher EU equality law.⁶⁰ This also makes them a key to understanding as well as challenging equality law at the member state level.

The fundamental rights guaranteed by the ECHR according to Article 6 (3) TEU “constitute general principles of the Union’s law.” This means that they are a part of the EU’s primary legislation. The position of the ECHR was further strengthened when the Charter was adopted in 2009. According to Article 52(3) of the Charter, to the extent that the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. At the same time, it also states that this “provision shall not prevent Union law providing more extensive protection.” Article 53 goes on to state that the Charter shall

⁵⁹ *Egenberger*, C-414/16, 17 April 2018, paragraphs 76 and 77. Also see *Dansk industri*, C-441/14, 19 April 2016, *Bougnouli*, C-188/15, 14 March 2017 and *Achbita*, C-157/15, 14 March 2017.

⁶⁰ See e.g. Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds.). *The EU Charter of Fundamental Rights: A Commentary*. Publisher: Nomos, C.H. Beck, Hart Publishing Publication 2014, 579–603.

not be interpreted in a way that restricts or adversely affects human rights and fundamental freedoms as recognized by e.g. the ECHR. These factors and others indicate that the protection of human rights is strongly rooted in both EU primary law as well as the CJEU's case law.⁶¹

Furthermore, Article 52(3) of the Charter emphasizes that to the extent that the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. At the same time "This provision shall not prevent Union law providing more extensive protection." Article 53 goes on to state that the Charter shall not be interpreted in a way that restricts or adversely affects human rights and fundamental freedoms as recognized by e.g. the ECHR.

Article 14 ECHR concerning non-discrimination is thus an important key to EU equality law. Concerning the prohibition on discrimination, Article 14 states

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

Article 14 is not a stand-alone article; its use is limited to "the rights and freedoms set forth in this Convention". Thus an assertion of a violation of Article 14 must be combined with reference to another article such as the right to life (Article 2), the right to a fair trial (Article 6), the right to respect for private and family life (Article 8) and the right to freedom of thought, conscience and religion (Article 9).

As Article 14 is not a stand-alone article, Protocol 12 (2000) to the ECHR was developed to expand scope of the prohibition against discrimination.⁶² Although some countries have ratified, many have thus far failed to do so. A number of key states such as France, the UK and Sweden have refused to even sign the Protocol.⁶³ At the same time, since there are indications that the ECtHR is willing to interpret Article 14 together with the rights and freedoms

⁶¹ Bernitz & Kjellgren 2018, pp. 142–143.

⁶² Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.2000. <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680080622>.

⁶³ Sweden's opposition to Protocol 12 seems to vary. According to Ds 2001:10, p. 27, *Sveriges åtaganden på området för de mänskliga rättigheterna*, Sweden explained that one reason for its abstention in June 2000 was that a more detailed, separate tool was needed that would have an effect as soon as it was ratified and entered into force. Protocol 12 was so general that it would take a long time before case law provided clarity. Another problem was the lack of clarity concerning positive measures. A relatively similar position can be found on p. 45 in Regeringens skrivelse 2016/17:29 Regeringens strategi för det nationella arbetet med mänskliga rättigheter (The Government strategy for the national work with human rights). The protocol is too general, and its scope is too broad. However, the government stated that it may in the future be of interest to investigate if it would be suitable and possible to formulate a *general and comprehensive prohibition against discrimination*.

expressed in the other Articles in a relatively expansive manner, it is possible that many of the potential “Protocol 12” cases are already being submitted.⁶⁴ In fact, in a dissenting opinion, a judge essentially brought up the question of whether the expansive interpretation given to Article 14 has made Protocol 12 redundant.⁶⁵

5. ANOTHER TOOL BORROWED – EU PUBLIC PROCUREMENT DIRECTIVES

The EU anti-discrimination directives have clearly affected national law on non-discrimination. The higher law of the EU provides support to understanding the directives as well as providing an independent basis for higher equality law in certain situations. One of the key issues in equality law is the need to ensure increased awareness of those with the power to discriminate. While there can be questions about their interest in fundamental rights as enunciated through equality law, it can be presumed that businesses that participate in public procurement will increase their awareness if compliance with equality law is connected to the conditions in their contracts. Over the years there have been questions about the legality of the use of public procurement for socio-political purposes in relation to EU law.⁶⁶ This is particularly relevant in the equality field as the connection between public procurement and anti-discrimination, “contract compliance”, in the US has historically been a very important complement to the laws against discrimination, particularly concerning proactive or affirmative action measures, both at the federal, state and local levels.⁶⁷ These questions seem to have been resolved.

⁶⁴ Fredman, Sandra. Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights, *Human Rights Law Review*, 2016, 16, 273–301, 277.

⁶⁵ See the partial dissent in *Boyraz v Turkey* Application No 61960/08, Merits, 2 December 2014, in which Judge Spano questions if the broad interpretation of the protection provided Article 14 according the majority in substance makes Protocol 12 redundant, p. 22.

⁶⁶ See e.g. Sweden’s government inquiry *Goda affärer – en strategi för hållbar offentlig upphandling* SOU 2013:12 (*Good Business – A Strategy for Sustainable Public Procurement*), Appendices 12–13, 12. Hettne, J., Legal analysis of the possibilities of imposing requirements in public procurement that go beyond the requirements of EU law; 13. Caranta, R., Commentaries on Jörgen Hettne’s Legal Analysis of the Possibilities of Imposing Requirements in Public Procurement that Go Beyond the Requirements of EU Law; 14. Kunzlik, P. Comment on Professor Jörgen Hettne’s Legal Analysis of the Possibilities of Imposing Requirements in Public Procurement that Go Beyond the Requirements of EU Law and professor Roberto Caranta’s commentary.

⁶⁷ See e.g. US Department of Labor, Office of Office of Federal Contract Compliance Programs, “History of Executive Order 11246” at <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history>.

The EU's 2014 public procurement directives are very clear about the possibility to use public procurement as a tool to promote political objectives such as equality. The EU underlines this by pointing out that a key purpose of the public procurement directives is "to enable procurers to make better use of public procurement in support of common societal goals."⁶⁸ The directives express a concern for the promotion of equality for men and women at work, integration, disadvantaged persons or members of vulnerable groups, minorities and persons with disabilities. The 2014 Directive also underlines the issue of accessibility criteria for persons with disabilities or design for all users in both the preamble and various articles.

An examination of parts of Directive 2014/24/EU on public procurement⁶⁹ provide various examples. According to Article 18 (2) concerning principle of procurement:

Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

The term *shall* take sounds quite strong in this setting if it is understood as meaning must. The term *appropriate* measures presumably modifies the term so that a member state could look at the term shall as could instead. Nevertheless, 18 (2) is a clear encouragement to states indicating that contract compliance conditions related to e.g. social obligations fall within the framework of the EU's procurement directive. Annex X includes, among others, ILO Convention 100 on Equal Remuneration and ILO Convention 111 on Discrimination (Employment and Occupation).

In addition, Article 70 on conditions for performance of contracts, states:

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

Article 70 basically underlines what was stated in Article 18.

The basic message seems clear. If member states want to use public procurement as a means to promote equality and counteract discrimination, the EU public procurement rules will not prevent them from doing so, as long as it is

⁶⁸ Directive 2014/24/EU, preamble (3).

⁶⁹ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC. Also see Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

done in a manner that is open and transparent and does not discriminate against companies in other EU member states. In fact they are encouraged to do so.

6. CONCLUSIONS AND FINAL THOUGHTS CONCERNING EU NON-DISCRIMINATION LAW

Even though EU-law has some focus on the discrimination grounds (sex/gender, race, religion, disability, sexual orientation and age) the tendency nonetheless seems to be towards a more holistic approach that puts equal rights and opportunities in focus, rather than the equality silos. EU equality law has developed from a field of law related to potential distortions hindering a common market to being a fundamental principle of EU law. The equality directives in turn have raised the minimum level of protection against discrimination required in all member states, at least in principle. This means a fairly high level of protection concerning sex/gender and race/ethnicity both within and outside of working life. The protection concerning religion, disability, sexual orientation and age essentially applies only to working life. It can thus be said that there is a hierarchy of grounds.

While sex/gender discrimination had long been a primary focus of EU equality law, a new dynamic became apparent once the Race Directive was adopted with its broader reach in comparison to sex/gender.⁷⁰ This generated pressure that in turn contributed to the greater consolidation and expansion of the sex/gender directives. Similarly it did not seem acceptable to have lower levels of protection at the EU level concerning the grounds other than race and sex/gender; thus the not yet adopted proposal for a horizontal directive. This underlying holistic tendency has presumably contributed to the increased consolidation of the grounds into more holistic equality laws and equality bodies at the member state level. Sweden and the UK are two examples. In general terms, these examples are reminiscent of the 1964 Civil Rights Act in the US and the 1977 Human Rights Act in Canada which provide protection against discrimination on a variety of grounds both inside and outside of working life. Nevertheless, there is a risk that EU law, given the manner in which it is structured, provides support for the acceptance of an equality grounds hierarchy, both in terms of the formal legal hierarchy concerning e.g. the scope of protection and

⁷⁰ Other than the UK, most European countries up to the 1990s, to the extent they had meaningful prohibitions against discrimination at all, had laws that put sex/gender discrimination into focus. This also meant that discrimination against women was accepted, as long as the reason was something other than sex.

effectiveness (de jure hierarchy) as well as in terms of enforcement, remedies and effectiveness (de facto hierarchy).⁷¹

As to the minimum standards provided, at least in examining the EU directives, the use of civil law is the primary tool. The EU directives and even the early case law have tools that seem to have found direct or indirect inspiration in e.g. the US and Canada. This refers to such factors as the use of civil law as opposed to criminal law, the introduction of direct and indirect discrimination, harassment, victimization, shifting the burden of proof and the establishment of an equality body. As to the Starting Line Group, certain similarities with the civil rights movement in the US can be seen, particularly in the decision to submit a civil society proposal in the form of the SLG racial equality directive.

European non-discrimination law provides individuals at least a theoretical possibility of challenging national laws as not living up to the promises of EU law in the form of the treaties and/or the equality directives. In this way, EU law provides a form of “higher law” that can be appealed to. This again provides a similarity to both the US and Canada with their constitutional equality provisions and application by their respective Supreme Courts.

The EU developments concerning public procurement provide support to the use of a socio-political tool that can be an important complementary tool for behavioural change and non-discrimination. The EU has made it abundantly clear to member states that EU law not only allows but also encourages the use of public procurement, within certain standards, to promote political goals, including equality and non-discrimination. Whether this is done, is a choice made by the member state, not the EU. This is pointed out due to the opposition that has been exhibited over the years at the Member State level particularly by national public procurement authorities as well as by employer’s associations.⁷² Again, some of the inspiration here has been the US use of public contracts to promote equality for more than 60 years.

The key role of civil society, through the Starting Line Group in formulating, proposing and lobbying for the Race Equality Directive and support for the expansion of the EU mandate in the form of Article 13 in the Amsterdam Treaty, can possibly provide inspiration to organizations at the national level.

⁷¹ Xenidis, Raphaële, *Shaking the normative foundations of EU equality law: Evolution and hierarchy between market integration and human rights rationales*. EUI Working Paper LAW 2017/04, 24–31.

⁷² In Sweden there was a determined opposition in the 2000s and after by Sweden’s public procurement authorities as well as Sweden’s business sector, often based on the argument that the use of public contracts to promote equality would violate EU law. While this argument can still be heard, it carries much less weight today. Concerning the earlier discussions in Sweden see e.g. *Det blågula glashuset: strukturell diskriminering i Sverige* (The Blue and Yellow Glass House: Structural Discrimination in Sweden) SOU 2005:56, pp. 579–585 and Lappalainen, Paul. *Ingen diskriminering med skattemedel! Avtalsklausur mot diskriminering vid offentlig upphandling* (No discrimination with public funds! Anti-discrimination clauses in public contracts) Integrationsverkets rapportserie 2000:7.

The EU's equality directives seem to be an important example of the potential, even at the EU level, of bottom up pressure. The Race Directive was put on the political agenda by civil society organizations representing less powerful interests in Europe. Naturally the boycott concerning Austria added an important political impetus. Nevertheless, the work of the Starting Line Group was essential, especially given the general array of interests that are opposed to laws against discrimination. The SLG's work seems to reflect similar patterns from e.g. the US or the UK or the Canadian civil rights movements, women's movements, disability movements or LGBT movements, where civil society not only asks for laws but participates in their actual formulation. Once formulated they also participate in their enforcement through, e.g., the courts.

This development of a bottom-up pressure concerning EU equality law created a top down effect in regard to member states. In particular, the Race Directive established a minimum level of protection that essentially required each country to raise the existing minimum – even countries that already had fairly well-established laws against discrimination. EU equality law, including the directives, as well as the ECHR, created in turn greater possibilities for legal and political mobilization of individuals and groups in the member states.⁷³

European equality law (EU and ECHR/COE) is complex and highly diverse given e.g. the different legal systems in the member states, particularly when the directives establish a general framework. At the same time, European law also allows for a variation of implementation depending on the national systems, making it somewhat difficult for individuals to understand, assess and enforce their rights. The diversity of systems could inspire interest groups and collective actors in terms of networking and cooperation in terms of learning, inspiration and competition between the systems. This potentially increases the interest in sharing ideas and possibly even transnational cooperation and even financing concerning strategic litigation.⁷⁴

As to future research, access to justice needs to be explored further at various levels. Even if certain minimum standards have been established in member state legislation, if the law is not used, does it have any real effects? Transforming principles into practice is particularly difficult if the goal is changing the behaviour of powerful interests. Laws against discrimination necessarily question the behaviour of employers, unions, businesses, civil servants and others – in other words people who seldom have their actions questioned, particularly by individuals or groups that tend to have less power in society. How effective

⁷³ Dawson, Mark, Muir, Elise, and Claes, Monica. "A Tool-box for Legal and Political Mobilisation in European Equality Law" in Dia Anagnostou (ed.) *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*. London: Hart Publishing, 2014, pp. 105–128, 125–128. Oñati International Series in Law and Society. Bloomsbury Collections.

⁷⁴ Ibid.

are equality bodies in providing support to the victims of discrimination? Do they understand their role in terms of helping to provide some balance of power in relation to the huge imbalance that exists between those with the power to discriminate and the victims of discrimination? Is a sufficient body of case law being developed so that the EU directives, through member state legislation, are achieving the goal of changing societal norms – as well as providing remedies in individual cases. Given the overall inspiration from the US and Canada concerning EU equality law, do civil society organisations representing the victims of discrimination at the national level play a key role in legislative advocacy? How about in terms of strategic litigation? In other words, is there a healthy “competition” between civil society organisations and equality bodies in terms of both legislation and litigation?

Perhaps the killing of George Floyd and the resonance of the Black Lives Matter movement in Europe will provide a renewed interest in the trans-Atlantic dialogue as well as an impetus concerning non-discrimination issues. It is also possible that this could help to fulfil the original goal of the Starting Line Group, which was not only laying a foundation for EU equality law concerning racial and religious discrimination, but also seeing to it that such principles were turned into practice at the member state level.